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Invoking, establishing and remedying State responsibility in mixed multi-party disputes

Lessons from Eurotunnel

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International disputes involving multiple claimants or respondents, or both, that are of mixed State/non-State nature seem to be arising with increasing frequency, as the circle of responsibility gradually widens to include, for example, international organisations. In a number of recent cases, issues of shared responsibility of States providing peacekeeping contingents, and of the organisation to which they are provided, have emerged.[1] These and similar envisaged contingencies raise difficult questions of substance and procedure which were only partially addressed by the International Law Commission (ILC) in its Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles on State Responsibility).[2] Remaining issues are being grappled with by international adjudicatory bodies and scholars.

The present chapter draws from a wider research project on shared responsibility in mixed multi-party disputes, involving States and non-State entities as claimants as well as respondents. One specific case (the

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[1] See e.g. *Behrami and Behrami* v. *France*, Application No. 71412/01 and *Saramati* v. *France, Germany and Norway*, Application No. 78166/01, ECtHR, Decision Court (GC), 2 May 2007; *Al-Jedda* v. *UK*, Application No. 27021/08, ECtHR, Judgment (Merits and Just Satisfaction) Court (GC), 7 July 2011; *The Netherlands* v. *Hasan Nuhanović* (12/03324 LZ/TT), Supreme Court of The Netherlands, Judgment (First Chamber), 6 September 2013.

[2] UNILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), GAOR 56th Session Supp 10, 43.

Eurotunnel arbitration)[3] is examined in terms of its ramifications on invoking, establishing and remedying State responsibility. This choice was inspired by two considerations: *Eurotunnel* provides a prime example of a mixed dispute likely to increasingly occur due to ever more complex joint ventures between States and non-State entities. Moreover, an analysis of *Eurotunnel* seemed a fitting contribution to this book as the arbitral tribunal that decided the case was presided over by the honouree of this work: Professor James Crawford.

The starting point of this chapter is that, although in principle there is no general rule in international law allowing for joint and several responsibility,[4] such a rule can be created by means of specific treaty provisions. The legal difficulty lies in applying and interpreting such a *lex specialis* rule within an appropriate procedural framework which allows for mixed disputes. This chapter is structured as follows: after setting out the facts, background and legal claims of *Eurotunnel* (section I), the Partial Award is analysed (section II) so as to identify the relevance of this case for future shared responsibility disputes between mixed parties (section III).

I The *Eurotunnel* dispute

A Facts and background

In 1985, the French and United Kingdom governments issued an invitation calling for tenders to develop, finance, construct and operate a 'Fixed Link' across the Channel between France and the UK, to be financed

[3] *The Channel Tunnel Group Limited and France-Manche S.A.* v. *The Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland and Le Ministre de l'Équipement, des Transports, de l'Aménagement du Territoire, du Tourisme et de la Mer du Gouvernement de la République Française*, Partial Award, Permanent Court of Arbitration (PCA) (30 January 2007), 132 ILR 1 (*Eurotunnel* Partial Award). For an analysis of the entire case, see e.g. M. Audit, 'Un arbitrage aux confins du droit international public: observations sur la sentence du 30 janvier 2007 opposant le Groupe Eurotunnel au Royaume-Uni et à la République française', *Revue de L'Arbitrage*, 3 (2007), 445 ; Jean-Marc Thouvenin, 'L'arbitrage Eurotunnel', *Annuaire français de droit international*, 52 (2006), 199.

[4] As confirmed by James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), 328–32; to the contrary: Alexander Orakhelashvili, 'Division of Reparation between Responsible Entities' in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford University Press, 2010), 647–65.

entirely by private investment.[5] France-Manche S.A. and The Channel Tunnel Group Ltd submitted a joint response[6] and on 20 January 1986, the French president and the British prime minister announced that they had been selected as the Concessionaires of the Fixed Link.[7] The Treaty concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link between the UK and France (Treaty of Canterbury) sets out the international legal framework to permit the construction and operation of this project.[8] Pursuant to its Article 1(2), the Fixed Link includes the tunnels themselves and associated terminal areas and freight facilities.

Article 10(1) establishes an Intergovernmental Commission (IGC) 'to supervise, in the name and on behalf of the two Governments, all matters concerning the construction and operation of the Fixed Link'. Subsequently, a Concession Agreement was signed on 14 March 1986 by the *ministre de l'équipement, du transport et de l'habitat* for France and the Secretary for Transport for the UK, on the one hand, and France-Manche S.A. and The Channel Tunnel Group Ltd, on the other, which granted both companies a concession to develop, finance, construct and operate the Fixed Link for a term of fifty-five years.[9] This period was extended to ninety-nine years by the Concession Extension Agreement of 13 February 1998.

The Fixed Link consists of 'a fixed twin-bored tunnel rail link under the English Channel, a service tunnel and terminal areas at Coquelles in the French Département du Pas de Calais and Cheriton in the County of Kent'.[10] Since its opening in 1994, it has accommodated the transport of road vehicles through trains and shuttles, at the time said to be the largest privately financed infrastructure project in history. The Coquelles terminal has a kilometres-long perimeter fence, supplemented by additional fencing, and is situated in a rural area, approximately 3 km from the town of Calais. The Partial Award includes a map of the region (see Figure 23.1).

