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Attributing Investment Contracts of State-Owned Entities to the Host State

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Andrijana Mišović

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Preface and Acknowledgments

The idea for this thesis arose from a moment of confusion during my work as a practitioner. While working on a case involving attribution of contract, I encountered several arbitral awards referring to state entities exercising *governmental authority* or acting under the *effective control* of the government, while *entering*, breaching and terminating *contracts*. What struck me was that these tribunals appeared to treat the attribution of contract and attribution of conduct (for the purposes of determining treaty breach) as essentially the same question. This left me puzzled. This dissertation grows out of that confusion. It seeks to explain why these are two distinct legal questions that should be addressed separately and under different legal frameworks.

My reflections on this issue might well have remained just that, an idea, were it not for my supervisor Professor Michael Waibel. He not only agreed to supervise this thesis but also offered me a predoctoral position at Juridicum, which provided the time and resources necessary for research and writing. His questions often encouraged me to consider different and broader perspectives, which significantly shaped and guided the development of this dissertation. I am deeply grateful for his thorough comments, our fruitful discussions, and most importantly, for his remarkable kindness and continuous support throughout my academic journey.

My special gratitude goes to Professor Christoph Schreuer, with whom I had the pleasure and honour of working before joining Juridicum. He consistently offered valuable guidance, directed me to important cases, and showed genuine curiosity about my work, which always reassured me that I was on the right path.

I am also grateful to Professor Irmgard Marboe for the valuable comments provided during the Methods course and to Professors August Reinisch, Ursula Kriebaum, Stephan Wittich and Christina Binder for their insightful comments during the Joint Seminar in International Law.

Parts of this thesis (in particular some sections of Chapters II, IV and V) are based on my recently published article ‘Attributing Investment Contracts: The General Principles Approach’, published in Vol. 28(2) (2025) of the *Journal of International Economic Law (JIEL)*. I also had the opportunity to present this work at the JIEL Junior Faculty

Forum and received very detailed comments from Professor Caroline Henckels and valuable feedback from Professors Kathleen Claussen, Sergio Puig, Andrew Lang, and Federico Ortino. Their comments significantly improved both the article and this thesis.

During the process of writing this thesis, I had the pleasure and honour of serving as an assistant editor for the commentary *General International Law in International Investment Law* (Oxford University Press 2024), which was awarded the 2026 ASIL Certificate of Merit for High Technical Craftsmanship and Utility to Practicing Lawyers and Scholars. In this role, I had the opportunity to engage with the writings of prominent scholars in the field and to gain first-hand experience of the process of reviewing entries for the commentary. I learned a great deal from this experience, which proved particularly helpful in formulating parts of this thesis, especially Chapter III. I am very grateful to Professors Michael Waibel and Andreas Kulick for enabling me to be part of this project.

While writing this thesis, I designed and taught two courses closely related to its subject matter: *Contracts and Torts in Civil Law Jurisdictions* (taught at Central European University) and *Comparative Contracts* (taught at Juridicum). Teaching these courses allowed me to deepen my understanding of contract law, which proved particularly useful for the development of Chapter V.

I enjoyed discussing this topic with my wonderful colleagues from the International Law Department and I am very grateful to them for their insight and encouragement.

Finally, I am deeply grateful to my loving and supportive family, especially to my children, who joyfully enabled me to enjoy the process of writing this thesis a little longer.

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Chapter I: Introduction

This Chapter introduces the central problem addressed in this dissertation, namely, attributing investment contracts to States in cases involving State-owned entities (SOEs). It outlines the typical scenarios in which the issue arises, as well as the stages of arbitration proceedings where it becomes relevant. It then sets out the main research question, namely: *which legal rules should govern the attribution of investment contracts to the State when an SOE is a contracting party?*

After briefly examining the legal frameworks that investment tribunals have applied thus far to this attribution, this Chapter formulates the key sub-question examined in the rest of the dissertation: *whether general principles of law (GPL) should serve as the applicable legal framework* for contract attribution in such cases.

The Chapter then outlines the methodological approach, with particular emphasis on the *comparative method*, which serves as the primary tool for identifying the relevant GPL. Finally, it surveys the sources of international law on which this dissertation relies, with reference to Article 38(1) of the ICJ Statute.

1. The Problem and Its Significance

Whenever a foreign investor concludes a contract with an SOE and there is a possible breach, the question arises as to whether the contract can be attributed to the State. Given the growing prominence of SOEs over the past two decades,[1] the issue is highly relevant. Contract attribution is rooted in the broader and deeply contested distinction between

[1] Darius Hashemolhosseini, Patricia Wiater, 'International law approaches to state-owned enterprises. Geopolitical instruments of states and/or private market players?'(2024) 62 (4) *Archiv des Völkerrechts (AVR)*, p. 419; Carmine Di Noia, 'An increasing role of state-owned enterprises in the global economy calls for better governance', OECD, 17 July 2023; Wendy Leutert, 'State-Owned Enterprises in Contemporary China' in Wendy Leutert et al. (eds) *The Routledge Handbook of State-Owned Enterprises* (Routledge 2020), p. 201; Malcolm G. Bird, 'State-Owned Enterprises. Rising, falling and returning? A brief overview' in Wendy Leutert et al. (eds) *The Routledge Handbook of State-Owned Enterprises* (Routledge 2020), pp. 60, 61. Bird provides an overview of the evolution of SOEs through three periods. The third and final period started in the early 2000s and is, according to him, characterised by increasing acceptability of state interventions and critical roles of SOEs in the developing world, particularly China. More on growing importance of SOEs in investor-State arbitration see in: Ji Li, 'State-Owned Enterprises in the Current Regime of Investor-State Arbitration' in Shaheeza Lalani and Rodrigo Polanco Lazo, *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series 2015), p. 380 et seq. Specifically on presence of the State in the financial systems through direct ownership of banks and its correlation with economic growth and banking crises, see in Ugo Panizza, 'State-owned commercial banks' (2023) 26 (1) *Journal of Economic Policy Reform*, 44-66.

treaty and contract – one of the most fundamental debates in investment arbitration.[2] Contract claims often arise in combination with investment treaty claims, so it is often difficult to separate 'contract cases' from 'treaty cases'.[3]

There are four reasons why investors may want to include the State as a party to a dispute arising from contracts concluded with an SOE.

First, the contract between the SOE and the investor may lack a dispute-resolution clause, leaving no legal basis to bring the SOE before an international arbitral tribunal. In such circumstances, investors may pursue claims against the State under an investment treaty. However, the investor would have to show that the host State (not only the SOE) is a party to the dispute. This is where the issue of contract attribution becomes relevant. If the contract can be attributed to the State, it could breach the contract, indicating that it is involved in the dispute.[4] In *Duke Energy v Ecuador* for example, the Tribunal held that an investment agreement must be entered into by the host State and the foreign investor (not by a State-owned entity) to enjoy the BIT protection.[5]

Second, Article 25 of the ICSID Convention requires that the dispute be between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State. The ICSID Convention allows Member States to designate subdivisions and agencies that can appear as respondents (and claimants), which means that investors can initiate arbitrations against them, in addition to host States.[6] The consequences of such designation are that investors can initiate arbitrations against such designated entities,

[2] James Crawford 'Treaty and Contract in Investment Arbitration' (2008) 24 *Arbitration International* 351: 'No issue in the field of investment arbitration is more fundamental, or more disputed, than the distinction between treaty and contract'.
[3] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of international investment law* (3rd edition, Oxford University Press 2022), p. 130. A recent example is an ICC arbitration between EU investors from Germany and Portugal, on the one hand and Vietnam and Vietnamese State-owned banks, on the other. The claim reportedly relies on EU-Vietnam Free Trade Agreement and the EU-Vietnam Investment Protection Agreement, and Germany -Vietnam BIT, as well as an investment contract – see Lisa Bohmer, 'EU investors lodge high-stakes ICC arbitration against Vietnam and Vietnamese state-owned banks' *IA Reporter* (27 February 2023).
[4] The breach of contract would have to qualify as a treaty breach so that the investment tribunal could establish its jurisdiction under the treaty.
[5] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of international investment law*, (3rd edition, Oxford University Press 2022), p. 124, commenting on *Duke Energy v. Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) para 182.
[6] Michael Waibel, 'Investment Arbitration: Jurisdiction and Admissibility' in Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds.) *International Investment Law* (Nomos, Baden-Baden 2015), p. 1242.

and that such entities can initiate investment arbitrations themselves.[7] Hence, if the State designates the SOE, claims may be brought simultaneously against both the State and the designated SOE.[8] Some ICSID Member States have designated SOEs as subdivisions and agencies in accordance with Article 25 (1) of the Convention: For example, Nigeria has designated the Nigerian National Petroleum Corporation, Guinea designated a State mining company – the Société des Mines de Fer de Guinée pour l'Exploitation des Monts Nimba, Turkey designated the Turkish Electricity Generation and Transmission Corporation (TEAŞ) Petroleum Pipeline Corporation (BOTAŞ), Peru designated its national oil company - Perupetro S.A, Kenya designated Kenya Ports Authority and Kenya National Shipping Line, Sudan designated its national oil company - The General Petroleum Corporation. However, this practice is uncommon: most SOEs are not specifically designated under Article 25 (1).

The case of *Cable TV v St Kitts and Nevis* is a prominent example where the Tribunal explained the importance of this designation. The contract contained an ICSID arbitration clause between the Claimant (the foreign investor) and the Nevis Island Administration – an autonomous entity within the Federation of St Kits and Nevis. The Tribunal held that the Federation was not a party to the agreement and that NIA had not been designated as a 'constituent subdivision or agency', which meant that the Tribunal had no jurisdiction:

> Jurisdiction in respect of such a constituent subdivision can only be available from ICSID if Nevis was designated as such by the Federation. Furthermore, consent by NIA to ICSID jurisdiction requires the approval of the Federation under Article 25(3) of the Convention unless the Federation notifies ICSID that no such approval is necessary. None of these has been done and, in the circumstances, the Arbitral Tribunal has no jurisdiction to hear this matter.[9]

Thus, in the absence of designation, ICSID has no jurisdiction over the SOE. In such cases, pursuing the State is the only option. To establish jurisdiction over the State, the Tribunal must determine that the State is involved in the dispute, meaning the dispute

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[7] Ibid.

[8] Stephan Schill, Christoph Schreuer, Anthony Sinclair, 'Article 25' in Stephan W. Schill, Loretta Malintoppi, August Reinisch, Christoph H. Schreuer, Anthony Sinclair (eds), *Schreuer's Commentary on the ICSID Convention* (3rd edition, Cambridge University Press 2022), p. 274, ft 855.

[9] *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of St. Kitts and Nevis*, ICSID Case No. ARB/95/2, Award (13 January 1997), para. 2.33

extends beyond a mere commercial relationship between the SOE and the investor. This is where the issue of contract attribution becomes crucial. Only if the contract is binding for the State in the first place can the State breach such a contract. Provided that such a breach also qualifies as a treaty breach, the Tribunal can establish treaty-based jurisdiction. On the contrary, if the contract binds only the SOE, and not the State, the investment Tribunal cannot establish treaty-based jurisdiction for the SOE's contractual breach.

Third, contract attribution is important for determining breaches of the umbrella (observance) clause – the State could breach such a clause only if it undertook an obligation (protected by the observance clause) towards the investor in the first place. In other words, only if the contract can be attributed to the State can the investor argue that the State breached the umbrella clause.

Fourth, even if the contract between the SOE and the investor includes a dispute-resolution clause, attributing it to the State may still be important. Concerns may arise regarding the SOE's solvency and the ability to satisfy the award. Thus, it may be important for the investor to pursue the State, which has deeper pockets, as well. Arguing that the State is bound by the contract (including its dispute resolution clause) could enable this.

This dissertation provides a legal framework for analysing the attribution of contracts concluded by SOEs to the State itself. Investment treaties sometimes offer express guidance on this issue by defining which entities' agreements qualify as investment agreements which enjoy treaty protection. However, such provisions in investment treaties are rare and so far, are limited to U.S. treaties and the TPP.

For example, the 2012 U.S. Model Bilateral Investment Treaty defines 'investment agreement' as 'a written agreement between a national authority of a Party and a covered investment or an investor of the other Party'.[10] For the United States, the model defines national authority as 'an authority at the central level of government'.[11] The aim is to exclude subnational entities, the fifty States and all other subdivisions, including countries and municipalities (as well as SOEs owned by them).

Since only the authorities expressly identified in the treaty have the power to enter into contracts on behalf of the State, if an SOE or any entity not explicitly mentioned in the

[10] Adopted in United States BITs with Rwanda (2008) and Uruguay (2005).
[11] 2012 U.S. Model Bilateral Investment Treaty, Article 1, footnote 5.

treaty concludes an investment agreement, such an agreement would not qualify as a treaty-protected investment agreement. This has implications for jurisdiction under Article 24 of the U.S. Model BIT. Article 24(1) restricts the types of claims that may be submitted to arbitration. One of three permissible grounds is an allegation that the respondent *breached an investment agreement*. Therefore, if the contract does not meet the definition of 'investment agreement' (not concluded by a central-level authority – for the U.S.) no claim can be based on its breach under Article 24(1)(a)(i)(C) (the same applies to 24(1)(b)(i)(C)).

Under this model, each counterparty to the BIT must identify its 'national authority'. Under this model, the treaty itself determines contract attribution: if the investor concluded an investment agreement (a contract) with a relevant 'national authority of the Party' (defined by that Party), the tribunal will have jurisdiction over the alleged breach of that contract. Conversely, if such a contract is concluded with another entity, the tribunal would not have jurisdiction to decide the alleged contractual breach. There is no need to have recourse to the principles of contract attribution to the State to demonstrate State involvement, because the treaty already answers this question. The State is involved if the relevant national authority entered into a contract with the investor.

A similar provision appeared in Article 9.1 of the original Trans-Pacific Partnership Agreement (TPP) in whose negotiation the United States was involved. It defined investment agreement as 'a written agreement (…) between an authority at the central level of government of a Party and a covered investment or an investor of another Party…', and 'authority at the central level of the government of a Party' in a footnote as follows:

> [F]or unitary States, an authority at the ministerial level of government. Ministerial level of government means government departments, ministries or other similar authorities at the central level of government, but *does not include*: (a) a governmental agency or organ established by a Party's constitution or a particular legislation that has a separate legal personality from government departments, ministries or other similar authorities under a Party's law, *unless* the day to day operations of that agency or organ are *directed or controlled* by government departments, ministries or other similar authorities; or (b) a governmental agency or

> organ that acts exclusively with respect to a particular region or province.[12]

The definition of an investment agreement was important because (just like the abovementioned U.S. BIT Model) only investment agreements, as defined in Article 9.1, could be submitted to the arbitral tribunal. According to Article 9.19, the claimant was entitled to submit a claim to arbitration alleging, *inter alia*, that the respondent breached an investment agreement (contract). Under this provision, an investor could submit a contractual claim to the arbitral tribunal, provided that the contract is concluded with the central government or an SOE under the government's direction or control. As with the U.S. BIT Model, this would mean the tribunal would not have to analyse contract attribution under rules external to the investment treaty, since the treaty itself determines which contracts fall within the tribunal's jurisdiction.

However, Articles 9.1 (including the associated footnotes) and 9.19.1 are suspended and do not form part of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). According to the official explanation, this suspension aims to narrow the scope of Investor-State Dispute Settlement (ISDS): foreign investors can no longer make ISDS claims for violations of private investment contracts with the Government.[13]

Unlike the U.S. Model and the suspended CPTPP provisions, most investment treaties lack a clear designation of the entities that may enter into an investment contract on behalf of the State. In such cases, tribunals must independently assess contract attribution to the State. This is where the analytical framework developed in this dissertation matters.

The issue of contract attribution may arise in both the jurisdictional and merits phases of an investment treaty arbitration.

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[12] Footnote 7 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (emphasis added).

[13] Australian Government, Department of Foreign Affairs and Trade, CPTPP Suspensions Explained, available at: https://www.dfat.gov.au/trade/agreements/in-force/cptpp/outcomes-documents/Pages/cptpp-suspensions-explained. This is where CPTPP adopts a different solution from TPP and the U.S. Model. However, there is a strong argument that U.S. Model BIT and CPTPP belong to 'the same group in the greater scheme of American FTA practice'. See: Wolfgang Alschner and Rama Panford-Walsh, 'How Much of the Transpacific Partnership is in the United States-Mexico-Canada Agreement?' (2020) *Transnational Dispute Management* (available at https://www.transnational-dispute-management.com/article.asp?key=2734).

In the *jurisdictional phase*, the tribunal's jurisdiction can be based on a *contractual or treaty provision* (it can also be based on domestic law, but this aspect falls outside the scope of this dissertation). Where jurisdiction is based on a *contractual provision*, the question of whether the contract in question may be attributed to the State becomes crucial. State-owned entities often conclude contracts with foreign companies. If the investor seeks the tribunal to establish jurisdiction over the State, it must prove that a contract with the SOE is attributable to that State. Tribunals applied different theories in deciding this matter, resulting in divergent and at times contradictory outcomes in comparable factual situations.

Alternatively, jurisdiction can be based on a *treaty provision*, and investment treaties typically contain an advance expression of the State's consent to investment arbitration. However, if the investor relies on a contract with a State-owned entity as a source of dispute, the tribunal will have to determine that the State is indeed involved. In other words, the tribunal would have to determine that the contract with a State-owned entity can be attributed to the State. As mentioned earlier, Article 25 of the ICSID Convention provides that the dispute *must involve a contracting state*. Thus, if the investor claims a treaty breach arising from a contract between the SOE and the investor, the tribunal will first have to determine whether that contract binds the State in the first place. The tribunal's jurisdiction does not go beyond contracts concluded with States, meaning that contracts concluded with State entities do not fall under its jurisdiction unless they can be attributed to the State. This is why a uniform legal framework applied to the issue of contract attribution is important.

In the *merits phase* of the (treaty-based) arbitration proceedings, the issue of contract attribution arises in the context of the *umbrella clause*. The umbrella clause is a provision in the investment treaty which requires the State to honour the commitments it (the State) has made to the investors. Such commitments include contracts that the State concluded with the investors. Investors often rely on umbrella clauses in arguing that the State's breach of contract amounts to a treaty breach. If the investor did not conclude a contract with the State but with a separate State-owned entity, the question of contract attribution naturally arises. The application of the umbrella clause is premised on the contract being concluded with the State.

1.1. Jurisdictional Phase

Consent by both parties to the dispute is an indispensable condition for the tribunal's jurisdiction.[14] There are three ways in which States can consent to arbitration: 1) investment contracts; 2) domestic law; 3) investment treaties.[15] Two approaches are particularly important for present purposes: consent through a contract with an investor and consent through a treaty clause.[16]

First, the tribunal's jurisdiction can be established by a *contract provision* that represents the consent of both the investor and the State to resolve disputes arising from the contract through arbitration.[17] In such a case, the question of whether such a contract can be attributed to the State is crucial. If an investment contract (which contains an arbitration clause) is concluded between a State entity and an investor, the issue may arise as to whether the contract can be attributed to the State and, consequently, whether the tribunal has jurisdiction over the State.[18] Due to the backlash against investment arbitration,[19] in recent years more foreign investors seek protection under contracts concluded with States or State entities that provide for international arbitration, rather than relying on investment treaties.[20]

In several cases, the question of contract attribution arose during the jurisdictional phase of arbitrations under investment contracts.

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[14] Stephan Schill, Christoph Schreuer, Anthony Sinclair 'Article 25' in Stephan W. Schill, Loretta Malintoppi, August Reinisch, Christoph H. Schreuer, Anthony Sinclair (eds), *Schreuer's Commentary on the ICSID Convention* (3rd edition, Cambridge University Press 2022), para 759.

[15] Jonathan Bonnitcha, Lauge Skovgaard Poulsen, Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press 2017), p. 60.

[16] Ibid, paras 759, 767. Petsche uses the term 'consent instruments' – see Markus Petsche, 'The Application of the Salini Test Beyond Article 25 of the ICSID Convention: Analysis of Recent Trends in Treaty and Arbitral Practice' (2023) 24 *Journal of World Investment & Trade* 881.

[17] Jonathan Bonnitcha, Lauge Skovgaard Poulsen, Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press 2017), 60,61.

[18] On this matter see: Michail Risvas, 'International Law as the Basis for Extending Arbitration Agreements Concluded by States or State Entities to Non-Signatories' (2022) 71 International and Comparative Law Quarterly

[19] See further Michael Waibel et al., *The Backlash against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer Law & Business 2010). More on 'full backlash' see in Toby Landau, Chester Brown and Michael Waibel, 'For the Proposition: A World Without Investment Arbitration?' in Cavinder Bull, Loretta Malintoppi, Constantine Partasides (eds.), *Arbitration's Age of Enlightenment?* (Kluwer Law International 2023) p. 908.

[20] Michail Risvas, 'International Law as the Basis for Extending Arbitration Agreements Concluded by States or State Entities to Non-Signatories' (2022) 71 *International and Comparative Law Quarterly*, 185. See also according to Jason Yackee the first investor-State arbitration was decided based on a contract – the dispute between the Suez Canal Company and Egypt. See: Jason Yackee, 'The First Investor-State Arbitration: The Suez Canal Company v Egypt (1864)', (2016) 17 (3) *The Journal of World Investment & Trade*, pp. 401–462.

For example, in *Chevron v. Bangladesh*, the investor initiated ICSID arbitration based on five investment contracts, each containing an ICSID arbitration clause: two Production Sharing Contracts (PSC) and three Gas Purchase and Sale Agreements (GPSA). The PSCs were concluded by the Claimants, Bangladesh and Petrobangla (the State-owned national petroleum company of Bangladesh), while the Claimants and Petrobangla only entered into the GPSAs. Bangladesh argued that no arbitration agreement existed between the Claimants and Bangladesh, given that the dispute arose out of the GPSA, to which it was not a party. The Tribunal rejected this objection and upheld its jurisdiction. It held that Bangladesh had consented to the arbitration by virtue of the links between the PSCs and the GPSAs, such that the agreements comprised a 'unified contractual scheme'. Thus, the dispute settlement mechanism provided for in the PSCs (to which Bangladesh was a party) must be regarded as covering disputes concerning the GPSAs. Moreover, the Tribunal concluded that Petrobangla is a *de jure* State organ, and that its actions are *attributable* to Bangladesh.[21]

A second example, with the opposite outcome, is *Niko v. Bangladesh*. In this case, the Tribunal had to decide whether the contracts concluded between the investor on the one hand and two state-related companies, BAPEX (Bangladesh Petroleum Exploration & Production Company) and Petrobangla, could be attributed to Bangladesh. Even though it held that 'the Government of Bangladesh played a central role in the elaboration of the project and the negotiations of the two contracts', the Tribunal held that Bangladesh is not a party to any of the agreements, which is why it lacked jurisdiction over Bangladesh.[22] Claimant argued that Petrobangla and BAPEX were agencies or instrumentalities of the Government of Bangladesh. The Tribunal, however, held that 'control by one legal entity over another does not extinguish the separation in law'.[23]

The Tribunal also held that the two entities are not agents of the State since they had clearly been identified as 'parties' to the agreements.[24] The Tribunal also did not accept the Claimant's argument on the application of ARSIWA. It held that 'such attribution is relevant when it comes to determining the question of whether a State has violated its

[21] Lindsey Marchessault, 'Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v. People's Republic of Bangladesh (ICSID Case No. ARB/06/10)' (2011) 26 *ICSID Review* pp. 260, 261. The Award has not been published.
[22] *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"),* ICSID Case No. ARB/10/18, Decision on Jurisdiction (19 August 2013), para 256.
[23] Ibid, para 235.
[24] Ibid, para 241.

international obligations under general public international law or under a treaty'. The relevant issue in this case, according to the Tribunal, was 'not the responsibility of Bangladesh for acts by Petrobangla and BAPEX but the question whether Bangladesh has consented to arbitrate with the Claimant'.[25] The Tribunal held that since the Claimant failed to show 'any intent of the Government of Bangladesh to be bound by the ICSID arbitration agreement' and since no such intent can be implied in the circumstances, Bangladesh did not consent to ICSID arbitration.[26]

This brief comparison of these two cases illustrates the importance of applying the appropriate legal framework to the question of contract attribution in investment arbitration. In *Chevron v. Bangladesh*, the Tribunal established jurisdiction based on the existence of *a unified contractual scheme*, concluding that the State's consent to arbitration expressed in one contract extended to the dispute arising out of another, sufficiently related, contract to which the State was not a party. It seems the Tribunal drew inspiration from contractual theories of binding non-signatories. At the same time, however, the Tribunal held that the State entity involved was a State organ, and that its actions were therefore attributable to the State under the rules of public international law, specifically those found in ARSIWA. Thus, the Tribunal combined principles of public international law regarding attribution with doctrines of agreement extension to non-signatories. In contrast, in *Niko v. Bangladesh* the Tribunal found that it lacked jurisdiction over the State, reasoning that the government had not demonstrated any intent to be bound by the arbitration agreement. It also rejected the existence of an agency relationship, thereby relying more heavily on contractual theories of binding non-signatories. Notably, the Tribunal explicitly stated that the rules of attribution under public international law were irrelevant.

The applicable legal framework is unclear, creating the risk of divergent outcomes in otherwise comparable circumstances. This underscores the need for greater clarity and consistency in determining the governing law in such disputes.

Second, the tribunal's jurisdiction can be *based on a treaty provision*. Contrary to the first situation, an investment treaty contains the State's advance consent to arbitrate certain types of disputes with investors in general (or a broad category of investors).[27]

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[25] Ibid, para 242-248.
[26] Ibid, para 256.
[27] Jonathan Bonnitcha, Lauge Skovgaard Poulsen, Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press 2017), pp. 60, 61.

This type of arbitration is called *arbitration without privity*, because the host State makes a *standing offer to arbitrate* to any potential investor, and an individual investor *accepts such offer* by initiating arbitration proceedings – thereby giving its consent to arbitration.[28] Most international investment treaties contain dispute-resolution clauses that submit any dispute between the investor and the host State to arbitration (without specifying the precise nature of the disputes between investors and States amenable to arbitration).[29] However, some form of State involvement is required.

For example, Article 25 of the ICSID Convention provides that the dispute *must involve a Contracting State* or one of its subdivisions or agencies specifically designated to ICSID. If the investor initiates a dispute arguing that the host State's contractual conduct led to a treaty breach, the tribunal will first have to determine whether the host State is a party to the contract.[30] Thus, to establish its jurisdiction *ratione personae*, the tribunal would have to determine that the host State is indeed 'involved in the particular dispute as a Contracting Party'.[31] Thus, it must be decided that the host State has standing in the proceedings 'by virtue of the manifestation of its will to be bound by the contract with the investor to which the impugned conduct relates'.[32]

The *Hamester v. Ghana* Tribunal discussed jurisdictional requirement *ratione personae*, as set out in Article 25 of the ICSID Convention. Here, the Tribunal explained that the question of attribution only determines the State's involvement, not the existence of a violation of international law. State involvement is a jurisdictional question as a matter of principle. However, in that case, the Tribunal held that it was not evident that the State was not involved at all. It held that it would be more appropriate to deal with the issue of attribution in the merits phase.[33]

One of the crucial cases on this point, which stressed the difference between contracts concluded with the States directly and with State entities, as separate legal persons is *Salini v Marrocco*. The Tribunal interpreted the dispute resolution clause in the applicable BIT to be very general, encompassing claims based on contracts as well. However, the Tribunal stressed that the clause *is limited as to the persons concerned*.

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[28] Ibid.
[29] Laurence Shore, Campbell McLachlan, Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edition, Oxford University Press, 2017), para 3.03.
[30] Csaba Kovács, *Attribution in International Investment Law* (Wolters Kluwer 2018), 243, 244.
[31] Ibid, p. 244.
[32] Ibid.
[33] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010) paras 143-145.

The consent to arbitration offered by the State in the BIT dispute-resolution clause did not extend to a contractual breach committed by a State-owned entity. In other words, the dispute resolution clause represented a basis for the Tribunal's jurisdiction in relation to violations of the treaty and breaches of contracts that bind the State directly, not breaches of contract to which an entity other than a State is a party.[34] The Tribunal's jurisdiction here could not extend to a breach of a contract concluded with an SOE unless such breaches also amounted to a BIT violation. The contract claims stemming from a contract with an SOE (which did not amount to a BIT violation) remained outside the Tribunal's jurisdiction.[35]

1.2. Umbrella Clauses – Merits Phase

An umbrella or observance clause typically provides that a party to the treaty shall observe any obligation it may have entered into regarding investments of the other treaty party. The purpose of the umbrella clause is to 'bridge the protections offered under contract law with those offered under international investment law'.[36] The clause enables treaty protection of contractual arrangements between the State and investors.

The lack of contract attribution may preclude tribunals from finding that the host State breached the *umbrella clause.* This is because it is necessary to determine 'whether the host State is bound by the contractual undertaking, the breach of which is alleged to constitute a breach of the umbrella clause'.[37] The State could breach the observance clause only if it had undertaken the obligation stemming from such a clause in the first place. To become an obligation protected by the umbrella clause, a contract must be concluded between the State and an investor. Thus, if the contract is concluded between an investor and a S*tate-owned entity*, the issue of contract attribution to the State becomes crucial.

This issue arose in *Deutsche Bank v Sri Lanka*.[38] Deutsche Bank entered into a Hedging Agreement with the National Petroleum Corporation of Sri Lanka (CPC). The key

[34] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* [I], ICSID Case No. ARB/00/4 Decision on Jurisdiction (31 July 2001) paras. 60, 61.
[35] Christoph Schreuer et al, *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Cambridge University Press 2009) p.151, para 235.
[36] Csaba Kovács, *Attribution in International Investment Law* (Kluwer Law International 2018), p. 255.
[37] Ibid.
[38] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2), Award (31 October 2012).

preliminary question regarding the umbrella clause was *whether this agreement was Sri Lanka's obligation*. The Tribunal had to decide whether to determine this question by reference to international law principles of attribution or by reference to domestic law.[39] The Tribunal decided that it did not need to establish a breach of the umbrella clause, since other treaty breaches had already been established.[40] Beyond this, the Tribunal made a few relevant observations, holding that the State's control over CPC was evident, that this SOE acted under the instructions of the State – which is why its actions were attributable to the State either because it was an organ of the State or because it lacked separate legal existence – and/or acted under the instruction of the State.[41]

A typical umbrella clause provides that 'each Contracting Party shall observe any obligations *it* has entered into with an Investor of the other Contracting Party' (emphasis added). Thus, much of the relevant discussion in literature and case-law focuses on the interpretation of the word 'it'. In other words, the question is whether the word 'it' refers merely to the State in a narrow sense or to certain State entities such as SOEs as well.

It has been argued in the literature that the word 'it' does not cover parastatal entities due to their separate legal personality.[42] As discussed above (see Chapter I, Section 1) the ICSID Convention itself provides for the possibility of nominating State entities as respondents, thereby offering an opportunity to 'open up the system for arbitrations between State entities and investors'.[43] States may also create duties for their organs to ensure or monitor the performance of contracts concluded between their instrumentalities and foreign investors, as in Energy Charter Treaty, Article 22.[44]

However, certain tribunals have interpreted the umbrella clause as extending to contracts concluded by separate entities, by referring to international law rules of attribution.[45]

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[39] Ibid, para 372.
[40] Ibid, para 404.
[41] Ibid, para 405.
[42] Carlo De Stefano, *Attribution in International Law and Arbitration* (Oxford University Press 2020), p. 127. He explains that states may expressly stipulate umbrella clauses that establish that the 'it' also includes state instrumentalities (or also territorial sub-state entities), but such clause is nearly absent in state practice.
[43] Ursula Kriebaum, 'Is ISDS Beneficial or Dangerous for the Rule of Law Both in the International and the National Spheres?' (2015) 109 *Proceedings of the ASIL Annual Meeting* 203, p. 207.
[44] Carlo De Stefano, *Attribution in International Law and Arbitration* (Oxford University Press 2020), p. 129
[45] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 Jun 2012), para 347 (iii) referring to *Noble Ventures v. Romania*, Award (12 October 2005), paras 68 and 79-80; *Eureko BV v. Republic of Poland*, Partial Award (19 August 2005), paras 115-134; *Nykomb*

The umbrella clause itself cannot answer the question of whether the State in fact entered into an obligation towards the investor. As an international law provision, it cannot join the State to a contract to which such State is not a party.[46] In order to trigger the application of the umbrella clause, it must be first determined that the State is a party to the contract. As explained in literature, the umbrella clause is applicable only if a 'particular relationship between an obligor and an obligee' is determined based on 'its own set of rules, including with respect to the issue of the privity of that relationship and the related rules of representation'.[47] However, this does not imply that contractual breach has to be determined as a precondition of the umbrella clause application. As Waibel explains, contractual breaches are 'neither necessary nor sufficient for treaty violations'.[48] Finally, although the umbrella clause can elevate a contract claim to a treaty claim, it does not change the nature of such contract claim, which is to be decided based on the applicable contract law.[49]

The issue whether a contract claim is capable of being 'transposed' to an international forum through an umbrella clause is sometimes referred to as an issue of 'umbrella clause internationalisation'. According to Veeder, Lena Goldfields' counsel in the *Lena Goldfields v. USSR* developed the idea of internationalisation of a transnational contract. It was, in Veeder's words 'a gigantic first step for international commercial arbitration, almost equivalent to the caveman's discovery of fire'.[50]

Building upon this term, Jean Ho explains that whether a contract claim can be elevated to treaty obligations depends on whether one accepts the so called 'internationalisation of the umbrella clause'. If such internalization is accepted, then 'contractual obligations can be elevated to treaty obligations', while if it is rejected, 'contractual obligations are not promoted to treaty obligations'.[51] Given that the rules of interpretation do not

Synergetics Technology Holding AB v. Latvia, Award (16 December 2003), section 4.2. More on *Noble Ventures v. Romania* and *Eureko v Poland* see below in Chapter II, Section 1.2.

[46] Csaba Kovács, *Attribution in International Investment Law* (Kluwer Law International 2018), p. 255.

[47] Ibid, p. 256

[48] Michael Waibel, 'Opening Pandora's Box: Sovereign Bonds in International Arbitration' (2007) 101 (4) *American Journal of International Law*, p. 717. Kovács and De Stefano apparently argue the opposite, that application of an umbrella clause, as a treaty provision, is based on the premise that a contract has been breached. See: Csaba Kovács, *Attribution in International Investment Law* (Kluwer Law International 2018), p. 255 and Carlo de Stefano, *Attribution in International Law and Arbitration* (OUP 2020) pp. 126, 127.

[49] Carlo de Stefano, *Attribution in International Law and Arbitration* (OUP 2020) pp. 126, 127.

[50] V. V. Veeder, 'The Lena Goldfields Arbitration: The Historical Roots of Three Ideas' (1998) 47 *International & Comparative Law Quarterly* 747, at 772.

[51] Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018), p. 197.

provide a 'conclusive answer on the character of protection that an umbrella clause confers on contractual rights', Ho argues that there are three different degrees of umbrella clause internationalisation.[52] The first rejects umbrella clause internationalisation, meaning that an umbrella clause does not convert contractual obligations (governed by the proper law of the contract – probably national law) into international obligations (to which international law applies).[53] The second degree of internationalisation advocates partial internationalisation of an umbrella clause, meaning that breach of contract can amount to a treaty violation if the host State acts in its sovereign capacity.[54] Finally, the third degree of umbrella clause internationalisation means that any breach of a contractual obligation represents a breach of an international obligation.[55] Given that the umbrella clause internationalisation is highly contested, Ho concludes that seeking the investment contract protection through the applicable general international law (Minimum Standard of Treatment - MST of aliens and the law on expropriation of alien property) is more stable than seeking the protection through umbrella clause internationalisation.[56]

The level of internationalisation of an umbrella clause is important for determining whether a contract breach amounts to a treaty breach. A preliminary question, however, which this dissertation aims to explore, is whether a certain contract binds the State in the first place and by reference to which rules this should be determined. This preliminary question is independent of the 'degree of umbrella clause internationalisation'. However, many tribunals failed to draw this distinction: instead, they treat *contract* attribution as a question of *conduct* attribution.[57] If the question of contract attribution is treated in the same way as conduct attribution, then the level of internationalisation of an umbrella clause becomes important. Full internationalisation means that contract breach is treated as a treaty breach and that the ARSIWA rules on attribution apply. If there is a partial internationalisation, it is necessary to determine whether the State acted in its sovereign capacity, in which case other international rules apply, in particular the rules on State immunity. Finally, if there is no

[52] Ibid, p. 198 and 204.
[53] Ibid, pp. 224, 225.
[54] Ibid, pp. 224, 225.
[55] Ibid, p. 205.
[56] Ibid, pp. 224, 225.
[57] See for example: *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan* (SCC Case No. V (064/2008)), Partial Award on Jurisdiction and Liability (2 September 2009), para 168, *Eureko B.V. v. Republic of Poland*, Ad Hoc Arbitration, Partial Award (19 August 2005), paras. 124-138.

internationalisation, domestic law is to be applied to determine whether there is a contractual breach (which is not to be treated as a breach of treaty since contractual obligations are not promoted to treaty obligations).

As already noted, different tribunals applied different legal frameworks to determine whether the contract in question is attributable to the State. The applicable legal framework is crucial to the outcome. In the vast majority of cases analysed in this dissertation in which tribunals decided to apply the ARSIWA to the issue of contract attribution, they established the link between the State and the relevant State entity.[58] On the contrary, in almost all cases in which tribunals applied domestic law to contract attribution, they concluded that the contract could not be attributed to the State due to the lack of privity. The application of different rules often yields different results, which is why selecting the appropriate rules is crucial.

[58] Tribunals attributed contracts concluded by entities other than the host state based on the ARSIWA in the following cases*: Eureko v. Poland*, *Noble Ventures v Romania*, *EnCana v. Ecuador*, *Toto v Lebanon*, *Ampal v Egypt*, *Strabag v. Libya*, *Al-Bahloul v Tajikistan*, *Deutsche Bank v Sri Lanka*. Only in two cases where ARSIWA were applied, tribunals held that there is no attribution: *Jan de Nul v Egypt* and *Bosh v Ukraine*. On the other hand, based on the relevant domestic law, tribunals held that there was no contract attribution in the following cases: *William Nagel v. Czech Republic*, *Impregilo SpA v Islamic Republic of Pakistan, Amto v. Ukraine, EDF v. Romania*, *Hamester v. Ghana*, *Tethyan v. Pakistan*, *Gavrilović v. Croatia*. Only in one case - *Garanti Koza v. Turkmenistan* did the Tribunal formally apply domestic law and determined that there was attribution, although in fact the Tribunal implicitly relied on Article 5 ARSIWA standard without explicitly mentioning this.

2. Research Question

The central question in this dissertation is *which rules should govern the attribution of investment contracts to the State when SOEs are the contracting parties.*

The research question is predominantly *normative*, as it seeks to determine what the law ought to be, which rules should govern the attribution of contracts concluded by SOEs to the host State in investment arbitration. However, the question also has a *descriptive doctrinal* dimension, insofar as the dissertation examines the various rules applied to this issue to date.

As a preliminary matter, *contract* attribution must be distinguished from *conduct* attribution. The second does not raise the question of applicable law, given that Chapter II of the ARSIWA deals with attribution of *conduct* to the State.[59] Conversely, different legal rules could be applied to the question of *contract* attribution. Crawford and Mertenskötter identify three approaches.[60]

The first approach is to apply relevant ARSIWA rules on attribution. Some tribunals followed this approach.[61] Some authors also argue in favour of this approach.[62] For example, Petrochilos concludes that the question of whether the State is a party to the contract is to be answered based on international law, which determines it with recourse to the ARSIWA's rules of attribution.[63]

However, many tribunals and authors express discomfort with applying the ARSIWA to the question of contract attribution.[64] They regard the ARSIWA as an inadequate set

[59] This question is extensively dealt with in Luca Schicho, *State Entities in International Investment Law* (1. Auflage 2012. edn, Nomos Verlagsgesellschaft mbH & Co. KG 2012), p. 21: 'the central topic of this book is how arbitral tribunals have applied the general rules of attribution with regard to the *conduct* of State entities' (emphasis added). See also: Jonas Dereje, *Staatsnahe Unternehmen : Die Zurechnungsproblematik im Internationalen Investitionsrecht und weiteren Bereichen des Völkerrechts* (1. Auflage 2016. edn, Nomos 2016): 'Die vorliegende Untersuchung geht der Frage nach, ob und inwieweit *die Handlungen* staatsnaher Unternehmen im Internationalen Investitionsrecht dem Staat zuzurechnen und somit als Staatshandlungen anzusehen sind' (emphasis added).

[60] James Crawford and Paul Mertenskötter, 'The Use of the ILC's Attribution Rules in Investment Arbitration' in Meg Kinnear and Geraldine Fischer (eds), *Building International Investment Law: The First 50 Years of ICSID* (Wolters Kluwer, ICSID 2015), pp. 31-35.

[61] The most prominent example is: *Eureko BV v. Poland*, Partial Award (19 August 2005), para 127 et al. See also: *Noble Ventures, Inc. v. Romania*, Award (12 October 2005).

[62] Stéphanie Caligara, 'Attribution of Lawful Conduct in Investment Treaty Arbitration - The 'It' Problem Solved?' (2019) *Law & Society: International & Comparative Law eJournal*, p. 7 (available at http://dx.doi.org/10.2139/ssrn.3390563).

