INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/05/22

BIWATER GAUFF (TANZANIA) LIMITED

v.

UNITED REPUBLIC OF TANZANIA

CONCURRING AND DISSENTING OPINION

1. While agreeing with many of the conclusions and much of the analysis of the Tribunal's Award, I write separately with regard to several aspects of the Tribunal's analysis, and also with regard to the Tribunal's ultimate decision.

2. Preliminarily, I emphasize both my high regard for my colleagues and the narrow scope of my concurring and dissenting opinion. I agree in most respects with the Tribunal's factual and legal analysis, which is careful and thorough. I differ only on limited grounds, and do so with reluctance, mindful of the desirability of unanimity in arbitral decision-making. Nonetheless, on these issues, which are of importance in both this and other cases, I am unable to join in the Tribunal's analysis.[1]

I. EXPROPRIATION AND OTHER VIOLATIONS OF THE BIT

3. First, I join in the Tribunal's conclusion (Award, paras. 451-519) that the Republic's treatment of BGT constituted an expropriation in violation of Article 5(1) of the BIT and the Tribunal's declaration that the Republic's conduct violated the protections of the BIT (Award, para. 814). In this regard, it is clear that the Republic engaged in a series of actions which had the effect of prematurely terminating the Lease Contract, without regard to the contractual termination and other provisions of that agreement, and denying BGT any meaningful possibility to use either its leased premises or other assets, without any consideration being given by the Republic to the possibility of compensation for the seizures. This amounts to a classic instance of expropriation in violation of both Article 5(1) and settled principles of customary international law.

II. THE REPUBLIC'S RETENTION OF THE ENTIRE PROCEEDS OF THE PERFORMANCE BOND

4. Second, and despite the foregoing, the Tribunal minimizes one aspect of the Republic's conduct which had particular importance, both independently and as informing the characterization of the Republic's other actions. The Tribunal also characterizes this aspect of the Republic's conduct as a purely "contractual matter," falling outside its mandate -- analysis and conclusions which I am unable to join.

5. As mentioned in the Award (Award, paras. 494-495, 679(c), 697-706), the Republic's Cabinet adopted a formal decision on 13 May 2005 which decreed, among other things, that City Water's Performance Bond should be called in its entirety and that the proceeds of the bond should be used in part to satisfy City Water's obligations to DAWASA and in part, after DAWASA's claims had been fully satisfied, as so-called "seed money" for a newly-created government entity (DAWASCO). It is relevant in this regard to quote the Cabinet Minute verbatim:

> "money received after DAWASA takes of the Bond [i.e., City Water's Performance Bond] should be used to pay the debt of [City Water] to

[1] Terms defined in the Award have the same meaning in this concurring and dissenting opinion.

DAWASA and *some to be used as seed capital to enable DAWASCO to carry out its responsibilities.*"[2]

6. Pursuant to the Cabinet Minute, DAWASA subsequently called City Water's Performance Bond and retained the entire amount obtained thereby. It was considered to be clear at the time (and remains relatively clear now) that the amounts obtained by DAWASA under the Performance Bond were in excess of amounts it was then entitled to from City Water pursuant to the Lease Contract and the parties' other contractual relations. DAWASA had previously sought to draw the Performance Bond in part, for a sum of Tsh 3,446,459,746, but was unable to do so because the bond was by its terms capable of being drawn only in full; little had changed between the time of DAWASA's first partial draw and its subsequent complete draw (in the sum of Tsh 5,490,845,296), making it clear that a material excess was considered to be due for reimbursement to City Water.

7. Nonetheless, complying with the directions in the Cabinet Minute, DAWASA did not return the excess funds obtained by its draw of the Performance Bond (which excess funds were City Water's property) and instead transferred all of those funds to DAWASCO for its use in taking over City Water's business. This misappropriation of City Water's property for use by DAWASCO cannot be characterized as anything other than both expropriatory and a denial of fair and equitable treatment. Indeed, it was recognized as such, in very frank testimony, by one of the Republic's responsible officer in the course of these proceedings:

> "QUESTION: [T]he Cabinet seems to have thought that there would be money left over [from the proceeds of the Performance Bond after satisfying DAWASA's claims against City Water]. They didn't say how much, they said some amount, but they thought there would be money left over, once the Performance Bond was pulled, beyond what DAWASA was entitled to that could be given to DAWASCO. Is that right?
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> MR. MUTALEMWA: Yes. Actually, that is what it implies, yes.
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> QUESTION: Did you agree with that? Is that -- did you think the Cabinet was wrong ...?
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> MR. MUTALEMWA: Well, it wasn't correct for us to give money to DAWASCO, because DAWASCO is a new public corporation so the government should have given money to DAWASCO, rather than take money from us, but that is what happened, actually. The government gave money eventually to DAWASCO. ...
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> QUESTION: What was left over, even if it was not very much, in your opinion... Was it repaid to City Water?
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> MR. MUTALEMWA: No. It was not repaid to City Water."[3]

[2] Exhibit C-26.
[3] Hearing Transcript, Day 3, p. 108, 17 to p. 110, 6.