[5] *Eurotunnel* Partial Award, para. 48.

[6] *Ibid.*, para. 46. France-Manche S.A. and The Channel Tunnel Group Ltd formed a *société en participation* under French law and a partnership under English law (agreement concluded on 31 August 1996).

[7] *Ibid.*, para. 49.

[8] France–UK, Treaty concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link (Canterbury, adopted 12 February 1986, entered into force 24 July 1987), 1497 UNTS 334.

[9] Clause 2 of the Concession Agreement.

[10] *Eurotunnel* Partial Award, paras. 55–7.

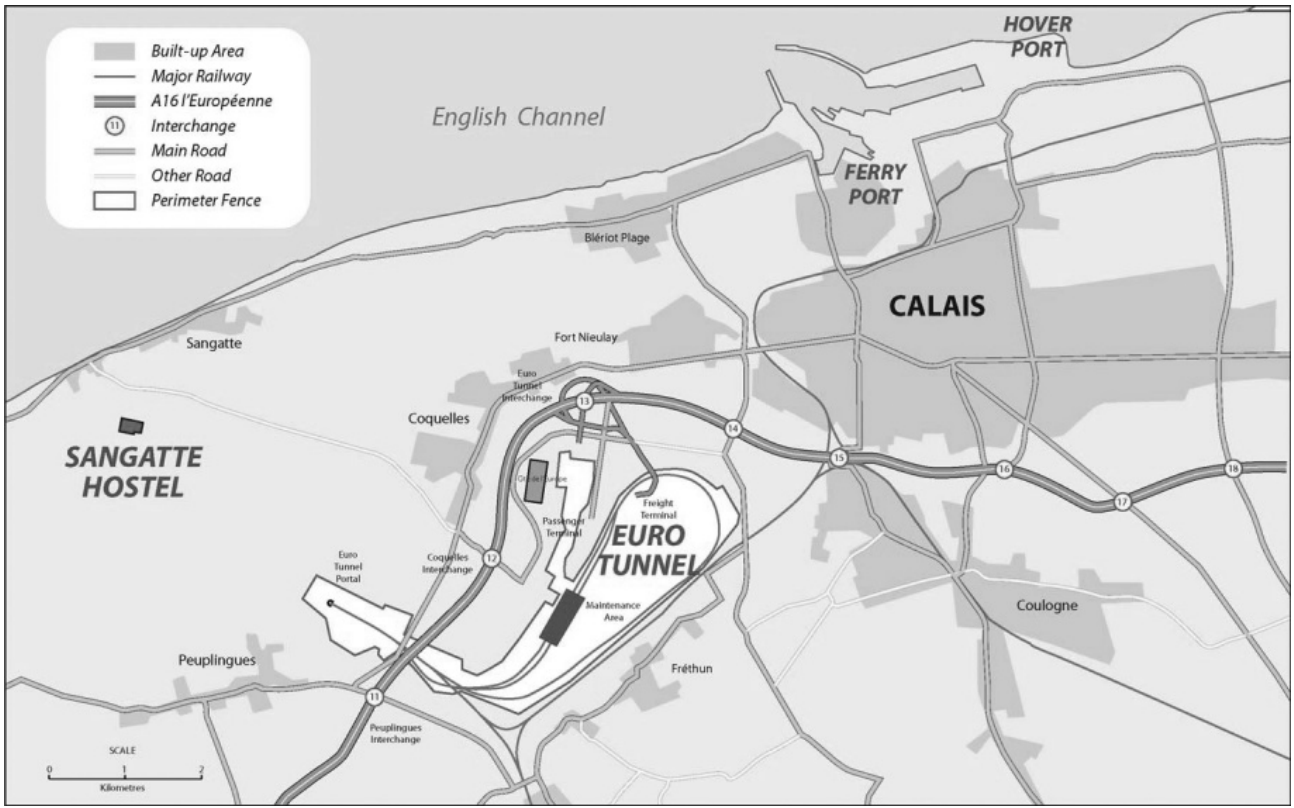

Figure 23.1 Map of the Calais Region

B Legal claims: Sangatte and SeaFrance

By a Notice of a Request for Arbitration dated 17 December 2003, the Channel Tunnel Group Ltd and France-Manche S.A. initiated arbitral proceedings against the UK and France under the auspices of the Permanent Court of Arbitration (PCA). Their two main claims related to (1) the allegedly inadequate protection of the Fixed Link against disruptions by clandestine migrants at Sangatte, linked to a complaint about the UK's civil penalty regime, and (2) the allegedly improper financial support to the SeaFrance sea link. Although both claims were brought against both respondents, the tribunal later held that there was no dispute between the Concessionaires and the UK as concerned the SeaFrance claim so, to the extent that this claim was directed against the UK, the case was dismissed entirely for want of jurisdiction.[11] Analysis of the SeaFrance claim hence provides no further relevance to the present discussion concerning shared responsibility.