[63] Georgios Petrochilos, 'Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine' (2013) 28 *ICSID Review* 262, p. 271.

[64] For example: James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 *ICSID Review* 127, 134.

of rules to govern this issue because they were designed for the different context of State responsibility and formally apply only in that context and not to determine whether the State is a party to the contract.

Thus, the second approach to this problem is to apply domestic law (or the applicable contract law). Two recently published monographs on attribution in international law argue precisely for this approach.[65] This solution addresses concerns that the ARSIWA are not an appropriate legal framework to deal with the issue in question. However, applying domestic law may make attribution significantly more difficult than under ARSIWA. This would lead to less attribution in practice and thereby less protection of investments. Precisely for that reason, some authors argue that to protect transnational investments and prevent States from expropriating through their entities (acting as their agents), the tribunals need to apply attribution rules.[66] On a similar note, Hamamoto argues that the umbrella clause in the investment treaties should be interpreted in accordance with the international rules of treaty interpretation and not in accordance with the domestic rules, because such domestic rules could make it easy for the State to set up entities with a distinct legal personality when concluding any agreement with foreign investors.[67]

This concern is addressed in the third approach to the issue, which treats the attribution of investment contracts as governed by international law: not by the ARSIWA, but by general principles of international law. Given the focus of the dissertation on this third approach, a *research sub-question* answered in this dissertation is whether general principles of law could serve as a legal framework for contract attribution. More precisely, the analysis examines whether domestic doctrines on binding the non-signatories (including contract and agency rules) can be identified as GPL applicable to the question of contract attribution in investment arbitration.

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[65] Carlo de Stefano, *Attribution in International Law and Arbitration* (OUP 2020), p. 126. Csaba Kovács, *Attribution in International Investment Law* (Wolters Kluwer 2018), p. 245.

[66] Ji Li, 'State-Owned Enterprises in the Current Regime of Investor-State Arbitration' in Shaheeza Lalani and Rodrigo Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Ser. Web. 2015), p. 384.

[67] Shotaro Hamamoto, 'Parties to the 'Obligations' in the Obligations Observance ('Umbrella') Clause' (2015) 30 *ICSID Review* 449, pp. 458, 459.

3. Methods for Answering the Research Question

Given that the main research question can be qualified as both descriptive-doctrinal and normative, this dissertation will apply different methods to provide a comprehensive response.

First, an essential part of this dissertation aims to determine what the law is by examining existing legal rules on contract attribution as applied by investment arbitration tribunals. This part seeks to analyse and describe the doctrine from an internal perspective.

Second, the central part of this dissertation addresses the question of which rules *should* govern contract attribution in investment arbitration. The core argument is that the GPL should be applied and that these principles can be identified through a *comparative method*. Several criteria guided the selection of jurisdictions for comparative analysis: representation of major legal families, geographical diversity, and the degree of doctrinal development regarding the issue of binding non-signatories. However, the inquiry does not rest solely on *commonality and representativeness* of the principles. Attention is given to their normative *soundness and persuasiveness*, particularly in light of their reception and application in international (commercial) arbitration.

4. Sources

As for the sources of international law, this dissertation will examine the following primary sources, as classified by Article 38 (1) (a), (b) and (c) of the International Court of Justice (ICJ) Statute: 1) treaties – primarily bilateral investment treaties (BITs) and multilateral investment treaties (MITs); 2) customary international rules – the ARSIWA provision on attribution, coupled with the Commentary of the International Law Commission (ILC); and 3) general principles of law (GPL). The GPL constitute a central focus of this dissertation. The primary objective is to determine whether the GPL, upon binding the non-signatories, can be identified and applied to the issue of contract attribution in the context of investment arbitration.

In addition, this dissertation makes use of the so-called 'subsidiary means for the determination of rules of law', as recognized under Article 38 (1) (d) of the ICJ Statute. Judicial decisions play a vital role. The research examines not only relevant international investment arbitration awards, but also court rulings and arbitral awards outside the investment context regarding the issue of binding non-signatories in general. Finally, the research relies on ‘teachings of the most highly qualified publicists of the various nations’ as further subsidiary means for determining the applicable rules.

Chapter II: Existing Legal Frameworks for Contract Attribution

This Chapter analyses the two legal frameworks that have thus far been applied to the question of contract attribution in investment arbitration: the ARSIWA rules of attribution and domestic law.

Section 1 focuses on the ARSIWA rules of attribution. Investment tribunals often rely on the ARSIWA rules of attribution when confronted with the issue of attribution. This is largely because the ARSIWA are perceived as a reliable and authoritative legal framework. However, there is ongoing debate in the academic literature over whether the ARSIWA rules of attribution are suitable for attributing contracts concluded by SOEs to States. Multiple scholars challenge this application of the ARSIWA, arguing that they are specifically drafted to address attribution in the context of State responsibility for internationally wrongful acts, rather than to address contract formation. These are two different legal matters. This part examines various doctrinal perspectives on the issue and surveys scholarly positions on the application of the ARSIWA to this matter. It also provides an overview of investment arbitration cases, demonstrating that many tribunals have applied the ARSIWA rules of attribution to questions of contract attribution. What emerges from the cases is that many tribunals fail to clearly distinguish between the contract itself and the conduct related to its breach, performance, and/or termination. Even though applying the ARSIWA may be appropriate in cases involving contractual breach or termination when such conduct potentially constitutes treaty breach, they do not provide a suitable legal framework for addressing the distinct issue of contract conclusion or the attribution of the contract as such to the State. Finally, Section 1 concludes with an assessment of why the ARSIWA should not be applied to the issue of contract attribution, even though many tribunals have relied on them to attribute investment contracts to the State. Tribunals invoking the ARSIWA rules of attribution often pointed to the substantial degree of government oversight over the entity in question. While SOEs usually operate under some form of State supervision, that element alone cannot justify attributing their contracts to the State. This is because the presumption of a certain level of control stems from the inherent structure of the SOEs. Accordingly, applying the ARSIWA rules of attribution results in over-attribution.

Section 2 shifts focus to the role of domestic law in determining contract attribution. It begins by examining scholarly commentary, which reveals that many scholars support the view that the question of whether the State itself is a party to an investment contract is governed by the applicable domestic law. The argument here is that contract attribution is inherently linked to contract interpretation and, as such, must be assessed with reference to the applicable contract law. The basis of this argument is that identification of the contracting parties and the determination of whether a binding agreement has been formed are questions that fall within the domain of applicable domestic contract law, not international law. In line with this view, some investment tribunals have held that contracts concluded with SOEs cannot be attributed to the State when domestic law recognizes such entities as separate, distinct and independent legal entities. Typically, the issue concerned the application of the umbrella clause, and tribunals held that the clause does not extend treaty protection to contractual obligations undertaken by entities legally distinct from the State itself. This Section offers a critical assessment of the use of domestic law in determining contract attribution. A key concern is that tribunals which have applied domestic law have almost exclusively relied on provisions recognizing the separate legal personality of SOEs, without engaging with the domestic contract law principles relevant to contract attribution. As a result, the actual level of State involvement in the negotiation and conclusion of the contract becomes irrelevant, since the mere existence of a legal framework recognizing an entity's separate legal personality is regarded as determinative. This approach is flawed, as it effectively leads to systematic non-attribution of contracts concluded with State entities, regardless of the factual context. Such a rigid application of domestic law risks producing outcomes of under-attribution.

1. The ARSIWA Rules of Attribution

Investment tribunals generally rely on the ARSIWA rules of attribution whenever an attribution issue arises before them. This is why Crawford described the Articles as 'a *tabula in naufragio*' or 'a plank in a shipwreck' – something reliable to rely on when everything else fails.[68]

[68] James Crawford and Freya Baetens, 'The ILC Articles on State Responsibility: More than a 'Plank in a Shipwreck'?' (2022) 37 *ICSID Review* 13 referring to the by the comprehensive list of ICSID cases in the Appendix of James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 *ICSID Review*.

In contract attribution, tribunals usually relied on the ARSIWA Articles 5 and 8. They are reproduced here in full:

Article 5. Conduct of persons or entities exercising elements of governmental authority

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise *elements of the governmental authority* shall be considered an act of the State under international law, provided the person or entity is acting in that capacity *in the particular instance*. (emphasis added).

The ILC's Commentary to this Article states that the following criteria are *not decisive* for attribution of the entity's conduct to the State: 'the fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control'. On the contrary, what is important for the application of this Article is 'that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority'.[69]

Tribulus often held that SOE's contracts should be attributed to the State under Article 5 of the ARSIWA because of the significant control the government exercised over the overall negotiation, performance, termination, and/or breach of the contract. This is an inaccurate application of Article 5, which requires a high level of specificity for the exercise of governmental authority. Determining the exercise of government authority for contract performance, breach, and termination differs from that for concluding the contract. To attribute a contract to the State, the tribunal would have to establish that the government empowered the entity to conclude a contract on its behalf, or that it intended to be bound by such a contract. The ARSIWA, however, do not provide rules that can answer this question.

Another related issue regarding Article 5 raised in the literature is that tribunals sometimes fail to distinguish between elements of *government authority* and *public functions*. In their Commentary to Article 5 ARSIWA, Viñuales and Hailes explain that

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[69] Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Commentary to Article 5, p. 43.

some tribunals assumed that an entity's public function is coextensive with the element of government authority, leading to anomalous results, such as the attribution of certain contractual terminations to independent entities.[70]

Contractual breach may be attributed to the State under the ARSIWA rules if it also constitutes a treaty breach. We must be cautious when assessing whether the breach (termination) was conducted in the exercise of government authority or merely as part of a public function.[71] Nevertheless, while Article 5 demands an exercise of governmental authority to attribute a contractual (treaty) breach to the State, no such requirement applies to the formation of the contract. To establish that the contract binds the State, it is not necessary to demonstrate that the SOE exercised elements of government authority. Instead, the focus should be on other elements, such as apparent authority, implied consent, and so on. Chapter V explains this further.

Another ARSIWA provision important for this matter is Article 8:

> Article 8. Conduct directed or controlled by a State
>
> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting *on the instructions of*, or *under the direction or control of*, that State in carrying out the conduct. (emphasis added).

The ILC's Commentary to this Article specifically mentions State-owned companies. It states that international law acknowledges 'the general separateness of corporate entities at the national level' except for the 'corporate veil' – when the company is used as a vehicle for fraud or evasion.[72] The fact that the State established a corporate entity is not enough to attribute the conduct of that entity to the State. The Commentary provides some examples to demonstrate when it is appropriate to attribute an entity's conduct to the State and when it is not. For example, in the case of a *de facto* seizure of property by a State-owned oil company, there was no proof that the State used its ownership

[70] Jorge Viñuales and Oliver Hailes, 'Article 5 of the ARSIWA – Conduct of Empowered Entities', in Andreas Kulick and Michael Waibel (eds.) *General International Law in International Investment Law, A Commentary* (Oxford University Press 2024), p. 270 (The ILC Commentary might have contributed to this confusion as it mentions 'public powers' in the context of Article 8, but with the reference to Article 5 – see p. 48 of the ILC Commentary).
[71] Ibid.
[72] Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Commentary to Article 8, p. 48.

interest as a vehicle for directing the company to seize the property.[73] On the contrary, where the State was 'using its ownership interest in or control of a corporation specifically to achieve a particular result', the conduct in question can be attributed to the State.[74] As with Article 5, a certain level of specificity is required in Article 8. The entity in question would have to act under either the instruction, direction or control of the State with respect to the 'conduct which is said to have amounted to an internationally wrongful act'.[75]

Providing instructions, direction, and control over conduct is different from directing, instructing, and controlling contract formation. Chapter V elaborates further.

1.1. Doctrine

There has been ongoing debate in the literature over whether the international rules of attribution are an appropriate legal framework for applying to contractual undertakings by State entities whose legal personality is separate from the State. Petrochilos frames the question as follows:

> [W]hether an undertaking, which under the domestic law applicable to it would be binding only on its proximate author (the separate entity that made it), may nevertheless be binding on the State on the basis of attribution under international law.[76]

He answers this question in the affirmative:

> [W]hether the State is a party to the contract in question is to be determined by international law and international law determines it with recourse to the ILC Articles' rules of attribution.[77]

However, the majority of authors question the broad application of the ARSIWA, as the rules were designed to define the State solely for State responsibility for wrongful acts.[78]

[73] Ibid (see reference to: SEDCO, Inc. v. National Iranian Oil Company, ibid., vol. 15, p. 23 (1987). S. and other cases in ft 163 of the ILC Commentary).
[74] Ibid (see reference to Hertzberg et al. v. Finland (Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex XIV, communication No. R.14/61, p. 161, at p. 164, para. 9.1. and more cases in ft 166 of the ILC Commentary).
[75] Ibid.
[76] Georgios Petrochilos, 'Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine' (2013) 28 *ICSID Review* 262, at 271.
[77] Ibid.
[78] Csaba Kovács, *Attribution in International Investment Law* (Wolters Kluwer 2018) p. 245. See also: Stephan Wittich, 'State Responsibility' in Marc Bungenberg and others (eds), *International Investment Law* (1 edn, Kooperationswerke Beck - Hart - Nomos 2015), p. 39, para 34.

More precisely, the ARSIWA presuppose an internationally wrongful act. Therefore, any invocation of the ARSIWA must be accompanied by a claim that there has been a breach of international law, which is a different matter from the question of the *conclusion of a contract* by a State entity.

Crawford, for instance, explains that 'the rules of attribution have nothing to do with questions of contractual responsibility' - attribution is 'an international law doctrine'.[79] The ARSIWA Commentary itself stipulates that the provisions on attribution are not designed to answer the question whether a certain organ or entity is authorized to enter into commitments on behalf of the State:

> The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State. . . . In principle, the State's responsibility is engaged by conduct incompatible with its international obligations, irrespective of the level of administration or government at which the conduct occurs. Thus, the rules concerning attribution set out in this chapter are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its Government.[80]

Olleson agrees that the ARSIWA's provisions on attribution do not apply to issues other than determining whether conduct is attributable to the State:

> Although the relevant rules codified in the Articles (…) apply to all questions of attribution of conduct for the purposes of determining responsibility of a State for breach of its obligations under an applicable investment protection treaty (…), attribution plays a number of other roles in international law. The rules in those different contexts, however, do not necessarily have the same underlying rationale, nor do they necessarily have the same content. As a consequence, it bears emphasis that the rules of attribution under the customary international law of State responsibility apply only for the purposes of determining whether conduct is attributable

[79] James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 *ICSID Review*, 134.
[80] Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Commentary to Part One, Chapter II, para 5, p. 39.

> to the State in order to determine whether an internationally wrongful act has occurred, and are not as such applicable to other issues.[81]

Milanovic distinguishes between 'attribution rules of the law of State responsibility' and 'other ascriptive rules'.[82] He argues that the first imputes certain conduct of a human being to the State with the aim of establishing responsibility for an internationally wrongful act. In contrast, the second attaches the State label to persons, conduct, and relations for some other purpose (e.g., treaty conclusion, custom formation), rather than to establish State responsibility for a wrongful act.[83]

Viñuales explains that 'the rules of attribution are only applicable to determine State responsibility for internationally wrongful acts'.[84] He clarifies that they cannot be applied to 'create privity of contract in the first place'.[85]

Hamamoto dealt with this issue in the context of the umbrella clause. He explains that the rules on attribution cannot explain the applicability of the umbrella clause in situations where an investor concludes a contract with an entity established by the host State but with a distinct legal personality. [86] This is because there is no privity between the host State and the investor.[87]

The lack of privity of contract is a common law concept, allied to consideration, as Waibel explains 'only the person who has given consideration for a promise can enforce it'.[88] Although the term itself is not often used in international law, the idea of privity has been influential.[89] Generally in international investment law, the principle of privity of treaty has been relaxed, while privity of contract still 'plays an important role' at the level of investment contracts.[90]

Lack of privity between the investor and the host State prevents the application of the umbrella clause and may lead to the investment tribunal lacking jurisdiction. This may

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[81] Simon Olleson, 'Attribution in Investment Treaty Arbitration' (2016) 31 *ICSID Review* 483, p. 463.
[82] Marko Milanovic, 'Special Rules of Attribution of Conduct in International Law', (2020) 96 *International Law Studies* 295, at 303.
[83] Ibid.
[84] Jorge E. Viñuales, 'Attribution of Conduct to States in Investment Arbitration' 20 *ICSID Reports*, p. 80.
[85] Ibid, p. 80.
[86] Shotaro Hamamoto, 'Parties to the 'Obligations' in the Obligations Observance ('Umbrella') Clause' (2015) 30 *ICSID Review* 449.
[87] Ibid.
[88] Michael Waibel, 'The Principle of Privity' in Dino Kritsiotis and Michael J. Bowman (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018), p. 203.
[89] Ibid, p. 204.
[90] Ibid, p. 221.

deprive many investors of the protection of their rights before international forums, leaving them at the mercy of domestic courts. Precisely to avoid such an outcome, many tribunals applied the ARSIWA rules to the question of contract attribution. As the analysis below shows, the number of cases in which the ARSIWA were applied to the question of contract attribution departs from the majority view in the literature. Only a handful of authors subscribe to the position that ARISWA governs this question. Besides Petrochilos, it seems that Hobér also argues in favour of applying attribution rules to contract claims. He analyses this matter in the context of umbrella clause interpretation, in particular, the interpretation of the word ‘it’. A typical example of the umbrella clause can be found in the ECT: ‘Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party’. The crucial question is whether the word ‘it’ includes governmental bodies and state-owned enterprises.[91] Hobér argues that international rules of attribution should be applied to resolve the so-called ‘it problem’:

> if the ‘it’ problem were to be solved by applying only municipal law— and not the rules of attribution of international law— it would seem that this would allow States to do precisely what the rules of State responsibility were intended to prevent, namely, to avoid responsibility by delegating responsibilities, to allow States to ‘contract out’ of State responsibility. [92]

Feit argues that it is unclear whether the ARSIWA rules of attribution should be applied to determine a State's responsibility under the umbrella clause in the event of a contract breach by a State entity.[93] On the one hand, the conclusion of the contract is not conduct that constitutes a breach of international law, meaning that the ARSIWA rules cannot be applied to contract attribution; this, in turn, implies that the breach of such a contract is meaningless.[94] However, he seems to agree with Hobér when arguing that such a formalistic approach disregards the very purpose of the umbrella clause and allows the State to avoid its responsibility.[95]

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[91] Kaj Hobér, 'Part II Substantive Issues, Ch.14 State Responsibility and Attribution' in Federico Ortino Peter T Muchlinski, Christoph Schreuer (ed), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008), p. 576.
[92] Ibid, p. 582.
[93] Michael Feit, 'Responsibility of the State under International Law for the Breach of Contract Committed by a State-owned Entity' (2010) 28 *Berkeley Journal of International Law* 142, p. 163.
[94] Ibid.
[95] Ibid.

1.2. Cases

In practice, many tribunals applied the ARSIWA to the question of contract attribution. Many of them examined the entering into, performance, and alleged breach of the contract under the same rules.[96] However, entering into a contract differs from contract performance, breach and termination. The latter may naturally entail questions of governmental interference with an investment contract, which could lead to a treaty breach. The ARSIWA can naturally be applied to determine whether such wrongful conduct can be attributed to the State. On the contrary, entering into an investment contract has nothing to do with a treaty breach; it deals with a preliminary question of whether the State undertook the obligation towards the investor in the first place.

In *Eureko v. Poland*, the Tribunal failed to distinguish between contract and conduct attribution. Thus, it applied the ARSIWA to answering *both* questions.

In this case, the investor entered into a contract with the State Treasury of the Republic of Poland, represented by the Minister of the State Treasury. The question arose whether this contract could be attributed to the Republic of Poland. The Tribunal held that as an international tribunal, it has to resolve the dispute based on the applicable treaty and 'the universally acknowledged rules and principles of international law'.[97] It further held that under the well settled rule of international law, 'the *conduct* of any State organ is considered *an act of that State*'.[98] It applied the ARSIWA to conclude that Poland was responsible, under international law, for the actions of the State Treasury.[99]

Although this case did not concern SOEs, it is relevant because the State Treasury has separate legal personality under the Polish Civil Code.[100] The question, as formulated by the Tribunal, was whether the State Treasury entered into a pure civil law relationship with the Claimants, 'which did not engage responsibility of the Republic of Poland'.[101] However, before addressing the question of State responsibility, it must first be determined whether a contract concluded by such separate entity is binding on the State.

Instead of answering whether the contract itself could be attributed to the State, the Tribunal answered a different question - whether the related actions could be attributed

[96] Csaba Kovács, *Attribution in International Investment Law* (Wolters Kluwer 2018), p. 245.
[97] Ibid, para 126.
[98] Ibid, para 127 (emphasis added).
[99] Ibid, paras 128, 138.
[100] Ibid, para 119.
[101] Ibid, para 121.

to the State. The confusion between the two questions is visible even in the title of the subsection in the Award, which refers to 'Attribution to the Republic of Poland of the SPA and its First Addendum *or* Actions Taken in respect of them'. Thus, the Tribunal answered, at the same time, whether the contract itself and the actions taken in respect of it could be attributed to the State.

In *EnCana v. Ecuador*, investors entered into specific investment contracts with Petroecuador, the Ecuadorian State Oil Company.[102] The Tribunal noted that the Respondent State did not deny *that in entering into such contracts*, the *conduct of* the state-owned and state-controlled instrumentality was *attributable* to the State.[103] The attribution was established pursuant to the relevant ARSIWA provisions and on the basis that the entity in question was subject to the President's instructions and that the Attorney-General had and exercised authority to supervise the performance of contracts.[104]

In *Noble Ventures v Romania*, although the Tribunal formally distinguished between contract and conduct attribution, it treated the two as a single question to be answered by ARSIWA. In this case, the investors entered into a contract (privatization agreement) with the Romanian State Ownership Fund (SOF) which was a Romanian 'institution of public interest' created in 1992 with a function to privatise Romanian State-owned enterprises. The question arose whether SOF's contractual obligations could be attributed to Romania. The Claimant argued that *contractual obligations* of SOF should be treated in the same way as SOF's *actions*.[105] The State, however, argued that contractual obligations (defined by reference to municipal law), could not be expanded or transformed by the principle of attribution.[106]

The Tribunal correctly noted that there were *two different questions* to be answered in this context. The first was whether the entity's acts could be attributed to the State. The second question was whether the State had entered into the contract in question, the breach of which, by reason of the umbrella clause, could consequently be regarded as a violation of the BIT.[107]

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[102] *EnCana Corporation v. Republic of Ecuador (LCIA Case No. UN3481, UNCITRAL) (formerly EnCana Corporation v. Government of the Republic of Ecuador),* Award (3 February 2006) , para 23 et seq.
[103] Ibid, para 154.
[104] Ibid.
[105] *Noble Ventures, Inc. v. Romania (ICSID Case No. ARB/01/11),* Award (12 October 2005) , para 65.
[106] Ibid, para 66.
[107] Ibid, para 68.

However, the Tribunal concluded, based on the relevant ARSIWA provisions that the entity in question was entitled to represent the State, which it did in 'all of [its] actions as well as omissions', meaning that the 'the acts allegedly in violation of the BIT' were attributable to the Respondent State.[108] The Tribunal overlooked what it had rightly noted earlier in the Award: there were two distinct questions. First, whether the acts of certain agencies (alleged to have constituted violations of the BIT) could be attributed to the Respondent State. Second, whether the State entered into a certain contract. They may both be questions of attribution, but only the first concerns the attribution of the *act* in order to determine state responsibility. In contrast, the second concerns the attribution of the *contract* and cannot be answered by reference to the same rules.

In *Toto v Lebanon*, the issue of contract attribution arose in the jurisdictional phase of the proceedings. In this case, the investor entered into a contract with an entity attached to the Lebanese Ministry of Public Works (Conseil Executif des Grands Projets - the 'CEGP and later its successor, the Council for Development and Reconstruction - the 'CDR'). Toto argued that CEGP and later CDR were acting on behalf of the Government.[109] The State objected to the Tribunal's *ratione personae* jurisdiction, arguing that the State was not a party to the contract, which was signed by entities distinct from the State (having financial and administrative autonomy).[110] The State, however, also argued that the treaty in question did not apply to '*breaches of contracts* by entities that are not the State'.[111] Thus, the State itself failed to distinguish between the questions of *contract* attribution and *conduct* (breach) attribution.

The Tribunal also failed to differentiate between the questions of attribution of an act and attribution of a contract. It held that the entity 'exercised Lebanese governmental authority when it *entered into the Contract* with Toto' and that 'its conduct has to be considered as an act of the Lebanese state' based on Article 5 of the ARSIWA.[112] Given that the State could be internationally liable for the acts of an entity in question, the Tribunal held that it had jurisdiction *ratione personae.*[113]

[108] Ibid, para 80.
[109] *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 September 2009), para 17.
[110] Ibid, para 50.
[111] Ibid (emphasis added).
[112] Ibid, para 52.
[113] Ibid, para 60.

One of the most illustrative cases is *Deutsche Bank v. Sri Lanka.*[114] In this case, Deutsche Bank entered into a hedging agreement with the national petroleum corporation of Sri Lanka - Ceylon Petroleum Corporation (CPC), which was a wholly State-owned company established to carry out the import, export, selling, supplying, distribution, exploration, production and refining of petroleum. The preliminary question in this case was *whether the hedging agreement* concluded by CPC was Sri Lanka's obligation, the answer to which was necessary for applying the BIT umbrella clause. Deutsche Bank argued that international law (in particular the ARSIWA rules on attribution) must govern whether a State is a party to the contract in question. However, it admitted that 'the case law is mixed on this point'.[115] On the contrary, Sri Lanka (whose lead counsel was James Crawford) argued that domestic law (English law) was relevant law to determine this issue.[116] It submitted that this was not a question of State responsibility, but rather whether the contract in question could be attributed to Sri Lanka, and that international law's rules of attribution should not govern this question.[117] The Tribunal sided with the Claimant and found that the ARSIWA provisions governed the contract.[118] It held that there was considerable evidence of the Government's significant control over the entity's personnel, finances, and decision-making, demonstrating that the entity acted under the direct instruction of the State both in negotiating and executing the investment contract and in refusing to pay the amounts owed following its termination.[119] Interestingly, the Tribunal explained that it was irrelevant whether the entity's actions were attributable to the State under ARSIWA or domestic law (English law), because they would lead to the same outcome. The Tribunal relied on the veil-piercing theory as an exception to the principle of separate legal personality under domestic law. It explained that its approach was in line with the ARSIWA rules of attribution requirements, concluding that CPC's actions would be attributable to the State, either because CPC was an organ of the State under Article 4 or because CPC lacked separate legal existence, and/or acted under the instruction of the State. [120] This explanation is confusing. The criteria for applying ARSIWA articles

[114] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012).
[115] Ibid, para 373.
[116] Ibid, para 393.
[117] Ibid, para 399.
[118] The Tribunal held that determining the umbrella clause violation was not even necessary since it determined other treaty breaches. Ibid, para 404.
[119] Ibid, para 405.
[120] Ibid, para 405.

on attribution and veil piercing theory are different, as will be shown in the remainder of this thesis. This reasoning underscores why we need a clearer legal framework to apply to this matter.

In *Ampal v Egypt* the investor entered into a contract (General Sale and Purchase Agreement - GSPA) with the Egyptian General Petroleum Corporation (EGPC) and the Egyptian Gas Holding Company (EGAS). The State argued that:

> The characterisation of the contracting party as an organ of the State under the ILC Articles is wholly irrelevant when it comes to determining whether a contract binds a State. What is relevant is whether the State itself has entered into the contract.[121]

The Tribunal formally addressed this argument but failed to address its substance. It held that it 'accepts the Respondent's submission that the rules of attribution only apply to the determination of breaches of international law' and that 'they do not apply to contractual breaches'.[122] The State's argument was not that ARSIWA did not apply to the *contractual breaches*, but that it was not relevant to the question of *contract attribution*. Based on this mischaracterization of the State's argument, the Tribunal applied ARSIWA to the issue of contract attribution, by holding that:

> [T]he confirmation of the termination of the contract by EGPC's board of directors, which comprised the Minister of Petroleum and other ministers of the Republic of Egypt, constituted sufficient grounds to substantiate attribution under ARSIWA Article 8 (…) [T]here is overwhelming evidence that the decisions of EGPC and EGAS *to conclude* and terminate the GSPA were all taken with the blessing of the highest levels of the Egyptian Government.[123]

The Tribunal clearly failed to differentiate between the issues of entering into a contract and contract termination. The question of whether an investment contract was terminated 'with the blessing' of the Government concerns the issue of a Government's interference in a contract, which may constitute a treaty breach. Indeed, the ARSIWA should be applied to determine whether such acts can be attributed to the State.

[121] *Ampal-American Israel Corporation v Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017), para 78 (emphasis added).
[122] Ibid, para 81.
[123] Ibid, para 146 (emphasis added).

Attribution of *contract* is a whole different issue – it answers the question whether the State undertook the obligation towards the investor in the first place. Thus, although the ARSIWA can be applied in the context of contractual breach or termination, it cannot, by analogy, be applied to the question of entering into a contract.

In *Strabag v. Libya*[124] the Tribunal considered whether pursuant to the umbrella clause it had jurisdiction to adjudicate the claims arising out of alleged breaches of contracts concluded between the investor on one side and a series of State-owned Libyan entities on the other. Strabag entered into a joint venture with LIDCO (Libyan Investment and Development Company), with whom it created a joint venture company.[125] The disputed contracts involved different contracting entities. Each contract was concluded between at least one Libyan State-owned company, on the one hand and Strabag or the joint venture company, on the other hand.[126] Libyan State-owned entities included: HIB (Housing and Infrastructure Board), which according to Libyan law had 'legal personality and independent financial liability' and was in charge of preparing urban planning schemes and engineering designs for the development of towns, RBA (Roads and Bridges Authority) which also had 'legal personality and independent financial liability' and had wide range of responsibilities relating to land transportation, design and maintenance of roads and transportation infrastructure; and TPB (Transportation Projects Board) 'financially independent legal entity 'according to the Libyan law, which implemented transportation infrastructure projects.[127]

Libya argued that the umbrella clause was inapplicable because *Libya was not itself a party* to the various contracts at issue. The Tribunal dismissed this jurisdictional objection. It held that the question of whether Libya had 'entered into' the relevant contracts must be resolved by applying international law, not Libyan domestic law. The Tribunal first looked into the umbrella clause, which provides that 'Each Contracting Party shall observe any obligation *it* may have entered into with regard to investments by investors of the other Contracting Party' (emphasis added). It focused on the word 'it' and held that it refers to Libya as represented by its Government but also potentially to other Libyan entities (based on Article 5 of ARSIWA).[128]

[124] *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award (29 June 2020).
[125] Ibid, para 6.
[126] Ibid, para 60.
[127] Ibid, para 8.
[128] Ibid, paras 167–70.

The Tribunal concluded:

> Reviewing the overall circumstances cumulatively, including the public importance of the functions carried out by [the state-owned Libyan entities] and their vesting with governmental authorities, their lack of administrative and financial economy, the nature of the contracts and their being deeply bound with State interest, and the existence of overwhelming evidence that demonstrates that an array of public authorities had a major hand in *the conclusion and performance of the contracts*, the Tribunal is of the view that, in this case, there is an exceptional combination of circumstances compelling the conclusion that the *Respondent did, indeed, 'enter into' the obligations* in the disputed contracts within the meaning of [the umbrella clause].[129]

The Tribunal was convinced that the factual circumstances had strongly indicated the Government's involvement in the contract formation. This seems to explain why the Tribunal applied ARSIWA rules, and not Libyan domestic law. However, the ARSIWA rules of attribution do not address the Government's involvement in contract negotiation and performance and thus do not constitute an appropriate legal framework for resolving the issue.

As noted earlier, in most cases in which tribunals applied ARSIWA to the question of contract attribution, they concluded that such contracts are in fact attributable to the State in question. However, in a minority of cases, applying ARSIWA did not lead to such attribution.

A first example is *Jan de Nul v Egypt*. The issue of contract attribution arose in the jurisdictional phase of the proceedings. The Tribunal decided that it should be dealt with in the merits phase, as it involved State responsibility. As in many other cases, the question of contract attribution was treated as an act of attribution. In this case, the investors entered into a contract with the state-owned Suez Canal Authority (SCA), an Egyptian State entity with an independent legal personality under Egyptian law. The State objected that there was no dispute with a Contracting Party, given that the SCA was an independent legal personality under Egyptian law.[130] Claimants, on the other

[129] Ibid, paras 187 (emphasis added).
[130] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (16 June 2006), para 83.

side, argued the issue of State responsibility for the acts of a State entity had to be resolved in accordance with international law, and in particular the principles codified in the ARSIWA. The Tribunal sided with the Claimants. It held that it was not for the Tribunal at the jurisdictional stage to examine whether the case was brought against the State and whether it involved the latter's responsibility.[131] Thus, the Tribunal treated the issue of contract attribution as 'State responsibility for the acts of a State entity', which clearly missed the Respondent's point.

In the merits phase, however, the Tribunal held that SCA's conduct could not be attributed to the Respondent State. It applied ARSIWA and held that the Respondent State cannot be held liable for the SCA's actions and omissions.[132] Here again, we see the confusion between contract attribution and attribution of the acts and omissions for the purposes of establishing State responsibility. However, contrary to most cases in which applying ARSIWA led to contract attribution, in this case, the facts failed to satisfy the ARSIWA requirements.

In *Bosh v Ukraine*, the Tribunal indirectly applied ARSIWA to the question of contract attribution. In this case, the investor entered a contract with the State University. The issue of contract attribution arose in the context of the interpretation of umbrella clauses. The umbrella clause provided: 'Each Party shall observe any obligation it may have entered into with regard to investments.' The Tribunal noted that it was the University, not the State party which had entered into the contract in question. Thus, it had to determine whether the term 'Party' from the umbrella clause was limited to the two States Parties or extended to the entities controlled by the Parties.[133]

The Tribunal looked superficially into the domestic law in answering the question of contract attribution. It relied on the relevant Presidential Decree and the University Charter to conclude that the University had autonomous status.[134] However, when interpreting the term 'Party' in the umbrella clause, the Tribunal turned to international law. It held that this term referred to any situation where 'the Party' was 'acting qua State'. It held:

[131] Ibid, para 85.
[132] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 November 2008), para 174.
[133] *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award (25 October 2012) , para 243.
[134] Ibid, para 244.

> where the conduct of entities can be attributed to the Parties (under, for instance, *Articles 4, 5 or 8 of the ILC Articles on State Responsibility*), such entities are considered to be 'the Party' for the purposes of Article II(3)(c) [the umbrella clause].[135]

The Tribunal held, based on its earlier conclusion that the *conduct of the University* was not attributable to Ukraine, that Ukraine, as a 'Party' did not enter into any obligations with regard to investments. [136] Thus, the Tribunal concluded that the State University's contract was not attributable to the State, but it is not entirely clear based on which rules. Although the Tribunal investigated domestic law, ARSIWA rules eventually determined the issue. Here too, as in many other cases, the Tribunal failed to distinguish the question of contract attribution from the question of conduct attribution. As noted in one recent contribution on this matter, tribunals still conflate questions of contractual responsibility with attribution for internationally wrongful conduct under the law of State responsibility.[137]

1.3.Evaluation

Even though many tribunals relied on ARSIWA to attribute investment contracts, this approach is misguided. As explained above, much of the literature holds that the ARSIWA rules are not designed to address contract attribution and should be applied only to attribute *conduct* in order to establish international State responsibility.[138] The fact that the rules are designed for a different purpose means that they should only be used to answer that question. A State cannot be made a party to a contract simply because it is responsible under international law for the act of its organs and private entities under its direction and control.[139] Customary rules of attribution codified in the

[135] Ibid, para 246 (emphasis added).
[136] Ibid, para 246.
[137] Esmé Shirlow and Kabir Duggal, 'The ILC Articles on State Responsibility in Investment Treaty Arbitration' (2022) 37 *ICSID Review*, p. 384.
[138] James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 *ICSID Review*, 134; Csaba Kovács, *Attribution in International Investment Law* (Wolters Kluwer 2018) 245. See also: Stephan Wittich, 'State Responsibility' in Bungenberg M and others (eds), *International Investment Law* (1st ed, Kooperationswerke Beck – Hart - Nomos 2015), p. 39, para 34; Simon Olleson, 'Attribution in Investment Treaty Arbitration' (2016) 31 *ICSID Review*, pp. 463, 465. Similarly, Hamamoto argues that the rules on attribution cannot explain the applicability of the umbrella clause when an investor concludes a contract with a certain entity (established by the host State, but with a distinct legal personality). See: Shotaro Hamamoto, 'Parties to the 'Obligations' in the Obligations Observance ('Umbrella') Clause' (2015) 30 *ICSID Review* 449. Petrochilos favours applying ARSIWA. Georgios Petrochilos, 'Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine' (2013) 28 *ICSID Review* 262, at 271.
[139] See: *City of London v Sancheti* [2008] EWCA civ 1283, Court of Appeal of the United Kingdom (21 November 2008).

ARSIWA deal exclusively with *conduct* attribution. Extending their application to *contract* attribution would be contrary to the State consensus – on which the rules in question are based.

There are three possible reasons why investment tribunals applied the ARSIWA to the issue of contract attribution. First, and the most obvious reason, is the failure to distinguish between *attribution of conduct* and *attribution of contracts.* The second possible reason is the lack of a better framework.[140] Respondent States often omitted to offer an alternative legal framework. Because the factual patterns in some cases seemed to fit well with the legal framework of the ARSIWA Articles 4, 5, or 8, investment tribunals simply applied the ARSIWA rules. In addition, even when domestic law is offered as an alternative, commentators have argued that investment tribunals fail to pay sufficient attention to domestic law, thereby being more inclined to grant investors international law protection.[141] The third possible reason is that tribunals implicitly applied the ARSIWA by analogy, without ever explicitly mentioning it in the awards.

Although questions of representation and conclusion of the contract fall outside of the ARSIWA ambit of application, tribunals have sometimes applied the ARSIWA 'by analogy'.[142] Tribunals' use of analogy to extend the application of the ARSIWA rules of attribution to other attribution-related matters for reasons other than State responsibility is questionable.[143]

However, drawing analogies is only permissible in limited circumstances. Bordin defines analogy as a case in which a rule that applies to situation 1, can also be applied to Situation 2, on the grounds that the two situations are *relevantly similar*.[144] Roberts defines analogy as the use of principles from other legal fields when analysing unresolved issues in the investment field.[145] Reasoning by analogy would need to meet

[140] Cortesi, for example, argues in favour of applying the ARSIWA when establishing tribunal's jurisdiction: 'it is substantially impossible for arbitrators to ascertain the existence of their own jurisdiction without – implicitly or explicitly – applying the rules on attribution'. Giulio Alvaro Cortesi, 'ICSID Jurisdiction with Regard to State-Owned Enterprises – Moving Toward an Approach Based on General International Law' (2017) 16 *The Law and Practice of International Courts and Tribunals*, p. 137.

[141] See Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (OUP 2017), pp. 1-10.

[142] Jorge Viñuales and Alina Papanastasiou, 'Article 8 of the ARSIWA: Attribution of Conduct Instructed, Directed or Controlled by a State' in Andreas Kulick and Michael Waibel (eds.) *General International Law in International Investment Law: A Commentary* (Oxford University Press 2024), p. 301.

[143] Ibid.

[144] See Fernando Bordin, *The analogy between states and international organizations* (Cambridge University Press 2019), p. 15.

[145] Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' 107 (1) 2013 *The American Journal of International Law*, 47.

certain criteria: after *comparing* regulated and unregulated cases (conduct attribution and contract attribution in the present situation) and identifying similarities and differences, rational judgement must be made that the similarities are relevant for legal evaluation and the *differences* are *irrelevant*.[146] The major challenge in this analysis is to determine when differences are genuinely principled (i.e., relevant).[147] For that judgement, the object and purpose of the rule concerned are crucial.[148] The ARSIWA rules aim to establish whether there is an act of the State for the purposes of international responsibility. The factors crucial for attributing *conduct* under the ARSIWA (such as governmental authority, direction and control) are not central to attributing *contract*. For instance, even if the State-owned entity is empowered with governmental authority, this does not mean that the contract concluded by such an entity can be attributed to the State.[149] Domestic rules about binding non-signatories (many of which international tribunals have accepted) focus on the intent to be bound, the behaviour of the non-signatory and reasonable expectations of the contractual partner, among other factors. Thus, *conduct* attribution for establishing State responsibility and *contract* attribution differ in nature and should not be determined by the same rules.[150] These differences also imply that the criteria for reasoning by analogy are not met here.

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[146] Silja Vöneky, 'Analogy in International Law' in (2008) *Max Planck Encyclopedia of Public International Law*, para 17. Cass R Sunstein, 'On Analogical Reasoning' 106 (3) 1993 *Harvard Law Review*, p. 745: 'For analogical reasoning to operate properly, we have to know that A and B are "relevantly" similar, and that there are not "relevant" differences between them'.

[147] Cass R Sunstein, 'On Analogical Reasoning' 106 (3) 1993 *Harvard Law Review*, p. 745.

[148] Silja Vöneky, 'Analogy in International Law' in (2008) *Max Planck Encyclopedia of Public International Law*, para 17.