8. This acknowledgement was right to make: the Republic deliberately directed, via the Cabinet Minute, the seizure of property (money) belonging to an investor and, recognizing that it had no legal entitlement to that property, and ignoring entirely the parties' contractual mechanisms, directed that the property be turned over to a local governmental entity. That action was all the more troubling because the local entity (DAWASCO) was founded specifically by the Republic to consummate the expropriation of the foreign investor's other property -- with the Republic thus directing the misappropriation and misuse of a private party's assets in order to finance that party's own expropriation. That action, in my judgment, constitutes both a separate expropriatory act, in violation of Article 5 of the BIT, and a further act in aid of the Republic's overall course of expropriatory conduct. To the extent that the Tribunal does not characterize the Republic's action as such, I am unable to join its reasoning.

9. The Tribunal appears instead to conclude that any characterization of the Republic's actions and any calculation of the amounts wrongfully seized by the Republic is solely a contractual matter that depends exclusively on an application of the Lease Contract (Award, paras. 494-495). According to the Tribunal, the Republic's appropriation of the Performance Bond "is a contractual matter," a seizure of surplus funds under the Performance Bond "cannot elevate the prior call on the Performance Bond into an expropriatory act," and "the computation of any such surplus (if there was one) is clearly a matter for the UNCITRAL arbitration pursuant to the Lease Contract to resolve" (Award, para. 495). In my view, the Tribunal's analysis fails properly to distinguish between City Water's contractual rights vis-à-vis DAWASA under the Lease Contract and BGT's rights vis-à-vis the Republic under the BIT and customary international law.

10. It is, of course, well-settled that an investor's BIT rights vis-à-vis a state arise from separate and independent sources -- namely, the BIT and customary international law -- than either the law of the host state or the parties' (or their affiliates') contractual relations. That is clearly recognized in prior authority in this context,[4] as well as under more general international instruments.[5] The same analysis applies to the respective mandates of a BIT tribunal, on the one hand, and a national court or commercial arbitral tribunal, on the other hand: a BIT tribunal has the mandate of deciding claims under the BIT and international law, while the national court or commercial arbitral tribunal has the mandate of deciding claims under applicable national law and the parties' contractual agreement(s). As one

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[4] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction of 29 January 2004, 8 ICSID Rep. 518 (2005); *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Objections to Jurisdiction of 6 August 2003, 18 ICSID Rev.—FILJ 301 (2003), 8 ICSID Rep. 383 (2004); *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL Arbitration), Award of 15 November 2004, *available at:* www.state.gov/documents/organization/38789.pdf [hereinafter *GAMI v. Mexico*]

[5] *See* International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, Article 3 ("The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law") [hereinafter ILC Articles]; J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (CUP, 2002), pp. 36-38 ("Article 3 makes explicit a principle already implicit in article 2, namely, that the characterization of a given act as internationally wrongful is independent of its characterization under the internal law of the State concerned").

tribunal put it well in analogous circumstances, "ultimately, each jurisdiction is responsible for the application of the law under which it exercises its mandate."[6]

11. Analytically, therefore, it is wrong to conclude that characterization of the Republic's actions with regard to the Performance Bond is solely a "contractual matter" or entirely for the UNCITRAL tribunal (or a national court) to decide; insofar as BGT's claims in this arbitration are concerned, the characterization of the Republic's actions is a question of international law under the BIT and is an issue for this Tribunal to resolve, applying the BIT. Equally, it is wrong to conclude that any quantification of the injury resulting from a wrongful expropriation is simply a "contractual matter," for the UNCITRAL tribunal or a national court to decide; again, that is an element of this tribunal's mandate under the BIT.