With regard to the Sangatte claim, the Concessionaires asserted that the Fixed Link was inadequately protected against interference by clandestine migrants based at the Sangatte Hostel, especially from 1999 to 2003. Thousands of migrants from Kosovo, Afghanistan, Iraq and Somalia broke into the perimeter of the terminal site at Coquelles, hoping to smuggle themselves into shuttle trains destined for the UK. The claimants alleged that 'this caused significant disruption to the operation of the Fixed Link and cost a great deal in additional protective measures'.[12]

Linked was a complaint concerning the UK's civil penalty regime, introduced in April 2000 pursuant to Part II of the Immigration and Asylum Act (the 1999 Act),[13] under which persons or companies responsible for transporting clandestine migrants into the UK were subjected to a system of penalties. At first this regime applied only to road transport vehicles, but in 2001 it was extended to the claimants. Close to £400,000 in penalty charges were imposed on the Concessionaires, which were all subsequently remitted, up to the point where the UK entirely exempted claimants from the system in 2002. Later that same year, the UK amended the 1999 Act so as to re-render operators of freight shuttle trains liable for carrying clandestine migrants to the UK, but at the time of the Partial Award, no penalties had been imposed upon the Concessionaires under the amended 1999 Act.

[11] *Ibid.*, para. 143. [12] *Ibid.*, paras. 58–64. [13] *Ibid.*, paras. 66–9.

The UK also imposed liability on the claimants under the Immigration Act 1971, as modified by the Channel Tunnel (International Arrangement) Order (the 1993 Order), which incorporated the Sangatte Protocol into English law,[14] for the costs of detention and removal of clandestine migrants arriving in the UK via the Fixed Link. The Partial Award refers to an amount of over £100,000 paid by the claimants on this account.

II The *Eurotunnel* partial award

On 30 January 2007, an arbitral panel composed of Maître L. Yves Fortier, Judge Gilbert Guillaume, Lord Millett and Mr Jan Paulsson, chaired by Professor James Crawford, issued a Partial Award in the *Eurotunnel* arbitration.

A Applicable law and jurisdiction

The law to be applied by the tribunal consisted of the relevant provisions of the Treaty and the Concession Agreement, supplemented by English and French law insofar as necessary for the implementation of particular obligations. Furthermore, recourse could be had to 'the relevant principles of international law and, if the parties in dispute agree, to the principles of equity'.[15]

In order to establish the scope of its jurisdiction,[16] the tribunal distinguished three questions:

> (1) Was there a 'dispute' between the Claimants and either or both Respondents which existed at the time of the Request?
> (2) As to any such dispute, have the Claimants presented claims falling within the scope of Clause 40.1 of the Concession Agreement?
> (3) Does the fact that certain proceedings were or could have been brought before another forum pursuant to Clause 41.4 of the Concession Agreement affect the present Tribunal's capacity to deal with the claims?[17]

[14] The Treaty of Canterbury was supplemented by later agreements between the two States, including the Protocol concerning Frontier Controls and Policing, Cooperation in Criminal Justice, Public Safety and Mutual Assistance Relating to the Channel Fixed Link, Sangatte, 25 November 1991 (Sangatte Protocol).

[15] Clause 40.4 of the Concession Agreement. [16] *Ibid.*, Clause 40.1.

[17] *Eurotunnel* Partial Award, para. 135.

The tribunal identified the source of its competence to determine the parties' respective rights and obligations as the Treaty ('but only insofar as it is given effect to by the Concession Agreement') and the Concession Agreement ('whether or not it goes beyond merely giving effect to the Treaty').[18]

B Findings on joint and several responsibility

Chapter V of the *Eurotunnel* Partial Award specifically deals with the claimants' thesis of 'Joint and Several Responsibility'. The Treaty of Canterbury, the Concession Agreement and their implementation were, at least in part, acts of the French and UK governments, so one contentious issue concerned 'the basis on which the Respondents may be held responsible'.[19] The question was whether the claimants needed to show precisely the degree to which any breach of obligations owed to them was specifically due to one or other government, or whether they could invoke some principle of solidary or collective responsibility.

1 Position of the claimants

The claimants argued that the conduct regarding the Sangatte claim (inadequate protection of the Fixed Link against clandestine migrants) was attributable to France and the UK, individually and collectively:[20]

> Any violation caused by the Governments' respective acts and omissions in the context of policing, security and frontier controls should, in addition to engaging the specific responsibilities of the relevant Government, also be attributable to both Governments jointly since these actions are manifestations of the Governments' joint failure to co-operate and co-ordinate their actions in making appropriate provision in relation to policing, security and frontier controls.[21]

Emphasising that both governments were jointly obliged with regard to security and frontier controls under the applicable rules, the claimants asked the tribunal to hold France and the UK 'liable in respect of all claims, either on the basis of their own acts or omissions, and/or on the basis of their failure to protect the claimants from the acts or omissions

[18] *Ibid.*, para. 153. [19] *Ibid.*, para. 162. [20] *Ibid.*, paras. 163–7.
[21] Claimants' Memorial, para. 262 – as cited in *Eurotunnel* Partial Award, para. 163 (original Memorial not publicly available).

of the other Government'.[22] Although accepting that joint responsibility does not generally exist under international law, the claimants pointed out that Article 47 of the ILC Articles on State Responsibility provides for the possibility of an agreement to the contrary between the States concerned. In the present case, this would imply that some form of 'joint liability flows from the fact that the [relevant] Instruments contemplate the Governments cooperating and coordinating their actions in making appropriate provisions in those fields'.[23]

This joint liability would be additional to the governments' individual liability. Thus, regardless of whether the relevant instruments gave rise to joint liability, the Concessionaires could still assert independent claims against both governments in those fields. The claimants further specified that such individual liability arose at two levels: first, 'each Government's liability for disregarding its specific responsibilities in relation to policing, security and frontier controls'; and second, 'each Government's failure to cooperate, coordinate and consult so as to prevent the other Government's breach'.[24]

The claimants asserted that accepting the concept of joint responsibility as outlined would not raise any complications at the compensation stage because 'each Government would be liable for the entirety of the damage to the Concessionaires' bearing in mind that '[t]he Concessionaires would not, of course, receive the same compensation twice over'.[25] The manner in which the governments' liabilities were subsequently to be apportioned between themselves was of no concern to the Concessionaires.