[149] Michael Feit, 'Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity' (2010) 28 *Berkeley Journal of International Law* 142, p. 154. Governmental authority required by Article 5 of the ARSIWA has been misinterpreted in practice of investment tribunals especially in context of contractual breaches and terminations. In their Commentary of Article 5 ARSIWA, Viñuales and Hailes explain that some tribunals assumed that entity's public function is coextensive with the element of government authority which led to some anomalous results – such as the attribution of certain contractual terminations by independent entities. They stress the importance of making a distinction between public service and governmental authority under Article 5. Jorge Viñuales and Oliver Hailes, 'Article 5 of the ARSIWA – Conduct of empowered entities', in Andreas Kulick and Michael Waibel (eds.) *General International Law in International Investment Law, A Commentary* (OUP 2024) p. 270.

[150] See also Simon Olleson, 'Attribution in Investment Treaty Arbitration' (2016) 31 *ICSID Review*, p. 466. It is not only that tribunals applied the ARSIWA to contract attribution, but they also applied *contract* attribution rules to *conduct* attribution. For example, in *Tethyan v Pakistan*, the Tribunal found that statutory development agency acted as an agent in entering into a certain agreement in question. This was used to conclude that entity's assurances to the claimant were attributable to the State. See: Jorge Viñuales and Oliver Hailes, 'Article 5 of the ARSIWA – Conduct of empowered entities', in Andreas Kulick, Michael Waibel (eds.) *General International Law in International Investment Law, A Commentary* (OUP 2024) p. 277.

In literature, we find support for the view that the attribution rules codified in the ARSIWA do not apply to the extension of contractual obligations and should be clearly distinguished from attribution-related matters governed by international or domestic law for purposes *other* than State responsibility.[151]

An example of a situation in which the ARSIWA rules of attribution can be applied by analogy illustrates the difference. For example, the ARSIWA rules of attribution, although formulated to determine State responsibility *towards another State*, can be applied by analogy to determine the responsibility of States *towards private parties*. On the contrary, they cannot be applied by analogy to determine whether a State is a party to a contract. To apply a certain rule by analogy, we must determine its purpose. In the first situation, the aim of attribution is the same – *determining State responsibility*. The difference between regulated cases (conduct attribution for determining State responsibility towards another State) and unregulated cases (conduct attribution for determining State responsibility towards a private party) is irrelevant (it is not relevant for determining State responsibility whether such responsibility is being determined towards another State or towards a private party). Thus, reasoning by analogy is applicable. On the contrary, in the second situation, the difference is relevant – the aim of attribution is not to determine State responsibility but to determine whether a State is a party to a contract.

The central policy argument in favour of applying the ARSIWA rules of attribution to the question of contract attributions is to prevent the State from *avoiding its responsibility*. This argument is not convincing because it is based on the presumption that the State is responsible/acting in bad faith. State-owned entities may act independently when entering into private contracts. The mere fact that the State establishes an SOE does not mean that the State should be made a party to every contract entered into by such an entity. By establishing an SOE, the State is not automatically avoiding 'its' responsibility. To determine whether a contract in question binds the State, the focus should be on the following factors: whether the entity acted as a State representative, what was the level of the State's involvement in contract negotiation and whether the entity was established merely as a façade in order to avoid contractual obligations. The theories examined in this thesis consider precisely those factors, and as

[151] Jorge Viñuales and Alina Papanastasiou, 'Article 8 of the ARSIWA: Attribution of Conduct Instructed, Directed or Controlled by a State' in Andreas Kulick and Michael Waibel (eds.) *General International Law in International Investment Law: A Commentary* (Oxford University Press 2024),p. 301.

such, they prevent States from avoiding their responsibility. As explained below, they focus on matters crucial to the *formation of the contract*, not *conduct* attribution.

Additionally, applying the international rules on *conduct* attribution to attribute *contracts* would be similar to applying tort/delict law rules to attribute contracts under domestic law. Domestic courts would not apply delict or tort law rules when attributing contracts. To illustrate this important distinction, while the employer is generally liable for the torts committed by her employee in the course of his employment, the same does not apply to contracts concluded by such an employee. The fact that the contract was concluded 'in the course of his employment' would not assist the domestic court in determining whether the contract can be attributed to the employer. Instead, the court would have to apply the rules governing the binding of non-signatories to determine whether the contract concluded by the employee is attributable to his employer. Similarly, on the international plane, factors relevant to attributing conduct when determining State responsibility for internationally wrongful acts are not relevant to determining whether a contract can be attributed to the State.

Finally, the question of *contract attribution* to the State differs from the issue of whether an investment tribunal may decide a contract claim. As a general matter, claims arising from an investment contract may be decided by an investment tribunal either under a broad dispute-resolution treaty provision that submits any investment dispute to arbitration or under a dispute-resolution provision in the contract itself.[152] A broad dispute-resolution clause referring to 'any dispute relating to an investment' has been interpreted as encompassing claims arising from contractual relations between an investor and a host State.[153] This means that tribunals may establish jurisdiction to determine the host State's contractual liability.[154]

The question of whether a contractual breach should be assessed under the applicable contract law or international law has been the subject of extensive debate. Where a contractual breach also gives rise to a potential treaty violation, arbitral tribunals have tended to permit the application of international law. Ultimately, it depends much on the

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[152] Csaba Kovács, *Attribution in International Investment Law* (Wolters Kluwer 2018), pp. 243, 244.
[153] August Reinisch, 'The Scope of Investor-State Dispute Settlement in International Investment Agreements' (2013) 21 *Asia Pacific Law Review* 3, at 9. See also *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 (29 January 2004), para 127.
[154] Anthony Sinclair, 'Bridging the Contract/Treaty Divide' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009), p. 104.

State's ability to effectively frame its claim as a treaty-based violation, rather than a mere contractual dispute.

Vivendi v Argentina illustrates this point well:

> Whether there is a breach of contract or a breach of the Treaty involves two different inquiries. (…) A State may breach a treaty without breaching a contract; it may also breach a treaty at the same time it breaches a contract. And, in the latter case it is permissible for the Tribunal to consider such alleged contractual breaches, not for the purpose of determining whether a party has incurred liability under domestic law, but to the extent necessary to analyse and determine whether there has been a breach of the Treaty. In doing so, the Tribunal would in no way be exercising jurisdiction over the contract, it would simply be taking into account the parties' behaviour under and in relation to the terms of the contract in determining whether there has been a breach of a distinct standard of international law (…).[155]

Once a dispute enters the realm of a potential treaty violation, an arbitral tribunal may invoke the ARSIWA rules of attribution. These provisions are specifically designed to determine State responsibility for breaches of international law, and since treaty violation constitutes such a breach, their application is appropriate and necessary in that context. However, when addressing the preliminary question of whether a contract can be attributed to the State – whether the State is a party to the contract – the ARSIWA rules of attribution are not helpful, since matters of contract attribution fall outside the framework of international State responsibility for wrongful acts.

2. Domestic Law

2.1. Doctrine

Many authors subscribe to the position that the issue of whether the State itself is a party to an investment contract is governed by internal (domestic) law.

[155] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic), Award (20 August 2007), para 7.3.10.

Brabandere argues that investment contracts are not governed by international law due to the lack of treaty-making capacity of the foreign investor:

> The investment contracts [contracts between an investor and State entity or agency] are not regulated by international law, since the presence of the foreign investor as a party to the contract makes it impossible to conclude an international legal instrument because they have no treaty-making capacity.[156]

Crawford argued that 'when international investment tribunals deal with questions of contractual liability, those questions are governed by the *proper law of the contract*'.[157] Further, contrary to the assumption that, when a State organ has entered into a contract, the State is responsible for compliance with it, Crawford submits that this will in fact depend on the proper law of the contract.[158]

Kovács contends that the attribution of contractual undertakings involves primarily the interpretation of the contract in question by reference to the law of the contract.[159] He explains that 'the parties to the contract and the creation and performance of the contractual obligations fall to be determined by the applicable contract law'.[160]

Along those lines, De Stefano argues that 'only the proper law of contract should govern contractual obligations (including ultra vires issues), determined upon application of the choice of law rules of the relevant system of private international law'.[161]

The approach that the *governing law of the contract* determines whether the host State is a party to the contract is sometimes described in the literature as the 'majority view' and 'the settled position'.[162] Although this seems to be the majority view in doctrine, the question is far from settled, given that some recent cases and publications argue for

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[156] Eric De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (Cambridge University Press 2014), p. 31.
[157] James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 *ICSID Review*, p. 134 (emphasis added).
[158] Ibid.
[159] Csaba Kovács, *Attribution in International Investment Law* (Wolters Kluwer 2018), p. 259.
[160] Ibid, p. 245.
[161] Carlo de Stefano, *Attribution in International Law and Arbitration* (Oxford University Press 2020), p. 126.
[162] Csaba Kovács, *Attribution in International Investment Law* (Wolters Kluwer 2018), pp. 244 and 256.

applying the ARSIWA provisions on attribution rather than the governing contract law.[163]

2.2. Cases

In *William Nagel v. Czech Republic*, the Tribunal dealt with the issue of contract attribution to determine umbrella clause violation. In this case, the investors entered into a contract with the Prague radio communication entity, owned by the State. The Tribunal concluded that the State had no obligations towards the investors under the investment contract because, *inter alia*, the entity in question lacked legal authority to bind the State and because the Government never adopted a resolution or regulation obligating itself in connection with the contract.[164]

In reaching this conclusion, the Tribunal heavily relied on Czech domestic law. It held that, under the domestic law, the entity in question was a distinct and independent legal entity.[165] It further held, based on the domestic law, a 'State enterprise is not responsible for the liabilities of the State or other persons, and that the State is not responsible for liabilities of the State enterprise, unless the law provides otherwise'.[166]

In *Impregilo v. Pakistan*,[167] the investor concluded two contracts with the Pakistan Water and Power Development Authority (WAPDA), which was under the Pakistani law a corporate body 'entitled to acquire, hold property, shall have perpetual succession and a common seal and shall by the said name sue and be sued'.[168] Claimant argued that the Authority's breaches of the contract constituted a violation of the umbrella clause. The Tribunal found the umbrella clause inapplicable. It held that the contracts in question were not concluded with the State, but with an entity separate and distinct from the State.[169] The Tribunal applied Pakistani domestic law to determine WAPDA's status.[170]

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[163] Stéphanie Caligara, 'Attribution of Lawful Conduct in Investment Treaty Arbitration - The 'It' Problem Solved?' (2019) *Law & Society: International & Comparative Law eJournal* (favouring ARSIWA application). Case-law analysed in Chapter II, Section 1.2. above indicates that the matter is not settled.
[164] *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award (9 September 2003), para 161
[165] Ibid, para 162.
[166] Ibid, para 165.
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[167] *Impregilo S.p.A. v. Islamic Republic of Pakistan,* Decision on Jurisdiction (22 April 2005)
[168] Ibid, para 199.
[169] Ibid, para 223. See also: Shotaro Hamamoto, 'Parties to the 'Obligations' in the Obligations Observance ('Umbrella') Clause' (2015) 30 *ICSID Review* 449, 458.
[170] *Impregilo S.p.A. v. Islamic Republic of Pakistan,* Decision on Jurisdiction (22 April 2005), para 199.

Hamamoto argues that this particular interpretation was problematic since it:

> would allow the host State to easily escape from the scope of the obligations observance clause by setting up entities having a domestic legal personality distinct from the State when concluding any agreement with foreign investors.[171]

His suggestion is to interpret the term 'party' in the umbrella clause in accordance with international law rules on treaty interpretation, rather than the domestic law of any State.[172] This would mean that the term 'party' would include an entity having a domestic legal personality distinct from the State.[173] Some tribunals, as explained in the previous chapter, followed this interpretation.

In *Amto v. Ukraine*,[174] the investor entered into numerous contracts with Energoatom, Ukraine's wholly State-owned national nuclear power company. This was 'a specific juridical person known as a state company'.[175] The investor had initiated court proceedings against the company in Ukraine and was successful in its claims.[176] In the international investment dispute, the investor relied on the umbrella clause. The State denied that any liability could be based on the umbrella clause, given the lack of a contractual relationship between the investor and the State. The Tribunal agreed with Ukraine:

> The undertaking by Ukraine of a contractual nature vis-a-vis [the investor] could very well bring into effect the umbrella clause. However, in the present case the contractual obligations have been undertaken by a *separate legal entity*, and so the umbrella clause has no direct application.[177]

The Tribunal clearly held that the entity in question was a separate legal entity distinct from the State, a conclusion that appears to follow from Ukrainian law. The Tribunal held earlier in the Award that Energoatom was 'a separate legal entity owned by the

[171] Shotaro Hamamoto, 'Parties to the 'Obligations' in the Obligations Observance ('Umbrella') Clause' (2015) 30 *ICSID Review* 449, p. 459.
[172] Ibid.
[173] Ibid.
[174] *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award (26 March 2008).
[175] Ibid, para 101.
[176] Ibid, para 21.
[177] Ibid, para 110 (emphasis added).

Respondent' and that 'Ukrainian law provides for the separate legal responsibility of the State and State-owned legal entities'.[178]

In *EDF v. Romania*, the investor's investment consisted of its participation in two joint venture companies with Romanian entities owned by the Romanian Government: ASRO and SKY.[179] ASRO was established through a joint venture contract between EDF, Bucarest Aeroport Otopeni (AIBO) and CASROM - a State enterprise formerly controlled by the State Ownership Fund.[180] SKY contract was a joint venture contract between EDF, TAROM (Romania's national airline company) and a former CASROM economic manager. The object of SKY was to provide in-flight duty-free services on board TAROM's aircraft.[181]

The investor argued breach of the umbrella clause based on a State's failure to observe its obligations under the contracts. The Tribunal held that breach of contractual obligations entailed responsibility at the contractual level. It held that there was no breach by the State, since the State was not a party to these contracts and, therefore, had not assumed the contractual obligations.[182]

Although it was unclear whether the investor relied on the attribution of the conduct of the two entities (AIBO and TAROM) to the State to establish responsibility, the Tribunal observed that the attribution of such conduct did not render the State directly bound by the contracts for the purposes of the umbrella clause. Attribution did not change the extent and content of the obligations arising under the two contracts, which remained contractual, *nor did it make Romania a party to such contracts.*[183] Thus, the Tribunal clearly held that ARSIWA provisions did not govern the issue of contract attribution, because they did not offer an answer to the question whether a State undertook a contractual obligation. This is a very important remark. The Tribunal referred to the Legal Opinion of Respondent's Expert, Professor Greenwood (not publicly available) and concluded that 'absent a breach of the [investment contracts] *under the governing law*, there can be no State responsibility under international law for violation of the umbrella clause'[184]

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[178] Ibid, para 101.
[179] *EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Award (8 October 2009), para 46.
[180] Ibid, para 47.
[181] Ibid, para 60.
[182] Ibid, paras 314-317.
[183] Ibid, para 319 (emphasis added).
[184] Ibid (emphasis added).

It is unclear based on which law the Tribunal decided that the contracts in question were not attributable to the State. It seems like a commonsense argument, but it would be desirable to take a clearer position. Implicitly, given that the Tribunal held that the governing law of contract determines the existence of a contractual breach, it may be concluded that the same law governs contract attribution. This is also supported by the fact that earlier in the Award, the Tribunal held that both State entities (AIBO and TAROM) possess 'legal personality *under Romanian law*, separate and distinct from that of the State'.[185]

In *Hamester v. Ghana*, the investor entered into a contract with the Ghana Cocoa Board. Cocoa Board is an entity established by the Ghana Cocoa Board Law as a successor to the Ghana Cocoa Marketing Board, with the primary function to purchase cocoa beans from Ghanaian cocoa farmers and to market and export them.[186]

Claimant relied on the umbrella clause to argue that even if all its claims were contract claims, the umbrella clause elevated them into treaty claims.[187] The Tribunal, however, held that contracts concluded between an investor and a legal entity separate from the State could not fall within the scope of an umbrella clause.[188] Given that the State was not named as a party, nor did it sign the contract and there were no suggestions that it intended to be a party thereto.[189] The Tribunal held that the umbrella clause was specifically delimited by reference to obligations that have been 'assumed by the State' which is why its ambit cannot be extended to contractual obligations assumed by other separate entities.[190] The Tribunal also noted that in some cases the ambit of the umbrella clause was in fact extended to contracts concluded by separate entities, by reference to the international law principles of attribution. The Tribunal, however, chose to follow the reasoning of other tribunals.[191] It concluded that contractual commitments of an entity *separate* from the State could not be elevated by the umbrella clause into treaty commitments of the State itself. Furthermore, a violation by such an entity, the Tribunal found, could not have constituted a treaty violation.[192] In this case, it is unclear which

[185] Ibid, para 190 (emphasis added).
[186] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010), para 22.
[187] Ibid, para 339.
[188] Ibid, paras 342-348.
[189] Ibid, para 347.
[190] Ibid.
[191] Ibid, paras 343-347. Referring to: *Impregilo v. Pakistan, William Nagel v. Czech Republic and CMS v. Argentina.*
[192] Ibid, para 348.

law was applied in concluding that Ghana was not a party to a contract, but it is fair to assume that this was the law of Ghana, based on the Tribunal's observation that the Cocoa Board was an entity separate from the State.

In *Tethyan v. Pakistan*, the investor entered into a joint venture agreement with the autonomous province of Balochistan. Its claims arose out of this agreement and certain rules on minerals issued by this autonomous province. The Tribunal held that the State was not a party to the agreement in question:

> [T]he Tribunal notes that in the present case, Respondent did not become party to the [joint venture agreement] (…) and Respondent further did not enact the 2002 BM Rules, but in both cases, its autonomous province Balochistan did so. While Balochistan's actions can be attributed to Respondent pursuant to the ILC Articles for the purposes of Treaty claims, i.e., claims under international law, *such attribution does not apply for non-Treaty claims under domestic law*. In the context of Respondent's claims based on the [joint venture agreement] and the 2002 BM Rules, the Tribunal must therefore give effect to the juridical distinction between the Islamic Republic of Pakistan and the Province of Balochistan *under Pakistani law*.[193]

Thus, giving effect to that jurisdictional distinction, the Tribunal held that the State lacked standing to raise non-treaty claims based on domestic contract and public law. The Tribunal applied domestic law in determining the status of the authority which entered into contract with the investor. The Tribunal held that the ARSIWA did not apply to the 'non-treaty claim'. However, the question of contract attribution is not a question of a claim at all. It is a preliminary question that can be answered based on different rules (domestic or international), depending on the tribunal's choice. Regardless of this choice, it is important to recognize the issue of contract attribution as a separate question, different from the question of which law should govern a non-treaty claim.

Gavrilović v. Croatia also involved the question of contract attribution. The contract was peculiar. The five 'Gavrilović' companies were placed into bankruptcy, and the bankruptcy court authorised the sale of the companies via public tender. After Mr

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[193] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability (10 November 2017), para 1421 (emphasis added).

Gavrilović's bid was accepted, the bankruptcy court, the liquidator, and Mr Gavrilović entered into a purchase agreement which the Ministry of Foreign Affairs approved.[194]

The investor argued that the liquidator represented the five companies, who signed and stamped the purchase agreement in his official capacity and thus bound the Respondent State which had appointed him. In the alternative, the investor contended that the State was bound by the obligations of the purchase agreement even if it was not considered a party in the strict sense. To support this argument, the inventors highlighted the *State's involvement* at every step of the sale of the five companies. On the other side, the Respondent State relied on the lack of *privity of contract* between the investors and the State. In its view, the umbrella clause could not create privity of contract where none existed. Finally, the State argued that the rules of attribution could not transform the liquidator's signature into the signature of the State.[195]

The Tribunal held that the agreement was concluded between the investor, as the buyer, and the five companies represented by the liquidator, as the seller. In reliance on *Hamester v. Ghana*, the Tribunal held:

> the Respondent was not named as a party and did not sign the Purchase Agreement. There was also no representation or suggestion that the Respondent was intended to be a party. As a matter of privity, the Respondent is plainly not a party to the Purchase Agreement.[196]

As for the investor's reliance on attribution of the actions of the liquidator, the Tribunal held that:

> the rules of attribution under international law as codified in the ILC Articles do not operate to define the content of *primary obligations*, the breach of which gives rise to responsibility. Rather, the rules concern the responsibility of States for their internationally wrongful acts. It follows that the rules of attribution *cannot be applied* to create primary obligations for a State under a contract.[197]

Thus, in this case, the Tribunal refused to apply ARSIWA to the issue of contract attribution. As for the applicable law, it relied on Croatian domestic law. It noted that

[194] *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia* (ICSID Case No. ARB/12/39), Award (25 July 2018), paras 93-104.
[195] Ibid, paras 833–49.
[196] Ibid, para 852.
[197] Ibid, para 856 (emphasis added).

the Croatian 'Bankruptcy Act does not define who is considered the seller in bankruptcy purchase agreements' so it went on to rely on the writings of Prof Dr Barbić (quoted in the expert report), explaining that 'where there is no holder of title to a company, as is the case with socially-owned enterprises, the seller may be only the company itself'. Thus, in the Tribunal's view, 'the five companies were the seller'.[198]

As the analysis of cases in this Section demonstrates, whenever the Tribunal opted for the application of the domestic law to the issue of contract attribution, it concluded that the contract was not attributable to the State. However, in *Garanti Koza v. Turkmenistan*[199] the outcome was the opposite, although it is not clear that domestic law was in fact applied.

In this case, the investor entered into a contract with the State Concern Turkmenavtoyollary (TAY) – one of the two entities which replaced Ministry of Automobile Transportation and Highways, after the Ministry was liquidated by the Presidential Decree.[200] TAY was responsible for 'the design, renovation, and construction of the highways connecting the major administrative cities of Turkmenistan'.[201] The issue of contract attribution arose in the context of the alleged breach of an umbrella clause. The Tribunal held:

> To the extent that the question presented to the Tribunal is whether a particular obligation was *created* by the Contract between Garanti Koza and TAY, *the Tribunal applies Turkmen law* (to the best of its ability) to determine the existence and dimensions of the obligation, because the parties to the Contract agreed that the Contract would be governed by Turkmen law. (..) At the same time, whether a particular action by Turkmenistan or one of its State organs constituted or caused a failure "to observe any obligation [Turkmenistan] may have entered into with regard to investments" of Garanti Koza is a question of international law that arises under the BIT.[202]

The Tribunal finally concluded that the acts of the State entity 'in furtherance of the contract' were attributable to the State. However, it is not entirely clear whether it in

[198] Ibid, para 853.
[199] *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award (19 December 2016).
[200] Ibid, para 46.
[201] Ibid, para 46.
[202] *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award (19 December 2016) , paras 331-332 (emphasis added).

fact applied the domestic law. The Tribunal took the following facts into account: the award of the contract was approved by the President in a presidential decree, which further authorized nine other State organs to take steps to implement the contract, the Government of Turkmenistan appeared on the face of the contract ('State Concern 'Turkmenavtoyollary' acting on behalf of Turkmenistan Government'), the contract itself stated that it would come into effect after its registration with the Turkmen Ministry of Economy and Development.[203] Interestingly, the Tribunal concluded that 'an entity empowered by a State to exercise elements of governmental authority is for that purpose acting as an organ of the State'.[204] This is the exact wording of Article 5 of the ARSIWA, which indicates that the Tribunal had the ARSIWA in mind when deciding this issue. However, it stated that the matter should be decided based on domestic law. Formally, this case involved the application of the domestic law (as the law of the contract). In substance, however, the Tribunal applied the ARSIWA reasoning when deciding the issue.

Similarly, in *Khan v Mongolia*, the Tribunal applied (at least formally) domestic law to the issue of contract attribution and held that the contract was attributable to the State. However, similarly to *Garanti Koza,* contract attribution does not seem to directly follow from applying the domestic law. In this case, the Tribunal had to determine whether it had *ratione personae* jurisdiction over Mongolia, given that Mongolia was not a party to the Founding Agreement, which represented the legal basis for the Tribunal's jurisdiction. Claimant argued that Mongolia was a party to the Agreement 'through various representatives' – State-owned entities which were the parties to the Agreements: Mineral Resources Authority of Mongolia (MRAM), State Property Committee of Mongolia (SPC) and Erdene and its successor MonAtom (limited liability company wholly owned and controlled by the SPC).[205]

The Tribunal held that 'the relationship between a State and its alleged representative must be assessed *under the law of this State* and in light of the factual background of this relationship'.[206] It explicitly held that Mongolian law applied to this matter.[207] However, the conclusion that Mongolia was a party to the Agreement seems to be

[203] Ibid, paras 333-335.
[204] Ibid, para 335.
[205] *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia* UNCITRAL, Decision on Jurisdiction (25 July 2012), para 343 et seq.
[206] Ibid, para 345 (emphasis added).
[207] Ibid.

derived from an interpretation of the Agreement and other related contracts and *parties' behaviour*, and not from a particular provision of Mongolian law. More precisely, the Tribunal held:

> To understand their relationship with Mongolia in the context of the Founding Agreement, it is helpful to start with the texts of both this Agreement and the Minerals Agreement. (…) [T]he latter document provides an essential element of context for understanding *the relationship* between the parties to the Founding Agreement.[208]

It further explained that under both agreements, the SOEs 'undertook obligations that only a sovereign State could fulfil'.[209] The Tribunal also held that '*the behaviour* of the parties (…) is *decisive*'.[210] Finally, the Tribunal explicitly stated that the interpretation of the relevant provisions of the agreements and the behaviour of the State and SOEs who signed the contract demonstrate the understanding of the parties that all the Mongolian entities (…) were acting on behalf of the State.[211] The Mongolian law was only used to 'confirm' this conclusion. [212] The Tribunal concluded that it had jurisdiction over Mongolia under the Founding Agreement.[213]

The Tribunal relied heavily on the behaviour of the parties and the interpretation of contractual provisions to conclude that SOEs acted as representatives of the State. The importance of Mongolian domestic law provisions seems to be minimal, given that the Tribunal relied on it only to support the conclusion already reached. To enable tribunals to rely on such behaviour and representations, relevant for determining 'real parties' of the contract, this thesis will offer a much-needed legal framework for contract attribution to the State.

2.3. Evaluation

This thesis argues against applying domestic law when attributing contracts between investors and SOEs. In most cases where tribunals opted for the application of domestic rules, they concluded that the contracts in question were not attributable to the State. As analysed above, they mostly relied on domestic rules on the separate legal personality

208 Ibid, para 347.
209 Ibid.
210 Ibid, para 355 (emphasis added).
211 Ibid, para 361.
212 Ibid, para 361.
213 Ibid.

of the State entities. It seems that the existence of such rules generally results in the non-attribution of the contract. In two analysed cases where contracts were attributed to the State, such domestic rules on separate legal personality did not play an important role. In *Garanti Koza v. Turkmenistan* the Tribunal purported to apply domestic law, but its reasoning drew heavily on ARSIWA attribution rules and standards. In *Khan v Mongolia,* the Tribunal relied on the behaviour of the parties in contract conclusion and performance, implicitly applying principles like apparent authority or implied consent, without clearly identifying them as applicable legal framework.

This thesis does not argue that arbitral tribunals applying domestic law have necessarily reached incorrect outcomes when concluding that a contract should not be attributed to the State. Rather, the critique is that tribunals usually base their finding on non-attribution solely on domestic legal rules on separate legal personality, without further analysing agency relationships (apparent authority), or the behaviour of the parties. This means that the *level of actual State involvement in the process of contract negotiation and conclusion* becomes irrelevant for determining contract attribution if there is a domestic law on separate legal personality. Provided that there is a domestic law on the separate legal personality of the SOE, the application of domestic law would always lead to the same result – non-attribution of the contract.

Non-application of domestic law on separate legal personality to the question of contract attribution does not mean that the State should not be allowed to organize its activities through a distinct legal entity. On the contrary, the State should be free to do so, and investment tribunals should not be concerned with contracts where the State is not a Party.[214] The crucial question is how to determine *whether the State is in fact a Party to the contract*. The answer cannot be found in domestic law on separate legal personality, because the application of the rule already predetermines the outcome, regardless of the degree of State involvement in the process of contract formation.

Many authors consider that investment contracts (in general) should be governed by (domestic) law of the contract.[215] But this only means that proper contract law should

[214] See for example: *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (22 April 2005), para 212 referring to *Salini Costruttori SpA v. Kingdom of Morocco.*
[215] Eric De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (Cambridge University Press 2014), p. 31; James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 *ICSID Review* 127, p. 134; Csaba Kovács, *Attribution in International Investment Law* (Wolters Kluwer 2018), pp. 245, 259; Carlo De Stefano, *Attribution in International Law and Arbitration* (Oxford University Press 2020), p. 126.

govern the *question of contractual responsibility for the breach of contracts* (which does not cover the issue of contract attribution). Applicable contract law (either chosen by the parties or determined by the Tribunal) typically deals with questions such as contract formation, interpretation of the contract, performance obligations, breach of contract, remedies, defences and excuses, and so on. However, the issue of binding the non-signatories of the contract involves doctrines that go beyond contract law, such as agency, implied consent, and veil piercing. Thus, the governing contract law is not suitable to answer the question of contract attribution (binding the non-signatory of the contract). This is the so-called 'chicken and egg' conundrum.[216] The law of contract, as its name states, intends to govern the relationship *between contractual partners*, not between strangers. The issue is whether a State is a party or a stranger to the contract. It is doubtful whether the applicable contract law extends to the issue of binding non-signatories.

Furthermore, if one adopts the approach of applying contract law to the issue of binding the non-signatories, this gives rise to the question of mandatory rules. A mandatory rule is a rule that a court or Tribunal must apply, notwithstanding the otherwise applicable law (determined based on the ordinary rules of conflict of laws) and notwithstanding a contrary agreement by the parties.[217] Mandatory rules of the *chosen law* will certainly be considered by the Tribunal 'as figuring among the applicable legal norms'.[218] Moreover, mandatory rules (economic public policies or governmental interests) of a *State closely connected with the contract* (especially the country where the contract has to be performed) must also be taken into account.[219] Thus, regardless of which contract law rules govern the contract, *domestic rules on separate legal personality* could still be applied as mandatory provisions, which would imply automatic rejection of contract attribution, regardless of the actual level of State involvement in contract formation and performance.

For this reason, it is preferable to apply international law to the issue of contract attribution. Investment arbitration is typically governed by international law and

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[216] See: William Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma' in *Multiple Parties in International Arbitration* (Oxford University Press, Permanent Court of Arbitration 2009), para 1.33.
[217] George Bermann, 'Introduction: Mandatory Rules of Law in International Arbitration' (2007) 18 (1) *The American Review of International Arbitration*, pp. 1-2.
[218] Ibid, p. 7.
[219] Sixto Sánchez Lorenzo, 'Choice of Law and Overriding Mandatory Rules in International Contracts after Rome I' (2010) 12 *Yearbook of Private International Law*, p. 88. See Article 9.3. of the Rome I Regulation.

international law will trump the inconsistent municipal law.[220] Reliance on domestic contract law entails the risk that domestic rules on separate legal personality will operate as mandatory rules. In contrast, the application of international law – particularly the general principles of law identified in this thesis mitigates this concern, as international law prevails over conflicting municipal norms in the context of investment arbitration.

Additionally, there is a policy argument against applying domestic law (mentioned above as a policy argument in favour of applying ARSIWA[221]), namely that applying domestic law to the issue of contract attribution may allow the host State to *easily escape from its treaty obligations* by establishing entities with separate legal personality.[222] This is a persuasive argument against applying domestic law – we saw that when investment tribunals applied domestic law, they mostly relied on domestic rules on separate legal personality which almost always led to non-attribution, regardless of the actual level of State involvement in the process of contract negotiation and performance. However, as already explained, this is not a persuasive argument in favour of applying the ARSIWA.

Finally, the non-application of domestic law aligns with the recent trend of States seeking to limit investment tribunals' authority to interpret and apply domestic law. States have begun to include provisions in their investment treaties that typically require that domestic law be treated as a matter of fact rather than as a matter of law. A prominent example is Comprehensive Economic and Trade Agreement (CETA), often referred to as the 'gold standard'. The relevant provision provides:

Article 8.31(2) CETA

> The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party. For greater certainty, in determining the consistency of a measure with this Agreement, *the Tribunal may consider, as appropriate, the domestic law of the disputing Party as a*

[220] Andrea K. Bjorklund, 'Investment Arbitration' in George Bermann and Loukas Mistelis (eds.), *Mandatory Rules in International Arbitration* (Juris 2011), pp. 233, 262.
[221] See above p. 39.
[222] Shotaro Hamamoto, 'Parties to the 'Obligations' in the Obligations Observance ('Umbrella') Clause' (2015) 30 *ICSID Review* 449, p. 459 (also referring to André von Walter, 'Die Reichweite von Schirmklauseln in Investitionsschutzabkommen nach der jüngsten ICSID-Spruchpraxis' (2006) Recht der internationalen Wirtschaft 815, 823); Kaj Hobér 'State Responsibility and Attribution' in Peter T Muchlinski, Federico Ortino, Christoph Schreuer (eds.) *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 550, p. 582.

> *matter of fact*. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party. (emphasis added).

This means that tribunals are effectively precluded from assessing the legality of the State's measure under its own domestic law. However, there are situations where tribunals would have to engage in such an assessment, for example when determining whether the contract termination was in accordance with domestic law.[223] One possible approach to reconcile this tension is to treat the examination of domestic law as incidental to a determination grounded on international law – a case of the tribunal exercising its incidental jurisdiction.[224] Another approach is to treat domestic legality strictly as a fact, obliging the tribunal to rely on domestic courts' interpretations, which is close to denying domestic law's normativity from the standpoint of international law.[225] This could also be problematic when domestic rulings are self-serving or lacking independence.[226]

Given these concerns, it is more appropriate to avoid the direct application of domestic law and instead rely on international law (the general principles of law, as elaborated in this thesis). This thesis argues that rules on binding the non-signatories which developed in domestic legal systems and have been accepted at the international level should be applied to this matter as general principles of law.

[223]Jarrod Hepburn, 'CETA's New Domestic Law Clause', *EJIL Talk* (17 March 2016), available at: https://www.ejiltalk.org/cetas-new-domestic-law-clause/

[224] Ibid. More on incidental jurisdiction see in James G. Devaney and Christian J. Tams, 'In re Arbitration Between the Italian Republic and the Republic of India Concerning the "Enrica Lexie" Incident' (2021) 115 *American Journal of International Law*, pp. 513–519.

[225] Stephan W. Schill, Michail Risvas, 'Symposium: Re-thinking the Role of Domestic Law in International Adjudication' (2024) 23 *The Law and Practice of International Courts and Tribunals* 73, p. 76.

[226] Jarrod Hepburn, 'CETA's New Domestic Law Claus', *EJIL Talk* (17 March 2016), available at: https://www.ejiltalk.org/cetas-new-domestic-law-clause/.

Chapter III: Attribution in Context: Tailoring Rules for SOEs Across International Law

The fragmented nature of attribution has already been recognized in literature, demonstrating that various branches of international law apply distinct attribution tests, each tailored for its own context.[227] Attribution is not a universal concept that can be freely applied across legal subsystems, because each test is designed for a specific purpose and is only appropriate within its original legal framework.[228]

The legal status of SOEs in international law remains unsettled, largely due to the diverse and context-dependent roles these entities play across various legal regimes. The lack of uniform criteria for identifying SOEs in relevant areas of international law (investment protection, human rights WTO law, etc.) is sometimes described as 'classification chaos'.[229]

In the field of international investment law (IIL), SOEs may appear in multiple guises. First, they may be involved in conduct that amounts to a breach of investment treaties or other instruments that confer rights upon foreign investors, raising the question of whether such conduct can be attributed to the State for establishing international responsibility. Second, SOEs themselves may act as investors, thereby gaining access to rights under investment treaties – posing complex questions regarding their standing and the applicability of investor rights to State-affiliated entities. Third SOEs frequently enter into contracts directly with foreign investors, prompting legal debate over whether such contractual obligations can be attributed to the State.

Outside of investment law, SOEs also feature prominently in other fields of international law. In the context of human rights, for example, SOEs may be implicated in violations

[227] Gabor Kajtàr, 'Fragmentation of Attribution in International Law' in Gabor Kajtàr and others (eds), *Secondary Rules of Primary Importance – Attribution, Causality, Standard of Review and Evidentiary Rules in International Law* (Oxford University Press 2022), p. 299. Mark McLaughlin, 'Defining a State-Owned Enterprise in International Investment Agreements' (2019) 34 (3) *ICSID Review*, p. 596.

[228] Gabor Kajtàr, 'Fragmentation of Attribution in International Law' in Gabor Kajtàr and others (eds), *Secondary Rules of Primary Importance – Attribution, Causality, Standard of Review and Evidentiary Rules in International Law* (OUP 2022), p. 299.

[229] See: Darius Hashemolhosseini, Patricia Wiater, 'International law approaches to state-owned enterprises. Geopolitical instruments of states and/or private market players?' (2024) 62 (4) *Archiv des Völkerrechts (AVR)*, p. 430. Shixue Hu, 'Clash of Identifications: 'State Enterprises' in International Law' (2019) 19 *Business Law Journal*, p. 172. Specifically, on how to improve disciplines on SOE in international economic law see: Ines Willemyns, 'Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?' (2016) 19 *Journal of International Economic Law*, 657–680.

that give rise to State responsibility, again raising the issue of attribution. In the field of international trade law, SOEs may provide financial contributions to private producers, which in turn invites scrutiny under subsidy rules – specifically, whether such contributions constitute State subsidies within the meaning of the WTO's Agreement on Subsidies and Countervailing Measures. Given the multiplicity of roles that SOEs may assume, the question of whether their conduct (or contract) is attributable to the State is necessarily context specific. The appropriate legal standard for attribution must therefore be carefully tailored to the legal framework in which the SOEs operate.

Despite the diverse legal context in which SOEs operate, a constant element across all scenarios is the need to assess the nature, strength, and quality of the relationship between the SOE and the State. However, the criteria used to evaluate this connection vary depending on the legal framework and the specific question at hand.

For example, in the context of an alleged breach of investor's rights, the central inquiry typically revolves around whether the SOE in question qualifies as a *de facto* organ of the State, whether it exercised elements of governmental authority, or whether it acted under the direction or control of the State in performing the relevant conduct.

By contrast, when the issue pertains to whether a contract concluded by an SOE constitutes a State contract, entirely different considerations become relevant. The analysis may turn on whether SOE acted as a State representative, whether it was perceived as such by the investor and whether representations of the parties support that conclusion.

A further variation arises in the domain of international trade law and international human rights (see Sections 3 and 4 of this Chapter).

In sum, while the underlying question in each case pertains to the link between the State and the SOE, the criteria to establish that link are highly context dependent. The relevant standards differ depending on whether the inquiry concerns State responsibility, contractual obligations, or trade measures, each requiring a distinct analytical lens to assess the State's involvement or control.

This Chapter aims to explore the role of SOEs from the perspective of attribution, focusing on three key fields of international law: international investment law, international trade law and human rights law, preceded by an overview of general public international law (GPIL). The introductory section outlines the main rules of attribution, the legal context in which they operate, and the purposes they serve, drawing on the most relevant cases. The analysis then turns to how various matters (such as wrongful acts, human rights violations, contractual actions, financial contributions, and so on) may be attributed to the State, depending on the applicable legal framework.

1. General Public International Law

The conduct of all State organs and all entities empowered to exercise elements of governmental authority can be attributed to the State, when determining international State responsibility for wrongful acts.[230] Conversely, acts committed by private entities or individuals are not attributable to the State unless it can be shown that the State exercised effective control over their actions.

This subsection examines two landmark ICJ decisions that have significantly shaped the attribution of conduct under general international law. Although they are not specifically dealing with SOEs, they provide a starting point to this analysis, as they represent the building blocks of GPIL in the field of attribution.

In *Nicaragua*, the ICJ had to determine whether the acts committed by *contras* in Nicaragua were attributable to the U.S. in order to establish the U.S. responsibility for internationally wrongful acts. In other words, the Court had to determine:

> whether or not the relationship of the contras to the United States Government was so much one of *dependence* on the one side and *control* on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.[231]

The Court held that 'despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf.[232] The Court then proceeded to elaborate on the critical distinction between a State's general control over an armed group and its effective control over the specific

[230] Djamchid Momtaz, 'Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority' in James Crawford et al. (eds), *The Law of International Responsibility* (Oxford University Press 2010), p. 246.
[231] Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Judgment (27 June 1986), para 109.
[232] Ibid.

operation that gave rise to the internationally wrongful act. This distinction, as the ICJ articulated it, has become one of the most frequently cited and authoritative passages in the Court's jurisprudence:

> [The]United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, based on the evidence in the possession of the Court, *for the purpose of attributing to the United States* the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed.[233]

The purpose of attribution was central to the Court's reasoning. In assessing the nature and strength of the connection between the State and the entity in question, the Court was guided by the specific purpose for which the link was being evaluated – namely, establishing State responsibility under international law. The Court emphasized that general control exercised by the State over a given entity – even where the entity is highly dependent on the State – is insufficient, on its own, to justify attribution of the entity's conduct to the State. Instead, what must be demonstrated is that the State exercised effective control over the specific conduct that gave rise to the alleged violations. Attribution for determining international State responsibility requires an inquiry into whether the State directed or controlled the particular actions in question, rather than a mere showing of structural dependence or overarching supervision.