12. This is true notwithstanding the fact that BGT's rights under the BIT arise, in part, from City Water's contractual rights under the Lease Contract. In my view, the essential point is that City Water's rights under the Lease Contract provide the original foundation for BGT's investment and property rights, but once they have arisen, those property rights have their own separate international legal status, safeguarded by the terms of the BIT and by customary international law. Put differently, BGT's rights under the BIT are not exclusively defined by the terms of the Lease Contract and Tanzanian law: they are instead rights protected by international law, which are for this Tribunal to assess, both as to whether the rights have been violated and what the monetary consequences of any such violation are. Thus, contrary to the Tribunal's apparent suggestion, the UNCITRAL tribunal's mandate with regard to contractual disputes under the Lease Contract and the Performance Bond does not supersede this Tribunal's mandate under the BIT.

13. That conclusion applies with particular force here, where the Republic's expropriatory actions entailed a deliberate departure from and destruction of the contractual relationship between City Water and DAWASA. In those circumstances, it is particularly anomalous to conclude that the Republic's actions are only a "contractual matter" and subject entirely to the UNCITRAL tribunal's jurisdiction. Rather, it was the Republic which chose, through its expropriatory conduct, to depart from and render nugatory, the contractual mechanisms of the Lease Contract. In those circumstances, treating the Lease Contract as the sole basis for, and necessary limit to, BGT's rights is in my view inconsistent with the protections of the BIT and international law.

14. Despite these disagreements with the Tribunal's characterization under the BIT of the Republic's Cabinet Minute and DAWASCO's retention of funds under the Performance Bond, I do not disagree with the ultimate conclusion that, on the record before the Tribunal, there are no quantifiable monetary damages attributable to the Republic's actions in this regard. As the Tribunal correctly notes, "neither Party ... tendered evidence to prove any specific surplus amount" (Award, para. 495). In the absence of such evidence, there is no basis for concluding that a specific, quantifiable amount of damages was caused or for making an award to that effect. Importantly,

[6] *GAMI v. Mexico,* Award of 15 November 2004, para. 41. *See also Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Award of 21 November 2000, 5 ICSID Rep. 296 (2000), p. 315.

however, it is for this Tribunal, applying the BIT and international legal principles -- and not for the UNCITRAL tribunal or another body applying other legal instruments -- to characterize the lawfulness of the Republic's actions and to evaluate the evidence in order to determine the consequences of any such action.

III. CAUSATION AND VALUATION

15. Third, I am also unable to join in the Tribunal's apparent conclusion that BGT is entitled to no financial compensation on grounds of "causation" (Award, paras. 736-808 and particularly 797-808). The Tribunal concludes that "the actual, proximate or direct causes of the loss and damage for which BGT now seeks compensation were acts and omissions that had already occurred by 12 May 2005" (Award, para. 798). The Tribunal also reasons that "the Republic, in effect, interfered with and accelerated the contractual termination process, but by that stage [i.e., 1 June 2005] termination was inevitable in any event" (Award, para. 799). Furthermore, the Tribunal concludes that there is a "lack of linkage between each of the wrongful acts of the Republic and each of the actual, specific heads of loss and damage for which BGT has articulated a claim for compensation" (Award, para. 805).

16. In my view, this analysis confuses issues of causation, on the one hand, and quantification or quantum of damages, on the other; this analytical confusion is ultimately not decisive to the specific outcome in the present case, but it could well be in future cases and I am therefore unable to join it.

17. Preliminarily, it should be clear that the Republic's expropriatory, unfair and inequitable and other wrongful acts caused injury to BGT. Specifically, it is beyond debate that the Republic wrongfully seized City Water's business, premises and assets at a point in time (1 June 2005) at which the Republic had no right – under either international law or the Lease Contract – to do so. That wrongful seizure clearly caused injury to City Water by depriving it prematurely of the use and enjoyment of its property: whether measured in weeks (to 24 June 2005, as the Tribunal concludes) or months (some longer period which would have obtained in reasonable dealings between contracting parties conducting themselves in good faith) or years (the remaining lease term under the Lease Contract), City Water was wrongfully evicted from its leased premises, and wrongfully denied the use of its assets, its management and its staff, for some ascertainable period of time.

18. In this respect alone, in my view, the Republic's actions clearly caused injury to BGT, by prematurely taking City Water's property and resources from it, and it is mistaken therefore to conclude, as the Tribunal does, that BGT's claims fail on the grounds of causation. Rather, the proper question is what quantum of loss or monetary value to attribute to the injury that the Republic caused to BGT.

19. Despite my disagreement with its analysis, I concur in the Tribunal's conclusions that BGT has failed to demonstrate, on the current record, compensable and quantifiable monetary damages or loss. That is because the evidence fails to show that that there was any monetary value associated with the injury that BGT suffered.