2 Position of the respondents

With reference to the closing of the Sangatte Hostel, France accepted that the two governments had assumed joint and several responsibilities. However, this solely concerned the execution of the Agreement so, in addition, each government retained 'its own onus of responsibility, which is the case for any obligations relative to public order which depend upon the

[22] Letter from Matthew Weiniger to Brooks Daly dated 26 April 2005, Bundle G, 3883 at point 3 – as cited in *Eurotunnel* Partial Award, para. 164 (original Letter not publicly available).

[23] Claimants' Reply, para. 136 – as cited in *Eurotunnel* Partial Award, para. 165 (original Reply not publicly available).

[24] *Ibid.*, para. 137 – as cited in *Eurotunnel* Partial Award, para. 166.

[25] *Ibid.*, para. 141 – as cited in *Eurotunnel* Partial Award, para. 167.

responsibility inherent to each State'.[26] How exactly the former (execution of the Agreement) was to be separated from the latter (public order obligations) was not clarified.[27] Moreover, France asserted that Clause 41.4 of the Concession Agreement granted national courts exclusive jurisdiction to address joint and several responsibility issues as it would be impossible for a tribunal to distinguish between breaches of France and those of the UK.

Unlike France, the UK maintained that it was unclear whether acts and omissions attributable to 'one or both of the Governments' entailed individual liability, joint liability or joint and several liability. In its view, 'Claimants must establish the specific responsibility of the United Kingdom for any alleged breach.'[28] Furthermore, the UK rejected the claimants' allegation that both governments had failed to co-operate, co-ordinate and consult so as to prevent the other government's breach, as such obligation of result was not stipulated in either the Concession Agreement or in any source of international law.[29] Whether it could instead potentially be construed as an obligation of conduct was not explored by either of the respondent parties.[30]

3 The tribunal's analysis

The tribunal commenced its investigation by examining Article 47 of the ILC Articles on State Responsibility (Plurality of responsible States) which provides:

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.
2. Paragraph 1:
   (a) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

[26] Transcript, Day 9, 34 (translation of the original French version, Day 9, 30–1) Reply – as cited in *Eurotunnel* Partial Award, para. 169 (original Transcript not publicly available).

[27] Insofar as this can be derived from the Partial Award as the original Memorials are not publicly available.

[28] United Kingdom Counter-Memorial, para. 3.81 and Transcript, Day 4, 122–3 – as cited in *Eurotunnel* Partial Award, para. 171 (original Counter-Memorial and Transcript not publicly available).

[29] *Eurotunnel* Partial Award, para. 172.

[30] Insofar as this can be derived from the Partial Award as the original Memorials are not publicly available.

(b) is without prejudice to any right of recourse against the other responsible States.

The ILC stated in the commentary to this Article that:

> The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several or solidary responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.[31]

Applying this statement, the tribunal questioned 'whether the provisions of the Treaty of Canterbury as given effect to by the Concession Agreement and the Concession Agreement establish or imply any general principle of solidary responsibility for breaches of obligation'.[32] Although Clause 20 of the Concession Agreement established a system of joint and several liability of the Concessionaires to the Principals, there is no equivalent provision vice versa.

Thus the question became whether 'the Concession Agreement provided or at least assumed that an obligation of the Principals was a joint obligation of both or individual obligations of each'.[33] The claimants' argument that such obligation was included in the reference in the Concession Agreement to the French Minister for Transport and the British Secretary of State 'of the one part' and to the British and French companies 'of the other part', was rejected by the tribunal as it is a usual formulation which does not necessarily entail any form of joint and several responsibility.[34] More significance was attached to the conduct of the IGC, a joint supervisory organ created to supervise 'in the name and on behalf of the two Governments, all matters concerning the construction and operation of the Fixed Link'.[35] Its decisions require the assent of both States-Principals – a violation of the Concession Agreement by an act of the IGC could thus entail joint responsibility of France and the UK.[36] The claimants, however, were complaining not about an act, but an omission on the part of the IGC – which gave rise to the question of whether this

[31] Commentary to Art. 47 of the ILC Articles on State Responsibility, para. 6.
[32] *Eurotunnel* Partial Award, para. 175. [33] *Ibid.*, para. 177. [34] *Ibid.*, para. 178.
[35] Arts. 10(1) and 10(3)(c) of the Treaty of Canterbury.
[36] The Partial Award hereby refers to the ILC Articles on State Responsibility which envisage the situation of 'a single entity which is a joint organ of several States': commentary to Art. 6, para. 3; commentary to Art. 47, para. 2.