[233] Ibid, para 115 (emphasis added).

The ILC heavily relied on *Nicaragua* in its Commentary to Article 8 of the ARSIWA which deals with 'conduct directed or controlled by a State'.[234] The ILC explained that 'such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation'[235]. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.'[236]

Two other ARSIWA provisions relevant to attribution are Articles 4 and 5.

Article 4 addresses the conduct of organs of the State:

> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

At first glance, it may appear that Article 4 is of limited relevance for SOEs, as such entities usually do not possess the formal legal status of State organs. However, Article 4 became pertinent to the discussion surrounding the concept of *de facto* organs of the State.

It is often mentioned in literature that the concept of *de facto* organs was created in *Nicaragua*. It is, however, questionable whether the ICJ, in the *Nicaragua* case, intended to articulate a single unified test for attribution of conduct by private actors to the State, or whether it in fact delineated two distinct tests: one of complete control (what would later become Article 4 of the ARSIWA) and the other one of 'effective control' (what would become Article 8 of the ARSIWA).[237]

The Court's position was, in certain respects, ambiguous and open to interpretation. On the one hand, the Court stated that it must determine whether there existed a relationship

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[234] Article 8 of the ARSIWA: 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.'
[235] Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Commentary to Article 8, p. 47, para 3.
[236] Ibid.
[237] See James Crawford, *State Responsibility, The General Part* (Cambridge University Press 2013), p. 125, ft 73.

of dependence and control between the contras and the U.S. Government which would justify equating 'the contras, for legal purposes, with an organ of the U.S. Government'.[238] This language has often been cited in the literature as suggestive of the conceptual seeds of the idea of *de facto* organs – entities that, while not formally part of the State apparatus, function in practice as if they were.[239] However, other passages in the judgement strongly undermine the idea that the Court intended to develop a separate test based solely on complete dependence. In particular, the Court held:

> In sum, the evidence available to the Court indicates that the various forms of assistance provided to the contras by the United States have been crucial to the pursuit of their activities but is insufficient to demonstrate their complete dependence on United States aid. On the other hand, it indicates that in the initial years of United States assistance the contra force was so dependent. However, whether the United States Government at any stage devised the strategy and directed the tactics of the contras depends on the extent to which the United States made use of the *potential for control* inherent in that dependence. The Court already indicated that it has insufficient evidence to reach a finding on this point.[240]

This reasoning indicates that the Court did not treat complete dependence as sufficient on its own for attribution. Although there were periods (the initial years) when the contras were described as completely dependent on the U.S. the Court required evidence of actual direction or control over specific operations in order to attribute conduct. Thus, while the judgement may have gestured toward the notion of attribution through functional equivalence to an organ, it ultimately adhered to a conduct-based attribution framework.

Neither *de facto organs* nor the 'complete dependence test' is mentioned in the ILC Commentary to Article 4. The ILC Commentary merely states that, for determining the status of State organs, it is insufficient to refer to internal law. This is because 'in some

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[238] Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), ICJ Judgment (27 June 1986), para 109.
[239] See for example: Chester Brown, 'Article 4' in Andreas Kulick and Michael Waibel (eds.) *General International Law in International Investment Law, A Commentary* (Oxford University Press 2024), p. 255: articulating the 'complete dependence' test from Nicaragua, as a test for determining a *de facto* organ of the State.
[240] Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), ICJ Judgment (27 June 1986), para 110.

systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading'.[241]

The link between the 'complete dependence test' and the attribution of conduct to the State under Article 4 was made explicit in another ICJ landmark case on attribution – *Bosnia v. Serbia*. Here, the ICJ provided extensive analysis of Articles 4 and 8 of the ARSIWA.

The question before the Court was whether acts of certain persons and entities were attributable to the Respondent State. The Court framed the issue of attribution as comprising two questions: First, whether such acts were perpetrated by organs of the Respondent, i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action.[242] Second, provided that the first question is answered in the negative, 'it should be ascertained whether the acts in question were committed by persons who, while not organs of the Respondent, did nevertheless act on the *instructions* of, or under the *direction or control* of, the Respondent'.[243] In other words, the Court structured the issue of attribution around two key questions: first, whether the individuals and entities in question could be regarded as *de facto organs of the State*, as contemplated by Article 4; and second, whether their actions were carried out under the *direction and control* of the State, as addressed in Article 8.

When dealing with the first issue, the Court was investigating whether the entities and persons in question were 'under such strict control of the State that they must be treated as its organs *for purposes* of the necessary attribution leading to the State's responsibility for an internationally wrongful act'.[244] Thus, *the purpose* of attribution was clearly important to the Court. In other words, what the Court considered significant is the objective behind assessing whether certain entities could be regarded as *de facto* organs of the State. In the context of the judgment, the assessment served the objective of determining State responsibility for internationally wrongful acts. The Court further clarified this in the following terms:

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[241] Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Commentary to Article 4, para 11.
[242] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), ICJ Judgment (26 February 2007), para 384.
[243] Ibid (emphasis added).
[244] Ibid, para 391 (emphasis added).

> [A]ccording to the Court's jurisprudence, persons, groups of persons or entities may, *for purposes of international responsibility*, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument.[245]

Regarding the second question, the Court was investigating whether the entities in question acted in accordance with that State's instructions or under its "effective control".[246] Importantly, the Court clarified that it must be shown that:

> this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.

On this specific point, the Court articulated what has since become a frequently cited statement on the question of State responsibility for internationally wrongful acts. It clarified the relationship between the 'effective control' test and the 'overall control' test adopted by the ICTY Appeals Chamber in the *Tadic case*. The Court distinguished thresholds applicable in different legal contexts:

> Insofar as the "overall control" test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it *for purposes of the present Judgment*. On the other hand, the ICTY presented the "overall control" test as equally applicable under the law of State responsibility *for the purpose of determining* — as the Court is required to do in the present case — *when a State is responsible* for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.[247]

[245] Ibid, para 39 (emphasis added). The purpose is also mentioned in paras 393 and 397.
[246] Ibid, para 400.
[247] Ibid, para 404 (emphasis added).

The purpose of attribution is critical because it directly informs the required nature and degree of State involvement. As the Court explained, the threshold for attributing conduct to a State may vary depending on the legal objective for which attribution is being assessed. Specifically, the degree of control necessary to establish the existence of an international armed conflict differs from that required to establish State responsibility for an internationally wrongful act:

> It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.[248]

Finally, the Court did not express any explicit views on Article 5, which constitutes the final key provision in the attribution framework relevant to SOEs. Article 5 deals with 'conduct of persons or entities exercising elements of governmental authority' and it states:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to *exercise elements of the governmental authority* shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance. (emphasis added).

The crucial requirement of this Article is 'governmental authority'[249] or 'empowerment' of the entity to exercise public power.[250] As it focuses on the empowerment of the entity, as a formal requirement, Article 5 represents a 'narrow category of attribution' different from other rules of attribution based on factual relationship.[251]

[248] Ibid, para 405.
[249] Georgios Petrochilos, 'Attribution of Conduct of Non-State Organ Entities: An Introduction' in Shaheeza Lalani, Rodrigo Polanco Lazo (eds) *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series 2015), p. 535.
[250] Jorge Viñuales and Oliver Hailes, 'Article 5 of the ARSIWA – Conduct of empowered entities', in Andreas Kulick and Michael Waibel (eds) *General International Law in International Investment Law, A Commentary* (Oxford University Press 2024), p. 265.
[251] Ibid, p. 273.

There is a degree of disagreement in the literature on whether Article 5 requires that an entity exercise governmental authority over a specific conduct in question, or whether the mere possession of such authority suffices. Petrochilos argues that acting under the government authority does not imply such authority over a specific conduct:

> ILC Article 5 requires a showing that the entity in question acted "in the capacity" of an entity empowered to exercise governmental authority. The provision does not require a showing that the conduct in question was in itself an exercise of some special governmental powers, only that it was in the context of the exercise of governmental authority.[252]

Contrary to this view, Viñuales and Hailes contend that Article 5 is *limited to a specific conduct*. They explain that Article 5 requires the following:

> First, an entity must be 'empowered' by internal law to 'exercise elements of governmental authority' (…) Second, an entity must be exercising such power 'in a particular instance'.[253]

A crucial issue is how to determine such governmental authority. Petrochilos elaborates that State ownership over the entity in question, the legal status of the entity – a private commercial company or a public law agency, State funding, and State control over the entity are all factors that *are not decisive* for determining such authority (although they might serve as indicia).[254]

Thus, the mere fact that an entity is established and owned by the State is not sufficient for attribution under Article 5. The ARSIWA Commentary is also supports this view:

> The fact that the State initially establishes a corporate entity, whether by special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, *although owned by and in that sense subject to the control of the State* are considered to be separate, prima facie their carrying out their activities is

[252] Georgios Petrochilos, 'Attribution of Conduct of Non-State Organ Entities: An Introduction' in Shaheeza Lalani, Rodrigo Polanco Lazo (eds) *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series 2015), p. 535.
[253] Jorge Viñuales, Oliver Hailes, 'Article 5 of the ARSIWA – Conduct of empowered entities', in Andreas Kulick, Michael Waibel (eds) *General International Law in International Investment Law, A Commentary* (Oxford University Press 2024), p. 265.
[254] Georgios Petrochilos, 'Attribution of Conduct of Non-State Organ Entities: An Introduction' in Shaheeza Lalani and Rodrigo Polanco Lazo (eds) *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series 2015), p. 535.

> not attributable to the State unless they are *exercising elements of governmental authority*.[255]

The crucial element of Article 5 is the empowerment of SOE to exercise elements of governmental authority.[256]

To summarize, under GPIL there are three legal bases for attributing conduct of SOE to the State: first, when the entity qualifies as a State organ (which equates to the State's complete control); second, when the State exercises elements of governmental authority in a particular case; and third, when the entity acts under the effective control of the State in a particular case.

GPIL *does not focus on ownership* of the entity for determining State responsibility, but on 'the degree of State involvement in the affairs of the entity'.[257] The Guidelines of the Organization for Economic Co-operation and Development (OECD Guidelines) on SOEs 2024 define an SOE as 'any undertaking recognised by national law as an enterprise, and in which the State *exercises ownership or control*'.[258] The Guidelines further elaborate how can such control be exercised: through majority voting rights, corporate articles of association or arrangements which ensure continued State control over an enterprise (including veto rights on matters that confer decisive influence exercised by the state), when the State has the power to appoint a majority of the members of the board of directors, or equivalent management body, or has the powers to appoint the CEO, or can control the material decision-making of the enterprise through other means.[259] Thus, *State ownership and control* are already a *defining element* of SOEs.[260]

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[255] Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), p. 48 (emphasis added).

[256] Jorge Viñuales and Oliver Hailes, 'Article 5 of the ARSIWA – Conduct of empowered entities', in Andreas Kulick, Michael Waibel (eds) *General International Law in International Investment Law, A Commentary* (Oxford University Press 2024), p. 267.

[257] Mihaela Maria Barnes, *State-Owned Entities and Human Rights. The Role of International Law* (Cambridge University Press 2021), p. 67.

[258] OECD Guidelines on Corporate Governance of State-Owned Enterprises 2024, available at https://doi.org/10.1787/18a24f43-en (emphasis added). More on implementation of OECD Guidelines see Antonio Capobianco, Hans Christiansen, 'Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options', OECD Corporate Governance Working Papers No. 1 (OECD 2011).

[259] OECD Guidelines on Corporate Governance of State-Owned Enterprises 2024, available at https://doi.org/10.1787/18a24f43-en

[260] More on various structures of Chinese SOEs see in: Ji Li, 'State-Owned Enterprises in the Current Regime of Investor-State Arbitration' in Shaheeza Lalani and Rodrigo Polanco Lazo, *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series 2015), p. 380 et seq. The study explains actual control and management, relationship with the government, internal mechanisms of decision making. See also: Mitsuo Matsushita and C. L. Lim, 'Taming Leviathan as Merchant: Lingering

However, some authors argue that ownership is an important criterion, which should be considered when determining State responsibility. Barnes, for example, states that SOEs are conceptually different from privately owned entities and as such they are part of the public domain and cannot be a part of the private domain.[261] She stresses that in the practice of the European Court of Human Rights (ECtHR) and human rights treaty bodies, *the ownership over the entity* is 'an important criterion for determining the rights and obligations of the State that owns a given entity'.[262] Moreover, States can use SOEs for different objectives: to smooth the dramatic variations of the market, to rescue an industry affected by economic crisis, or to fill the State treasury with their revenue.[263] According to Barnes, it is difficult to understand how an entity created for the purpose of fulfilling public interest becomes a private actor when moving from the domestic to the international sphere.[264]

A counterargument is that contemporary ownership structures may render the determination of the true extent of State control increasingly complex or, in some cases, even practically impossible. As concluded in a recent World Bank report on State entities, 'new developments make the overall State ownership more multilayered and the true level of State control and influence more complex to assess than in the past'.[265] Apart from this, treating State ownership (an inherent characteristic of all SOEs) as an attribution test would lead to over-attribution.

Questions about the Practical Application of Trans-Pacific Partnership's State-Owned Enterprises Rules' (2020) 19 *World Trade Review*, p. 405: State does not have to be a majority owner in order to have control over the entity.

[261] Mihaela Maria Barnes, *State-Owned Entities and Human Rights. The Role of International Law* (Cambridge University Press 2021), pp. 68 69.

[262] Ibid, p. 67 – referring to *Leo R Hertzberg, Ulf Mansson, Astrid Nikula and Marko and Tuovi v Finland*, Human Rights Committee, Communication No 61/1979, UN Doc CCPR/C/OP/1 (1985), at p. 124, para 91.

[263] Shixue Hu, 'Clash of Identifications: 'State Enterprises' in International Law', (2019) 19 *Business Law Journal*, p. 174

[264] Mihaela Maria Barnes, *State-Owned Entities and Human Rights. The Role of International Law* (Cambridge University Press 2021), pp. 74, 75.

[265] World Bank, *The Business of the State* (Washington, DC, World Bank 2023) available at https://www.worldbank.org/en/publication/business-of-the-state, p. xvi: 'Because these new forms of ownership are seldom captured in a systematic way, the true state footprint has become more invisible and the frontier between state-owned and genuinely private firms more blurred.'

2. International Investment Law

Investment arbitration tribunals have not universally accepted the difference between traditional attribution (for determining State responsibility) and a broader concept of attribution (beyond determining State responsibility).[266]

Attribution (or more broadly, imputation) plays a significant and multifaceted role in international investment law (IIL). It takes several distinct forms, each corresponding to a specific legal context and purpose.

The first and most established form of attribution concerns the attribution of internationally wrongful acts to the State. An investment treaty violation is a typical example of an internationally wrongful act, and the question of attribution is central to establishing State responsibility. This form of attribution is arguably the most prominent in IIL. Where SOEs are involved, the question is typically whether their conduct can be attributed to the State under Articles 4,5 or 8 of the ARSIWA.

Second, attribution may arise through special rules that are unique to IIL. Bilateral and multilateral investment treaties may establish their own standards of attribution. They sometimes include provisions that define the 'Contracting Party' for identifying responsible entities. Such clauses may extend or limit attribution to SOEs, thereby departing from general rules of customary international law. These treaty-based rules can significantly shape attribution outcomes.[267]

Third, and central to the present thesis, is the issue of attribution of contracts – that is, the question whether a contract concluded by an SOE can be attributed to the State itself. This concerns not the attribution of wrongful conduct, but rather the identification of the parties to the contract. In such cases, the legal test must reflect the specific purpose of determining whether the State can be considered a party to the contractual relationship.

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[266] Gabor Kajtàr, 'Fragmentation of Attribution in International Law' in Gabor Kajtàr et al. (eds), *Secondary Rules of Primary Importance – Attribution, Causality, Standard of Review and Evidentiary Rules in International Law* (Oxford University Press 2022), p. 296.

[267] See for example: Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area, Article 10.1.2: 'A Party's obligations under this [Investment] Section shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party'. See also United States – Korea Free Trade Agreement, Article 11.1.3 'For purposes of this [Investment] Chapter, measures adopted or maintained by a Party means measures adopted or maintained by: (a) central, regional, or local governments and authorities; and (b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.'

Finally, another type of attribution arises when an SOE appears as a claimant in investment arbitration proceedings. In such cases, the question may be whether the entity qualifies as an investor given its close institutional or functional connection to the State. The question is not whether the acts or contracts of the entity can be attributed to the State, but rather whether the entity's legal identity is sufficiently distinct from the State.

These various forms of attribution, whether of acts, contracts, or legal personality, share a common focus on SOEs and their relationship to the State. Crucially, the applicable test depends on the objective of the attribution in each context. Whether the aim is to establish State responsibility, to determine contractual parties, or to assess investor status, the relevant rules will differ accordingly. This functional approach to attribution is the core theme of the present analysis.

2.1. General Rules of Attribution

This Section addresses the question of whether the investment tribunals have developed special rules and standards of attribution in the context of IIL, which diverge from GPIL. The conclusion is that they generally apply the ARSIWA rules of attribution, which are part of the GPIL. Such alignment is not surprising, and it is fully consistent with the central argument of this chapter – namely, that the attribution is purpose driven. The purpose of attributing conduct of the SOE, which has the potential to be qualified as an internationally wrongful acts, is to establish State responsibility, which is the exact purpose of attribution rules under GPIL.

Article 4 has frequently been invoked in investment disputes and has generally been interpreted in line with the jurisprudence of the ICJ and other international courts and tribunals.[268] Thus, this section will focus on Articles 5 and 8, with respect to which the literature has identified a potential departure of IIL from GPIL.

As mentioned earlier, the ICJ did not offer its interpretation of Article 5, neither in *Nicaragua* nor in *Bosnia* (landmark cases of GPIL discussed in Section 1 above). Thus, certain inconsistencies in the practice of investment tribunals probably arise from a lack

[268] Chester Brown, 'Article 4' in Andreas Kulick and Michael Waibel (eds) *General International Law in International Investment Law, A Commentary* (Oxford University Press 2024), p. 251. See also Stephan Wittich, 'Chapter 7: Investment arbitration as an engine of development of the rules of attribution - with particular focus on lex specialis and de facto state organs', in Christian Tams, Stephan Schill, and Rainer Hofmann (eds) *International Investment Law and General International Law* (Edward Elgar Publishing 2023): 'Tribunals in investment arbitration have generally been very compliant in adopting the concept of de facto organs'.

of authoritative interpretation, rather than from intentional divergence of the investment tribunals from GPIL.

Much discussion arose from the famous *Mafezzini* decision. In this case, the Claimant argued that actions and omissions of the SODIGA (the agency for industrial development of Galicia) affected his investment and were attributable to the Kingdom of Spain.[269] On the contrary, Spain argued that SODIGA's acts and omissions were not attributable to the State, because SODIGA was a private corporation, and the State's ownership of a part of its shares did not alter its private commercial character.[270]

The Tribunal applied the so called 'functional test'. It held that this functional test was applied in *Ceskoslovenska Obchodni Banka, A. S. v. the Slovak Republic* for defining a national of a Contracting State in order to establish ICSID jurisdiction under Article 25 of the ICSID Convention.[271] In *CSOB*, the Tribunal held that the Claimant had standing as long as its activities were 'essentially commercial rather than governmental in nature'. The *Mafezzini* Tribunal relied on this position and held:

> By the same token, a private corporation operating for profit while discharging essentially governmental functions delegated to it by the State could, under the functional test, be considered as an organ of the State and thus engage the State's international responsibility for wrongful acts.[272]

The Tribunal concluded that functions of the entity in question were: 'the undertaking of studies for the introduction of new industries into Galicia, seeking and soliciting such new industries, investing in new enterprises, processing loan applications with official sources of financing, providing guarantees for such loans, and providing technical assistance' and 'providing subsidies and offering other inducements for the development of industries.'[273] The Tribunal found that:

> Many of these objectives and functions are by their very nature typically governmental tasks, not usually carried out by private entities, and, therefore, cannot normally be considered to have a commercial nature.[274]

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[269] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (English) (25 January 2000), para 72.
[270] Ibid, para 73.
[271] Ibid, para 80.
[272] Ibid.
[273] Ibid, para 86.
[274] Ibid.

On this basis, the Tribunal held that SODIGA was *prima facie* a State entity acting on behalf of the Kingdom of Spain.[275] In the merits phase, the Tribunal confirmed this *prima facie* determination.[276]

This reasoning has attracted some scholarly criticism, especially considering the divergent approach later adopted in Article 5 of the ARSIWA. As argued in literature, the central to this functional test is *the function or purpose* of the entity in question.[277] However, Article 5 hinges not on the purpose or function of the entity, but on whether the entity has been *empowered* to exercise elements of governmental authority.[278] There is a conceptual distinction between an entity's governmental authority and its public function, meaning that the *Mafezzini* test is inconsistent with the customary rule of attribution codified in Article 5 of the ARSIWA.[279]

This criticism appears well-founded, particularly given that the *Mafezzini* Tribunal relied on a functional test formulated by *CSOB* developed for a different *purpose* – defining a national of a Contracting State in order to establish ICSID jurisdiction under Article 25.

The transposition of that test to the distinct context in *Mafezzini* led to the 'anomalous results'.[280] Various acts, which belong to the areas of commercial activities, were attributed to the State on this basis: 'contractual and lease terminations by independent entities concerning water management, forestry, civil aviation, or road construction'.[281]

This example aptly illustrates the importance of the specific *purpose* of attribution. The *Mafezzini* Tribunal relied on a functional test developed for determining *whether an SOE could qualify as an investor under* Article 25 of the ISCID Convention. In that context, the (governmental) function of the entity may indeed be decisive. However, this test is ill-suited for attribution under the ARSIWA Article 5, where the appropriate inquiry is not the function of the entity, but whether the entity was *empowered* to exercise elements of governmental authority.

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[275] Ibid, para 89.
[276] Ibid, para 47.
[277] Jorge Viñuales and Oliver Hailes, 'Article 5 of the ARSIWA – Conduct of empowered entities', in Andreas Kulick, Michael Waibel (eds) *General International Law in International Investment Law, A Commentary* (Oxford University Press 2024), p. 270.
[278] Ibid.
[279] Ibid.
[280] Ibid.
[281] Ibid.

In relation to the ARSIWA Article 8, the issue arose whether the standards developed under GPIL are applicable within IIL, or whether IIL operates under distinct attribution standards.

In *Bayindir v Pakistan*, the National Highway Authority of Pakistan (NHA), a public corporation controlled by the Government of Pakistan, entered into a contract with an investor. The Tribunal held that the entity exercised its contractual rights 'in a manner allegedly in breach of the Treaty'.[282] The crucial question then was whether such an act could be attributed to the State of Pakistan.[283] The Tribunal held that NHA's conduct was attributable to Pakistan under Article 8 of the ARSIWA because 'each specific act allegedly in breach of the Treaty was a direct consequence of the decision of the NHA to terminate the Contract, which decision received express clearance from the Pakistani Government'.[284]

What is particularly noteworthy about this case is that the Tribunal held that the attribution standard under Article 8 of the ARSIWA, which requires a high threshold of control, is not always well-suited for the realities of international economic law. Thus, the Tribunal appeared to suggest that the approach within international economic law may be somewhat more flexible and relaxed:

> Finally, the Tribunal is aware that the levels of control required for a finding of attribution under Article 8 in other factual contexts, such as foreign armed intervention or international criminal responsibility, may be different. It believes, however, that the approach developed in such areas of international law is not always adapted to the *realities of international economic law* and that they should not prevent a finding of attribution if the specific facts of an investment dispute so warrant.[285]

The 'effective control' test developed under GPIL is not mentioned in this decision at all. However, despite this, references to the ARSIWA Article 8 in investment arbitration cases since 2010 suggest a departure from this 'more flexible' interpretation and indicate that investment tribunals have generally endorsed the high threshold of effective control

[282] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (I), ICSID Case No. ARB/03/29, Award (27 August 2009), para 117.
[283]Ibid.
[284] Ibid, para 125
[285] Ibid, para 130 (emphasis added).

as established under GPIL.[286] In sum, the attribution rules applied in GPIL and IIL for the purpose of determining international State responsibility are the same.[287]

While some cases show certain divergence from GPIL standards of attribution in the context of IIL, it is fair to conclude that investment tribunals relied heavily on ARSIWA rules of attribution when attributing an alleged treaty breach (or internationally wrongful acts) to the States. There are no clearly formulated special attribution rules applied in investment disputes, and the applicable rules are those of GPIL as codified in the ARSIWA.[288] Such reliance on the ARSIWA is completely justified, given that these rules deal with the attribution of conduct capable of being qualified as international wrongful act.

In conclusion, when dealing with *the attribution of conduct* by SOE in the context of IIL, for instance, where an SOE breaches a contract with a private investor or otherwise acts in a manner which allegedly violates State treaty obligations – the central issue becomes whether such conduct can be attributed to the State, and the ARSIWA apply. This is because the process of attribution fundamentally concerns the determination of State responsibility for internationally wrongful acts. The ARSIWA was specifically developed for this purpose, providing a comprehensive framework to assess when the conduct of entities, including SOEs, can be considered an act of the State under international law. Therefore, the ARSIWA rules of attribution are both relevant and appropriate in such cases.

2.2. Special Rules of Attribution

While the general rules of attribution applicable in both GPIL and IIL serve the same objective, namely the establishment of State responsibility, and are substantively the same, certain special rules of attribution may nonetheless arise from specific treaty provisions found in bilateral investment treaties (BITs) multilateral investment treaties (MITs). This section aims to examine certain special rules of attribution which may arise from such treaty provisions.

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286 Esme Shirlow and Kabir Duggal, 'The ILC Articles on State Responsibility in Investment Treaty Arbitration' (2022) 37 (1-2) *ICSID Review*, p. 383.

287 See conclusion of Jorge Viñuales and Alina Papanastasiou, 'Article 8 of the ARSIWA: Attribution of Conduct Instructed, Directed or Controlled by a State' in Andreas Kulick and Michael Waibel (eds) *General International Law in International Investment Law: A Commentary* (Oxford University Press 2024), p. 311

288 Jorge E. Viñuales, 'Attribution of conduct to States in investment arbitration' (2022) 20 *ICSID Reports*, para 49.

Milanovic argues that a distinction must be made between *special rules on attribution of conduct* and the *scope of State obligations*.[289] He explains that the ILC provides no good example of special rules of attribution.[290] For example, he deals with the Convention against Torture (CAT), which the ILC provides as an example to support the following sentence

> a particular treaty might impose obligations on a State but define the 'State' for that purpose in a way which produces different consequences than would otherwise flow from the rules of attribution in chapter II [ARSIWA].[291]

As further elaborated by the ILC, Article 1 of the CAT only applies to torture committed 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. Contrary to the ILC Commentary, Milanovic argues that the CAT *does not* lay down rules that are narrower than the basis for attribution of conduct in ARS.[292] What the Convention does is define the concept of torture, thereby requiring it to be committed by a 'public official or other person acting in an official capacity or at the instigation or with the consent or acquiescence of such a person.'[293] However, there is no special rule of attribution.[294] Milanovic concludes that 'a rule that modifies the breach of State obligations element of an internationally wrongful act under Article 2(b) ASR, and not the attribution element per Article 2(a) ASR, is not a special rule of attribution'.[295]

While the distinction between rule of attribution and a primary obligation holds in principle, in practice special rules of attribution are tied to the specific primary

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[289] Marko Milanovic, 'Special Rules of Attribution of Conduct in International Law' (2020) 96 *International Law Studies*, p. 311.
[290] Ibid, p. 314.
[291] Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) with commentaries (2001), Commentary to Article 55, p. 140, fn. 820.
[292] Marko Milanovic, 'Special Rules of Attribution of Conduct in International Law' (2020) 96 *International Law Studies*, p. 311.
[293] Ibid, p. 312.
[294] Ibid. Although I agree with Milanovic in principle on this point, in defence of the ILC, its focus was on the *consequences* (as the sentence quoted above shows). The question is whether the rule limiting the scope of State obligations and the rule on limiting the scope of attribution would have different consequences. It seems that the consequence of the fact that torture, as defined by the CAT, does not cover the acts of private individuals, is the same as the consequence of a provision limiting the attribution of the acts of private parties to the State – State would not be responsible for the torture of private individuals.
[295] Marko Milanovic, 'Special Rules of Attribution of Conduct in International Law' (2020) 96 *International Law Studies,* p. 316.

obligations in question.[296] As illustrated by the following NAFTA cases, the line between the two can be exceedingly fine. Crucial NAFTA provision is Article 1503 (2):

> Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapters Eleven (Investment) and Fourteen (Financial Services) wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges.

A prominent NAFTA case where this provision was analysed is *UPS v Canada*. In this case, UPS argued that actions of the SOE Canada Post, which are alleged to be in breach of NAFTA Articles 1102 (Investment - National Treatment) and 1105 (Investment - Minimum Standard of Treatment), were attributable to Canada based on Articles 4 and 5 of the ARSIWA.[297] Canada, however, argued that NAFTA provided for special provisions relating to attribution, meaning that residual rules of attribution contained in the ARSIWA must be displaced.[298] The Tribunal sided with Canada, holding that Articles 1502-03 NAFTA presented *lex specialis* rules of attribution, thereby excluding the application of the ARSIWA rules of attribution.[299]

Another NAFTA decision - *Mesa Power v Canada* – adopted the same approach. The Tribunal held:

> The NAFTA thus establishes a special regime which distinguishes between a NAFTA Party and its enterprises, specifies what control obligations the former has over the latter, and thus organises the NAFTA Party’s responsibility for acts of its enterprises. This regime cannot be displaced by the ILC Articles, which, as mentioned above, are residual in nature. (…) As a consequence, the responsibility regime arising from Article 1503(2) prevails over the residual rules of Article 5 of the ILC Articles. The acts of the [three entities] will accordingly be attributable to

[296] Ibid, p. 305.
[297] *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on Merits (24 May 2007), para 45.
[298] Ibid, para 55.
[299] Ibid, para 62.

> Canada if these enterprises were exercising regulatory, administrative or other governmental authority as specified in Article 1503(2) when they carried out the acts in question.[300]

Although in both cases Article 1503 (2) was applied as *lex specialis* rule of attribution, there is an argument in literature that such obligation could be interpreted as primary rule of international law, which specify which primary NAFTA rules govern the conduct of State enterprises.[301] Indeed, the rule imposes an obligation on the State Party to make sure that its State enterprises act in a manner which is consistent with State obligations under this treaty. If the enterprise acts in a manner which is inconsistent with treaty obligations of the State, this can entail State responsibility. However, the State is not responsible for the acts of State enterprises, but for its failure to act in a way required by the treaty.

A similar question arose in *Al Tamimi* in a dispute between a U.S. citizen and the Sultanate of Oman. The issue was whether the acts of Oman Mining Company LLC (OMCO), an Omani SOE, were attributable to the Sultanate of Oman. The Tribunal relied on Article 10.1.2. of the applicable US–Omani Free Trade Agreement as a *special rule of attribution*. This provision states:

> A Party's obligations under this Section shall apply to a State enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party.[302]

The Tribunal held that this provision 'sets out a relatively narrow test for the circumstances under which the actions of a State enterprise may be attributed to the State' and that the test under this provision 'may be narrower in some respects than the test for State responsibility under customary international law'.[303] The Tribunal's holding on this point fails to distinguish between the *scope of a treaty obligation* (which is here limited to the State enterprises) and *the rules of attribution*. Technically, framing this provision as a *lex specialis* rule on attribution was not necessary, since the Tribunal could have held that the State's treaty obligations were limited in scope. Thus, the State

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[300] *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award (24 March 2016), para 362.
[301] Jorge E. Viñuales, 'Attribution of conduct to States in investment arbitration' (2022) 20 *ICSID Reports*, para 33
[302] The United States – Oman Free Trade Agreement (2009).
[303] *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (3 November 2015), paras 318 and 320.

is not responsible for certain acts of the SOEs because State responsibility is determined by the scope of its primary obligations (and certain types of conduct of such entities fall outside of that scope). Lack of State responsibility is not a consequence of the lack of attribution. Accordingly, the absence of State responsibility arises from the limited scope of its primary obligation and not from the lack of attribution. Despite the 'technical' distinction between the scope of treaty obligation and the rule of attribution, the practical outcome is the same.

A similar and more recent case provides a better example of the special rule of attribution – *Mason v Korea*. Article 11.1.3 of the applicable free trade agreement, *United States – Korea Free Trade Agreement,* provides:

> For purposes of this [Investment] Chapter, measures adopted or maintained by a Party means measures adopted or maintained by:
>
> (a) central, regional, or local governments and authorities; and
>
> (b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.[304]

This treaty provision deals with the attribution of conduct, and it can be characterized as a special rule of attribution. The Tribunal held:

> Article 11.1.3 of the FTA deals with State attribution and sets out two grounds for attribution of measures adopted or maintained by (a) central, regional or local governments and authorities and (b) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities. Based on the provision's ordinary meaning, these two instances are the sole grounds for State attribution under the Treaty, thereby excluding the application of the ILC Articles insofar as they provide for broader attribution. The wording of Article 11.1(3) of the FTA is formulated in such way that it can only be understood as an exhaustive and self-contained list of the grounds for State attribution.[305]

Unlike the FTA provision in *Al Tamimi*, which deals with the scope of primary State obligation, this provision defines organs and bodies whose acts can be attributed to the

[304] The United States – Korea Free Trade Agreement (2012).
[305] *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, Final Award (11 April 2024) para 463.

State for the purposes of this treaty, and as such represents a secondary rule of attribution.

This thesis builds upon this distinction between the *scope of State obligations* under a treaty and the *attribution of conduct* to the State. Whether the treaty obligations encompass the SOEs is a different issue from whether the acts of such entities can be attributed to the State. Similarly, as argued in this thesis, the question whether the contractual obligations of the State-owned entities can be extended to the State as a non-signatory is analytically separate from the question whether the acts of such entities are attributable to the State for establishing State responsibility.

2.3. Attribution of Contracts

The ARSIWA rules of attribution are conceptually distinct from both questions of contractual responsibility and the determination of who is bound by a contract, and they do not govern either. This distinction is particularly relevant in the context of this dissertation, as it underscores the central importance of what attribution seeks to accomplish. Specifically, the attribution of conduct to the State in order to establish international responsibility operates under a different rationale and legal framework than the attribution of rights and obligations under a contract.

An illustrative case is *Niko v Bangladesh*. The Tribunal's jurisdiction was based on the arbitration clauses in contracts concluded between SOEs in the oil and gas sector and the investor. Although Bangladesh was not a party to the contracts, Claimant relied on the ARSIWA attribution rules to establish the Tribunal's jurisdiction over the State of Bangladesh.[306] The Tribunal pointed out that such attribution is relevant for determining a violation of the State's international obligations. It held: 'the issue to be considered here is *not the responsibility of Bangladesh* for acts by Petrobangla and BAPEX but the question whether *Bangladesh has consented to arbitrate* with the Claimant'.[307] It concluded that the Government had not agreed to ICSID arbitration and that attribution of the actions of certain SOEs to Bangladesh could not justify the conclusion that Bangladesh agreed to arbitrate the contract disputes with the investor.[308]

[306] *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No. ARB/10/18, Decision on Jurisdiction (19 August 2013), paras 242, 243.
[307] Ibid, para 246 (emphasis added).
[308] Ibid, para 268.

Similarly, in *Veolia v. Egypt*, the Tribunal explained that a contract is *not* an act *capable of being attributed* under the ARSIWA rules of attribution, because a contract as such does not represent a treaty breach (or generally, an internationally wrongful act). It held:

> The Tribunal records at the outset that it is not particularly useful or appropriate to consider questions of attribution in the abstract. What must be capable of being attributed to the State pursuant to Article 2 of the Articles on State Responsibility, which lays down the elements of the internationally wrongful act, are the precise acts or omissions that are alleged to constitute a breach of the primary obligation and not otherwise. The question of whether the act of the Governorate of Alexandria *in entering into the Contract* with Veolia Propreté is attributable to Egypt is irrelevant to this inquiry because the Claimants do not suggest that the Governorate's act of concluding the Contract with Veolia Propreté was a violation of the BIT. In other words, this is not the act that must be attributed to Egypt to establish the international responsibility of Egypt under the BIT.[309]

This holding clearly indicates the significance of the rationale for attribution. Attribution is not a purely formal exercise – it serves a specific objective. Where the aim is to establish international State responsibility for an allegedly wrongful act, the application of the attribution rules set out in the ARSIWA is appropriate. However, if the conduct in question does not potentially constitute an internationally wrongful act, there is no clear legal basis for invoking these rules. In other words, before applying the ARSIWA rules of attribution, one must first determine whether the act can engage State responsibility under international law. Once such an act is properly attributed to the State, international responsibility follows. By contrast, when the aim is to determine whether the State entered into a contractual relationship with an investor, the ARSIWA are not an appropriate legal framework. In such cases, attribution must be assessed in light of principles of contract and agency law (framed as general principles of law in this thesis).

[309] *Veolia Propreté v. Arab Republic of Egypt*, ICSID Case No. ARB/12/15, Award Final Awards on Jurisdiction, Merits or Damages (25 May 2018), para 119 (emphasis added).

Nevertheless, many investment tribunals conflate contractual responsibility with the attribution of conduct for establishing internationally wrongful acts under the laws of State responsibility.[310]

For instance, in *Sehil v. Turkmenistan,* the investor entered into contracts with numerous SOEs. The Respondent State argued that it is not a party to any of the disputed contracts. It argued that the SOEs, which concluded contracts with the investor, acted as 'ordinary contracting parties', and that their acts and omissions cannot be characterized as internationally wrongful and attributable to the State.[311] The Tribunal pointed out that this Respondent's argument 'blends two separate inquiries into one' – namely, under Article 2 of the ARSIWA there are two elements of an internationally wrongful act: the act is attributable to the State and it constitutes a breach of international obligation.[312] The Tribunal held that 'one must *first determine whether an act is attributable to the State* before assessing whether the act can be deemed to be in breach of an international obligation'.[313] The following paragraphs illustrate the Tribunal's reasoning:

> [P]rior to reaching any conclusions on whether the alleged breach of the Disputed Contracts was a simple commercial breach (i.e. one in which any commercial entity could have engaged) or if it was sovereign in nature, the Tribunal must first determine the extent to which the *conduct of various Turkmen entities can be attributed* to the State. It is only if the Tribunal determines that conduct may properly be attributable to Respondent that, at the second stage of the inquiry, it will analyse whether the alleged breaches of contract can be characterized as breaches of international law under the BIT, taking into account the conduct of the various State organs and State-owned companies.[314]

The Tribunal then held that certain entities qualified as State organs under Article 4 of the ARSIWA and thus all of their conduct was attributable to the State.[315] It relied on the ILC Commentary and held that '*the entry into* or *breach of a contract* by a State organ is (…) an act of the State for the purposes of Article 4, and it might in certain

[310] Esmé Shirlow and Kabir Duggal, 'The ILC Articles on State Responsibility in Investment Treaty Arbitration' (2022) 37 *ICSID Review*, p. 384.
[311] *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Final Awards on Jurisdiction, Merits or Damages (4 May 2021), para 735.
[312] Ibid, para 735.
[313] Ibid, para 737 (emphasis added).
[314] Ibid, para 739 (emphasis added).
[315] Ibid, para 743.

circumstances amount to an *internationally wrongful act*'.[316] However, this line of reasoning is problematic. The entry into contract and breach of contract are not the same thing. The breach of contract, which at the same time can be characterized as a treaty breach, can become an internationally wrongful act. On the contrary, entry into a contract cannot be qualified as an internationally wrongful act – entry into a contract is not capable of being qualified as a treaty breach. In this case, while the Tribunal explained how a contract breach can become a treaty breach, it did not explain how entering into a contract can become an internationally wrongful act:

> Of course, breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party.[317]

The CPTPP provides a good example of a treaty which intended to contain two distinct attribution frameworks.

First, as already explained (see Chapter I, Section 1) provisions of the original Article 9.1. of the CPTPP (now suspended) defined 'investment agreement' as an agreement between 'authority at the central level of the government of a Party' and an investor or covered investment of another Party. Authority at the central level of the State was defined in a way which specifically excludes governmental agencies or organs with separate legal personality, unless they were under the *direction or control of the government*.[318] This provision would operate as a treaty-specific rule of attribution of contract, determining which contracts bind the State for treaty protection and investor-State arbitration.

Separately, Article 9.2. of CPTPP addresses the scope of the treaty. This provision states:

> A Party's obligations under this Chapter shall apply to measures adopted or maintained by:

[316] Ibid, para 744 (emphasis added).
[317] Ibid.
[318] Footnote 7 (suspended) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018).

> (a) the central, regional or local governments or authorities of that Party; and
>
> (b) any person, including a State enterprise or any other body, when it exercises any governmental authority delegated to it by central, regional or local governments or authorities of that Party.

Footnote 13 further clarifies governmental authority:

> For greater certainty, governmental authority is delegated under the Party's law, including through a legislative grant or a government order, directive or other action transferring or authorising the exercise of governmental authority.

This can be qualified as a special rule of attribution of conduct, specifying which actor's behaviours can give rise to State responsibility under the treaty. It captures traditional State organs, SOEs, and private entities when exercising delegated governmental authority. Although one could argue that this provision represents a primary rule – limiting the scope of the obligation to certain entities, the practical outcome is the same. It makes little difference whether we interpret the provision as imposing the obligation only on specific entities whose conduct is then attributable to the State, or as identifying which entities' acts are to be considered as acts of the State.