20. BGT's request for relief broadly sought all damages caused by the Republic's wrongful actions: "the financial equivalent of full reparation for the unlawful expropriation of BGT's investment" or "compensation for the expropriation of BGT's investment in accordance with Article 5 of the Treaty" (Claimant's Memorial, para. 275). That request is not limited to specific sums or items of damages, but instead seeks recovery for all injury flowing from the Republic's wrongful actions. In turn, this requires determining the value of City Water's expropriated property (and, in particular, the value of City Water's remaining leasehold under the Lease Contract and other properties associated with its business).

21. The answer to this question appears, on the record in these proceedings, to be that no monetary value can be associated with City Water's remaining leasehold and other properties (Award, para. 787). Put differently, although the Republic caused BGT injury, including by expropriating its property and prematurely terminating the contractual relations between City Water and DAWASA, the property that the Republic wrongfully seized had no quantifiable monetary value.

22. Specifically, the evidence showed that City Water was persistently losing money under the Lease Contract and that, even with significant contractually-permitted modifications (pursuant to the Lease Contract's provisions) to the terms on which City Water did business, City Water would continue to lose money both in the short term and over the life of the Lease Contract. Only with a fundamental renegotiation of the Lease Contract, and its economic terms, would it have been possible for City Water to have become a sustainable and profitable enterprise; nothing entitled City Water to such a fundamental renegotiation and DAWASA had refused to consent to such revised terms of the Lease Contract prior to the events of 1 June 2005. Accordingly, whatever the remaining term of the Lease Contract (i.e., three weeks or a number of years) the evidence showed that City Water's business simply did not have a quantifiable positive monetary value. Thus, although the Republic wrongfully took City Water's remaining leasehold and the associated assets, thereby causing BGT injury, the monetary value of the commercial injury to BGT was zero.

23. The distinction between causation and quantification of injury is not, as the Tribunal appears to suggest, an academic one. Importantly, had City Water been earning a profit, or had the Lease Contract had a positive value, then BGT would have been entitled to a monetary award of damages. In that case, the fact that the "termination of the Lease Contract was inevitable and was going to materialise within a matter of weeks" (Award, para. 791) would be irrelevant. Even if one assumed that the Lease Contract would be terminated (and putting aside questions of the lawfulness of termination (see below)), the premature termination of a profitable lease or premature cessation of a profitable business would cause quantifiable monetary damage. Issues would arise in valuing that damage, but these would concern the matter of attributing a value to a prescribed period of time. It is for this reason that it is inaccurate to characterize BGT's claims for monetary damages as failing for lack of causation; rather, BGT's monetary damages claims fail because the injury that was caused to it had no quantifiable monetary value.

24. This analysis is important as a conceptual matter, and also consistent with more general principles of international law. The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles) make clear that a state which commits an internationally wrongful act, such as an expropriation, is under a number of obligations.[7] These include the obligation to cease the wrongful act and the "obligation to *make full reparation for the injury caused by* the internationally wrongful act."[8] In turn, and importantly, Article 31(2) provides that "injury *includes* any *damage, whether material or moral,* caused by the internationally wrongful act of a State,"[9] while Article 36(1) provides that a State that commits an internationally wrongful act "is under an obligation *to compensate for the damage* caused thereby, insofar as such damage is not made good by restitution."[10]

25. Commentary to the ILC Articles explains that "'injury' includes any material or moral damage" and that the formulation is intended as "inclusive, covering both material and moral damage broadly understood."[11] In particular:

> "there is no general requirement, over and above any requirements laid down by the relevant primary obligation, that a State should have suffered material harm or damage before it can seek reparation for a breach. The existence of actual damage will be highly relevant to the form and quantum of reparation. But there is no general requirement of material harm or damage for a State to be entitled to some form of reparation."[12]

26. The structure of these provisions makes clear that an internationally wrongful act results in an obligation to make reparation for "*injury*," which includes, but is not limited to, an obligation to "compensate for *damage*." An injury can very readily include matters not entailing monetary damage, and require relief not limited to monetary compensation for damage. Specifically, a state's expropriation or denial of fair and equitable treatment causes injury to the investor by depriving it of property or procedural or legal rights. The fact that this injury does not entail monetary damage in no way implies that there was no injury; on the contrary, an injury can very readily exist even without monetary damage.

27. Thus, and importantly, the fact that BGT suffered injury that entailed no quantifiable monetary value does not in any way contradict the fact that the Republic's wrongful expropriation caused BGT injury. Rather, as the ILC's Articles and accompanying commentary make clear, injury is distinguishable from the form and quantum of damage. Here, the Republic caused BGT injury through the premature and wrongful expropriation of its property -- regardless whether that injury had a quantifiable monetary value. Specifically, as noted above, the Republic's action deprived BGT of the

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[7] ILC Articles, Articles 28-39.