'failure to take action' entailed the joint liability of both Principals or the individual liability of each.[37]

This led the tribunal to examine the Invitation to Promoters, more specifically, the undertaking not to terminate the promoters' right to operate the Fixed Link.[38] This Invitation provided that the Treaty would lay down 'the conditions for the allocation of responsibility as between the States'.[39] Where a breach of such undertaking falls under the responsibility of both States, or where the responsibility is disputed, the issue is to be decided by arbitration on the basis of international law. The Treaty in general does not require any joint action – the one express reference being Article 5(4) on measures necessary for the defence and security of the Fixed Link, which states that:

> The Concessionaires shall, if required by the two Governments, take measures necessary for the defence and security of the Fixed Link. Save in exceptional circumstances of the kind envisaged in Article 6, the two Governments shall consult each other before requiring the Concessionaires to take such measures, and shall act jointly.

As Article 6 deals with natural disasters, acts of terrorism and armed conflicts, the tribunal concluded that the defence and security of the Fixed Link must be a wider concept. Furthermore, Article 15 on Compensation of Concessionaries states that:

> (3) . . . In those cases where *both States are liable* under this provision and where the Concessionaires make a claim for compensation against both States, *they may not receive from each State more than half of the amount of compensation payable* in accordance with the law of that State.
> (4) Each State shall bear the cost of the payment of the compensation to the Concessionaires *in proportion to its responsibility*, if any, in accordance with international law.[40]

The Treaty contains many provisions for consultation and co-operation between the two governments,[41] while in other respects proceeding on the basis that the implementation of the Fixed Link is a matter for one government or the other, depending on where the tasks are to be carried

[37] *Eurotunnel* Partial Award, paras. 179–80.
[38] *Ibid.*, para. 181.
[39] Invitation to Promoters, para. 11.5.
[40] Emphasis added.
[41] *Eurotunnel* Partial Award, para. 184.

out.[42] So, the tribunal scrutinised all provisions of the Concession Agreement which envisage joint or co-operative action by the Principals as well as action by each of them on its own responsibility.[43]

However, the tribunal found that 'there is no equivalent so far as the Principals are concerned of the joint and several responsibility and mutual guarantees exacted from the Concessionaires'.[44] As a result, to the extent that the claims relied on joint and several responsibility, defined as 'the *per se* responsibility of one State for the acts of the other', they failed. What was required was close co-operation between the two governments, in particular through their joint organs (the IGC and the Safety Committee); the Concession Agreement set out core commitments towards the Concessionaires, in particular to facilitate the construction and to permit the uninterrupted operation of the Fixed Link. Subsequently, the tribunal embarked upon an extensive analysis of the alleged breaches of the Concession Agreement resulting from the fault of one or other, or both, States – whereof the findings on the Sangatte claim are most relevant to the present discussion.

C Findings on the Sangatte claim

The Sangatte claim consisted of two allegations which were brought jointly against both respondents: (1) failure to protect the Coquelles site against clandestine migrant incursions and (2) favouring the *Société Nationale des Chemins de Fer Français* (French Railways National Society or SNCF) Terminal and Port of Calais to the detriment of the Fixed Link.

1 Failure to protect against incursions

Starting with the failure to protect the Coquelles site against incursions, the tribunal identified four applicable legal standards. First, the clauses placing the burden of the assumption of risk upon the Concessionaires do not apply in this case as these clauses concern external hazards – such as risks arising from acts of third parties or the state of the economy – as opposed to governmental non-compliance with commitments under the Concession Agreement.[45] Secondly, the legal standard against which the respondents' conduct had to be measured consisted of obligations to allow the Concessionaires freely to determine their commercial policy,

[42] *Ibid.*, para. 185.
[43] *Ibid.*, para. 186.
[44] *Ibid.*, para. 187.
[45] *Ibid.*, paras. 279–82.

not to intervene in the operation of the Fixed Link and not to interrupt its operation.[46] Thirdly, the respondents' conduct had to be examined in the light of the clauses relating to frontier controls.[47] The fourth and final legal standard was the claimants' primary reliance on certain systematic obligations of the Principals, acting in consultation and through the IGC, to maintain the basic conditions under which the Fixed Link could be constructed and operate.[48]

Applying these standards, the tribunal recognised that the opening of the Sangatte Hostel fell within the margin of appreciation of the French authorities but by January 2001, it should have been sufficiently clear to the Principals and the IGC that it was being used 'as a base for criminal activity'.[49] This led the tribunal to hold that '[u]nder Clauses 2.1 and 27.1 of the Concession Agreement, the IGC should have taken the necessary steps to ensure the orderly operation of the Fixed Link' but yet 'at crucial periods, the IGC sought to shift the whole burden of security on to Eurotunnel'.[50] Even though 'issues of policing outside the control zone were exclusively a matter for France, the overall responsibility for the security of the Fixed Link was shared and not divided'.[51]

It was not that the UK was responsible for the security of the Fixed Link on its side of the boundary, while France was responsible on the Continental side. Rather, both States shared that responsibility and under Clause 27.7 had agreed to ensure that the IGC took the necessary steps to facilitate the implementation of the entire Agreement. The tribunal concluded that:

> in the circumstances of the clandestine migrant problem . . . , it was incumbent on the Principals, acting through the IGC and otherwise, to maintain conditions of normal security and public order in and around the Coquelles terminal; that they failed to take appropriate steps in this regard, and thereby breached Clauses 2.1 and 27.7 of the Concession Agreement, and that the Claimants are entitled to recover the losses directly flowing from this breach.[52]

This finding was not considered inequitable vis-à-vis the UK because all measures to secure the Coquelles terminal were taken to benefit the integrity of UK immigration laws. Moreover, the IGC record did not show 'consistent and conscientious opposition by the United Kingdom to a unilateral French policy, such that the United Kingdom could argue that it did everything within its power to bring a clearly

[46] *Ibid.*, paras. 279–89. [47] *Ibid.*, paras. 290–4. [48] *Ibid.*, paras. 295–302.
[49] *Ibid.*, paras. 306–9. [50] *Ibid.*, para. 309. [51] *Ibid.*, para. 317. [52] *Ibid.*, para. 319.

unsatisfactory situation promptly to an end'.[53] As a result, the tribunal held the UK co-responsible with France for the damages caused to the claimants.

2 Favouring the SNCF Terminal and Port of Calais

Subsequently, the tribunal moved to examine the discrimination claim brought against the respondents, namely the allegation that both governments had favoured the SNCF Terminal and Port of Calais to the detriment of the Fixed Link. Although this could in principle have resulted in a shared responsibility finding, the tribunal held that there was 'no general obligation on the Principals under the Concession Agreement to observe the principle of non-discrimination between different cross-Channel operators in respect of operational requirements such as security and safety'.[54] Hence, as there was no general obligation, there could be no general breach either, resulting in a finding of shared responsibility.[55]

3 The extent of responsibility as between the respondents

In sum, only one ground for shared responsibility was accepted by the tribunal: the failure to prevent incursions on the Coquelles site. Regarding the apportionment of the established shared responsibility and the division of compensation obligations, as between the UK and France, the tribunal referred to the second phase of the proceedings, in which the quantum of the claimants' loss would be determined and apportioned.

The tribunal in the *Eurotunnel* Partial Award held that it had jurisdiction over the Sangatte claim in relation to both respondents. Furthermore, in the circumstances of the examined clandestine migrant problem, 'it was incumbent on the Principals, acting through the IGC and otherwise, to maintain conditions of normal security and public order in and around the Coquelles terminal'.[56] In failing to take appropriate steps in this regard, the tribunal decided with a 4:1 majority (with Lord Millett dissenting) that the Principals had breached Clauses 2.1 and 27.7 of the Concession Agreement. As a result, the claimants were entitled to recover the losses directly flowing from this breach, to be assessed in a separate phase.[57] This next phase, the proceedings on damages, terminated when the

[53] *Ibid.*, para. 318. [54] *Ibid.*, para. 324.
[55] *Ibid.*, paras. 325–35. [56] *Ibid.*, para. 395. [57] *Ibid.*

parties reached a settlement, the precise terms of which are not available to the public.[58]

The reasoning underlying the majority decision on liability can be summarised as follows: (1) both governments bore the responsibility for security maintenance under the Concession Agreement; (2) both governments were liable for damages suffered by the Concessionaires based on the fact that the Channel Tunnel required close co-operation between the two governments and through their joint organ, the IGC; (3) as a result, what the IGC as a joint organ failed to do (protect the French terminal against intrusions of clandestine migrants), the governments in whose name and on whose behalf it acted, equally failed to do.

III Relevance of the *Eurotunnel* award for shared responsibility

A Reciprocity of joint and several responsibility?

Arguably, Clause 20, which establishes a system of joint and several liability of the Concessionaires vis-à-vis the Principals but not vice versa, may seem prima facie 'unfair' as it contradicts the reciprocity of contractual obligations, creating a potential imbalance in the relationship between the contracting parties. However, although the fact of private corporations being joint and severally liable in the absence of a similar liability as between the States may seem to lack symmetry, there is a clear reason why enterprises which run commercial ventures are often assumed to be joint and severally liable while governments are not.[59] Under private law, the system of joint and several liability aims at strengthening the position of the creditor, extending the assets available for recovery in case the debtor goes bankrupt. The traditional position is that States and public bodies, even when engaging in commercial activities, cannot be equated with private corporations because, amongst other things, they cannot go bankrupt. In case of contractual breach, the creditor will still be able to obtain a (financial) remedy,[60] which could explain the position taken when the Eurotunnel Concession Agreement was signed. Although the current financial crisis may weaken this argument, it remains

[58] Correspondence with the UK Foreign and Commonwealth Office, on file with author.

[59] See e.g. Scott L. Hoffman, *The Law and Business of International Project Finance*, 3rd edn (Cambridge University Press, 2008), 158–63.

[60] *Ibid.*

indisputable that States cannot simply be equated with private companies in the anticipation of bankruptcy.