The same treaty contained two provisions on attribution: one addressing contract attribution and the other addressing conduct attribution. Both represent special rules of attribution that displace the application of general attribution rules under international law.

Let us consider a hypothetical example involving SOE with a separate legal personality. Under the original version of Article 9.1. if it can be demonstrated that the entity operated under the direction or control of the central government, this would be sufficient to qualify a written agreement that the entity concluded with an investor as a protected 'investment agreement' under Article 9.1. In such a case, the investor could invoke the treaty's dispute resolution mechanism and allege a breach of that agreement.

However, when it comes to attribution of conduct, when the same entity takes measures adversely affecting the investor, mere direction and control by the government will not be sufficient. Under Article 9.2, the attribution of such conduct to the State requires that the entity exercised delegated governmental authority.

This example illustrates how the treaty distinguishes standards for attributing contractual obligations and those for attributing conduct in order to establish State responsibility. Although relevant provisions of Article 9.1 are suspended to narrow the scope of Investor-State Dispute Settlement, and exclude investment contracts, the comparison of the two provisions is still useful for understanding the difference between contract attribution (to determine parties to the agreement) and conduct attribution (to establish international state responsibility).

2.4. SOE as Claimants

SOEs can act as foreign investors.[319] Investment treaties rarely distinguish between State-owned and privately-owned enterprises. This means that SOE may appear as claimants or investors in the proceedings against the host States, unless the applicable investment treaty provides otherwise. However, the ICSID Convention clearly prevents ICSID tribunals from arbitrating disputes between States. Article 25 (1) of the ICSID Convention states:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) *and a national of another Contracting State*, which the parties to the dispute consent in writing to submit to the Centre. (emphasis added).

When the SOE initiates an investment claim against another (host) State, the tribunal will naturally examine the connection between the SOE and the State that owns it.[320] Such a connection may prevent the Tribunal from assuming jurisdiction over the SOE as the claimant. If the connection between the two is of such a nature that arbitrating SOE's claim would be the same as arbitrating the State's claim against another (host) State, the ICSID Tribunal cannot establish jurisdiction.

[319] Carney explains that they can also engage in 'increasingly aggressive foreign investment behaviour', see: Richard W. Carney, *Authoritarian Capitalism. Sovereign Wealth Funds and State-Owned Enterprises in East Asia and Beyond* (Cambridge University Press 2018), p. 2.

[320] For a detailed analysis if Chinese influence over SOE in the context of FDI, see Randall W. Stone, Yu Wang, and Shu Yu, 'Chinese Power and the State-Owned Enterprise' 2022 (76) *International Organization*, pp. 229–50.

The first case in which this issue arose was *CSOB v Slovakia.* Here, an SOE appeared as the Claimant. As previously noted, this case provided the foundation for the *Mafezzini* Tribunal's adoption of the well-known functional test. To determine whether an SOE can qualify as an investor, the CSOB Tribunal applied the Broches test, which both parties accepted. The test provides as follows:

> for purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an *agent for the government* or is discharging an essentially *governmental function*.[321]

The Tribunal strongly focused on the *nature of the activities* in question, instead of their purpose. Although State policies drove the activities of the SOE (certain banking transactions), they 'did not lose their commercial nature', the Tribunal concluded.[322] This reasoning has been subject to some criticism in literature, particularly on the ground that the Tribunal failed to take into account the motivations driving the SOE's activities.[323] It is argued that customary rule reflected in Article 5 of the ARSIWA should be applied, and this rule takes into account such motivations, by taking into account not only of the nature, but also the purpose of an SOE's activities.[324] This thesis argues, however, that the purpose *of attribution* dictates the attribution framework to be applied, not the purpose of the SOE's activities.

A second case in which the matter arose is *Masdar v Spain*.[325] The question in this case was whether the Claimant (a Dutch private company with the majority ownership held by a wholly owned subsidiary of another company controlled by the Government of Abu Dhabi) could be equated to the State of Abu Dhabi. An affirmative answer to this question would have implied a denial of the Tribunal's jurisdiction due to the absence of the requirement outlined in Article 25 of the ICSID Convention.[326]

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[321] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (24 May 1999), para 17 (emphasis added).
[322] Ibid, paras 20,21.
[323] Mark Feldman, 'State-Owned Enterprises as Claimants in International Investment Arbitration', (2016) 31 (1) *ICSID Review*, p. 34
[324] Ibid, p. 35
[325] *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award (16 May 2018).
[326] Ibid, para 145.

The Tribunal started its analysis by stating that 'in order for an act to be attributed to a State, it must have a *close link to the State*'.[327] Then, it held that Articles 4,5, and 8 of the ARSIWA must be applied to determine such a link to the State.[328] Interestingly, the Tribunal also held that it 'adopts the reasoning of the Tribunal in CSOB' (where the test was whether an entity in question was 'acting as an agent for the government or is discharging an essentially government function').[329] This means that the Tribunal conflated attribution based on the ARSIWA with the Broches test.

A similar conflation of distinct attribution tests occurred in *Beijing Urban Construction v. Yemen*. This case provides a useful context for illustrating the importance of distinguishing between the different objectives of attribution. Beijing Urban Construction Group (BUCG), a publicly funded and wholly State-owned entity established by the Chinese Government, concluded a construction contract for building an airport terminal with the Yemen Civil Aviation and Meteorology Authority (CAMA). BUCG initiated ICSID arbitration proceedings against Yemen, arguing that it was unlawfully deprived of its investment because the Respondent's military and other security forces prevented it from performing its contractual obligations. Respondent argued that because BUCG is linked to the State, the Tribunal lacks jurisdiction *ratione personae* based on Article 25 (1) of the ICSID Convention, which excludes inter-State disputes from the jurisdiction of ICSID tribunals.

The Tribunal held that Article 25(1) of the ICSID Convention 'is *not open to State-owned companies as claimants* when acting as *agents of the State* or when engaged in activities where they *exercise governmental functions*'.[330] The Parties agreed that the matter should be resolved based on the Broches' test:

> [I]n today's world the classical distinction between private and public investment, based on the source of the capital, is no longer meaningful, if not outdated. There are many companies which combine capital from private and governmental sources and corporations all of whose shares are owned by the government, but who are practically indistinguishable from the completely privately owned enterprise both in their legal

[327] Ibid, para 168 (emphasis added).
[328] Ibid.
[329] Ibid, para 170.
[330] *Beijing Urban Construction v. Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction (31 May 2017), para 31 (emphasis added).

> characteristics and in their activities. It would seem, therefore, that for purposes of the Convention a mixed economy company or government owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as *an agent for the government* or is discharging an essentially *governmental function*.[331]

The Tribunal connected this test to Articles 5 and 8 of the ARSIWA, holding that '[t]he *Broches* factors are the mirror image of the attribution rules in Articles 5 and 8 of the ILC's Articles on State Responsibility'.[332] However, it seems that the Tribunal did not in fact apply these rules of attribution.[333] The international legal rules on attribution are 'inoperative' for determining the Tribunal's jurisdiction over the SOEs as claimants.[334] Thus, to establish its jurisdiction over an SOE as claimant, the Tribunal would have to determine 'whether a claimant's links to a State are such that they preclude its right of action'.[335] This should not be conflated with the issue of attribution of conduct in the context of State responsibility.[336]

Indeed, the Tribunal clearly applied only the Broches test when determining the relevance of the link between the BUCG and the Chinese Government in order to establish its jurisdiction over BUCG as an investor. It first held that in building the airport terminal there was no evidence that 'BUCG was *acting as an agent* of the Chinese State in any relevant sense of the word "agent"'.[337] It explained that BUCG was performing its works as a 'commercial contractor, and not as an agent of the Chinese government'.[338] Second, the Tribunal concluded that 'BUCG was clearly *not exercising a Chinese governmental function* on the airport site in Yemen'.[339] It held that the fact that the 'Chinese State is the ultimate decision maker for BUCG was too remote' to be relevant.[340] The Tribunal made no further reference to Articles 5 and 8 of the ARSIWA.

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[331] Ibid, para 33 (emphasis added).
[332] Ibid, para 34.
[333] Jorge E. Viñuales, 'Attribution of conduct to States in investment arbitration' (2022) 20 *ICSID Reports* 13-95, para 41.
[334] Ibid, para 18.
[335] Ibid.
[336] Ibid.
[337] *Beijing Urban Construction v. Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction (31 May 2017), para 39.
[338] Ibid, para 41
[339] Ibid, para 43.
[340] Ibid.

Based on these three cases, it can be concluded that tribunals have not applied a uniform test to determine whether a particular State entity qualifies as a national of another Contracting State for the purposes of Article 25 (1) of the ICSID Convention. Tribunals relied either on the Broches test, the ARSIWA attribution rules, or both.[341]

Nisugi argues that the ARSIWA attribution standards are irrelevant to Article 25 of the ICSID Convention because of the 'distinction between these two attribution dimensions' – the ARSIWA rules deal with the attribution of conduct, while Article 25 of the ICSID Convention deals with the attribution of the status of a national.[342]

What the Broches test essentially requires is an examination of the nature of the entity's activities – whether they are commercial or governmental. The purpose of the test is to exclude the Tribunal's jurisdiction in cases where SOEs function merely as instruments of the State, lacking the commercial independence necessary to qualify as protected investors under the ICSID Convention. The Broches test must be interpreted within the broader aim of the Convention which is to encourage and facilitate the flow of international investments. Accordingly, the approach is inclusive: entities should not be excluded from the definition of 'investor' unless they exhibit a clear and strong connection with the State, such as they effectively function as State agents or perform governmental functions. The aim is to ensure that entities with commercial independence are afforded protection under the Convention. In contrast, attribution under the ARSIWA serves a very different purpose – to determine State responsibility for a specific conduct. The test requires a clear and direct connection between the State and the *conduct* in question.

To illustrate the divergence in purpose and its implications for attribution, it is useful to consider the following example: A State-owned oil company enters into a commercial contract abroad. In the context of an investment treaty claim, the host State may challenge the company's status as a protected investor under Article 25 of the ICSID Convention, arguing that it was acting on behalf of the State of origin and not as an independent commercial actor. To decline jurisdiction on this basis, the Tribunal would need to determine, in the alternative, that the SOE acted as an agent of its home State

[341] More on this topic see in Kento Nisugi, 'Piercing the 'National' Veil of State-Backed Investors in ICSID Arbitration: Beyond Broches Test and ARSIWA' OSIPP Discussion Paper 23E003, Osaka School of International Public Policy, Osaka University (2023), available at https://ideas.repec.org/p/osp/wpaper/23e003.html.
[342] Ibid, pp. 16, 17.

government, and not as a commercial party, or was discharging functions of its home State government in the territory of a foreign country.

This jurisdictional inquiry, however, is conceptually distinct from the question of attribution under the law of State responsibility. Imagine a different scenario involving the same SOE, this time operating within its home State. Suppose it is alleged to have participated in the expropriation of a foreign investor's assets. The focus would typically be on whether the entity was *empowered* to exercise elements of governmental authority (Article 5 of the ARSIWA), or whether the government exercised effective control over its actions in the specific instance of expropriation (Article 8 of the ARSIWA).

Thus, while both scenarios involve SOEs, the objectives underlying the assessment of its relationship with the State (jurisdiction under the ICSID Convention versus attribution under the ARSIWA) are fundamentally distinct.

Common to both legal standards is that it is not sufficient for the State to exercise general control over the entity. Mere structural or formal control by the government does not meet the threshold in either case. The difference is that in the first scenario, the tribunal would have to assess whether the SOE qualifies as an investor – a commercial actor, not a government agent, which is an inquiry distinct from any allegation of an internationally wrongful act. In the second scenario, however, the assessment is directly tied to the alleged internationally wrongful act – the inquiry is whether the conduct of an SOE can be attributed to the State, thereby transforming that conduct into an internationally wrongful act (provided, of course, that it also constitutes a breach of international obligation).

When determining the status of *nationals of another Contracting State* under Article 25 (1) ICSID Contracting, the focus is not on whether the State exercised control over a specific act, but rather on the nature of the entities' activities – commercial or governmental. In this sense, there may be some conceptual overlap with Article 5 of the ARSIWA, which addresses attribution where the State empowers entities to exercise elements of *governmental* authority. There are, however, two key differences between the Broches test – used to determine the status of a national and the attribution under Article 5 of the ARSIWA. First, Article 5 requires the entity in question to be empowered by the State to exercise elements of governmental authority and second, it must be shown that the entity in fact exercised such authority in the specific instance. The Broches test does not require either formal empowerment or conduct in a particular instance. Instead of empowerment to exercise governmental authority, the Broches test focuses only on governmental functions.

As for the 'particular instance' – this does not seem to be an original requirement of the Broches test. Nisugi argues that in *BUCG v Yemen*, the Broches test was 'circumscribed in scope' because the Tribunal incorporated the requirement of the exercise of governmental authority 'in that particular instance' into the Broches test.[343] Such circumscription makes it more difficult to establish the connection between the entity and the State. Although this is not something originally envisaged in the test itself, it does not seem to be contrary to the purpose and the spirit of the provision, given its inclusive nature.

Relevantly for this thesis, this underscores the importance of distinguishing between different purposes of attribution. The objective of attribution informs the legal framework within which the tribunal should operate – it determines both the applicable legal tests and the evidentiary threshold. If the purpose is to determine whether an SOE is so closely linked to the State that it cannot qualify as an investor entitled to protection under the ICSID Convention, the relevant test is whether the SOE acted as a State agent or exercised governmental functions in the course of its investment activities. If the purpose is to determine State responsibility for the acts of the SOE, the relevant test is whether the SOE was empowered to exercise elements of governmental authority or was under the effective control of the State when it committed an act alleged to constitute an internationally wrongful act.

This section has examined various forms of attribution (in a wide sense) in IIL with a particular focus on SOEs. It concludes that attribution is not a unitary concept but rather takes multiple forms depending on the objective it serves.

The first form discussed was attribution for establishing State responsibility. In this context, the general rules set out in the ARSIWA apply. This is not surprising, as the aim is to determine whether the conduct of an SOE can be imputed to the State in order to determine its responsibility under international law. Whether the SOE qualifies as a State organ, is empowered to exercise elements of governmental authority, or acts under the effective control of the State are all questions governed by the ARSIWA.

[343] Ibid, p. 9.

The second form of attribution considered was treaty-specific or special rules of attribution. In this case, BITs or MITs may modify or displace the application of the general ARSIWA framework.

The third form of attribution is contract attribution. As argued, this form of attribution serves a different purpose and therefore requires a different legal framework. The applicable rules are drawn not from the ARSIWA but from principles of contract and agency law, often informed by the parties' behaviour and their reasonable expectations.

Finally, this section dealt with the question of whether an SOE may qualify as an investor, whether the SOE is functionally indistinct from the State itself. While this question is not about attribution of acts to the State, it still involves a form of imputation: the potential assimilation of the SOE with the State. If the SOE is so closely linked to the State that it is effectively discharging governmental functions or acting as a direct agent of the State, it may not qualify as an investor for the purposes of ICSID jurisdiction, which excludes State-to-State disputes.

In sum, the objective of the attribution inquiry is decisive in determining which legal rules and standards apply. This approach underscores the complexity of attribution in IIL, especially where SOEs are involved. It reinforces the need to avoid conflating distinct attribution frameworks that serve different legal ends.

3. WTO Law

The negotiators of the World Trade Organization (WTO) treaty framework could scarcely have anticipated the emergence of the *sui generis* economic structure that has taken shape in China over the past two decades.[344] One of the most significant - and arguably decisive - factors contributing to the crisis within the WTO, culminating in the U.S. blocking new Appellate Body appointments, was the unresolved tension surrounding SOEs. The U.S. consistently criticized the WTO framework for its inability to effectively regulate Chinese SOEs – a dissatisfaction which escalated into a broader China-U.S. trade conflict.[345]

[344] Mark Wu, 'The "China, Inc." Challenge to Global Trade Governance', (2016) 57 (2) *Harvard International Law Journal*, p. 261.
[345] Shixue Hu, 'Trade Rules of State Enterprises: A Lawmaking Perspective' (2023) 44 *Michigan Journal of International Law* 263, p. 264.

In *United States – Anti-Dumping and Countervailing Duties (China)*, the question arose whether Chinese State-owned commercial banks could be considered as *public bodies* for the purposes of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). This was important for determining the existence of a subsidy: a financial contribution by a public body may qualify as a subsidy (provided that other conditions for defining a subsidy are fulfilled). The U.S. contended that *majority ownership and government control* should serve as a decisive criterion in determining whether an entity qualifies as a public body. At the same time, China advocated for a test focusing on whether an entity exercises powers or authority *vested in it by a government* for the purpose of performing functions of a governmental character.[346] The Panel sided with the U.S. However, the Appellate Body denied the ownership and control test and created a combination of *authority and function test* to determine whether a certain SOE qualifies as a public body. The Appellate Body investigated the *core characteristics* that such an entity must share with a government in the narrow sense in order to qualify as *a* public body for the purposes of the SCM Agreement.[347] It held that 'the performance of governmental functions, or the fact of being vested with, and exercising, the authority to perform such functions are *core commonalities* between government and public body'.[348]

Although this test has certain similarities to the customary rule of attribution under general international law (Article 5 of the ARSIWA), the Appellate Body clearly departed from the customary rule in its report adopted in 2019. It first summarized the approaches of the parties in dispute. China's position was that 'the entity concerned is exercising a governmental function when engaging in the specific investigated conduct'.[349] The U.S., on the other hand, argued that 'the relevant question for a public body inquiry is not whether the conduct (…) is governmental but rather whether the entity engaging in the conduct is governmental', meaning that 'it is sufficient for an investigating authority to determine that, overall, the entity concerned has a sufficiently

[346] US — Anti-Dumping and Countervailing Duties (China), WTO Doc. WT/DS379/R, Panel Report (adopted 22 October 2010), paras. 8.127 and 8.55.
[347] US — Anti-Dumping and Countervailing Duties (China), WTO Doc. WT/DS379/AB/R Appellate Body Report (adopted 11 March 2011), para 291 (emphasis added).
[348] Ibid, para 390 (emphasis added).
[349] US — Countervailing Measures (China), WT/DS437/AB/RW Appellate Body Report (adopted 15 August 2019), para 5.99.

close relationship with government to find that entity to constitute a public body'.[350] The Appellate Body held:

> In our view, the nature of an entity's conduct or practice may certainly constitute evidence relevant to a public body inquiry. However, the assessment of such evidence is aimed at answering the central question of whether the entity itself possesses the core characteristics and functions that would qualify it as a public body. In other words, we do not consider that a public body inquiry must necessarily focus on every instance of conduct in which the relevant entity may engage, or on whether each such instance of conduct is connected to a 'government function'. Instead, the conduct of an entity – particularly when it points to a 'sustained and systematic practice' – is one of the various types of evidence that, depending on the circumstances of each investigation, may shed light on the core characteristics of an entity and its relationship with government in the narrow sense.[351]

The test developed by the WTO AB considers the aim of attribution and the nature of the attributed act. Here, the aim was to determine whether a financial contribution from a State-owned entity constitutes a subsidy (in the context of the SCM Agreement). Thus, the focus was on *core commonalities between SOE and the government*, namely the authority to perform and actual performance of governmental functions. Moreover, in contrast to the standard of attribution under general international law, Article 5 of the ARSIWA, which requires exercising governmental functions with respect to a *particular conduct*, for a public body investigation, such a connection between every instance of conduct and government function is not necessary.

The AB's approach for determining what constitutes 'public body' is shaped by the underlying objectives of the international trade regime. Unlike regimes, such as IIL, which place significant emphasis on the protection of individual rights and investor interests, the WTO framework is primarily geared toward broader systemic goals – trade liberalization, economic efficiency, and the promotion of global welfare. This influenced the concept of attribution in the definition of public bodies and subsidies. The AB had to navigate between under-attribution and over-attribution of State

[350] Ibid.
[351] Ibid, para 5.101. Footnotes omitted.

influence in the economy. It had to strike a balance between legitimate State participation in the economy and actionable subsidies. Treating all State-owned enterprises as 'public bodies' would lead to over-attribution, because even ordinary commercial conduct could be attributed to the State. For instance, a loan from the State-owned bank could easily qualify as a subsidy, even if provided based on commercial criteria. This could further lead to the imposition of countervailing duties (CVD) by other WTO members even when no real subsidy existed, which would further discourage legitimate commercial activities of SOEs. On the other hand, requiring that an SOE must exercise governmental functions in every specific case to be classified as a 'public body' would lead to under-attribution. For example, an SOE, such as a government-owned steel producer supplying steel at below-market price to the domestic downstream manufacturers, could evade scrutiny under an overly narrow test, as it may be impossible to demonstrate that each instance of its conduct was directly linked to the exercise of a governmental function.

Thus, the attribution test was specifically designed to reflect particularities of the international trade regime. It should be noted that the WTO AP's interpretation was subsequently reversed in the TPP (and later CPTPP), which reinstated the U.S. definition of public body, focusing primarily on ownership.[352]

4. Human Rights

The ECtHR and the Inter-American Court of Human Rights (IACtHR) have applied their own approaches to attribution, thereby focusing on positive obligations of the State to protect human rights from the conduct of private entities under the primary rules.[353] Such primary rules often incorporate due diligence obligations, which play a very important role in human rights law.

[352] Mitsuo Matsushita and C. L. Lim, 'Taming Leviathan as Merchant: Lingering Questions about the Practical Application of Trans-Pacific Partnership's State-Owned Enterprises Rules' (2020) 19 *World Trade Review*, p. 406. See also: Jan Yves Remy and Iain Sandford, 'Rules for State-Owned Enterprises in Chapter 17 of the Trans-Pacific Partnership Agreement: Balancing Market-Oriented Discipline and Policy Flexibility for States' in Jorge A. Huerta-Goldman and David A. Gantz (eds) *The Comprehensive and Progressive Trans-Pacific Partnership: Analysis and Commentary* (Cambridge University Press; 2021), p. 539.

[353] Jorge Viñuales and Oliver Hailes, 'Article 5 of the ARSIWA – Conduct of Empowered Entities', in Andreas Kulick, Michael Waibel (eds) *General International Law in International Investment Law, A Commentary* (Oxford University Press 2024) p. 272

The landmark decision of the IACtHR, *Velásquez-Rodríguez v. Honduras*, offers a foundational articulation of the approach that the human rights court may adopt with respect to State responsibility for human rights violations. The Court relied on Article 1 of the Inter-American Convention on Human Rights (IACHR) which obliges the States Parties to 'undertake to respect the rights and freedoms' recognized in the Convention and to 'ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination'(…).[354] The Court stressed that this provision is 'essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party'.[355] However, the judgement did not ultimately turn on the issue of attribution, but on the content of the State's primary obligation under the IACHR.

> What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible. Thus, the Court's task is to determine whether the violation is the result of a State's failure to fulfil its duty to respect and guarantee those rights, as required by Article 1 (1) of the Convention.[356]

The Court held that the State failed to investigate the disappearance of Manfredo Velásquez and also failed to fulfil its duty to pay compensation and punish those responsible, as set out in Article 1 (1) of the Convention.[357] Due to such 'failure of the State apparatus to act', the Court held that the State failed to 'fulfil the duties it assumed under Article 1 (1) of the Convention'.[358]

The State's breach, therefore, was in omission to act with due diligence – that is, failure to investigate the disappearance, to provide redress to the victims, and to ensure accountability. In this way, the violation stemmed not from the wrongful act of the private actor being attributed to the State, but from the State's own failure to fulfil a primary obligation under the Convention.

[354] *Velásquez-Rodríguez v. Honduras*, Inter-American Court of Human Rights Case, Judgment on Merits (29 July 1988), para 161.
[355] Ibid, para 164.
[356] Ibid, para 173.
[357] Ibid, para 178.
[358] Ibid, para 182.

It is also evident that the objective of attribution played a critical role in shaping the IACtHR's reasoning. The Court expressly held that 'for *the purposes* of establishing whether Honduras is responsible under international law for the violations of human rights perpetrated within the practice of disappearances' it was irrelevant whether there is any evidence that such disappearances had been carried out pursuant to official orders.[359] Thus, the focus was not on control or instruction, but on whether the State had met its proactive duties to protect individuals from harm. From this, we can conclude that the logic of attribution in human rights law is purpose-driven – oriented toward ensuring effective protection of rights, rather than focused on establishing a precise connection, let alone the strength of that connection between the State and entities that committed violations.

In the practice of the ECtHR several cases involved SOEs. However, most cases did not address attribution in the sense of State responsibility - rather they engaged with broader 'ascriptive' questions.[360]

This dissertation does not undertake a comprehensive analysis of all relevant cases but instead highlights select examples to illustrate the ECtHR's general approach. These examples support the central argument that attribution (understood in a broad sense) is inherently purpose driven.

In *Mykhaylenky*, the applicants were entitled to wages from an SOE involved in construction activities within the Chernobyl evacuation zone. The ECtHR explained:

> The issue arises therefore whether the State is liable for the debts of a State-owned company which is a separate legal entity and whether it can be held responsible for the ultimate failure to pay the applicants the amounts awarded to them in the judgments against that company.[361]

The issue was considered in the context of the admissibility of claims. The Government argued that the debtor company (although State-owned) was a separate legal entity, for whose debts the State could not be held responsible.[362] The Court held that the Government failed to demonstrate that the SOE 'enjoyed sufficient *institutional and*

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[359] Ibid, para 183.
[360] Marko Milanovic, 'Special Rules of Attribution of Conduct in International Law', (2020) 96 *International Law Studies*, p. 385.
[361] *Mykhaylenky and Others v. Ukraine*, ECtHR, Applications nos. 35091/02, 35196/02, 35201/02, 35204/02, 35945/02, 35949/02, 35953/02, 36800/02, 38296/02, and 42814/02, Judgment (30 November 2004), para 43.
[362] Ibid, para 41.

operational independence from the State to absolve the latter from responsibility under the Convention for its acts and omissions'.[363]

The same *institution and operational independence test* also played a role in *Yershova v. Russia* - a case dealing with contamination coming from a formerly State-owned steel plant. The ECtHR held:

> [T]he Court will have regard to such factors as the company's legal status, the rights that such status gives it, *the nature of the activity* it carries out and the *context* in which it is carried out, and the degree of its independence from the authorities (…). The Court will notably have to consider whether the company enjoyed *sufficient institutional and operational independence* from the State to absolve the latter from its responsibility under the Convention for its acts and omissions.[364]

The focus of the ECtHR was on the *degree of independence* of the SOE, taking into account *the nature of the activity* and *the context* in which such activity was carried out.

Given the ECtHR's lack of engagement with the ARSWA rules of attribution, the question arises whether the Court has developed a distinct attribution standard tailored to the human rights framework. As a general matter, human rights treaties, like BITs, entail more interpretative space than other subfields of international law due to their open-textured formulations.[365] At the same time, more specialised interpreters (like human rights lawyers) tend to have narrower perspective than generalists.[366] Milanovic contends that there is no need for special rules of attribution in the human rights context because the ILC's general rules of attribution are both coherent and sufficiently flexible to address the core question at stake: whether conduct can be linked to the State *for the purposes* of establishing State responsibility.[367] Building on this view, this thesis argues that attribution must always be purpose-driven. Where the objective is to establish State

[363] Ibid, para 44.
[364] *Yershova v. Russia*, ECtHR App. No. 1387/04, Judgment (8 April 2010), para 55 (emphasis added). On this matter see: Judith Schönsteiner, 'Attribution of State Responsibility for Actions or Omissions of State-Owned Enterprises in Human Rights Matters' (2019) 40 *University of Pennsylvania Journal of International Law* 895.
[365] Michael Waibel, 'Uniformity versus Specialisation (2): A Uniform Regime of Treaty Interpretation?', in Christian J. Tams, Antonios Tzanakopoulos and Andreas Zimmermann (eds) *Research Handbook on the Law of Treaties* (Edward Elgar Publishing 2014), p. 385.
[366] Ibid, p. 401.
[367] Marko Milanovic, 'Special Rules of Attribution of Conduct in International Law' (2020) 96 *International Law Studies*, p. 386.

responsibility – whether under GPIL or for human rights violations, there is no justification for departing from the ILC's attribution framework.

While there do not appear to be any special rules of attribution specifically developed for determining State responsibility in the context of human rights violations, what does emerge as a distinguishing characteristic of the human rights regime is the emphasis on strong due diligence obligations. State responsibility is often established not through attribution of conduct alone, but through a failure to act with the due diligence to prevent, investigate or remedy human rights violations.

The above analysed *Velásquez-Rodríguez* case before the IACtHR illustrates how State responsibility can be established based on failure to act with due diligence, grounded in a broader interpretation of the primary obligations under human rights law. In the jurisprudence of ECtHR, due diligence obligations are articulated through the concept of positive obligations – State duties to take measures to protect individuals from harm.[368]

The concept of due diligence becomes particularly relevant in situations where the acts or omissions of SOEs cannot be directly attributed to the State (they cannot qualify as State organs, do not exercise elements of governmental authority, and are not under the effective control of the State).[369] In such cases, even though attribution under the ARSIWA may not apply, the State may still be responsible for failing to act with due diligence (not taking all available measures to prevent or punish human rights violations). According to this view, State practice confirms that it is ultimately the State that determines how SOEs are regulated and overseen.[370] Consequently, where corporate structuring prevents attribution, States may still bear independent due diligence obligations under international law, including in an extraterritorial setting, to ensure that entities they own or control do not engage in conduct that violates human rights.[371] As Barnes observes, human rights due diligence within the state-business nexus should be understood as a part of the State's broader due diligence obligation under international law, reinforcing the State's ongoing responsibility to ensure that entities it owns and controls do not commit human rights violations.[372] Moreover, as a

[368] Mihaela Maria Barnes, *State-Owned Entities and Human Rights* (Cambridge University Press 2021) pp. 243, 244.
[369] Ibid, p. 246.
[370] Ibid.
[371] Ibid.
[372] Ibid, p. 351.

matter of international law, States have an obligation to regulate extraterritorial activities of their SOEs, representing an exception to the otherwise territorial presumption of jurisdiction.[373]

This perspective expands the scope of States' due diligence obligations but concerns primary obligations. In contrast, this dissertation focuses on attribution as a secondary rule. Specifically, this section interrogates whether attribution in the human rights field diverges from general international law. There appears to be no distinct or divergent set of attribution rules operating within human rights law. Instead, the general attribution framework remains applicable, with the emphasis shifting to the nature and scope of the State's substantive duties.

Focusing on whether and how the rules of attribution are tailored or not for the SOEs, two distinct paths for establishing State responsibility emerge. The first is direct responsibility for the acts of SOEs, which raises the question of attribution. In this context, as the objective is to establish responsibility for internationally wrongful acts, and that objective aligns with the general framework of PIL rules (there appears to be no need for a separate set of attribution rules under human rights).

The second path concerns the State's failure to exercise due diligence in preventing human rights violations committed by SOEs. Due to the broader understanding of due diligence obligations in the field of human rights, it has been argued in literature that States are required to regulate the activities of their SOEs not only within their own jurisdiction but also extraterritorially.[374] A State may incur responsibility for failing to act with due diligence if it neglects to fulfil this regulatory and oversight obligation – particularly given that it is the State itself that determines the extent to which such entities are regulated and supervised.

This broader potential for responsibility reflects a more generous approach to State responsibility in the human rights context. However, this approach is rooted in the primary rule of due diligence, rather than in any modification of the rules of attribution. Attribution remains conceptually and functionally distinct. Since its goal is to establish State responsibility for internationally wrongful acts, the standard rules of attribution codified in the ARSIWA apply. This supports the central argument of this thesis: attribution is purpose driven.

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[373] Ibid, p. 251.
[374] Ibid, p. 264.

5. Conclusion

This Chapter has examined attribution in context, focusing on how the rules of attribution apply to SOEs across various branches of international law. What emerges clearly is that SOEs perform markedly different roles across legal regimes.

For example, in IIL, SOEs may appear in different capacities: as parties whose conduct breaches international obligations, as investors themselves, or as contractual counterparts to foreign investors. In each of these scenarios, the relevant legal tests and standards for determining their connection to the State differ depending on the objective of attribution (in a broad sense).

The purpose driven approach is not limited to IIL. In international trade law, particularly within the WTO framework, the question of whether an SOE constitutes a public body is central to subsidy disciplines. This requires a nuanced approach that balances legitimate State involvement in the economy with the need to discipline actionable subsidies. Rigidly applying the ARSIWA rules of attribution – such as the requirement that the entity exercised governmental authority – would lead to under-attribution, thereby frustrating the object and purpose of WTO subsidy rules.

In the human rights context, another distinction arises. Where attribution aims to establish State responsibility for direct human rights violations, the ARSIWA rules remain appropriate. However, if the aim is to determine the State's failure to act with due diligence – for example, in regulating or overseeing SOEs, the responsibility stems not from attribution of conduct, but from a breach of the State's primary obligations. This due diligence-based responsibility offers more flexibility and operates independently of the ARSIWA framework.

The ARSIWA rules of attribution are well-suited to determining responsibility for internationally wrongful acts, but they are not suited to every context where attribution (broadly understood) is at issue.

The following chapters build on this insight by developing an alternative set of attribution rules specifically tailored to the contractual investment context. The central argument advanced in this thesis is that the attribution of contracts in international arbitration must be addressed within a legal framework that is responsive to the context in which the attribution arises. In the present inquiry, which concerns the attribution of contractual obligations, it is therefore essential to focus on legal rules specifically governing contract attribution (binding the non-signatories), rather than importing attribution tests developed for fundamentally different purposes.

Chapter IV: Applying the GPL to Contract Attribution

The GPL recently attracted considerable attention in public international law and in 2018 the ILC appointed a Special Rapporteur for this topic.[375] Domestic law has always been an 'important touchstone' of international law and this is even more so nowadays when international law is expanding.[376] Thus, reliance on GPL is not only helpful and useful, but sometimes even necessary in international law.

It has been argued that GPL 'play an important role in the field of foreign investment', especially regarding the relationship between the host State and a foreign investor.[377] This relationship represents a 'fertile ground' for the application of the GPL, given that they have emerged in the 'domestic legal system with regard to relationships in which at least one party is a natural or legal person'.[378] Moreover, the GPL play a role in international litigation both in the area of substantive law and when dealing with questions of procedure, which is important given that our question may arise both in procedural and merits phase of the proceedings.[379]

There is a historical connection between investment contracts and GPL. Namely, the internationalization of such contracts was at first achieved precisely through the application of GPL. This so-called 'discovery of fire'[380] marked the beginning of investor-State dispute resolution on the international plane.

Just like they were once used for contract internationalization, particularly during the 1950s to the 1970s, the GPL can now be used for internationalizing the issue of contract attribution. Only now would the focus be on private contract law (and agency law) rules widely accepted among nations.

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[375] Patrick Dumberry, 'The Emergence of the Concept of 'General Principle of International Law' in Investment Arbitration Case Law' (2020) 11 *Journal of International Dispute Settlement* 194, p. 195. ILC, Report of the ILC, 70th Session, 3433rd meeting, 19 July 2018, UN Doc A/73/10, chap XIII, s A, para 363.

[376] Jaye Ellis, 'General Principles and Comparative Law' (2011) 22 *The European Journal of International Law*, p. 950.

[377] Tarcisio Gazzini, 'General Principles of Law in the Field of Foreign Investment' (2009) 10 *The Journal of World Investment and Trade* 103, p. 109. See also: Christoph Schreuer et al, *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2nd ed, Cambridge University Press 2010), p. 608: 'General principles of law are particularly useful in areas of the law which involve non-State actors such as investment relationships'.

[378] Tarcisio Gazzini, 'General Principles of Law in the Field of Foreign Investment' (2009) 10 *The Journal of World Investment and Trade* 103, p. 109.

[379] Rudolf B. Schlesinger, 'Research on the General Principles of Law Recognized by Civilized Nations' (1957) 51 *American Journal of International Law* 734, pp. 735, 736.

[380] V. V. Veeder, 'The Lena Goldfields Arbitration: The Historical Roots of Three Ideas' (1998) 47 *International & Comparative Law Quarterly* 747, p. 772. See also page 14 above.

Sections 1 and 2 of this Chapter explore this connection between the GPL and investment contracts and explain the notions of internationalization of contracts and internationalization of contract law principles. Section 3 elaborates on the gap-filling function of GPL, arguing that in the absence of a clear rule governing contract attribution, GPL offer a suitable framework to resolve the issue. Section 4 justifies the application of GPL as a part of public international law (PIL) – it sets out the rationale for applying PIL to this question. Finally, Section 5 is dedicated to methodology – how do we determine GPL that should be applied to the issue of contract attribution.

1. Internationalization of Contracts

International tribunals decided many concession disputes before the ICSID era. This rich historical repository of awards is important because tribunals applied international law (specifically the GPL) to investment contracts. Although the principles applied were not necessarily contract law principles, this period is important because international law, as such, was applied to contractual disputes.

Numerous concession disputes from 1930–1982 (Lena Goldfields, Abu Dhabi Oil, Sapphire, Aramco, three Libyan Oil arbitrations, and Aminoil) evidenced a growing application of the GPL either through the parties' express choice to have them act as applicable law or through the tribunals' application of them.[381] In those disputes prior to the emergence of investment treaty arbitration in the late 1980s, the GPL served as an 'external axis of stability for State contracts' clearly 'drawing on ideas of the prevalence of the international legal order over national laws'.[382]

The *Lena* award represents 'an early example' of application of the GPL (compensation for unjust enrichment) by a private arbitral tribunal, despite the lack of parties' agreement to apply PIL or GPL. The application of non-national rules of law to such private civil law relationships was described as 'unique'.[383]

One of the leading authorities who argued in favour of applying GPL to investment contracts was McNair. He predicted, in 1957, that the GPL would prove fruitful in the interpretation and application of investment contracts, which are not inter-State

[381] Yuliya Chernykh, *Contract Interpretation in Investment Treaty Arbitration* (Brill Nijhoff 2022), p. 186.
[382] Ibid, p. 205
[383] V. Veeder, 'The Lena Goldfields Arbitration: The Historical Roots of Three Ideas' (1998) 47 *International & Comparative Law Quarterly* 747, p. 750.

contracts governed by PIL *stricto sensu*, but which can ‘more effectively be regulated by GPL than by the special rules of any single territorial system’.[384] He argued that countries which import capital and skills ‘are governed by some system of law which has not yet been developed to deal with this particular type of transaction’.[385] He further argued that the appropriate legal framework for this type of contract is ‘not public international law but shares with public international law a common source of recruitment and inspiration’, namely, ‘the general principles of law recognized by civilized nations’.[386]

McNair used two premises on which he concluded that the GPL should govern investment contracts that do not provide for the application of a particular domestic law. The first premise was that it is reasonable to infer from such investment contracts that the parties ‘do not regard the national law of either of them as affording an adequate or appropriate system within which these contracts can operate’.[387] Second, such contracts contain an international element, and although they are ‘not governed by public international law stricto sensu’, they must enjoy certain protection by public international law.[388]

To support his thesis on applying GPL, McNair relied on three cases. The first was *The Lena Goldfields Arbitration* from 1930. A British company entered into a concession agreement with the USSR Government. The Agreement did not contain the applicable law clause, but in Article 89 stated that:

> [T]he parties base their relations with regard to this Agreement on the principle of good will and good faith as well as on reasonable interpretation of the terms of the Agreement.

The arbitrators held that Soviet law should be applied to all domestic matters except where the Agreement excluded it. For other purposes, the ‘general principles of law recognized by civilized nations’ should be regarded as the ‘proper law’ of the concession. Unjust enrichment was determined as such a principle, and on that basis, the arbitrators ruled in favour of Lena.[389]

[384] Arnold McNair, 'The General Principles of Law Recognized by Civilized Nations' (1957) 33 *British Yearbook of International Law*, p. 15.
[385] Ibid, p. 4.
[386] Ibid, p. 6.
[387] Ibid, p. 10
[388] Ibid.
[389] Ibid, p. 11.

Further, in *Goldenberg & Sons v. Germany* (1928), the Tribunal held that 'respect for the private property and the acquired rights of foreigners' represent general principles of law, which the Tribunal applied in this case.[390]

Finally, in the arbitration between the *Ruler of Qatar and International Marine Oil Company* (1953), the question arose which law should be applied in the construction of the investment contract: Islamic law or the principles of natural justice and equity. The Tribunal held that there was nothing in the contract which would clearly show what was the parties' intention regarding the applicable law, but one important consideration points against the application of Islamic law, namely 'there is no settled body of legal principles in Qatar applicable to the construction of modern commercial instruments'.[391] Thus, the Tribunal held that Islamic law does not govern the contract in question.

In all three cases, the arbitrators applied GPL to private investment contracts with the aim of protecting the investors. Although PIL as such could not be applied, private investors were given certain international protection. That is how GPL contributed to internationalizing private investment contrast.

Many contemporary authors argue that investment contracts should be protected by international law, due to their inherently international character.[392] Risvas explains that international law was historically applied to international State contracts for two reasons: to protect foreign investors against the abuse of State legislative powers and to differentiate such international contracts from domestic law contracts concluded between private parties.[393] These are the fundamental ideas on which the entire IIL was developed in the years to come.