[8] ILC Articles, Article 31(1).

[9] ILC Articles, Article 31(2) (emphasis added). In turn, Article 36 provides that the state "is under an obligation to compensate for the damage caused [by its internationally wrongful act]," and that "compensation shall cover any financially assessable damage including loss of profits insofar as it is established." ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 36.

[10] ILC Articles, Article 36(2).

[11] J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (CUP, 2002), pp. 91-92.

[12] *Idem*, p. 92.

use of its property and leasehold rights for at least some specified period of time, and of its rights to be treated fairly and equitably, regardless of the monetary value of those rights.

28. The Tribunal reasons that "'causing injury' must mean more than simply the wrongful act itself" (Award, para. 803). That is correct, but the essential point is that injury need not have a quantifiable monetary value: here, as stated, the injury is the premature taking of BGT's property and the attendant deprivation of the use of that property.

29. The Tribunal also suggests that there is a "lack of linkage between each of the wrongful acts of the Republic and each of the actual, specific heads of loss and damage for which BGT has articulate a claim for compensation." (Award, para. 805) That implies that BGT's claim was limited to only specific, precisely-quantified amounts of loss, which is incorrect. Although BGT requested precisely quantified amounts (i.e., "damages in the range of US$19,059,205 to US$20,158,775" Claimant's Memorial, para. 275(6)(b)) it separately, and naturally, more generally requested compensation for all damages caused by the Republic's actions: again, "the financial equivalent of *full reparation for the unlawful expropriation of BGT's investment*" and "*compensation for the expropriation of BGT's investment* in accordance with Article 5 of the Treaty." (Claimant's Memorial, para. 275(6)(a)). Importantly, the reason that BGT's general request for reparations is to be denied is that the evidence showed that the value of City Water's business and remaining leasehold, however calculated, was zero. That is not an absence of causation of injury but a matter of valuation and quantum of damage.

30. Finally, although the negative long-term value of City Water's business makes it unnecessary to decide the issue in this case, if City Water's business would have been profitable over the life of the Lease Contract, even if unprofitable in the short-term, then the Tribunal would have been required to consider, for the purposes of this arbitration, the contractual entitlement of City Water to continuation of the Lease Contract on either new or different terms. In turn, that would have raised questions regarding the scope of the Tribunal's jurisdiction to consider and decide contractual issues and the relevance (if any) of the UNCITRAL Award made pursuant to the Lease Contract. In this regard, it would not be sufficient to conclude, as the Tribunal does, that "termination of the Lease Contract was inevitable" (Award, para. 791); rather, the decisive consideration would have been whether "*lawful* termination of the Lease Contract" would have occurred.

31. Indeed, the conclusion that the Lease Contract would inevitably have been terminated is, taken alone, neither relevant to the proper outcome in this case nor a conclusion, given the issues presented to this Tribunal, that can properly be reached. Rather, the decisive point is that, whether or not it was terminated, the Lease Contract did not provide City Water and its business with a positive financial value.

IV. COSTS AND RELATED ISSUES

32. Fourth, I am unable to join in the Tribunal's decision only to grant declaratory relief. In circumstances where a State deliberately conducts itself in a manner it knows at the time to be wrongful, disregarding the basic legal rights and protections of private

parties, it is at best anomalous for a tribunal to grant no affirmative relief. It is ancient law that there is no right without a remedy (*Ubi jus ibi remedium*) and that adage applies here no less than elsewhere. Whether denominated as moral damages (as some tribunals have done, but which has not been specifically requested here), recognized by way of a costs award (as other tribunals have done), or otherwise, it better advances the objectives of bilateral investment treaties and the ICSID Convention to require a measure of tangible reparations for violation of internationally-protected rights.

33. Here, while BGT did not demonstrate a quantifiable monetary loss, it did demonstrate an unacceptable breach of fundamental international rights and protections. In my view, that breach demands a remedy beyond merely declaring it a violation of the relevant BIT. The Republic's conduct caused moral damages to BGT, as well as the legal costs inevitable, given the Republic's refusal to acknowledge in any fashion the effects and nature of its conduct, in BGT obtaining international recognition of the violation of its rights. In these circumstances, I am unable to join in a decision granting only declaratory relief and would instead make an award of costs in favor of BGT.

V. CONCLUSION

34. For these reasons, I am unable to join the Award and must with all due respect issue this concurring and dissenting opinion.

Gary Born

18 July 2008