B The Eurotunnel *case as a precedent for determining shared responsibility*

1 The Partial Award: dividing the allocation of responsibility

When it comes to providing guidance as to the allocation of responsibility or reparation in shared responsibility cases, the approach taken by the *Eurotunnel* tribunal can be seen as rather careful – for very good reasons. The caution in the liability award hardly comes as a surprise, if one considers that the chair of the arbitral tribunal in the *Eurotunnel* dispute (Professor James Crawford) was also the ILC Special Rapporteur under whose charge the ILC Articles on State Responsibility – which are equally non-committal with regard to shared responsibility – were finalised. What the *Eurotunnel* case does teach us is the importance of the specific terms of the agreement upon which the jurisdiction of the adjudicatory body is to be based. Does this agreement, as *lex specialis*, prescribe any particular form of shared responsibility? More specifically, has a system of joint and several liability been stipulated? Has the issue of implementation of any such responsibility been devised, particularly when it comes to remedies, or should recourse be made to national law?

This is where arbitration as a procedural means to an end – settling shared responsibility claims – might have an edge over international and domestic litigation, as it allows for *ad hoc* solutions via the conclusion of an arbitration agreement. Moreover, arbitration also allows for the participation of a variety of actors – as seen in the *Eurotunnel* case in which two companies successfully invoked the shared responsibility of the two States involved. The decision adopted in *Eurotunnel* was to divide the allocation of responsibility between France and the UK rather than holding them jointly and severally responsible, with the concrete determination and allocation of the compensation to be made in a subsequent phase. Nothing in the procedural toolbox of arbitration, however, predetermines this division of the allocation of responsibility to be repeated in similar future proceedings.

2 The Millett dissent: with no power comes no responsibility

Lord Millett's dissent has a certain straightforward, practical charm: why would a State be held responsible for omissions if it was not in a position to act? Why would the UK have to pay damages for lack of maintenance

of public order if it did not have the competence to authorise any actions on French soil? The answer, as found in the majority opinion, is that this was exactly what the parties had agreed to in the Concession agreement: the creation of a legal fiction, whereby two States could indeed be held jointly responsible on an abstract level, whereas only the actions of one of them could have prevented the breach in practice. Legally, it is a logical and common set-up to hold someone liable for damages due to failure to act, even if their own conduct did not contribute to the damages – for the sole reason that this was a joint operation.

Although Lord Millett agreed that the UK shared France's understanding of their legal obligations in this matter, he maintained that the respondents' authorisation of the IGC's conduct did not form a breach of the Concession Agreement in itself, but at most 'some encouragement to France'.[61] As a result, France – and only France – violated the Concession Agreement. Concluding that Clause 27 does not add anything to Clause 2.1[62] is an illustration of circular reasoning, effectively leaving Clause 27 devoid of legal meaning. Furthermore, it is rather unfair to the majority to state that:

> [t]he key proposition on which the majority base their finding against the United Kingdom is that it did not 'do everything within its power to bring an unsatisfactory situation promptly to an end' . . . This is, with respect, an abbreviated version of the truth, omitting as it does a crucial qualification. The true position is that the United Kingdom did not do everything within its power to bring an unsatisfactory situation promptly to an end *by getting France to perform its obligations*.[63]

The majority did *not* include the latter finding (either explicitly or implicitly) in its award. The most straightforward explanation is that this was not included because it was not part of the majority's position. The dissent seems to read an obligation of result into what is phrased as an obligation of conduct. Taken at face value, the award states exactly what it was in all likelihood meant to state: the UK could have undertaken certain actions to try to induce France to comply with the obligations resting upon both respondents, but the UK failed to do this. The reason is quite simple: the UK was labouring under the same understanding of these obligations as France was, thereby encouraging France to continue acting accordingly.

Had the UK, however, adopted the correct – the tribunal's – understanding of the Principals' obligations and done everything in its power

[61] Dissent Lord Millett, para. 16. [62] *Ibid.*, para. 18.
[63] *Ibid.*, para. 23 (emphasis in original).

to convince France to change course, but failed in achieving that goal, the discussion would presumably have run a different course. The facts being as they are, the majority rightly concluded that the shared responsibility of both respondent States had been established. Particularly as to the IGC's conduct, the majority decision concurs with the line of reasoning followed by the International Court of Justice (ICJ) in its decision in *Certain Phosphate Lands in Nauru* relating to the shared responsibility of Australia, the UK and New Zealand for their joint organ, the Administrative Council[64] – incidentally also the first ICJ case in which the chair of the *Eurotunnel* arbitration and honouree of this work appeared as counsel.

This is not to imply that Lord Millett's dissent should be discarded: particularly relevant remains his analysis of the consequences of primary as opposed to secondary responsibility and, more precisely, the consequences pertaining to the different nature of the internationally wrongful act committed by the UK.[65] The majority award could be criticised not so much for the injustice of holding the UK liable, but for reducing France's liability to any extent, as 'ultimately the cause of the United Kingdom's supposed liability is that France failed to discharge its obligations under the Concession Agreement'.[66] Indeed, if France on its own had adopted the correct understanding of the Principals' obligations under the Concession Agreement and had satisfactorily discharged such obligations, there would have been no dispute, regardless of the UK's understanding. Thus, in such case, even if the UK had maintained its present incorrect understanding that no action was required, this would not have entailed a shared responsibility finding as there would have been no injury and ensuing cause for damages.

Even if one accepts that the UK and France jointly committed the same internationally wrongful act, the responsibility of one involved State (France) cannot be reduced due to the existence of a co-perpetrator (the UK). To what extent this may influence the allocation of the damages is a different matter.[67]

[64] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, Judgment on Preliminary Objections, 26 June 1992 ICJ Reports (1992), 240, 258–9, para. 48; see also Christian Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State' in James Crawford, Allain Pellet, Simon Olleson (eds.), *The Law of International Responsibility* (Oxford University Press, 2010), 281–4.