However, other authors criticize such application of GPL to investment contracts in this pre-ICSID period. Leiter-Bockley argues that the *Lena* Tribunal conveniently relied on

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[390] Ibid, p. 15

[391] Ibid, pp. 13, 14.

[392] Ursula Kriebaum, 'Article 42', in Stephan Schill et al. (eds), *Schreuer's Commentary on the ICSID Convention* (3rd ed, Cambridge University Press 2022), p. 819 referring to Richard B Lillich, 'The Law Governing Disputes under Economic Development Agreements: Re-examining the Concept of "Internationalization"' in Richard B Lillich and Charles N Brower (eds*), International Arbitration in the 21st Century: Towards 'Judicialization' and Uniformity?* (Translational 1994), pp. 199, 211. Michail Risvas, 'International Law as the Basis for Extending Arbitration Agreements Concluded by States or State Entities to Non-Signatories' (2022) 71 *International and Comparative Law Quarterly*, p. 183. Arnold McNair, 'The General Principles of Law Recognized by Civilized Nations' (1957) 33 *British Yearbook of International Law*, p. 10.

[393] Michail Risvas, 'International Law as the Basis for Extending Arbitration Agreements Concluded by States or State Entities to Non-Signatories' (2022) 71 *International and Comparative Law Quarterly*, p. 198.

the GPL in order to avoid applying domestic Soviet law which was very unfavourable to the concessionaire. She explains that concession agreements in this ‘pre-historical period’ were secured through reliance on general principles recognized by civilized nations (protection of acquired rights, prohibition of unjust enrichment), but such principles completely disregarded rules related to ‘redistribution and social planning’, which were simply not considered as ‘candidates for general principles of law’ among liberal thinkers.[394]

Leiter-Bockley points out that jurisdiction over allocation of resources and wealth was allocated to the international sphere in order to avoid domestic policies implemented by States. The theoretical conception legitimizing such elevation ‘was based on private law principles such as the protection of private property and the sanctity of contract’.[395] In this way, GPL played an important role in ‘the overall vision of an international legal order superseding domestic policies’.[396]

Based on this criticism, when determining the GPL in the context of the present research, different legal systems will be taken into account in order to reflect geographical and cultural diversity as much as possible. However, it is fair to say that the principles that this research focuses on are far less controversial than those that Leiter-Bockley analysed in her research. Protection of private property was certainly not a uniformly recognized principle in the first half of the XX century. On the other hand, there likely are more similarities between different legal systems and traditions regarding the question of contract attribution (or binding the non-signatories of the contract) – a more technical question that has a less direct bearing on the allocation of resources.

2. Internationalization of Contract Law Principles

While Section 1 addressed the application of the GPL to international investment contracts (concession agreements), marking a foundational step in internationalization of such contracts, it did not engage directly with the contract law principles themselves.

[394] Andrea Leiter-Bockley, 'Making the World Safe for Investment: the Protection of Foreign Property 1922-1959', PhD Thesis (Melbourne Law School, University of Melbourne and Vienna Law School, University of Vienna 2019), pp. 119, 130.

[395] Ibid, p. 136.

[396] Ibid, p. 138. Compare this with the study of Marco Duranti on the European human rights system, which was in his words shaped by ‘a surprisingly small group of individuals’. Marco Duranti, *The conservative human rights revolution: European identity, transnational politics, and the origins of the European convention* (Oxford University Press 2017), p. 7.

Section 2 shifts focus: the analysis turns to the contract law principles as GPL that are central to the core argument of this dissertation. Their natural connection with domestic laws makes GPL very suitable for answering the main question of this project.

Chernykh argues that GPL can and should be used for contract interpretation in investment disputes. She explains that even though PIL primarily governs the relationships between States and it does not deal with contracts as national-law instruments, substantive provisions of international law may be useful for understanding contracts.[397] She argues that international law is generally silent about contract interpretation, which is why GPL could fill in the existing gap.[398] Substantive GPL may be very valuable for construing contracts because they 'mimic' domestic contract law regulations.[399]

Although Chernykh's argument focuses on contract interpretation, there is no obstacle to applying the GPL to general contract law issues (contract formation, defects of consent, and so on). Moreover, international tribunals already showed a willingness to apply domestic principles of contract law as GPL.

The practice of the Iran-U.S. Claims Tribunal is a prominent example. In some cases, investment contracts themselves had a reference to the 'general principles of law' or 'common principles of law' as the applicable law. For example, the concession agreements in *LIAMCO v. Libya*; *Texaco v. Libya* and *BP Exploration Company v. Libya* all contained the same provision, as follows:

> This Concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law, and in the absence of such *common principles* then by and in accordance with the *general principles of law* as may have been applied by international tribunals.[400]

Similarly, in *American Oil v. Kuwait*, the arbitration agreement provided:

[397] Yuliya Chernykh, *Contract Interpretation in Investment Treaty Arbitration* (Brill Nijhoff 2022) p. 111.
[398] Ibid, pp. 164, 165.
[399] Ibid., p. 186.
[400] *Libyan American Oil Company v. The Government of the Libyan Arab Republic*, Ad hoc Arbitration Award (12 April 1977), para 123. See also: *Texaco Overseas Petroleum Co. and California Asiatic Oil Company v. Libya,* Ad hoc Arbitration, Award (19 January 1977), para 36 and *BP Exploration Company (Libya) Limited v. Government of The Libyan Arab Republic,* Ad hoc Arbitration, Award on Merits (10 October 1973), para 1(7) (emphasis added).

> The law governing the substantive issues between the Parties shall be determined by the Tribunal, having regard to the quality of the Parties, the transnational character of their relations and the *principles of law* and practice prevailing in the modern world.[401]

Even when the parties' contract referred to national systems of law as the source of controlling rules without reference to PIL or the GPL, the Iran-U.S. Claims Tribunal often referred to them.[402] In many cases, the Tribunal applied the GPL to different contractual issues, such as contract formation, performance, defects of consent and remedies for the breach of contract.

For example, in *General Dynamics v. Iran*, the Tribunal held that the GPL required parties to perform their contracts satisfactorily and with due diligence.[403]

In *Pomeroy v. Iran*, the Tribunal held that it was a general principle of law that a party could not allege invalidity of contract after it consented to it:

> It is both a general principle of law and a principle embodied in Articles 247 and 248 of the Civil Code of Iran that a party may not deny the validity of a contract entered into on its behalf by another if, by its conduct, it later consents to the contract.[404]

In *Harnischfeger v. Ministry of Roads and Transportation*, the Tribunal held that escaping a contract based on an error (as a defect of consent) represented a general principle of law:

> It is a generally accepted principle in various legal systems that an essential error regarding the conditions upon which a party has entered into a contract may relieve that party from liability, at least where the other party knew or should have known about the error.[405]

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[401] *The American Independent Oil Company v. The Government of the State of Kuwait*, Ad hoc Arbitration, Final Award (24 March 1982), p. 2 (emphasis added).

[402] John R. Crook, 'Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience' (1989) 83 *American Journal of International Law* 311, p. 286.

[403] *General Dynamics Corporation and General Dynamics International Corporation v. The Islamic Republic of Iran, The Government of The Islamic Republic of Iran and The Navy of The Islamic Republic of Iran,* Iran-U.S. Claims Tribunal, Award No. 123-283-3 (16 April 1984), para 64.

[404] *R.N. Pomeroy, K.S. Pomeroy and R.M. Pomeroy v. Government of The Islamic Republic of Iran,* IUSCT Case No. 40, Award No. 50-40-3 (8 June 1983), para 38.

[405] *Harnischfeger Corporation v. Ministry of Roads and Transportation, Industrial Development and Renovation Organization of Iran, Machine Sazi Arak And Machine Sazi Pars,* Iran-U.S. Claims Tribunal, Case No. 180, Final Award No. 175-180-3 (26 April 1985), para 50.

In *Morrison v. Ministry of Roads & Transportation of Iran* the Tribunal applied the GPL in determining contract remedies:

> [A]s a general principle of law, a party may recover for losses suffered as a consequence of contract breach irrespective of whether a right also exists to terminate the contract.[406]

Extracting the GPL from domestic contract law provisions has precedents in international investment arbitration. In addition to the Iran-U.S. Tribunals practice, a prominent example from ICSID practice is *Amco v. Indonesia*. The Tribunal applied the GPL when defining a contract as 'an agreement based on a meeting of minds and wills and creating obligations'.[407] It then applied the GPL in the context of formal requirements for contract formation, holding that written form is not required for certain types of contracts under both Indonesian law and the GPL.[408] The Tribunal also recognized full compensation for a contractual breach (*damnum emergens* and *lucrum cessans*) as 'principle common to the main systems of municipal law, and therefore, a general principle of law'.[409]

To sum up, internationalization of contract law principles would not be an uncharted territory for international tribunals. Many tribunals have already applied different contract law principles as GPL. Additionally, an argument has been made in literature that contract law principles dealing with interpretation should be applied as GPL, since international law is generally silent on this matter.[410] The solution offered in this thesis builds on these arguments. Because international law does not address the issue of contract attribution, there is a gap to be filled by GPL.

[406] *Morrison-Knudsen Pacific Limited v. The Ministry of Roads and Transportation and The Islamic Republic of Iran,* Iran-U.S. Claims Tribunal, Case No. 127, Award No. 143-127-3 (13 July 1984), para 79.
[407] *Amco Asia Corporation and others v. Republic of Indonesia,* ICSID Case No. ARB/81/1, Award (20 November 1984), para 183.
[408] Ibid, para 184.
[409] Ibid, para 267.
[410] Yuliya Chernykh, *Contract Interpretation in Investment Treaty Arbitration* (Brill Nijhoff 2022). More generally on silence of States see: Danai Azaria, *State silence across international law: meaning, context, and developments* (Oxford University Press 2025).

3. The Gap-filling Function of GPL

The role of GPL in PIL is to fill gaps.[411] As a 'reservoir of legal principle' for enriching and developing international law and 'a fertile source of inspiration and guidance', GPL are particularly useful for attributing contracts.[412] The issue at hand remains unanswered, due to the inadequacy of the two solutions offered in practice. GPL can helpfully fill this gap.

The formulation of Article 38 (1) (c) of the ICJ Statute, which refers to the GPL as a source of law, is the same as Article 38 of the Statute of the Permanent Court of International Justice (PCIJ).[413] The intention of the Advisory Committee of Jurists, which adopted this provision, was merely to give a name to the 'part of existing international law which is not covered by conventions and custom *sensu stricto*'.[414] Members of the Advisory Committee 'knew there was more to international law' than what was covered by 'positive rules' and they were seeking other sources in addition to treaties and customs.[415] That is how the third source of law, 'the general principles of law recognised by civilised nations' was established.[416]

Thus, the main idea of the drafters was to include a source to be applied where there is no applicable treaty or custom.[417] International judges use them to fill the lacunae in the applicable law.[418] Given that international law does not seem to offer an answer to the question from this thesis, and that applying domestic law may be undesirable from a policy perspective, GPL should be applied to fill this void.

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[411] See: Beatrice Bonafé and Paolo Palchetti, 'Relying on General Principles in International Law' in Catherine Brölmann, Yannick Radi (eds) *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar Publishing 2016) 160-177, p. 172. Alec Stone Sweet and Giacinto della Cananea, 'Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez' (2014) 46 *New York University Journal of International Law & Politics* 911, p. 954.

[412] Arnold McNair, 'The General Principles of Law Recognized by Civilized Nations' (1957) 33 *British Yearbook of International Law*, 6. Christian J. Tams, 'The Sources of International Investment Law: Concluding Thoughts' in Tarcisio Gazzini and Eric De Brabandere (eds.) *International Investment Law: The Sources of Rights and Obligations* (Martinus Nijhoff Pub. 2012), pp. 319-331 at 324, 325.

[413] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons Limited 1953), p. 2.

[414] Ibid, p. 19.

[415] Ole Spiermann, The History of Article 38 of the Statute of the International Court of Justice, 'A Purely Platonic Discussion'? in Samantha Besson and Jean D'Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2017), p. 172.

[416] Ibid, 173.

[417] Beatrice Bonafé and Paolo Palchetti, 'Relying on General Principles in International Law' in Catherine Brölmann, Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar Publishing 2016), pp. 167, 168.

[418] Alec Stone Sweet and Giacinto della Cananea, 'Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez' (2014) 46 *New York University Journal of International Law & Politics* 911, p. 954.

Moreover, this approach is in line with Crawford and Mertenskötter's classification, which identifies three possible frameworks for contract attribution: domestic law; the ARSIWA rules of attribution; and international law other than ARSIWA.[419] The framework offered in this thesis falls squarely within the third category, namely GPL, which represent international law other than ARSIWA. This thesis argues that neither the ARSIWA rules of attribution nor domestic law should be applied to the issue of contract attribution, which leaves a gap to be filled by GPL.

4. Public International Law as Governing Framework

Applying GPL when attributing contracts is a novel approach which represents a compromise between the two traditional approaches.[420] On the one hand, GPL belong to international law (just like the ARSIWA), while on the other hand their origin is in domestic law. Because of the dual nature of GPL (domestic origin and international character), they represent a valuable source in IIL.[421] It has already been argued that they should be used when interpreting contracts in investment disputes.[422]

Before examining the exact principles to be applied here, we must address a preliminary question: why should the issue of contract attribution be governed by public international law of which GPL form part?

As a general matter, applicable law in international arbitration is determined based on the parties' agreement. In investment arbitration, such an agreement may be found in the applicable investment treaty. Most treaties, however, do not offer any guidance on applicable law. [423] In an ICSID arbitration, the relevant provision is Article 42 of the ICSID Convention:

Article 42

> (1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such an agreement,

[419] See Chapter I, Section 2.
[420] Andrijana Mišović, 'Attributing investment contracts: the general principles approach' (2025) 28 (2) *Journal of International Economic Law*, p. 192.
[421] See: Tarcisio Gazzini, 'General Principles of Law in the Field of Foreign Investment' (2009) 10 *The Journal of World Investment and Trade* 103, p. 109.
[422] Yuliya Chernykh, *Contract Interpretation in Investment Treaty Arbitration* (Brill Nijhoff 2022), pp. 111, 165.
[423] Christoph Schreuer, Ursula Kriebaum, 'The Meaning of 'and': International Law and Domestic Law in Investment Arbitration', p. 3, available at: https://investmentlaw.univie.ac.at/fileadmin/user_upload/p_investmentlaw/Writings/A063.pdf.

> the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

In a non-ICSID arbitration, the applicable arbitration Rules typically direct the Tribunal to primarily apply the law chosen by the parties, and, in the absence of such a choice, to apply the law that it determines to be appropriate.[424]

Gaillard and Banifatemi made a strong argument in favour of applying international law in investment arbitration in their article published in the early 2000s.[425] They advocated to fully recognise the role of international law in ICSID arbitration, as opposed to limiting its role to merely supplementing or correcting domestic law. This position soon gained prominence and became the prevailing approach in investment arbitration.[426]

Moreover, the argument has expanded beyond investment arbitration to other forms of arbitration potentially involving States. Risvas, for example, focuses on contract-based arbitrations involving States or State entities. He argues persuasively that international law must be considered when deciding on extending the arbitration agreements concluded by States or State entities.[427] After examining the applicable law clauses in contracts concluded by foreign investors and States or State entities, as well as the relevant cases and authorities, he concludes that 'public international law is often part of the *lex contractus* in contracts between foreign investors and States or State entities'.[428] Many authors argue that investment contracts should enjoy the protection of international law because of their international element.[429]

This thesis builds upon this premise and further expands on specific rules of international law that should govern this matter. Since neither the ARSIWA rules of attribution nor the governing law of the contract should be applied for the reasons

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[424] Ibid, p. 2

[425] Emmanuel Gaillard and Yas Banifatemi, 'The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process' (2003) 18 *ICSID Review*.

[426] Ibid, p. 375. Christoph Schreuer, Ursula Kriebaum, 'The Meaning of 'and': International Law and Domestic Law in Investment Arbitration', p. 10, available at: https://investmentlaw.univie.ac.at/fileadmin/user_upload/p_investmentlaw/Writings/A063.pdf.

[427] Michail Risvas, 'International Law as the Basis for Extending Arbitration Agreements Concluded by States or State Entities to Non-Signatories' (2022) 71 *International and Comparative Law Quarterly*, p. 183.

[428] Ibid, p. 193.

[429] Ursula Kriebaum, 'Article 42' in in Stephan Schill et al (eds) *Schreuer's Commentary on the ICSID Convention* (Cambridge University Press 2022), p. 819 et al (see fn. 392 above).

explained, a third and novel alternative offered in this dissertation is to apply general principles of law.

5. Methodology for Identifying the GPL

Already in his first report, the ILC Special Rapporteur distinguished between the two categories of GPL:1) general principles of law derived from national legal systems and 2) general principles of law formed within the international legal system.[430] The second category is controversial, and many States expressed their disagreement or at least scepticism with respect to it.[431]

Importantly, the process of identification of the GPL is directly related to their definition.[432] The first step in determining the GPL is extraction, meaning identification of a principle common to the majority of legal systems. The second step is determining whether the principle is applicable in the international legal system.[433] For the first category of the GPL (general principles of law derived from national legal systems), the first step is crucial. However, for the second category of the GPL (general principles of law formed within the international legal system) this first step is not even necessary.[434] This thesis will treat the GPL as the *principles derived from national legal systems*, given that the second category has not been generally accepted.

Some authors describe the identification of the GPL as a process of three stages. For example, Kotuby describes the first stage as extracting a legal principle from national legal rules (unlike the rules, principles are expressions of certain fundamental values).[435] The second stage is determining whether the principle is accepted in many legal systems as a reasonable and appropriate solution.[436] Importantly, the principle does not have to

[430] Special Rapporteur Marcelo Vázquez-Bermúdez, *First report on general principles of law* (ILC Seventy-first Session, 2019), p. 6.
[431] Ori Pomson, 'General Principles of Law Formed Within the International Legal System?' *EJIL Talk*, 12 July 2022, available at: https://www.ejiltalk.org/general-principles-of-law-formed-within-the-international-legal-system/.
[432] Special Rapporteur Marcelo Vázquez-Bermúdez, *First report on general principles of law*, ILC Seventy-first Session (2019), p. 8.
[433] Ibid. See also: Jaye Ellis, 'General Principles and Comparative Law' (2011) 22 *The European Journal of International Law*, p. 954 referring to J. Combacau and S. Sur, Droit international public (8th edn, 2008), at 109–110; Verdross, 'Les principes généraux du droit dans la jurisprudence internationale', III RCADI (1935) 195, at 200.
[434] Special Rapporteur Marcelo Vázquez-Bermúdez, *First report on general principles of law*, ILC Seventy-first Session (2019), p. 9.
[435] Charles Kotuby, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press 2017), pp. 19, 20.
[436] Ibid, p. 19.

be recognized in each and every legal system.[437] Finally, the last stage is transferring the domestic principle to the international plane, which includes modifications in order to fit into the international legal system.[438] This means that the international principle will usually not have the same characteristics that it has in domestic law.[439]

While international investment tribunals have not been reluctant to apply GPL, they have been criticized for not conducting a proper *comparative law analysis* when determining such principles.[440]

For example, Peat takes the view that the practice of investment tribunals demonstrates that 'comparative law has not been used because it manifests a general principle of law', but it has merely been used 'to substantiate treaty standards or to confirm an interpretation made on other grounds'.[441] However, Peat's study focuses on domestic public and administrative law which can help in interpreting 'vague provisions and broad standards of investment treaties'.[442] Conversely, the rules of binding the non-signatories, which are at the core of this dissertation, belong to private law and they would not serve to interpret any broad standard, but would help to answer the question whether an international contract binds a non-signatory. Interestingly, the literature has noted that the GPL 'have traditionally been associated with private law'[443] and that reliance on the GPL has played an important part in providing legal rules 'on essentially private law matters'.[444] Thus, this is a different way of applying comparative law from the one that Peat describes as substantiating treaty standards or confirming an interpretation made on other grounds. Second, the criticism towards investment tribunals is often misplaced, given that they are not necessarily in the best position to conduct a thorough comparative analysis for determining the GPL in a short period of time, having in mind the interest of efficiency of the arbitration proceedings. Academics may well be in a better position to conduct such comparative analysis and offer their position on the existence of certain GPL, which is precisely the focus of this thesis.

[437] Ibid, pp. 22, 23.
[438] Ibid, pp. 19, 28.
[439] Ibid.
[440] Daniel Peat, 'International investment law and the public law analogy: The fallacies of the general principles method' (2018) 9 *Journal of international dispute settlement* 654, p. 677.
[441] Ibid, p. 677.
[442] Ibid, p. 655.
[443] Tarcisio Gazzini, 'General Principles of Law in the Field of Foreign Investment' (2009) 10 *The Journal of World Investment and Trade*, p. 13 and references in fn. 73.
[444] Robert Jennings, Arthur Watts, 'Introduction: Foundation of International law, Sources of International Law' in Robert Jennings, Arthur Watts (eds), *Oppenheim's International Law*, vol 1 (9th edn, Longman 2008), p. 40.

However, Peat's insistence on the importance of a proper comparative law analysis for determining the GPL is justified. This is especially the case because the ILC report on GPL specifically refers to a comparative analysis of national legal systems, which must be wide and representative and include different regions of the world.[445] This is why the present analysis relies on the comparative method for determining the GPL.

Bin Cheng explains that the *comparative method*, although rarely used in practice, is 'a conclusive test whether a given principle represents a general juridical truth'.[446] Similarly, draft conclusion 5 of the ILC report on GPL refers to 'determination of the existence of a principle common to the various legal systems of the world'. It explains that the determination of such a principle requires a comparative analysis of national legal systems, which must be wide and representative and include different regions of the world.[447] Such comparative analysis should include 'an assessment of national laws and decisions of national courts, and other relevant materials'.[448] Some described this process as 'a task of colossal magnitude'.[449] However, this does not mean that such a principle has to exist in every legal system, since that would grant certain isolated systems the power of veto.[450]

The first methodological question here is how many and which countries should be analysed to ensure fair representation. One approach would be to investigate different legal families.

Zweigert and Kötz offer a very detailed analysis of legal families. They describe the traditional legal families classification of Arminjon, Nolde and Wolff as the most convincing one.[451] Such classification divides legal systems into seven legal families: French, German, English, Hindu, Islamic, and Russian.[452] However, putting legal systems into groups has been criticized because it takes into account only some factors (historical development, legal context and the observable techniques of the rules of law),

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[445] Third report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur (April 2022), draft conclusions 5 (1) and (2).
[446] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons Limited 1953), p. 392.
[447] Third report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur (April 2022), draft conclusions 5 (1) and (2).
[448] Ibid, draft conclusion 5 (3).
[449] Rudolf B. Schlesinger, 'Research on the General Principles of Law Recognized by Civilized Nations', (1957) 51 *American Journal of International Law*, p. 734.
[450] Charles Kotuby, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press 2017), pp. 22, 23.
[451] Hein Kötz, Konrad Zweigert, *An Introduction to Comparative Law* (Oxford University Press 1998), p. 65.
[452] Ibid.

and overlooks other important factors such as legal culture (whether the citizens have similar attitudes to law and similar expectations of it).[453] However, in the absence of a better alternative, Zweigert and Kötz adopt the following classification as the second-best. They find the following six legal families: Anglo-American, Germanic, Romanic, Nordic, Law in the Far East (China and Japan) and religious legal systems (Hindu and Islamic).[454]

On the contrary, Siems maintains that it is perfectly possible to conduct comparative legal research without using the notion of legal families.[455] He explains that classification into legal families often fails to provide an accurate picture.[456] This is because such classifications can overemphasize the differences between the categories, underemphasize the differences within the categories and ignore the hybrid systems.[457] A preferable alternative would be a comparison focused on just a small number of countries that have influenced neighbouring countries, former colonies, and other legal systems.[458]

Finally, Pellet and Müller argue that applying a comparative law method for discovering the principles *in foro domestico* may seem essential, but it is actually unrealistic (lack of availability of material and international lawyers' lack of training in comparative law) and unnecessary (all modern law can be grouped into a few families, insofar as general principles are concerned). [459] Thus, it is enough to determine that principles are present in 'any (or some) of the laws belonging to these various systems'.[460]

The present research focuses on three principles/doctrines on binding the non-signatories deriving from domestic legal systems: the doctrine of apparent authority, implied consent and veil piercing. These principles aim to identify the true parties of the contract – beyond mere formal signatories.

When determining specific countries selection, the following criteria were taken into account: representation of different legal families (Romanic, Germanic, Anglo-

[453] Ibid, p. 67.
[454] Ibid. Legal families part: pp. 63-323.
[455] Mathias Siems, *Comparative Law* (Cambridge University Press 2017), p. 93
[456] Ibid.
[457] Ibid, p. 80.
[458] Ibid, p. 93.
[459] Alain Pellet Daniel Müller, 'Part Three Statute of the International Court of Justice, Ch. II Competence of the Court, Article 38' in Christian J. Tams, Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary* (3rd ed Oxford University Press 2019), p. 929.
[460] Ibid.

American and Law in the Far East); representation of different regions of the world (Europe, North America, Latin America, Africa, Asia); the level of development of the relevant rules on binding the non-signatories (France, Switzerland and United States, for example have very rich court practice on this matter).[461] The thesis focuses on the following countries: Brazil, China, England, France, India, South Africa, Switzerland, and the United States.

The second methodological question for determining the GPL is whether to focus merely on *commonality and representativeness* of the rules or also on their *soundness and persuasiveness*.[462]

The crucial method for the process of extraction of the GPL is *functionality* – the focus is on the function of a certain rule (the aim, which such a rule is designed to achieve). Functionalism is the basic methodological principle of all comparative law.[463] As Kötz and Zweigert explained, the only things which are comparable in law are 'those which fulfil the same function'.[464]Although legal systems face similar problems, they do not necessarily structure their solutions in the same way and may therefore use different terminology.[465] The central idea of functionalism is to study the effect of different rules, thereby focusing on functional equivalents, instead of focusing on doctrinal structures alone.[466] The same problems in different legal systems are resolved by different means, with often similar results.[467] Formally different legal rules may provide similar answers to the same problems.[468] Functionalism is practically applied on the international plane as well. As Cheng Bin explains, GPL are applied in the international sphere to the

[461] Andrijana Mišović, 'Attributing investment contracts: the general principles approach' (2025) 28 (2) *Journal of International Economic Law*, p. 193.
[462] Ibid.
[463] Hein Kötz, Konrad Zweigert, *An Introduction to Comparative Law* (Oxford University Press 1998), 35.
[464] Ibid
[465] Solène Rowan, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (Oxford University press 2012), p. 6
[466] Katerina Linos, 'Methodological Guidance: How to Select and Develop Comparative International Law Case Studies' in Paul B. Stephan, Anthea Roberts, Pierre-Hugues Verdier, Mila Versteeg (eds), *Comparative International Law* (Oxford University Press 2018), p. 48.
[467] Hein Kötz, Konrad Zweigert, *An Introduction to Comparative Law* (Oxford University Press 1998), 35.
[468] Katerina Linos, 'Methodological Guidance: How to Select and Develop Comparative International Law Case Studies' in Paul B. Stephan Anthea Roberts, Pierre-Hugues Verdier, Mila Versteeg (eds), *Comparative International Law* (Oxford University Press 2018), p. 48.

‘circumstances similar to those justifying their application in the municipal sphere’ where they ‘have been found to work substantial justice between individuals’.[469]

Functionalism is particularly useful for identifying GPL. Linos argues that functional analyses are ‘critical for international lawyers eager to identify whether particular practices are rare or widespread’.[470] Instead of focusing on particular rules, the focus should be on the concrete problem and how that problem is resolved in different legal systems.[471] Zweigert and Kötz further explain that the principle of functionality (which very much resembles the accepted international law methodology) means that:

> the solutions we find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of their function, as an attempt to satisfy a particular legal need.[472]

However, this approach has been criticized. Frankenberg argued that this approach represents a contradiction in itself – it is not possible to cut the solutions from their context and at the same time to see them purely as a function that satisfies a particular need.[473] He further explains:

> The functionalist negates the interaction between legal institutions and provisions by stripping them from their systemic context and integrating them in an artificially universal typology of ‘solutions’.[474]

The main point of critique of functionalism here is that legal rules do not only represent responses to (solutions of) certain problems, but they also develop in a certain legal culture (environment).[475] Ellis argues in favour of exploring this legal culture. She explains that perhaps the methodology of determining GPL should be rethought since it may not be possible to extract a legal rule from its context, as functionalism requires.[476]

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[469] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons Limited 1953), p. 391.
[470] Katerina Linos, 'Methodological Guidance: How to Select and Develop Comparative International Law Case Studies' in Paul B. Stephan Anthea Roberts, Pierre-Hugues Verdier, Mila Versteeg (eds), *Comparative International Law* (Oxford University Press 2018), p. 49.
[471] Hein Kötz, Konrad Zweigert, *An Introduction to Comparative Law* (Oxford University Press 1998), p. 35.
[472] Ibid, p. 34.
[473] Günter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 *Harvard International Law Journal*, p. 440.
[474] Ibid.
[475] Jaye Ellis, 'General Principles and Comparative Law' (2011) 22 *The European Journal of International Law*, p. 962.
[476] Ibid.

This has strong implications on 'commonality or representatives' of the GPL - determining whether a given principle is common to the major legal systems of the world.[477] In other words, to establish a GPL, there must be 'evidence that the rule exists in a number of States whose legal systems are representative of the world's "families" of legal systems'.[478] Regarding such commonality or representativeness, Ellis argues that such 'quest for a universally shared body of legal rules or concepts' is not only futile, but also undesirable. She explains that the validity of the GPL should not be justified by its objective nature or implicit State consent, but by its soundness and persuasiveness.[479] This means that domestic laws are to be treated as sources of inspiration, and not as 'machines from which parts can be extracted and inserted elsewhere'.[480]

Ellis makes a persuasive point on the impossibility and undesirability of universal acceptance. Her argument on persuasiveness and the soundness of a principle applies directly to the present thesis. However, one should be careful about potential subjective determinations of persuasiveness and soundness (see Leiter-Bockley's criticism against the selective approach in determining the GPL above).[481]

As a first step, principles need to be identified in (extracted from) domestic legal systems. The crucial methodological question is whether to apply a purely functional method (regardless of the conceptual context of such principles); or should context, and the environment where the rule developed, be also considered. A related question is what should be more important: that the principle is common to the major legal systems of the world or that it is sound and persuasive.

The present research takes a mixed approach: it investigates different jurisdictions that represent different legal families and regions of the world, but it also considers the soundness and persuasiveness of the principles. Clearly, the focus is on domestic legal systems with developed rules on binding the non-signatories. To determine the persuasiveness of the principles, the argumentation of domestic courts that dealt with the issue of binding the non-signatories (most often in the context of arbitration agreements) must be considered. Moreover, such domestic principles (doctrines) were influential and persuasive for many international courts and tribunals, meaning that their

[477] Ibid., p. 957.
[478] Ibid, p. 953.
[479] Ibid., p. 971.
[480] Ibid.
[481] See page 105 above.

decisions should also be taken into account as evidence *of the soundness and persuasiveness* of a principle in question. Looking into the decisions of international courts and tribunals is generally very important for the process of GPL identification.[482] There are views that decisions of international courts and tribunals play a *substantive role in the formation* of this source of international law, which goes beyond providing a mere aid in identification (as stated in Article 38 1 (d) of the ICJ Statute).[483] Some of the literature has argued that the GPL in fact crystallize for the first time within judicial decisions and judicial dialogue, which enrich the content of the principle.[484]

This thesis argues that similar principles on binding the non-signatories have developed in different legal systems. They focus on the same factors, especially *intent to be bound*, *behaviour of the non-signatory* and *reasonable expectations of the contractual partner*. Moreover, such principles have already been accepted at the international level, primarily in international commercial arbitration proceedings dealing with the personal scope of the arbitration agreement. This means that they have already been accepted as sound and persuasive at the international level. International investment tribunals should apply them when determining the issue of contract attribution, instead of applying the ARSIWA rules on attribution or domestic rules on separate legal personality, which are both irrelevant for attributing contracts. The argument is that contract attribution should be determined based on the rules dealing precisely with contract attribution which developed in domestic legal systems and crystallized at the international level as general principles of law.

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[482] Special rapporteur mentioned a potentially important role of international courts and tribunals in the process of identification of the GPL. See: Marcelo Vázquez-Bermúdez, *First report on general principles of law*.

[483] Ibid, p. 9.

[484] Johann R Leiss, 'The Juridical Nature of General Principles' in Malgosia Fitzmaurice Mads Andenas, Attila Tanzi, Jan Wouters, Ludovica Chiussi (eds), *General Principles and the Coherence of International Law* (Brill 2019), pp. 97, 98.

Chapter V: Principles of Binding the Non-Signatories in Comparative Law

1. Introduction

The significant jurisprudence on binding the non-signatories has not been adequately followed by doctrinal development.[485] Currently, there is no proper theoretical framework on the extension of arbitration agreements to non-signatories, especially in cases where States or State entities are involved.[486] This thesis has been developed with the idea of filling this gap in the doctrine.

Domestic legal systems do offer theories based on which a State could be held contractually bound based on its involvement in a contract (or more generally, the entire economic operation). Moreover, theories developed in international commercial arbitration that govern the extension of arbitration agreements to non-signatories heavily rely on contract and agency relationships.

In doctrine, there are certain contributions on this matter, which this project builds on and extends. Risvas, for example, argues that arbitration agreements can be extended to non-signatories based on theories of implied consent, or abuse of separate legal personality and estoppel, which are, in his view, recognized under PIL.[487] He argues that arbitration agreements concluded by States or State entities are governed by public international law (although not exclusively, but in parallel with domestic law).[488] His contribution fits nicely into Crawford and Mertenskötter's categorization of three potential legal frameworks that can govern the issue of contract attribution, and it can be described as an approach in favour of applying PIL rules other than the ARSIWA. He comes close to the idea that such PIL theories of implied consent, abuse of separate legal personality and estoppel qualify as GPL, but refrains from making that

[485] Pedro J. Martinez-Fraga, 'The Dilemma of Extending International Commercial Arbitration Clauses to Third Parties: Is Protecting Federal Policy While Accommodating Economic Globalization a Bridge to Nowhere' (2013) 46 *Cornell International Law Journal*, p. 294.
[486] Michail Risvas, 'International Law as the Basis for Extending Arbitration Agreements Concluded by States or State Entities to Non-Signatories' (2022) 71 *International and Comparative Law Quarterly* p. 186.
[487] Ibid, p. 183.
[488] Ibid, p. 184.

argument.[489] Thus, it remains open under which category of formal sources of PIL such theories would fall.

Brekoulakis proposes a unifying theory for non-signatories focused on the concept of dispute rather than the concept of contract.[490] Under his theory, the crucial question is not whether a non-signatory can demonstrate consent for arbitration, but whether it is inextricably implicated in a dispute which is the subject matter of an arbitration.[491] He explains that this theory captures the current reality where courts and tribunals apply non-signatory theories which are often alien to fundamental principles of consent, although they formally claim that whether an arbitration agreement binds a non-signatory is a matter of consent.[492] He further distinguishes between two groups of non-signatory theories: 1) theories based on equity and 2) theories based on the functional concept of consent that concerns the underlying substantive contract (not the arbitration agreement).[493] Similarly, in his study on non-signatories and international contracts, Park relies on two general theories based on which non-signatories can be held contractually bound: (1) implied consent or (2) disregard of corporate personality.[494]

These contributions are very valuable as they offer a clear and systematic classification of the various legal theories for binding non-signatories to arbitration agreements. Additionally, they provide a very useful overview of the international arbitration practice where tribunals applied these theories. However, the analysis remains incomplete, as it does not specify the legal framework under which such theories should be applied. There is no indication that they should be applied as GPL, nor is there a clarification as to the method by which they should be identified. This thesis seeks to fill that gap by framing such theories within the category of GPL and offering a methodology for their identification, grounded in comparative legal analysis.

The thesis focuses on three principles of binding the non-signatories deriving from domestic legal systems: the principle of apparent authority, implied consent, and veil piercing. These principles were selected because they aim to identify parties of the

489 Ibid, p. 209.
490 Stavros Brekoulakis, 'Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories' (2017) 8 *Journal of International Dispute Settlement*, pp. 610, 612.
491 Ibid, 612.
492 Ibid, 613.
493 Ibid.
494 William Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma' in *Multiple Parties in International Arbitration* (Oxford University Press, Permanent Court of Arbitration 2009), para 1.10.

contract, beyond mere formal signatories. Other principles of binding the non-signatories are either not suitable for contracts concluded by the State entities, or some States have rejected them (e.g., a group of companies doctrine). Additionally, some principles are well established in some States, but underdeveloped in others (e.g., estoppel). Moreover, some principles can be subsumed under one of the three principles analysed in this study (e.g., estoppel is analysed in the context of implied consent; alter ago is analysed in the context of veil piercing).

The table below provides an overview of the recognition and relevance of the three principles in the nine analysed jurisdictions and international law. A detailed analysis of each principle follows the table.

Jurisdiction	**Apparent authority**	**Implied consent**	**Veil-piercing**
Brazil	The general doctrine of appearance is grounded in the protection of third parties and applied to the issue of binding the non-signatories.	Active participation in negotiations serves as a proof of intent to be bound. Applied in the context arbitration agreements.	Allowed in cases of deviation from purpose (the use of the legal entity for the purpose of harming creditors), and commingling of assets.
China	Apparent authority recognized in contract law. Applied to the issue of binding the non-signatories in the context of arbitration agreements.	Court has bound the non-signatory of the arbitration agreement where it performed the contract under the name of signatory.	If shareholders abuse the independent status of the company in a way that causes serious damage to the interests of any company's creditors, the law provides for joint and several liability of such shareholders.
England	Apparent (ostensible) authority is well-established principle, creating a legal relationship between the principal and a third party based on representations made by the principal.	English approach to the doctrine of implied consent primarily focuses on the intent of being bound.	Corporate veil can be lifted if the distinct legal personality appears to be a mere sham or façade. Applicable in cases of binding the non-signatories of the arbitration agreement.

France	The doctrine of *mandat apparent* stems from a general doctrine of *l'apparence*. Applied in the context of binding the non-signatories of the arbitration agreement.	Flexible approach focuses on the conduct of the non-signatory, directly involved in the conclusion, performance, and termination of the contract.	Concepts comparable to veil piercing (*société fictive* and *confusion de patrimoines*) played no significant role in binding non-signatories (likely because the group of companies doctrine is accepted).
Germany	Authority by toleration or acquiescence (*Duldungsvollmacht)* and apparent authority (*Anscheinsvollmacht)* applied to bind the non-signatory.	German law recognises the idea that entering into contract negotiation should have certain legal consequences (e.g. *culpa in contrahendo*).	Veil-piercing theory is generally accepted under German law, but it remains uncertain whether it can be applied to bind a non-signatory of the arbitration agreement.
India	Apparent agency recognized under Indian contract law.	Non-signatories can express their intent of being bound by the contract through their conduct or relationship with signatories.	Veil-piercing doctrine is recognized, but conflated with the group of companies doctrine in the context of binding the non-signatories.
South Africa	Apparent authority rooted in estoppel by representation.	Tacit contract - inferred from the conduct of the parties.	Veil piercing recognized in cases of fraud, deceit, improper or dishonest conduct.
Switzerland	The doctrine of appearance of being bound, which is based on the principle of reliance under Swiss law, has been applied to bind the non-signatory of the contract (arbitration agreement).	Implied consent is defined as an intent to be bound expressed through interference in contract negotiations or performance. Applied in the context of arbitration agreements.	'Durchgriff' doctrine - the corporate veil can be pierced in case of abuse of rights. Applied to bind the non-signatory of the arbitration agreement.
United States	Apparent authority applied to bind non-signatory of the arbitration agreement.	The doctrine of estoppel (highly developed in the U.S.) relies on implied consent.	Corporate veil piercing and the alter ego doctrine (strongly influenced by equity) are well-

			established under the U.S. law.
International law	Recognised as a general principle in international commercial arbitration. Argument has been made that it should be applied as a *representation* principle in investment arbitration.	International tribunals determine whether a non-signatory showed an intent to be bound to a contract based on its behaviour.	ICJ held that the principle should be applied 'to prevent the misuse of the privileges of legal personality' in cases of fraud, to protect third persons or to prevent the evasion of legal obligations.

Table 1: Summary of Legal Principles in the Selected Jurisdictions

2. Apparent Authority

The principle of apparent authority falls within the realm of agency law. Agency, as a legal concept, is well established in 'most, if not all legal systems'.[495] Agency enables contract attribution to a non-signatory if a signatory acted as an agent of such non-signatory. Since a formal agency relationship virtually never exists in cases analysed in this thesis, the focus is on the so-called apparent authority. Apparent authority applies where a third party (signatory) reasonably believed, based on the apparent principal's (non-signatory) words or behaviour, that the apparent agent (another signatory) acted on the principal's behalf when entering into a contract. The principle of apparent authority is widely accepted among States.

The crux of the principle of apparent authority is the reasonable belief of a third party, established based on the principal's words or actions. However, sometimes it suffices that the principal puts the apparent agent into a certain position, based on which a third party could reasonably conclude that there is an agency relationship. As Smits explains: 'courts around the world have indeed held that the principal remaining silent or putting someone in a certain position can induce a reasonable person to think that the agent had the necessary authority to bring about a contract'.[496]

[495] Mohamed S. Abdel Wahab, 'Extension of arbitration agreements to third parties: A never ending legal quest through the spatial-temporal continuum' in Franco Ferrari and Stefan Kröll (eds) *Conflict of Laws in International Arbitration* (Otto Schmidt/De Gruyter European law publishers 2010), p. 149.
[496] Jan Smits, *Contract Law - A Comparative Introduction* (Edward Elgar Publishing 2017), p. 255.

The following subsections examine the principle of apparent authority in nine domestic jurisdictions and before international arbitral tribunals.

2.1. Brazil

The theory of appearance is a general doctrine under Brazilian law and can be applied in very different types of cases (procedural communication, civil liability, consumer protection).[497] As stated in a decision by the Superior Court of Justice, the doctrine applies when a false legal situation appears as true, and a third party, acting in good faith, relies on it as if it is real.[498] In such cases, the law protects the third party's belief by creating rights in her favour, even if it contradicts the actual reality. The doctrine is firmly grounded in the protection of third parties who had legitimate expectations based on good faith.[499]

Superior Court of Justice applied the doctrine of appearance to validate the service of summons received by an individual who, according to the entity's bylaws, lacked the authority to represent it in legal proceedings.[500] The summons was accepted by the entity's director, who was not formally empowered by the internal statute to act on its behalf before the Court. Nevertheless, as the director received the summons without any reservation, the Court held this was a valid acceptance.

Moreover, Court of Justice of Sergipe held that a contract signed by a partner of the company was valid under the doctrine of appearance.[501]

In a case decided by the Brazilian Federal District's Court of Justice, a contract was executed by a company controlled by another company, which was designated as the

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[497] Superior Tribunal de Justiça, Notícias, Assim é, se lhe parece: a teoria da aparência nos julgados do STJ, 04/25/2021 (available at: https://www.stj.jus.br/sites/portalp/Paginas/Comunicacao/Noticias/25042021-Assim-e--se-lhe-parece-a-teoria-da-aparencia-nos-julgados-do-STJ.aspx)

[498] Superior Tribunal de Justiça (STJ), Recurso em Mandado de Segurança Nº 57.740 - PE (2018/0136305-6) 'uma situação de fato que manifesta como verdadeira uma situação jurídica não verdadeira, e que, por causa do erro escusável de quem, de boa-fé, tomou o fenômeno real como manifestação de uma situação jurídica verdadeira, cria um direito subjetivo novo, mesmo à custa da própria realidade' (available at: https://processo.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=2031251&num_registro=201801363056&data=20210329&peticao_numero=-1&formato=PDF).

[499] Superior Tribunal de Justiça (STJ), Recurso Especial Nº 1.637.611 - RJ (2016/0261016-5) (available at:https://processo.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=1629697&num_registro=201602610165&data=20170825&peticao_numero=-1&formato=PDF)

[500] Superior Tribunal de Justiça, Corte Especial do STJNº 864.947 - SC (2010/0197614-6) (available at: https://processo.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=1153418&num_registro=201001976146&data=20120831&peticao_numero=-1&formato=PDF)

[501] TJ-SE- Apelação Cível: AC XXXXX20118250001 (available at: https://www.jusbrasil.com.br/jurisprudencia/busca?q=Apela%C3%A7%C3%A3o+C%C3%ADvel+n%C2%B0+9109857-81.2007.8.26.0000)

defendant in the proceedings. The Court applied 'the theory of appearances' and held that since 'it is widely evidenced that the companies belong to the same economic group, which means, that is possible to conclude that the defendant is a legitimate party to respond to the claim'.[502] This concept of 'belonging to the same economic group' appears to be very similar to the group of companies doctrine. However, it is not clear whether this doctrine as such is accepted in Brazilian law.[503] The crucial element and the reason why this case is offered as an example of application of the theory of appearance is that it appeared to one signatory that a non-signatory was a legitimate party to the contract.

2.2.China

Chinese contract law accepts the doctrine of apparent authority. Article 49 of the Contract Law of the Republic of China provides that an act of agency is effective even if the actor has no power of agency (or it oversteps the power of agency, or the power of agency has expired) and yet concludes a contract in the principal's name. The crucial element is that the counterpart had 'reasons to trust' that such an actor in fact had the power of agency.

The issue arose particularly in the context of arbitration agreements, namely, whether a principal can be bound by the arbitration clause based on apparent agency. There are a couple of rulings where the courts held that when elements required for apparent authority are established, the principal should be bound by the arbitration clause. For example, in one recent case, the Intermediate People's Court in the Mianyang Municipality in the Sichuan Province held that although the agent had no authority to enter into the contract in question on the principal's behalf, the agent's act constituted apparent authority under Article 49 of the Contract Law.[504] This is because the third

[502] TJ-DF – AC: 451887120058070001 DF 0045188-71.2005.807.0001, Judge: Maria Beatriz Parrilha, Judgment Date: 11/04/2007, 4º Civil Panel, Date of Publication: 19/04/2007, DJU Page. 88 Section 3. Available at: http://www.jusbrasil.com.br/jurisprudencia/. Translation according to: Ilan Jadoul, 'Brazil: The binding effect of the arbitration clause in groups of companies and the group of companies doctrine', *Global Arbitration News*, 19 May 2016, available at https://www.globalarbitrationnews.com/2016/05/19/20160516-the-binding-effect-of-the-arbitration-clause-in-groups-of-companies-and-the-group-of-companies-doctrine/.

[503] See Leonardo Ohlrogge, 'The Extent of Consent in Multi-Party and Multi-Contract Arbitration under the Perspective of Brazilian Law - Substantive and Procedural Issues' PhD thesis, University of St. Gallen, School of Management, Economics, Law, Social Sciences and International Affairs (22 May 2018), p. 89 arguing that the doctrine is not recognised in Brazil.

[504] Weiwei Gu, Yin Wu, 'Effects of Unauthorised Agency on Arbitration Agreements' *Global Law Office* (18 October 2018), available at https://www.glo.com.cn/Content/2020/02-24/1406121059.html referring to (2016）川07民特字第1号ruled by the Intermediate People's Court in Mianyang Municipality in Sichuan Province and (2017）陕01民特92号 ruled by the Intermediate Court in Xian Municipality. It

party had reasons to believe that it was the principal who entered into a contract and agreed upon the arbitration clause.[505]

2.3. England

English law accepts the doctrine of apparent authority, meaning that the principal can be liable for contracts of its agent even if the principal did not authorise the agent to enter into such contracts.[506] This is based on the principal's representations to a third party that the principal has authorised the agent to act on the principal's behalf.[507] Apparent authority may be general (arising from the agent's position) and specific. General apparent authority stems 'from the course of dealing, or from placing an agent in such a position that it is reasonable for third parties to assume that he has the principal's authority to make a contract of the kind in question'.[508] Specific apparent authority exists only if 'the third party can show that the principal expressly represented that the agent had the authority to enter into a particular contract on its behalf'.[509]

The cases elaborating apparent authority under English law are numerous. Lord Denning explained the principle in *Hely-Hutchinson v Brayhead*, thereby focusing on the perception of the third parties:

> Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board appoints one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director.[510]

In *Freeman & Lockyer v. Buckhurst Park Properties*, Lord Diplock explained the principle of apparent authority and its consequences:

should be noted that the authors of the cited text are of the opinion that 'an agent without authority or with apparent authority should not be bounded by an arbitration agreement'.

505 Ibid referring to (2016）川07民特字第1号ruled by the Intermediate People's Court in Mianyang Municipality in Sichuan Province.

506 Edwin Peel, *The Law of Contract* (Sweet & Maxwell 2011), p. 751.

507 Ibid, p. 757.

508 Ibid, p. 758.

509 Ibid, p. 758.

510 *Hely-Hutchinson v Brayhead Ltd* [1968] 1 Q.B. 549.

> An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract.[511]

Finally, Justice Toulson connected the doctrine of apparent authority with estoppel by representation:

> The doctrine of apparent or ostensible authority is based on estoppel by representation. Where a principal (P) represents or causes it to be represented to a third party (T) that an agent (A) has authority to act on P's behalf, and T deals with A as P's agent on the faith of that representation, P is bound by A's acts to the same extent as if A had the authority which he was represented as having.[512]

Clearly, the doctrine of apparent authority is well established in English law. Foreign courts applying English law have also referred to apparent authority as an established principle under English law.[513] In its core lies the appearance for third parties, caused by a principal. Because of such appearance, a legal relationship is established between the third party and the principal.

Moreover, under English law, 'public corporations are sometimes regarded as agents of the Crown: such agency arises simply by virtue of incorporating statute'.[514] There is not much in English law on the application of this theory, but there is one historical case - *Bank Voor Handel En Scheepvaart, NV v Administrator of Hungarian Property* [1954]. It has been argued in the literature that this case may serve as an authority to join a non-signatory State into the arbitral proceedings, based on the agency relationship.[515]

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[511] *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 502.

[512] *ING Re (UK) Ltd v. R & V Versicherung AG,* 2 All ER (Comm), England and Wales High Court - Commercial Court (29 June 2006), para 99. For more cases on apparent authority see: N. Ryder, Griffiths, M., and Singh, L., *Commercial Law: Principles and Policy* (Cambridge University Press 2012), p. 18 et seq.

[513] China No. 44, Allenberg Cotton Co., Ltd. v. Jiangsu Nijiaxiang Group Co., Ltd., Intermediate People's Court, Jiangsu Province, Wuxi, Xi Shang Wai Zhong Shen Zi No. 9, 14 January 2015, in Stephan W. Schill (ed) (2023) 48 *ICCA Yearbook Commercial Arbitration*, pp. 56-57.

[514] Edwin Peel, *The Law of Contract* (Sweet & Maxwell 2011), p. 751.

[515] Hanna Roos, *Agency as a mechanism for compelling a non-signatory to join arbitral proceedings* (Wolters Kluwer 2009).

2.4. France

French courts developed the so-called doctrine of *mandat apparent.* The principal, who did not sign the contract, may be bound by it if a third party (contractual partner) was in a mistaken belief, in good faith, that the person it contracted with was an agent with the authority to bind the principal.[516] This doctrine stems from a more general doctrine of *l'apparence*, which French courts developed in order to attach certain legal consequences to a person's erroneous perception of reality.[517]

At first, the fulfilment of two conditions was necessary for applying this doctrine: 1) proving that the principal was at fault in creating the appearance of authority, and 2) the third party acted in good faith.[518] The notion of fault, however, was later abandoned and the only condition for the application of the *mandat apparent* became proof that the third party legitimately believed that the agent had authority to bind his principal.[519] As the French Supreme Court explained:

> The principal can be liable on the basis of the *mandat apparent*, even in the absence of fault on the part of the principal, provided that the belief of the third party as to the extent of the powers of the agent is legitimate. Such a belief is legitimate when the circumstances were such that the third party was allowed not to check the exact limit of this power.[520]

Another important aspect of the doctrine of *mandat apparent* is that it can be applied in situations where there was no agency at all. This was established by the French Supreme Court in *Consorts Kenicq v. Martin*.[521] This case concerned a tenant, Mr. Martin, who relied on a written promise by Mrs. Kenicq, the wife of the building co-owner, that the co-owners would pay certain repair costs in the flat. Mr. Kenicq, however, argued that his wife lacked the authority to bind the co-owners. Mr. Martin relied, *inter alia*, on the apparent authority doctrine based on her presence during the previous negotiations. While the lower courts sided with Mr. Martin, the Supreme Court noted that it was not properly explained why Mr. Martin was relieved from the duty to verify Mrs. Kenicq's

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[516] Severine Saintier, 'Unauthorised agency in French law' in Danny Busch, Laura Macgregor (eds), *The Unauthorised Agent: Perspectives from European and Comparative Law* (Cambridge University Press 2009), p. 21.
[517] Ibid.
[518] Ibid, p. 23.
[519] Ibid, p. 26.
[520] Ibid, p. 25 (Cass Ass Plén 13-12-1962, Banque Canadienne Nationale, D 1963, J 277, note Calais-Auloy).
[521] Ibid, pp. 28-29 (Cass Civ 1ère, 29-4-1969, 3ème espèce, JCP G 1969, II, 15972).

authority.[522] Although the decision additionally widened the doctrine of *mandat apparent* to cover the situations where there was no agency relationship at all, it remained unclear what the circumstances are that absolve the third party from the duty to check the authority of the agent.[523]

In the context of binding the non-signatory of a contract (specifically, an arbitration agreement), the doctrine of apparent authority was confirmed by the French Cour de Cassation in its decision of 8 July 2009.[524] The Court held that a company may still be bound by an arbitration agreement even if the individual who signed it lacked actual authority, provided that the other party could have legitimately believed that the signatory had the authority to bind the company.[525]

2.5. Germany

Under German law, two doctrines of representation are particularly relevant for this thesis: authority by toleration or acquiescence - *Duldungsvollmacht* and apparent authority - *Anscheinsvollmacht*. In the first situation, the principal knows that an apparent agent is acting in his name without authority and tolerates this conduct, while in the second situation, the principal causes another to believe that he has given authority to an agent, although he has not done so.[526] *Duldungsvollmacht* is applicable to situations where the principal had knowledge of the agent's actions but failed to interfere. *Anscheinsvollmacht* applies where the principal did not have such knowledge of the agent's actions but could have obtained it had he used due care.[527] The knowledge of the principal is the distinguishing factor between these two concepts.[528]

The third party is protected under the principle of legal appearance (*Rechtsscheinprinzip*).[529] The principal must have behaved in a certain way: failed to stop the apparent agent (*Duldungsvollmacht*); or through its behaviour or statements

[522] Ibid, p. 29.
[523] Ibid, p. 30.
[524] *Société d'Etudes et Représentations Navales et Industrielles (SOERNI) et Autre v. Société Air SeaBroker Limited (ASB)*, Case no. 08-16025, Bulletin2009, I, n° 165 and note D. Bensaude and J.Kirby. See according to Bernard Hanotiau, *Complex Arbitrations: Multi-party, Multi-contract and Multi-issue* (2nd ed, Wolters Kluwer 2020), p. 16.
[525] Ibid.
[526] Matthias Lehmann, 'Authority of Agents' in Stefan Leible and Matthias Lehmann, (eds) *European Contract Law and German Law* (Kluwer Law International 2014), pp. 128, 129.
[527] Martin Schmidt-Kessel, Ana Baide, 'Unauthorised agency in German law' in Danny Busch, Laura J. Macgregor (eds) *The Unauthorised Agent: Perspectives from European and Comparative Law* (Cambridge University Press 2009), pp. 114, 117.
[528] Ibid, p. 115.
[529] Matthias Lehmann, 'Authority of Agents' in Stefan Leible, Matthias Lehmann (eds) *European Contract Law and German Law* (Kluwer Law International 2014), p. 129.

caused the third party to believe in the authority of the apparent agent (*Anscheinsvollmacht*).[530]

Both doctrines require good faith on the side of the third party. Authority by acquiescence requires from a third party a good faith understanding that the other party is authorized as an agent.[531] The principle of apparent authority applies in situations where a reasonable person in the shoes of a third party would have reasonably inferred that the agent was acting with authority, based on the principal's words and/or actions.[532] Important for establishing apparent authority is the third party's reaction to the behaviour of the principal – the third party assumed that the agent had authority based on its good faith interpretation of the principal's behaviour.[533]

In a recent decision, the Higher Regional Court of Cologne enforced a Swiss arbitral award in which German law on apparent authority was applied.[534] The question arose whether a valid contract was concluded between the parties. Respondent argued that this was not the case because the contract was signed by a person who was not authorized to represent the Respondent.[535] Applicant's legal expert explained that German commercial agency law provides for three scenarios in which the actions of a representative may bind a principal to a third party: 1) formal power of attorney (förmlichen Vollmacht); 2) apparent authority (Anscheinsvollmacht) and 3) authority granted by toleration of the agent's actions (Duldungsvollmacht).[536] It was explained that in order to establish apparent authority the following conditions must be fulfilled: a) the principal consciously or unconsciously allowed the agent to assume that the agent can act on its behalf; b) the principal did not know that the agent was acting on its behalf in a particular transaction, but should have known and could have prevented this by exercising due care; and c) the third party acted in good faith.[537] Regarding the authority granted by the toleration of the agent's actions, three conditions must be fulfilled: a) the principal knew that the agent was acting on his behalf but remained inactive and thus

[530] Ibid.
[531] Martin Schmidt-Kessel and Ana Baide, 'Unauthorised agency in German law' in Danny Busch, Laura J. Macgregor (eds) *The Unauthorised Agent: Perspectives from European and Comparative Law* (Cambridge University Press 2009), pp. 115, 116 referring to BGH NJW 2004, 2745, 2746–47.
[532] Ibid, p. 117.
[533] Edwin R. Holmes, 'Apparent Authority and Undisclosed Principal under German Law' (1974) 4 *California Western International Law Journal* 340, pp. 349, 350.
[534] Oberlandesgericht Köln, 19 Sch 21/23, 19. Zivilsenat, ECLI:DE:OLGK:2024:0202.19SCH21.23.00 Beschluss (02.02.2024).
[535] Ibid, para 9.
[536] Ibid, paras 39-48.
[537] Ibid, paras 42-45.

consciously tolerated the agent's conduct; and b) the third party acted in good faith.[538] The arbitrator accepted this legal opinion as a correct explanation of the German law.[539]

In the enforcement proceedings before the German court, the Respondent argued, *inter alia*, that his right to be heard was violated because the arbitrator decided the question on the German law of representation solely based on the legal opinion submitted by the Applicant and not based on the correct criteria. The Court rejected this argument and held that the arbitrator considered the following: legal opinion submitted by Applicant, Respondent's statement, as well as German legal norms and case law of the Federal Court of Justice.[540] Consequently, the enforcement was granted.

To summarize, in the absence of formal authority, a principal may nevertheless be bound by a contract concluded by an agent. This requires that the principal either knowingly tolerated the agent's conduct or negligently failed to prevent the appearance of authority. In both cases the third party must have relied in good faith on the existence of the apparent agent's authority.

2.6. India

Section 237 of the Indian Contract Act, 1872, deals with apparent agency and states:

> When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations, if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

The Indian courts dealt with the question of apparent authority on many occasions. For instance, in *Valapad*, the Kerala High Court held that 'in the case of apparent authority, one has first of all to find out in respect to what transaction an agent has apparent authority and towards whom'.[541] The Court explained that the term 'ostensible authority' denotes no authority at all:

> It is a phrase conveniently used to describe the position which arises when one person has clothed another with, or allowed him to assume, an

[538] Ibid, paras 46-48.
[539] Ibid, para 49.
[540] Ibid, paras 249-252.
[541] *The Valapad Co-Operative Stores Ltd. vs K.H. Srinevasa Iyer Brothers, Palghat*, Kerala High Court (8 February 1963), para 7.

> appearance of authority to act on his behalf, without actually giving him an authority either express or implied, by which appearance of authority a third party is misled into believing that a real authority exists.[542]

In *Harshad J. Shah v. LIC,* the issue was whether a certain life insurance company could be held liable under the doctrine of apparent authority. One of the policyholders invoked the principle and argued that, through its conduct of accepting premiums via agents, the company had led policyholders to believe that the agents were authorized to collect premiums on its behalf. However, the Supreme Court found no evidence that the company had, by its conduct, induced the policyholders to believe that the agents were authorized to receive premiums on behalf of the company. Consequently, the Court held that the doctrine of apparent authority was inapplicable.[543]

Thus, a critical element of the doctrine of apparent authority under Indian law, as in many other jurisdictions, is that it must be demonstrated that the principal induced the third party to believe that the purported agent was authorized to act on the principal's behalf. In essence, the focus lies on the principal's actions that conferred upon the agent the appearance of authority, thereby justifying the third party's reliance.

2.7. South Africa

The Supreme Court of Appeal of South Africa dealt with the issue of apparent authority in several cases. For example in *NBS Bank Ltd v Cape Produce Company (Pty) Ltd and Others*, the Court held that following six requirements must be met to establish apparent authority: 1) a representation by words or conduct; 2) made by the principal and not merely by the agent, that he had the authority to act as he did; 3) a representation in a form such that the principal should reasonably have expected that outsiders would act on the strength of it; 4) reliance by the third party on the representation; 5) the reasonableness of such reliance; 6) consequent prejudice to the third party.[544] Both in this and another related case (*South African Eagle Insurance Company Ltd v NBS Bank Ltd*), the Supreme Court of Appeal dealt with liability of a commercial bank for unauthorized transactions concluded in the bank's name by one of its local branch managers and held in both cases that the bank was liable 'because of the aura of authority with which it enveloped its branch manager, causing a variety of investors to believe

[542] Ibid.
[543] *Harshad J. Shah V L. I. C. of India*, Supreme Court of India (4 April 1997), para 18.
[544] *NBS Bank Limited v Cape Produce Company Pty Ltd et al.,* Case No. 281/99, Supreme Court of Appeal of South Africa (28 September 2001), para 26.

that they were dealing with the bank when in truth they were dealing with the branch manager'.[545]

The South African formulation of apparent authority is 'firmly rooted in estoppel by representation'.[546] An argument has been made that while it is doubtful under English law whether the apparent authority is a form of estoppel, in South African law it is much clearer that the apparent authority has its basis in estoppel.[547] Moreover, in South African law, there is an additional requirement which does not exist in English law – 'a representation must be in such a form that the principal should reasonably have expected that outsiders would act on the strength of it'. [548] It has been argued that this formulation is more protective of the principal in comparison with English law.[549]

2.8. Switzerland

Swiss law protects qualified appearance, irrespective of the principal's actual will.[550] Where a third party relies in good faith on an appearance of authority created by the principal, the principal is bound by the agent's acts.[551]

International commercial arbitration cases often refer to the Swiss doctrine of appearance of being bound, which is based on the principle of reliance under Swiss law. The doctrine serves to protect a 'party's erroneous but reasonable belief that it entered into a contract with the parent rather than the subsidiary or with both.[552]

In one arbitral award rendered under the auspices of the Zurich Chamber of Commerce, the Arbitral Tribunal attributed a contract (containing an arbitration agreement) of a Chinese provincial SOE to a Chinese national SOE. The Swiss Federal Tribunal confirmed the arbitral award based on apparent authority.[553] The Court held:

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[545] *Glofinco v. Absa Bank Limited T/A United Bank,* Case number 135/2001, The Supreme Court of Appeal of South Africa (30 August 2002), para 1.
[546] Laura Macgregor, 'Agency' in Hector MacQueen, Reinhard Zimmermann (eds), *European Contract Law - Scots and South African Perspectives* (Cambridge University Press 2013), pp. 127, 128.
[547] Ibid, pp. 127, 128.
[548] Ibid, p. 128
[549] Ibid.
[550] Christoph Müller, *Swiss Contract Law in International Commercial Arbitration: A Commentary* (Cambridge University Press 2023), p. 83
[551] Ibid. See also Article 32 and 33 of the Swiss Code of Obligations.
[552] Nathalie Voser, 'Chapter 9: The Swiss Perspective on Parties in Arbitration: "Traditional Approach With a Twist regarding Abuse of Rights" or "Consent Theory Plus"' in Stavros Brekoulakis, Julian David Mathew Lew et al. (eds) *The Evolution and Future of International Arbitration* (Kluwer Law International 2016)161, p. 174, para. 9.64.
[553] *Not Indicated v. Not Indicated*, Bundesgericht, I. Zivilabteilung, Not Indicated, 1 September 1993, (1996) 14 (1) *ASA Bulletin* 623-629. See also: Bernard Hanotiau, *Complex Arbitrations: Multi-party, Multi-contract and Multi-issue*, (2nd ed, Wolters Kluwer 2020), p. 16 and Mohamed S. Abdel Wahab,

> Apart from their exclusive state control and their shared integration into a state economic apparatus with a unified purpose and merely a geographical division of responsibilities, the two companies appear to be mutually connected. This is particularly evident in the provincial company's organizational dependence on the central company, which also appoints its president and vice president. However, this means that the central company must accept any apparent legal relationship that it forms a single legal entity with the provincial company, while the latter is merely a branch office. These circumstances necessitate strict adherence to the principle of reliance and special protection for bona fide third parties who rely on this appearance. These principles apply particularly to state-owned enterprises.[554]

In another recent case Swiss Federal Supreme Court confirmed that a group company may be bound by an arbitration agreement signed by another group company in accordance with the principles of expected group liability; by piercing the corporate veil; on the basis of *apparent authority* or *legal appearance* (*apparence juridique*), whereby it is always a matter of protecting the expectation that has been created.[555]

In conclusion, the doctrine of apparent authority under Swiss law is firmly established and primarily aimed at protecting third parties acting in good faith.

2.9. United States

As a general matter, the issue of binding the non-signatories in the United States has been extensively elaborated in the context of binding the non-signatories of the arbitration agreement. Such discussion is relevant for this thesis simply because such theories directly derive from common law principles of contract and agency law in the United States. Thus, they are not relevant merely for the extension of the agreement to arbitrate, but for contracts as such. As stated in the SCOTUS landmark case on this matter *Thomson-CSF*:

'Extension of arbitration agreements to third parties: A never ending legal quest through the spatial-temporal continuum' in Franco Ferrari, Stefan Kröll (eds), *Conflict of Laws in International Arbitration* (Otto Schmidt/De Gruyter European law publishers 2010), p. 151.

[554] *Not Indicated v. Not Indicated*, Bundesgericht, I. Zivilabteilung, Not Indicated, 1 September 1993, (1996) 14 (1) *ASA Bulletin* 623-629.

[555] Switzerland No. 2024-1, *A (nationality not indicated) v. B GmbH (Germany)*, Bundesgericht [Federal Supreme Court], Second Civil Chamber, Case no. 5A_739/2022 (12 October 2023) in Stephan W. Schill (ed) (2024) 49 *ICCA Yearbook Commercial Arbitration* 208.

> This Court has recognized a number of theories under which non-signatories may be bound to the arbitration agreements of others. Those theories arise out of common law principles of contract and agency law. Accordingly, we have recognized five theories for binding non-signatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel.[556]

Turning to the agency, in the US Third Restatement of Agency, agency is defined as

> [T]he fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.[557]

An agent may act on a principal's behalf with actual, implied and apparent authority. Actual or implied authority means that the agent is taking actions 'designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives'.[558] Apparent authority is a situation when 'a third party reasonably believes the actor has authority to act on behalf of the principal. That belief is traceable to the principal's manifestations'.[559] One court described apparent authority as follows:

> Apparent authority is based on the doctrine of estoppel, and one seeking to charge the principal through apparent authority of an agent must establish conduct by the principal that would lead a reasonably prudent person to believe that the agent has the authority that he purports to exercise.[560]

In one prominent case - *Merrill Lynch v Optibase*, the Court of Appeals for the Second Circuit held that a mere affiliation was not enough to bind a non-signatory to an arbitration agreement signed by an affiliate. Optibase commenced an arbitration asserting claims against three parties, including one *Merrill Lynch* sister company with whom it did not have an agreement to arbitrate. Optibase relied principally on an agency

[556] *Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773*, at 776 (emphasis added). In addition, the doctrine of third-party beneficiary has also been recognised.
[557] Restatement (Third) of Agency, s 1.01.
[558] Ibid, s 2.02.
[559] Ibid, s 2.03.
[560] *Biggs v. U.S. Fire Ins. Co.*, 611 S.W.2d 624 (Tex. 1981)

theory to argue that the sister company should also be compelled to arbitrate based on: affiliate relationship, various corporate relationships, ownership, control, same personnel, the fact that companies present to the public the image of a single, integrated firm, etc.[561] The Court, however, rejected this argument and concluded that mere affiliation was 'insufficient to bind a non-signatory on agency principles to an arbitration agreement signed by an affiliate'.[562]

In conclusion, the principal can be bound by an agreement concluded by its agent based on actual (or implied) authority to enter into such an agreement. In addition, even in the absence of such actual or implied authority, the principal can be bound if it acted in such a manner that it led a reasonable other party to conclude that an agent had authority to enter into such an agreement on behalf of the principal.[563] Importantly, however, certain action on the side of the principal is required, and a mere affiliation with an agent would not be enough.

2.10. International law

The principle of apparent authority is widely recognized in the context of international commercial arbitration, with scholarly support affirming such acceptance.[564] It is also expressly recognized in the UNIDROIT Principles (2016), Article 2.2.5:

> (1) Where an agent acts without authority or exceeds its authority, its acts do not affect the legal relations between the principal and the third party.
>
> (2) However, where the principal causes the third party reasonably to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.

By way of illustration, one may refer to an early ICC case from 1975.[565] The dispute arose out of contracts for the construction of a factory between certain companies of a

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[561] *Merrill Lynch Inv Managers v Optibase, Ltd,* 337 F.3d 125 (2nd Cir 2003), 02-9195.
[562] Ibid
[563] Andrijana Mišović, 'Binding non-signatories to arbitrate—the United States approach' (2021) 37 *Arbitration International*, p. 761.
[564] Mohamed S. Abdel Wahab, 'Extension of arbitration agreements to third parties: A never ending legal quest through the spatial-temporal continuum' in Franco Ferrari and Stefan Kröll (eds), *Conflict of Laws in International Arbitration* (Otto Schmidt/De Gruyter European law publishers 2010), p. 149. In fn. 35 he refers to the following arbitral decisions: ICC case no. 5730 of 1988, 117 Journal du Droit International (1990), 1029; ICC case no. 10504 of 2000.
[565] L'affaire No 1434 (1975) in Sigvard Jarvin and Yves Derains, *Sentences Arbitrales, Collection of ICC Arbitral Awards Recueil des sentences arbitrales de la CCI 1974-1985* (Kluwer Law and Taxation Publishers), p. 261.

multinational group of companies A, and a State-owned company of a developing country B. The Tribunal was called upon to decide whether companies from group A that had not formally signed the contract could nonetheless be bound by the arbitration clause contained therein.[566] The Tribunal relied, *inter alia*, on the conduct of Mr. A, acting as a principal director of Group A and on the appearance of authority he created during the contractual negotiations:

> As is characteristic of arbitration, the common will of the parties is the main basis for the arbitral tribunal's decision. This will was evident from the correspondence included in the file and from the overall spirit of the agreements within which the contracts containing the arbitration clause were situated. Furthermore, Mr. A.'s attitude during the contractual negotiations had allowed the national company of State B to legitimately believe that he was committing all the companies in the group he led.[567]

In another ICC case, the Tribunal held that the director of a group of companies (Mr. Z) was bound by the contract containing an arbitration clause, based on his conduct during and after the contractual negotiations.[568] The Tribunal held that the director was a true contracting party because of the *appearance* he created and maintained, in particular through using similar names and intermingling of management and accounts.[569]

The theory of appearance was also applied in a more recent award. The Tribunal held that a company could legitimately believe in the apparent authority of the Minister of Justice to bind the State.[570]

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[566] Ibid, p. 268.

[567] Original in French: Scion une démarche caractéristique de l'arbitrage, la volonté commune des parties est le fondement principal de la décision du tribunal arbitral. Cette volonté ressortait des correspondances produites au dossier et de l'esprit de l'ensemble des accords dans lesquels s'inséraient les contrats contenant la clause d'arbitrage. Par ailleurs, l'attitude, lors des négociations contractuelles, de M. A., avait permis à la société nationale de l'Etat B de croire légitimement qu'il engageait l'ensemble des sociétés du groupe qu'il animait'. See: L'affaire No 1434 (1975) in Sigvard Jarvin, Yves Derains, *Sentences Arbitrales, Collection of ICC Arbitral Awards Recueil des sentences arbitrales de la CCI 1974-1985* (Kluwer Law and Taxation Publishers) 261, p. 268. See also: Bernard Hanotiau, *Complex Arbitrations: Multi-party, Multi-contract and Multi-issue* (2nd ed, Wolters Kluwer 2020), p. 15.

[568] L'affaire No 5730 (1988) in Sigvard Jarvin, Yves Derains, Jean-Jacques Arnaldez, *Collection of ICC Arbitral Awards Reeueil des sentenees arbitrales de la CCI 1986-1990* (Kluwer Law and Taxation Publishers), p. 410.

[569] Ibid, pp. 411, 419. See also Bernard Hanotiau, *Complex Arbitrations: Multi-party, Multi-contract and Multi-issue* (2nd ed, Wolters Kluwer 2020) p. 15.

[570] *SA Société Orléanaise d'Electricité et de Chauffage Electrique – SORELEC v. State of Libya*, Cour de Cassation, First Civil Chamber, Arrêt n° 610 FS-B, Pourvoi n° E 20-22.118 (7 September 2022) in Stephan W. Schill (ed) (2023) 48 *ICCA Yearbook Commercial Arbitration* 2023, pp. 219-220.

International arbitral tribunals have already applied the legal doctrine of apparent authority precisely in situations where a State tried to rely on its national law to argue that a State entity did not sign the arbitration agreement on its behalf. Brekoulakis explains that when a State attempts to rely on formalities of its national law to deny that it has validly authorized a State entity to sign an arbitration agreement on its behalf, tribunals have applied general principles of agency, namely, the legal doctrine of apparent or ostensible authority to compel the non-signatory State to arbitrate, especially if the State has given the reasonable impression that the State entity was generally acting on its behalf. [571]

Honlet and Borg argue in favour of applying this principle (which they call the representation principle) in international investment arbitration.[572] Interestingly, they explain that international investment tribunals have already applied the representation test, without explicitly using this term.[573] In particular, they argue that tribunals which reached different conclusions on attribution (*Eureko* and *Noble Ventures* on one side and *Nagel*, *Impregilo* and *Azurix* on the other) in fact applied the same representation test. [574]

To summarize, not only is the principle of apparent authority well-established among different legal systems, but it has also been accepted at the international level. Hence, the principle has already crystallized in the practice of international tribunals, even though it has so far not been formally labelled a general principle of law.

2.11. Conclusion

The doctrine of apparent authority is accepted in many domestic legal systems. The principle consists of the following elements: 1) lack of a formal agency relationship between an agent and a principal; 2) reasonable belief of the third party that there is such an agency relationship; 3) principal's conduct represents a basis for such a reasonable belief.

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[571] See, for example, ICC Partial Award on Jurisdiction and Admissibility in case no 6474 of 1992 - According to Stavros Brekoulakis, 'Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories' (2017) 8 *Journal of International Dispute Settlement* 610, p. 614.

[572] Jean-Christophe Honlet and Guillaume Borg, 'The Decision of the ICSID Ad Hoc Committee in CMS v. Argentina Regarding the Conditions of Application of an Umbrella Clause: SGS v. Philippines Revisited' (2008) 7 *The Law & Practice of International Courts and Tribunals* 1, p. 27.

[573] Ibid, p. 27.

[574] Ibid. See also Shotaro Hamamoto, 'Parties to the 'Obligations' in the Obligations Observance ('Umbrella') Clause' (2015) 30 *ICSID Review* 449, p. 464. He argues that it has to be determined whether 'the entity represented the host State in entering into the obligation in question', which cannot be done by the ARSIWA rules on attribution.

The doctrine of apparent authority is based on a legal fiction. Even though there is no real agency relationship between the principal and the agent, the law will assume that such a relationship exists. The reason for creating such fiction is to protect a third party who acted reasonably based on the principal's words or actions. Thus, the doctrine aims to prevent the principal from hiding behind the formal lack of authority of an agent, if in fact such a principal behaved as if the entity in question were its agent.

Notably, investment tribunals that ruled in favour of contract attribution based on the ARSIWA rules of attribution considered circumstances such as the State's involvement in contract negotiation, control over the personnel, finances and decision-making. Such circumstances may be useful for establishing whether it was reasonable for the investor to assume that an entity in question in fact acted as a State representative. If so, the State can be bound by an investment contract based on the doctrine of apparent authority.

Along those lines, Honlet and Borg argue that instead of assessing *ex post* whether a contract of a sub-State entity can be attributed to the state, the Tribunal should look at whether the undertaking was made *on behalf* of the State in the first place.[575] In other words, in their view, the test should be whether a relevant entity *represented* the State at the time the undertaking was made.[576]

Similarly, Hamamoto explains that when a foreign investor concludes a contract with an entity established by the host State which has legal personality distinct from the State, there is no privity between the host State and the investor. In such a situation, in Hamamoto's view, it must be determined that 'the entity *represented* the host State in entering into the obligation in question', which cannot be done based on the ARSIWA rules on attribution.[577]

Applied to the issue at hand, even though an entity, which entered into a contract with an investor, is separate from the State, and there is no formal agency relationship between the State and the entity in question, such a contract can be attributed to the State based on the principle of apparent authority. The crucial question is whether the State acted in such a way *that it was reasonable for the investor to conclude* that the entity concluded the contract on the State's behalf, which is a question to be answered

[575] Jean-Christophe Honlet, Guillaume Borg, 'The Decision of the ICSID Ad Hoc Committee in CMS v. Argentina Regarding the Conditions of Application of an Umbrella Clause: SGS v. Philippines Revisited' (2008) 7 *The Law & Practice of International Courts and Tribunals*, p. 27.
[576] Ibid.
[577] Shotaro Hamamoto, 'Parties to the 'Obligations' in the Obligations Observance ('Umbrella') Clause', (2015) 30 *ICSID Review*, p. 464.

depending on the facts of the case.[578] Investment tribunals that ruled in favour of contract attribution based on the ARSIWA rules of attribution considered circumstances such as: the State's involvement in contract negotiation, State control over the personnel, finances and decision-making of the entity. These circumstances may be relevant in assessing whether the investor's assumption that an entity acted as a State representative was reasonable. If so, the State can be bound by an investment contract based on the doctrine of apparent authority.[579]

3. Implied Consent

Most theories concerning binding the non-signatories are based on the notion of implied consent (consent by conduct).[580] This concept plays an important role in determining parties to an arbitration agreement in international commercial arbitration. Implied consent emphasizes the conduct of the non-signatory rather than explicit statements: the non-signatory's participation in contract formation; a single contract scheme constituted by multiple documents; acceptance of the contract by the non-signatory.[581]

The idea of implied consent lies at the heart of many theories of binding the non-signatories.[582] Moreover, the doctrine of implied consent may overlap with some other doctrines accepted only in some jurisdictions (for example, the doctrine of estoppel, which is well established in common law jurisdictions).[583]

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578 Andrijana Mišović, 'Attributing investment contracts: the general principles approach' (2025) 28 (2) *Journal of International Economic Law*, p. 196.
579 Ibid, p. 197.
580 Stavros Brekoulakis, 'Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories' (2017) 8 *Journal of International Dispute Settlement* 610, p. 612. Note that the author in fact challenges this generally accepted consent-based approach. See also: Michail Risvas, 'International Law as the Basis for Extending Arbitration Agreements Concluded by States or State Entities to Non-Signatories', (2022) 71 *International and Comparative Law Quarterly*, p. 183. Risvas qualifies implied consent as a public international law theory for extending arbitration agreements to non-signatories. He does not qualify it as the GPL but seems to come very close to that (at p. 209).
581 William Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma' in *Multiple Parties in International Arbitration* (Oxford University Press, Permanent Court of Arbitration 2009), para 1.31.
582 Stavros Brekoulakis, 'Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories' (2017) 8 *Journal of International Dispute Settlement* 610, p. 612.
583 Mohamed S. Abdel Wahab, 'Extension of arbitration agreements to third parties: A never ending legal quest through the spatial-temporal continuum' in Franco Ferrari and Stefan Kröll (eds), *Conflict of Laws in International Arbitration* (Otto Schmidt/De Gruyter European law publishers 2010), p. 154: '[I]mplied consent may clearly overlap with the 'Group of Companies' doctrine, if the third party is affiliated, vertically or horizontally, with one of the parties. In such cases, the test for extending the arbitration agreement to a parent, subsidiary, or affiliate hinges not only on the existence of 'one economic reality' amongst the group members, but also on the actual participation of such entity in the negotiation conclusion, and/ or performance of the underlying contract Furthermore, and from a purely philosophical

The focus of this thesis is on the characteristics of implied consent common to all analysed jurisdictions. However, particularities of each analysed jurisdiction will also be explained. Although they may not all accept theories such as estoppel or the group of companies doctrine, the same factual pattern may lead different courts in different jurisdictions to extend the contract to the non-signatories based on different theories. The application of different theories may, however, lead to the same result.[584] What is crucial here is that those different theories are actually designed to take into account very similar factual patterns.

Park suggests that the effect of the agreement extends beyond the named signatories, by virtue of behaviour that suggests acceptance of the agreement by someone else.[585] As he further explains, 'implied consent focuses on the parties' true intentions' which is shown in parties' behaviour rather than words.[586]

Scenarios that commonly relate to arguments based on implied consent include: non-signatory participation in contract formation; a single contract scheme constituted by multiple documents; and acceptance of the contract by the non-signatory.[587]

The following subsections analyse the doctrine of implied consent in nine jurisdictions and in the practice of international courts and tribunals.

3.1. Brazil

A landmark case on binding the non-signatories of the arbitration agreement under Brazilian law is *Trelleborg v Anel.* The issue in this case was whether the Swedish parent company, Trelleborg Industri AB, was bound to an arbitration involving an acquisition agreement executed by its Brazilian subsidiary. The São Paulo State Court of Appeals held that the parent company's 'active participation', 'clear involvement' and 'interest

perspective, implied con sent may also overlap with the doctrine of 'estoppel', where it can be argued that a non-signatory should be estopped from claiming disassociation with the arbitration agreement if it was actively and adequately involved in the underlying contract.'