[65] This option was cursorily mentioned by Lord Millett in para. 19 of his Dissent: '[e]ven if [the conduct of the UK] did [constitute a breach of the Concession Agreement], it would not be the same wrong but a wrong of a very different order'.

[66] *Ibid*., para. 24.

[67] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, Separate Opinion of Judge Shahabuddeen, 283–5; Commentary to the Art. 47 of the ILC Articles on State Responsibility

C Determining damages

Regarding the precise division of the damages flowing from the establishment of shared responsibility in the confidential settlement of the *Eurotunnel* case, one can only resort to speculative guesswork. Inasmuch as the IGC's conduct is concerned, it is most likely that the responsibility of the States involved has been divided on a fifty-fifty basis. Such estimation is based on the formulation of the Concession Agreement, and more precisely the stipulations under Clause 27 which give both Principals an equal role in the Agreement's implementation and the functioning of the IGC and the Safety Authority. Resulting from such equal power to drive the IGC's actions, and in the absence of evidence to the contrary, it would appear that each State should bear an equal measure of responsibility if and when the IGC fails to act to an extent that such omission is found to be in breach of the Agreement.

However, the same reasoning will not necessarily have been applied concerning the determination of the compensation for breaches due to acts or omissions of the respondents directly (as opposed to through the IGC). The tribunal held that 'it was incumbent on the Principals, acting through the IGC *and otherwise*, to maintain conditions of normal security and public order in and around the Coquelles terminal'.[68] The liability for the Principals' actions covered by the term 'and otherwise' is where the distinction between the consequences of primary versus secondary liability could come into play, because the settlement may have, as expressed in Lord Millett's words, treated 'the United Kingdom liable to the Claimants . . . in a very small amount'.[69] It is impossible to establish whether UK protests against French conduct would have had any effect. Hence, in the absence of any information on actual UK actions that have effectively contributed to the damage, it could even be possible that the UK share of reparation for this part of the Sangatte shared responsibility claim (as opposed to the IGC-related part) remained limited to some form of satisfaction, rather than actual compensation.

IV Conclusion

When it comes to providing guidance as to the allocation of responsibility or reparation in shared responsibility cases, the approach taken by the

for Internationally Wrongful Acts, para. 11; see also, Orakhelashvili, 'Division of Reparation between Responsible Entities', 647–65.

[68] *Eurotunnel* Partial Award, para. 395 (emphasis added).

[69] Dissent Lord Millett, para. 24.

Eurotunnel tribunal can be seen as quite cautious; a significant contribution to alleviate the under-theorisation and under-exploration in this field has not been realised due to the confidential settlement reached by the parties to the dispute. What the Partial Award in the *Eurotunnel* case does teach us is the importance of the specific terms of the treaty upon which the jurisdiction of the adjudicatory body is to be based. Does this *lex specialis* prescribe any particular form of shared responsibility? More specifically, has a system of joint and several liability been provided? Has the implementation of such responsibility been regulated, particularly concerning remedies, or should recourse be made to general law?

The solution advocated in this chapter is to anticipate shared responsibility claims that may arise in the future and address their implementation already in the treaty or contract which contains the primary obligations – as a *lex specialis* to the limited provisions in the ILC Articles on State Responsibility. A subsidiary solution, if there is no primary treaty or contract, or if it does not regulate shared responsibility claims, would be that parties to an existing dispute try to reach an agreement *in abstracto* on the implementation of shared responsibility, incorporate this in their arbitration agreement and then let an arbitral tribunal decide, first, whether the primary obligation has been breached, and, secondly, how the shared responsibility regulations have to be applied in the case at hand.

Including a 'division formula' in a treaty is not entirely uncommon, an illustration being the 1976 Convention on the Protection of the Rhine from Pollution by Chlorides and its 1991 Additional Protocol, which allocate the clean-up costs for the pollution of the Rhine among the riparian States according to a predetermined formula.[70] Evidently, the contributory payment under this treaty and protocol formed the primary obligation and not a secondary one resulting from previous internationally wrongful conduct but States, international organisations and non-State entities could similarly work out a formula for existing or future shared responsibility claims.

Arbitration as a procedural means to an end – settling shared responsibility claims – has an edge over international and domestic

[70] Agreement for the Protection of the Rhine against Chemical Pollution (Bonn, signed 3 December 1976, entered into force 1 February 1979), 1124 UNTS 406; *Case concerning the Audit of Accounts between the Netherlands and France in Application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976 (Netherlands* v. *France)*, Award, 12 March 2004, United Nations Reports of International Arbitral Awards, vol. XXV, 267–344.

litigation, as it allows for *ad hoc* solutions to be created via the conclusion of an arbitration agreement. Moreover, and just as important, arbitration also allows for the participation of a variety of actors – an option which is not limited to allowing companies to bring claims against States, as seen in the *Eurotunnel* case – but could be extended to include, as claimants or respondents, various combinations of States, international organisations, companies, peoples and individuals. In this manner, a just sharing of responsibility among all accountable actors becomes less of an unattainable ideal and more of an achievable reality.