[584] Ibid, p. 159: '[I]t is submitted that in jurisdictions where the doctrine has not been welcomed, same results could be achieved by invoking alternative doctrines such as 'implied consent', 'equitable estoppel', 'alter ego', and/ or 'agency' depending on the factual matrix of the case'.

[585] William Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma' in *Multiple Parties in International Arbitration* (Oxford University Press, Permanent Court of Arbitration 2009), para 1.10.

[586] Ibid, para 1.13.

[587] Ibid, para 1.31.

in the outcome' of the acquisition negotiations required its participation in the arbitral proceedings.[588] The Court elaborated:

> [D]espite the lack of a signature by the appellant Trelleborg Industri AB, it is more than evident, given the robust documentation, that there is a legal relationship between the parties, which arises from jointly held businesses, in which the active participation of appellant Trelleborg Industri AB is attested.[589]

The factual evidence based on which the court found such active participation and involvement were the fact that Trelleborg Industri AB: (i) appeared in the letter of intent executed by the parties; (ii) sent a correspondence to Anel in which it demonstrated its interest in the execution of the agreement; (iii) was represented by an official through a proxy and (iv) actively took part in the arbitration proceeding.[590]

A second important case is *GP Capital Partners et al. vs. Fernando Soares et al.* The Court of Appeal of São Paulo had to decide whether the share purchase agreement executed between Fernando Soares and Almeria (an entity controlled by GP) was binding for GP. The court held that GP clearly had the intention to be bound by the agreement, based on its active role in the negotiation of the agreement.[591]

Finally, in *Chaval v Liebherr*, the Superior Court of Justice confirmed the decision of the lower court, finding that a non-signatory can be bound by the arbitration agreement based on the principle of intertwined agreements (which should be interpreted as a whole).[592]

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[588] *Trelleborg v Anel,* Appeal 267.450.4/6-00, Sao Paulo State Court of Appeals, Seventh Chamber of Private Law, reporting Justice Constança Gonzaga (24 May 2006 by unanimous decision). Renata Brazil-David, 'An Examination of the Law and Practice of International Commercial Arbitration in Brazil' (2011) 27 (3) *Arbitration International* 57, pp. 69, 70.
[589] Ibid. See also: Leonardo Ohlrogge, 'The Extent of Consent in Multi-Party and Multi-Contract Arbitration under the Perspective of Brazilian Law - Substantive and Procedural Issues' PhD thesis, University of St. Gallen, School of Management, Economics, Law, Social Sciences and International Affairs (22 May 2018), pp. 78, 79.
[590] See according to Ilan Jadoul, 'Brazil: The binding effect of the arbitration clause in groups of companies and the group of companies doctrine', *Global Arbitration News*, 19 May 2016, available at: https://www.globalarbitrationnews.com/2016/05/19/20160516-the-binding-effect-of-the-arbitration-clause-in-groups-of-companies-and-the-group-of-companies-doctrine/.
[591] *GP Capital Partners V e outros v Fernando Correa Soares e outros*., Apelação n. 0035404-55.2013.8.26.0100, Court of Appeal of São Paulo (26 August 2015). See according to: Ibid.
[592] Mauricio Gomm-Santos, 'What's New on Latin American ADR?'(2010) 65 (1) *Dispute Resolution Journal* 17; Mohamed S. Abdel Wahab, 'Extension of arbitration agreements to third parties: A never ending legal quest through the spatial-temporal continuum' in Franco Ferrari and Stefan Kröll (eds), *Conflict of Laws in International Arbitration* (Otto Schmidt/De Gruyter European law publishers 2010), p. 167, fn. 104.

3.2. China

In China, doctrines of binding the non-signatories have been analysed in the context of extending the arbitration agreements.

Chinese arbitration law provides that arbitration must be based on a voluntarily concluded arbitration agreement.[593] Thus, as a general rule, arbitration agreements bind only the signatories of such agreements. There are certain exceptions to this general rule. Article 8 of the Chinese Arbitration Law provides that an arbitration agreement shall bind successors to the rights and obligations of a corporate signatory or natural person. Further, Article 9 provides that a non-signatory can be bound in the case of transfer of rights and debts (unless the transferee objected or was not aware of the existence of the arbitration clause). Like some other jurisdictions, the Chinese Arbitration Law provides for incorporation of the arbitration agreement by reference (see Article 11 of the Chinese Arbitration Law). Finally, the third-party beneficiary also seems to be accepted under Chinese law.

In one case, there was an insurance contract (policy) between the insurance company and the employer for the benefit of its employee. The employee did not sign the insurance policy, but he was a third-party beneficiary. The policy contained an arbitration clause, which the insurance company invoked. The question was whether such an arbitration clause bound the employee (as a non-signatory). The court held that he was bound. It explained that the employee enjoyed only rights under the policy, which can be either accepted or rejected. Since he accepted the right to claim insurance indemnity under the insurance policy, he must be bound by the arbitration clause contained in such policy.[594]

In another recent case, a Chinese court held that a non-signatory that was performing the contracts under the name of the signatory may enforce the arbitration agreement against the other signatory.[595] The court held that two subcontractors (who did not sign the contract) may enforce the arbitration agreement contained in such a contract against the owner of the project (one of the signatories). This was because claims of the non-

[593] See Article 4 of the PRC Arbitration Law.
[594] Dangyang People's Court of Hubei Province, (2016) Hubei 0582 Civil First Instance No. 1299, according to Runyang Liu, Luka Groselj, 'Binding a Non-Signatory to an Arbitration Agreement under Chinese and Swiss Laws' (2021) *China Law and Practice*.
[595] Intermediate People's Court of Loudi, Hunan Province, (2016) Hunan 13 Civil Special No. 13, according to: Runyang Liu, Luka Groselj, 'Binding a Non-Signatory to an Arbitration Agreement under Chinese and Swiss Laws' (2021) *China Law and Practice*.

signatories were related to contractual rights, and such rights should be governed by the arbitration clause.[596] This reasoning is very similar to the one underlying the doctrine of estoppel in the United States (see Section 3.9 of this Chapter).

3.3. England

Some authors describe the English approach towards implied consent as rather 'stringent'.[597] Reluctance of the English courts to accept the extension of an arbitral agreement to non-signatories based on implied consent is ascribed to the doctrine of privity of contract, which plays an important role in English law.[598] Additionally, English law does not accept the group of companies doctrine (binding the non-signatories because the signatories belong to the same corporate group).[599]

One of the reasons why the English approach is sometimes perceived as strict on this matter is the UK Supreme Court decision in the famous *Dallah* case. In this case, *Dallah* agreed with a trust in Pakistan. The crucial question was whether the Government of Pakistan could be considered as a party to this agreement. An ICC Tribunal decided that the Government was 'a true party' to the contract based on its 'direct involvement in the negotiation and performance of the contract' (see below Section 3.10. below).

The English courts dealt with the matter in the enforcement proceedings. Eventually, the UK Supreme Court decided. It disagreed with the ICC Tribunal on the matter that the Government was the true party to the Agreement. It held that:

> [A]ll of the material up to and including the termination letter shows that the *common intention* was that the parties were to be Dallah and the Trust. On the face of the Agreement the parties and the signatories were Dallah and the Trust. The Government's role was as guarantor and beneficiary of a counter-guarantee.[600]

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[596] Ibid.
[597] Eduardo Silva Romero, Luis Miguel Velarde Saffer, 'The Extension of The Arbitral Agreement to Non-Signatories in Europe: A Uniform Approach?' (2015) 5 *American University Business Law Review,* p. 375.
[598] Ibid, pp. 375, 376.
[599] *C&M Farming Limited (Formerly known as Nasik Breeding and Research Farm Limited) v. Peterson Farms Inc*., [2002] EWHC 121, Judgment of the High Court of Justice of England and Wales (4 February 2004), para 62.
[600] *Dallah Real Estate and Tourism Holding Company (Appellant) v The Ministry of Religious Affairs, Government of Pakistan (Respondent)*, [2010] UKSC 46, Judgment of the Supreme Court of the United Kingdom (3 November 2010), para 145.

The Court held that the test of 'direct involvement in the negotiation and performance of the contract' by itself is a low threshold for establishing the intent of a non-signatory to be bound.[601]

This approach was confirmed in the recent *Kout Food* case. A Lebanese company entered into an agreement with a Kuwaiti company (with Al Homaizi). After a while, a Lebanese company became a subsidiary of another company called Kout Food Group (KFG). The arbitration was initiated against KFG, and not against the Lebanese subsidiary. The Tribunal (by majority) held that the agreement bound KFG. KFG applied to the Paris Cour d'Appel and requested the setting aside of the award. The French court rejected the request and confirmed the award (see Section 3.4. below).

However, parallel with the proceedings before the French courts, the proceedings for enforcement of the Award were initiated before the Commercial Court in London. The English court held that English law governed and that, based on English law, KFG was not a party to the agreement. The Court of Appeals confirmed. Finally, the matter came before the UK Supreme Court. It confirmed the ruling of the Court of Appeal holding that 'there is no real prospect that a court might find at a further evidentiary hearing that KFG became a party to the arbitration agreement' in the contract.[602]

The Supreme Court held that it is difficult to argue that Kout Food became a party to the agreement, which contains 'a number of provisions which prescribe that it may not be amended save in writing signed on behalf of the parties'. The Court referred to these provisions as 'No Oral Modification Clauses'.[603] The Claimant's main argument, which was accepted by the Arbitral Tribunal and rejected by English courts, was that:

> [T]here had been a novation of the FDA [Franchise Development Agreement] by reason of the parties' conduct and the performance by KFG over a sustained period of time of various obligations under the FDA and related FOAs [Franchise Outlet Agreements]. In light of the undoubted fact of Al Homaizi's [claimant's] continued involvement in various contractual matters, at a late stage of the arbitration the case became one of 'novation by addition'.[604]

[601] Ibid, para 40.
[602] *Kabab-Ji SAL (Lebanon) (Appellant) v Kout Food Group (Kuwait) (Respondent)*, UKSC/2020/0036, Judgment of the U.K. Supreme Court (17 February 2020), para 93.
[603] Ibid, para 54.
[604] Ibid, para 62.

The Court held that it would be possible for one party to be estopped from relying on the 'No Oral Modification Clauses' under certain conditions, which were not satisfied in this case:

> (i) some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more (…) than the informal promise itself.[605]

Consequently, KFC could become a party to the agreement under English law, if there were words or conduct which would clearly mean that KFC became a party to the contract, coupled with something more than the informal promise. However, this particular contract contained no oral modification clause, which clearly makes the extension of the agreement to a non-signatory more difficult.

English courts are very much focused on the intent to be bound. In *Svenska v. Lithuania*, the ICC Tribunal dealt with the question of whether the Government agreed to be bound by the agreement entered into between Svenska (Swedish company) and Geonafta (Lithuanian State enterprise). Government officials signed the agreement that contained an arbitration clause and a statement above their signatures specifying that the government approved the agreement and 'acknowledges itself to be legally and contractually bound as if the Government were a signatory to the Agreement'.[606] The ICC Tribunal held that the Government agreed to be bound by the agreement.[607] In the enforcement proceedings, Lithuania argued that the Tribunal lacked jurisdiction over it. The English Court of Appeal held that the parties clearly intended the Government to be the party to the contract:

> The expression 'legally and contractually bound as if [it] were a signatory to the Agreement' is very strong and was clearly intended to go beyond mere approval of the Agreement in the exercise of sovereign authority.[608]

To sum up, the English approach to the doctrine of implied consent primarily focuses on the intent of being bound. However, such intent may be inferred from words and, more importantly, conduct. This means that the doctrine of implied consent is accepted under

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[605] Ibid, para 67. The Court here referred to para 16 of the Rock Advertising judgement.
[606] *Svenska Petroleum Exploration AB v AB Geonafta and the Republic of Lithuania,* [2005] EWHC 2437 (Comm) Judgment of the High Court of Justice Queen's Bench Division Commercial Court (4 November 2005), para 13.
[607] Ibid, para 17.
[608] *Svenska Petroleum Exploration AB v Government of Republic of Lithuania*, [2006] EWCA 1529, Judgment of the Court of Appeal of England and Wales (13 Nov 2006), para 28.

English law, but words and conduct would have to be rather clear in implying such consent.

3.4. France

Some authors describe the French approach towards implied consent as ‘very flexible’.[609] French courts used to focus both on the intent and conduct of the non-signatory when determining whether a non-signatory should be bound by the contract (and the arbitration clause contained therein). The Cour d’appel de Paris held:

> The effects of the arbitration clause extend to *parties directly involved in the performance of the contract,* provided that the actions and surrounding circumstances raise the presumption that *they were aware* of the existence and scope of the arbitration clause.[610]

Similarly, in *Cotunav,* the Paris Court of Appeal held:

> [T]he arbitration clause set out in an international contract has a validity and effectiveness of its own, such that the clause must be extended to the parties directly involved in the performance of the contract and in any dispute arising out of the contract, provided that it is established that their contractual situation and their activities lead to presume that they have accepted the arbitration clause, whose existence and scope they were aware of, irrespective of the fact that they were not signatories to the contract.[611]

However, in a more recent case the focus has moved towards the objective conduct of the non-signatory, completely disregarding the intent:

[609] Eduardo Silva Romero, Luis Miguel Velarde Saffer, 'The Extension of The Arbitral Agreement to Non-Signatories In Europe: A Uniform Approach?' (2015) 5 *American University Business Law Review*, p. 382.
[610] *Société V 2000 v. société Project XJ 220 ITD et autres*, Cour d'appel de Paris (1Ch. D) (7 December 1994) in (1996) 2 *Revue de l'Arbitrage* 245, p. 250 (emphasis added): ‘Or considérant que dans le droit de l'arbitrage international, les effets de la clause compromissoire s'étendent aux parties directement impliquées dans l'exécution du contrat dès lors que leur situation et leurs activités font présumer qu'elles avaient connaissance de l'existence et de la portée de cette clause a n que l'arbitre puisse être saisi de tous les aspects économiques et juridiques du litige’.
[611] Paris Court of Appeal, Decision of 28 November 1989, 1990 Rev. Arb., 675, note P. Mayer, confirmed by Cass. 1st Civ. Ch. (11 Jun. 1991) in (1991) *Rev. Arb*., p. 453, note P. Mayer - according to Bernard Hanotiau, *Complex Arbitrations: Multi-party, Multi-contract and Multi-issue* (2nd ed Wolters Kluwer 2020), p. 75.

> [t]he effect of international arbitration clauses extends to the parties *directly involved in the performance of the contract* and any disputes that may arise in connection therewith.[612]

French courts also accept the (in)famous 'group of companies' doctrine, which has been elaborated in the *Dow Chemical v Isover-Saint Gobain* case. In this case, the French court sided with the Arbitral Tribunal, which held that it had jurisdiction over a non-signatory parent company, whose subsidiary entered into an arbitration agreement. Tribunal based its ruling on the fact that the parent company exercised 'absolute control over its subsidiaries having either signed the relevant contracts or ... effectively and individually participated in their conclusion, their performance, and their termination'.[613] The Tribunal also held that many ICC tribunals supported the 'group of companies doctrine', thereby accommodating 'economic reality' and 'the needs of international commerce'.[614]

The preceding section on English law has already outlined the (in)famous Dallah case. Like the UK Supreme Court (applying French international arbitration law), the Paris Court of Appeal investigated the parties' *common intentions* in order to determine the real parties of the agreement. However, contrary to the UK Supreme Court, the Paris Court of Appeal held that Pakistan was a party to the agreement. As Born explains:

> The French court took a broad, pragmatic view of the parties' conduct, focussing in particular on the Government's (sole) involvement in negotiating the Agreement, in implementing its terms and in terminating the Agreement: the Government "behaved as if the Contract was its own; (…) this involvement [of the Government], in the absence of evidence that the Trust took any actions, as well as [the Government's] behaviour during the pre-contractual negotiations, confirm that the creation of the Trust was purely formal and that [the Government] was in fact the true Pakistani party in the course of the economic transaction.[615]

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[612] *Socie´te´ Alcatel Business Systems (ABS), Socie´te´ Alcatel Micro Electronics (AME) et Socie´te´ AGF v Amkor Technology et al* Cass 1e civ, 27 Mar 2007, JCP [2007] I 168, No 11, comment Christophe Seraglini; JCP [2007] II 10118, comment Catherine Golhen. See according to: Bernard Hanotiau, *Complex Arbitrations: Multi-party, Multi-contract and Multi-issue* (2nd ed Wolters Kluwer 2020) p. 75

[613] *Dow Chemical v Isover-Saint Gobain*, ICC Award No 4131, Interim Award (23 September 1982) in (1984) YCA 131, p. 136.

[614] Ibid.

[615] Gary B. Born, 'Dallah and the New York Convention' *Kluwer Arbitration Blog* (7 April 2011).

Thus, for the Paris court, the Government's involvement in the process of negotiation, implementation, and termination of the contract was enough to conclude that the Government, in fact, was a party to such a contract.

The section on English law (Section 3.3. above) also dealt with the *Kout Food* case. The UK Supreme Court found that Kout Food did not become a party to the agreement. It held that conditions which would prevent reliance on the no oral modification clause, were not met in this case. On the contrary, the Paris Court of Appeals held:

> Having regard to the organisational chart of KFG, its involvement in the performance of the Agreements for several years and in their termination and renegotiation, the arbitral Tribunal rightly (…) found that the said clause extended to bind KFG.[616]

The French Court of Cassation upheld the French Court of Appeal's decision.

In conclusion, French law focuses predominantly on the conduct of the non-signatory, directly involved in the conclusion, performance, and termination of the contract.

There is one additional important feature of the French law. That is treating contractual breach as a civil wrong. As a general matter, French law provides for means for third parties to be compensated for damages they suffered due to a breach of contract. The French Civil Code states that a contract creates legal obligations between parties only.[617] However, based on the French Supreme Court ruling, third parties can obtain compensation for damages suffered due to a breach of a contract.[618]

In its most recent ruling on the matter, the Supreme Court stated that contractual breach which causes damage to a third party amounts to a civil wrong.[619] The Court intended to relax the burden of proof for third parties, meaning that they merely have to prove breach of contract and damage causation, while the defendant would have to show that it complied with the contract, or that its breach did not cause damage to the claimant (third party).[620]

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[616] *Kabab-Ji S.A.L Company v. Kout Food Group Company*, Paris Court of Appeal (Department 1 - Chamber 1) 17/22943, Judgment (23 June 2020), para 47.

[617] See Article 1199 of the French Civil Code.

[618] Laura Ngoune, 'Mind the third party in the gap: breach of contract, third-party liability simplified by the Cour de Cassation' (2020) *International Litigation News* - Publication of the International Bar Association Legal Practice Division , p. 47.

[619] Ibid, p. 48 (Cass Ass Pl, No 17-19.963, 13 January 2020).

[620] Ibid.

The function of this rule is clearly to enable the non-signatory, which has an interest in contract performance, to be compensated for damages suffered due to the contractual breach, even though it is formally not a party to such a contract. The rule strives to hold accountable the one who breached the contract and compensate the one who suffered damages because of such breach, regardless of who signed the contract.

Investment arbitration tribunals that applied the ARSIWA attribution rules to the question of contract attribution were facing a similar challenge. Presumably, their focus was on State conduct which could be qualified as a treaty breach and damage which the investor allegedly suffered as a result of such breach. Arguably, the goal was to compensate the investor who suffered damage due to the contractual breach, which could also qualify as a treaty breach of the State, despite the lack of a direct contractual relationship between the State and the investor. This explains tribunals' confusion between contract and conduct attribution (see above Chapter II, Section 1).

French courts were faced with substantially the same issue. The conduct of a certain entity, which can be described as a breach of contract, caused damage to another entity, but the two entities were not in a direct contractual relationship. The French solution here is to offer a different legal basis for responsibility – tort law. However, while French courts could rely on tort law as an alternative legal ground for recovering damages in the absence of a direct contractual relationship, investment tribunals were not able to offer an alternative remedy. Thus, they simply used the ARSIWA rules of attribution as a convenient solution.

In conclusion, under French law, there are multiple ways for establishing a legal relationship between a contractual party and a non-signatory, based on the non-signatory's conduct. The intent of being bound is not as important as the non-signatory's behaviour.

3.5. Germany

German law contains doctrines reflecting the idea that a contract may bind a non-signatory based on its implicit consent.

First, there are contracts for the benefit of a third party - Verträge zugunsten Dritter. Section 328 (1) of the German Civil Code provides: 'Performance to a third party may be agreed by contract with the effect that the third party acquires the right to demand performance directly'. Such contracts may expressly provide for performance in favour of a third party (or give the third party the right to demand such performance). However, if there is no express reference that the third party has such rights, this can be inferred from the circumstances, especially from the purpose of the contract.[621] Thus, a non-signatory may become a third-party beneficiary based on the circumstances. Consent is inferred from the circumstances and purpose of the contract – it is implied.

Additionally, German law accepts the so-called *culpa in contrahendo* doctrine developed by German jurist Rudolf von Jhering. German courts accepted this doctrine before it was finally codified in section 311 of the German Civil Code during the 2001 reform. Section 311 deals with obligations created by legal transactions and obligations similar to legal transactions, and it provides:

> (1) In order to create an obligation by legal transaction and to alter the contents of an obligation, a contract between the parties is necessary, unless otherwise provided by statute.
>
> (2) An obligation with duties under section 241 (2) also comes into existence by
>
> 1. the commencement of contract negotiations;
>
> 2. the initiation of a contract where one party, with regard to a potential contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him, or
>
> 3. similar business contacts.
>
> (3) An obligation with duties under section 241 (2) may also come into existence in relation to persons who are not themselves intended to be parties to the contract. Such an obligation comes into existence in particular if the third party, by laying claim to being given a particularly high degree of trust, *substantially influences the pre-contract negotiations* or the entering into of the contract. (emphasis added).

Section 241 (2) of the German Civil Code established a duty not to harm the interests of others, as a general principle of German contract law, and section 311 extends this obligation to the pre-contractual realm.[622] As explained in literature, 'the idea of pre-

[621] Manfred Pieck, 'A Study of the Significant Aspects of German Contract Law' (1996) 3 *Annual Survey of International & Comparative Law*, p. 132.
[622] Sir Basil Markesinis, Hannes Unberath, Angus Johnston, *The German Law of Contract, A Comparative Treatise* (2nd ed, Hart Publishing 2006), p. 93.

contractual liability imposed by law is rationalized as reliance-based obligation imposed by law'.[623] Such liability derives from the conduct taking place before the contract is concluded.[624]

For this dissertation, paragraph 3 of section 311 is particularly interesting. It represents a reflection of the earlier case law dealing with the liability of agents and other persons not privy to the contract but involved in negotiating the contract.[625] If such a person is the one 'breaking the deal', it can be liable, in addition to the principal, based on pre-contractual liability – *culpa in contrahendo.*[626] The liability of the non-signatory is based on its presentation of itself as a particularly trustworthy entity and its significant influence on the negotiations between the signatories.[627]

Initiation of negotiations with the intention of entering a contract already creates a legal relationship. Even if a party is not a signatory to a contract, it has certain rights and obligations merely because it participated in contract negotiations. This, of course, does not mean that the non-signatory would be bound by such contract, but it does express the idea of German law that entering into contract negotiation should have certain legal consequences.

Finally, while the group of companies doctrine is not accepted in Germany, a company belonging to the same group can be bound by the arbitration agreement if it had given the impression that it wished to be bound.[628] This means that the contract can bind a non-signatory (and the arbitration agreement) based on its implied consent (intention to be bound).

3.6. India

In a landmark decision *Cox and Kings Limited v. SAP India*, the Supreme Court of India accepted the group of companies doctrine due to its 'utility in determining the intention of the parties in the context of complex transactions involving multiple parties and

[623] Ibid, p. 92.
[624] Ibid, p. 93.
[625] Ibid, p. 104.
[626] Ibid.
[627] Carsten Gerner-Beuerle, Michael Schillig, 'Veil-piercing' in *Comparative Company Law* (Oxford University Press 2019), p. 850.
[628] Werner Müller, Annette Keilmann, 'Beteiligung am Schiedsverfahren wider Willen?' (2007) *SchiedsVZ*, p. 119. ('Natürlich ist es nicht ausgeschlossen, dass im Einzelfall ein anderes Konzernunternehmen in die Schiedsvereinbarung einbezogen wird, wenn dieses den Eindruck erweckt hat, mitgebunden sein zu wollen').

multiple agreements'.[629] It expressly held that 'conduct of the non-signatory parties could be an indicator of their consent to be bound by the arbitration agreement'. [630] The Supreme Court explained:

> Modern commercial reality suggests that there often arise situations where a company which has signed the contract containing the arbitration clause is not always the one to negotiate or perform the underlying contractual obligations. In such situations, emphasis on formal consent will lead to the exclusion of such non-signatories from the ambit of the arbitration agreement, leading to multiplicity of proceedings and fragmentation of disputes.[631]

The Supreme Court held that non-signatories could express their intent of being bound by the contract through their conduct or relationship with signatories:

> The fact that the non-signatory did not put pen to paper may be an indicator of its intention not to assume any rights or responsibilities under the arbitration agreement. On the other hand, courts and tribunals cannot adopt a rigid approach to exclude all persons or entities who, through their conduct and relationship with the signatory parties, intended to be bound by the underlying contract containing the arbitration agreement. The area of arbitration law not only concerns domestic law, but it also encompasses the international law, particularly when it pertains to the enforcement of international arbitral awards. Therefore, this Court ought to adopt a balanced approach without comprising on the basic principles of arbitration law, contract law, and company law to ensure that the resultant legal framework is consistent with internationally accepted practices and principles.[632]

This decision of the Supreme Court has been acknowledged as a positive development in India's ongoing efforts to position itself as a pro-arbitration jurisdiction.[633]

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[629] *Cox and Kings Limited v. SAP India Limited and Respondent*, 2023/INSC/1051, Judgment of the Supreme Court of India (6 December 2023), para 165.
[630] Ibid, para 165 (b).
[631] Ibid, para 92.
[632] Ibid., para 95.
[633] Ashish Kabra, Nishanth Kadur, 'Indian Supreme Court Endorses the Application of the 'Group of Companies' Doctrine to Join Non-Signatories, *Kluwer Arbitration Blog* (15 March 2024).

3.7. South Africa

Under South African law, there is a well-established concept of a tacit contract, which is a contract inferred from the conduct of the parties.[634] Tacit contract is not different from express contract in its nature and legal effects. However, the distinction lies in the mode of proof, namely, a tacit contract is inferred from indirect or circumstantial evidence.[635]

In a recent decision, the High Court of South Africa confirmed that party's consent can be inferred from its conduct:

> A tacit contract is established by conduct. The court infers the existence of the contract from the conduct of the parties. The conduct of the parties must be such that it justifies an inference that the parties actually agreed. There must be evidence of conduct of the parties which justifies an inference that the parties intended to, and did, contract on the terms alleged, or, in other words, that there was consensus ad idem.[636]

Although South African courts have not yet developed a clear doctrine on binding non-signatories to arbitration agreements, South African contract law generally recognises the possibility of consent being established tacitly.

3.8.Switzerland

Under the Swiss approach, there are three bases for binding the non-signatories (in addition to the formal assumption, assignment, and delegation). These are: intent of the non-signatory to be bound expressed through its conduct; creation of an appearance to be bound by such contract in the eyes of the reasonable contracting partner; and the doctrine of the abuse of rights.

Swiss court practice is rich on this issue (perhaps unsurprisingly, given Switzerland's arbitration-friendly reputation). In one landmark case,[637] a company incorporated in Cyprus entered into a contract to perform certain dredging work in Qatar. This contract contained an arbitration clause. The Italian parent company provided a guarantee, but

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[634] Chris Pretorius, 'The Basis of Tacit Contracts' (2010) 31 (3) *Obiter*, p. 518.

[635] Louis F. Van Huyssteen, Catherine J. Maxwell, Contract Law in South Africa (6th ed. Kluwer Law International 2019), para 180, p. 104.

[636] *Ocv Investments (Pty) Ltd v. South African Breweries Limited*, Case Number: 31851/2000 (B), The High Court of South Africa, Transvaal Provincial Division (6 July 2007), para 9 (references omitted).

[637] *Cypriot Company X v. Qatari Company Y and Italian Company Z*, 4A_128/2008, Swiss Federal Tribunal, First Civil Law Division, Judgement (19 August 2008).

with no arbitration clause. The issue was whether the Italian parent company was also bound by the arbitration agreement contained in the original contract or not. The Arbitral Tribunal denied jurisdiction as to the Italian parent company. The Claimant in the arbitration appealed to the Swiss Federal Tribunal, claiming that jurisdiction had been wrongly denied.

The Federal Tribunal sided with the Arbitral Tribunal. It held that *no real intent* of the Parties as to an assumption of obligation by the Italian company was established in this case. Then the Tribunal went on to interpret the language of the Guarantee and held that the language was ambiguous and that the assumption of obligation cannot be inferred from it. Finally, the Tribunal looked into the '*subsequent behaviour* of the Parties', holding that although the Italian company had an interest in the fulfilment of the project, it cannot be concluded that it assumed the obligation. Thus, the Tribunal held that the Italian company was not a party to the arbitration clause.[638] The Tribunal also held that the Italian company was not involved 'in a significant manner in the negotiation or the performance of the Contract', which is why 'it may not be deemed to have adhered by its acts to the arbitration clause there'.[639]

A second prominent case is *A, B and C v D and the State of Libya*.[640] Company A was a joint venture formed under Turkish law by companies B and C, while company D was an independent entity established under Libyan law. Company A entered into a construction contract with company D. The contract contained an arbitration clause providing for arbitration under the ICC Rules seated in Geneva. When the dispute arose, claimants (A, B and C) initiated arbitration against D and the State of Libya. The Arbitral Tribunal held that it did not have jurisdiction over the State of Libya because it did not enter into the contract with the claimants. It held that the Claimants' contractual partner was an independent legal entity (both under Libyan and Swiss law) and it could not be considered in good faith that the State of Libya was a party to the contract (and thereby the arbitration clause).[641]

Claimants appealed to the Swiss Federal Tribunal to set aside the ruling of no jurisdiction and asked the Federal Tribunal to find that the Arbitral Tribunal had

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[638] Ibid.
[639] Ibid.
[640] *Turkish Joint Venture A, Turkish Company B and Turkish Company C v Libyan Company D and State of Libya*, 4A_636/2018, Swiss Federal Supreme Court, First Civil Law Court, Judgement (24 September 2019).
[641] Ibid, para 4.5.1.

jurisdiction over the Libyan State. The Swiss Federal Tribunal held that the Respondent itself did not conclude the arbitration agreement, and it could not be bound by it merely because it 'established and controlled' the entity which signed the arbitration agreement. It confirmed that the Arbitral Tribunal correctly found that under Public International Law and under Swiss law, arbitration agreements entered into by legal entities created by the State entities are not imputed to the States controlling them.[642]

The Federal Tribunal, however, noted that an arbitration clause may also be binding on persons who have not signed it:

> This is particularly true in the case of the assignment of a claim, of the cumulative or private assumption of debt or the delegation of a contract, where the arbitration clause appears to be ancillary. [643]

In this case the Federal Tribunal noted that the Appellants did not rely on such constellations, but on Libya's interference in the contract. The legal significance of such interference was explained as follows:

> A third party who, in a constant and repeated fashion, interferes in the performance of a contract containing an arbitration clause will be treated as if he had acceded to that contract and submitted to the arbitration clause, if in so doing he demonstrates his intention to be a party to the arbitration agreement himself.[644]

The Federal Tribunal held that there was no such interference in the present case. The case is significant because the Swiss Federal Tribunal drew a clear difference between establishment and (general) control over the entity which entered into a contract (as such, not enough for contract attribution) and participation in negotiation and performance of such contract (which can serve as proof of intent to enter into such contract).

Thus, the Swiss approach requires a combination of subjective and objective elements: intent to be bound expressed through interference in contract negotiations or performance.[645]

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[642] Ibid, para 4.5.3.
[643] Ibid, para 4.5.2.
[644] Ibid, para 4.5.3.
[645]Andrijana Mišović, 'Binding non-signatories to arbitrate—the United States approach' (2021) 37 *Arbitration International*, pp. 764, 765.

3.9. United States

Implied consent to be bound is derived from the party's conduct. As the Court of Appeals for the Second Circuit explained in *Gvozdenovic v. United Air Lines*: 'Although a party is bound by an arbitral award only where it has agreed to arbitrate, an agreement may be implied from the party's conduct.'[646] The issue in this case was whether the party implicitly agreed to participate in the arbitration proceedings by taking certain actions in the course of such proceedings. However, as a general matter, the case could be used as a reference that implied consent can be inferred from a party's conduct.

The issue of binding a non-signatory of a contract based on its implicit consent can overlap with the doctrine of estoppel, which is highly developed in the United States. In general, the doctrine of estoppel serves to prevent a party from simultaneously avoiding burdens and claiming the benefits of the same contract.[647] Since fairness considerations lie at the heart of the equitable estoppel theory. The implication is that a non-signatory cannot rely on a contract when it works to its advantage and avoid it when it works to its disadvantage.[648]

As held by the US Court of Appeals for the Second Circuit, when a party receives a 'direct benefit' from a contract containing an arbitration clause, it is 'estopped from denying its obligation to arbitrate'.[649]

The US Court of Appeals for the Fifth Circuit explained that there are two different circumstances in which equitable estoppel allows a non-signatory to compel arbitration:

> First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the non-signatory. When each of a signatory's claims against a non-signatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate. Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by

[646] *Gvozdenovic v. United Air Lines, Inc.,* 933 F2d (2d Cir 1991).
[647] *Comer v Micor, Inc,* 436 F.3d 1098, 1101 (9th Cir 2006).
[648] Andrijana Mišović, 'Binding non-signatories to arbitrate—the United States approach' (2021) 37 *Arbitration International* 762.
[649] *American Bureau, Shipping v Tencara Shipyard*, 170 F.3d 349, 353 (2d Cir 1999)

> both the non-signatory and one or more of the signatories to the contract. Otherwise the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favour of arbitration effectively thwarted. [650]

For this thesis, the second theory of estoppel is particularly valuable. If the signatory's claim is based on interdependent and coordinated misconduct between the other signatory and the non-signatories who maintained a close relationship, then the non-signatory is estopped from escaping such contract.

The doctrine of estoppel is not generally accepted among countries, but it has been increasingly invoked in the context of arbitration to extend arbitration agreements to third-party non-signatories.[651] Reference to the 'intertwinedness of agreements' as a justification for extension of the arbitration agreement has also been utilized by Brazilian and Swiss courts (see Sections 3.1 and 3.8).

The doctrine of estoppel relies on implied consent. According to Park, the American doctrine of estoppel is an illustration of 'deemed consent', which he describes as 'a way to objectify assent for fact patterns where an agreement exists, notwithstanding that traditional formalities may be absent or unclear'.[652]

3.10. International law

Most joinders of non-signatories in international arbitration relate to either (1) implied consent or (2) disregard of corporate personality.[653] Implied consent is a theory of crucial importance for binding the non-signatories of the arbitration agreement in international commercial arbitration. It is generally accepted that most non-signatory theories are premised on the idea of implied consent (consent by conduct).[654] Implied

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[650] *Grigson v Creative Artists Agency, LLC,* 210 F.3d 524 (2000)

[651] Mohamed S. Abdel Wahab, 'Extension of arbitration agreements to third parties: A never ending legal quest through the spatial-temporal continuum' in Franco Ferrari and Stefan Kröll (eds), *Conflict of Laws in International Arbitration* (Otto Schmidt/De Gruyter European law publishers 2010), p. 166.

[652] William Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma' in *Multiple Parties in International Arbitration* (Oxford University Press, Permanent Court of Arbitration 2009), para 1.45.

[653] William Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma' in *Multiple Parties in International Arbitration* (Oxford University Press, Permanent Court of Arbitration 2009), para 1.10. Although his study deals with joining the non-signatories of the arbitration agreement to the arbitration proceedings, many of his observations are applicable to the question of binding the non-signatories in general.

[654] Stavros Brekoulakis, 'Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories' (2017) 8 *Journal of International Dispute Settlement* 610, p. 612. Note that the author in fact challenges this generally accepted consent-based approach. Michail Risvas, 'International Law as the Basis for Extending Arbitration Agreements Concluded by States or State Entities to Non-Signatories',

consent focuses on the behaviour of a non-signatory rather than its words: non-signatory participation in contract formation; a single contract scheme constituted by multiple documents; acceptance of the contract by the non-signatory.[655]

In an ICC award rendered in 1975, the Tribunal, when determining parties to the arbitration, applied good faith interpretation in accordance with 'the spirit of the operation' unless 'formalistic interpretation is required and corresponds to the *true intention* of the parties'.[656]

International commercial arbitration tribunals have found (on several occasions) that an active involvement of a non-signatory in the performance of the contract can represent evidence of consent to arbitration.[657] However, the mere involvement in the negotiations and performance of the contract containing an arbitration clause will not always be enough for the extension of the arbitration agreement to the non-signatories.[658]

Gaillard explains that this problem typically arises in two situations: groups of companies and agreements between States or State-owned entities.[659] The group of companies doctrine is not universally accepted. However, what seems to be crucial for this doctrine is 'not so much the existence of a group that results in the various companies of the group being bound by the agreement signed by only one of them, but rather the fact that such was the *true intention* of the parties'.[660] In the context of States

(2022) 71 *International and Comparative Law Quarterly*, p. 183. Risvas qualifies implied consent as a public international law theory for extending arbitration agreements to non-signatories. He does not qualify it as the GPL but seems to come close to that (at 209). See also Ridhi Kabra, Jurisdictional Aspects of Multiparty Actions in International Dispute Settlement, PhD Thesis University of Cambridge (2019) – the author suggests applying judicially created doctrines of implied consent to the multiparty investment treaty arbitration.

655 William Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma' in *Multiple Parties in International Arbitration* (Oxford University Press and Permanent Court of Arbitration 2009), paras 1.11 and 1.13.

656 L'affaire No 1434 (1975) in Sigvard Jarvin and Yves Derains, *Sentences Arbitrales, Collection of ICC Arbitral Awards Recueil des sentences arbitrales de la CCI 1974-1985* (Kluwer Law and Taxation Publishers), p. 261 (emphasis added).

657 See, for example, ICC case no 5103 of 1988 (1991) 2(2) ICC Bull 20, Soci.t. Sponsor AB v Lestrade (Cour d'Appel Paris (1988) Rev Arb 154, with note A Chapelle) and ICC case no 6000 of 1988, (1991) 2(2) ICC Bull 32 – according to Stavros Brekoulakis, 'Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories' (2017) 8 *Journal of International Dispute Settlement* 610 at 620.

658 Mohamed S. Abdel Wahab, 'Extension of arbitration agreements to third parties: A never ending legal quest through the spatial-temporal continuum' in Franco Ferrari and Stefan Kröll (eds), *Conflict of Laws in International Arbitration* (Otto Schmidt/De Gruyter European law publishers 2010), p. 152. ICC case no. 6519 of 1991, 118 Journal du Droit International (1991), 1065.

659 Emmanuel Gaillard and John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999), pp. 281, 282.

660 Ibid, p. 283 (emphasis added).

and SOEs, a parallel may be drawn with the group of companies doctrine (only with vertical relationship).[661]

In a couple of ICC arbitration cases, the issue arose whether a signature of a State official on a contract is enough to establish the intention of the State to enter into such a contract (and arbitration agreement contained therein). In one case,[662] a company incorporated in Hong Kong (SPP) signed Heads of Agreement with EGOTH, an Egyptian State-owned company, and the Egyptian government, for the construction of two tourist centres in Egypt. SPP then entered into a contract with EGOTH. The contract contained an arbitration agreement. The Minister of Tourism of Egypt signed the contract (his signature appeared underneath the words 'approved, agreed and ratified'). SPP then initiated arbitration proceedings against both EGOTH and the State of Egypt. The State objected to the Tribunal's jurisdiction, arguing that it had not agreed to be bound by the arbitration agreement. Claimant, however, argued that the Government became the party of the agreement in one of three ways:

> (i) directly by the signature of the Minister of Tourism; (ii) because EGOTH was acting not only on its own behalf but also on behalf of the Government and/or (iii) because there was an essential governmental identity between EGOTH and the Government.[663]

The Government, on the other hand, argued that the signature of the Minister on that Agreement had no contractual significance:

> Its presence was to be ascribed either to the fact that the Minister was Chairman of the Assembly of EGOTH and was signing in that capacity to indicate on behalf of the 'shareholder' approval of EGOTH entering into that Agreement; or to supervisory powers that he possessed in an administrative capacity under Laws 1 and 2 of 1973. In either event, so it was contended, the signature did no more than perfect the obligation of EGOTH; it did not create any obligation in the Government.[664]

The Tribunal sided with the Claimant. It held that the Government became a party to the contract through the signature of the Minister:

[661] Ibid, p. 290 (quoting Philippe Leboulanger, Groupes d'Etat(s) et arbitrage, 1989 REV. ARB. 415.)
[662] *Southern Pacific Properties Limited v. Arab Republic of Egypt,* ICC Case No. YD/AS No. 3493, Award (11 Mar 1983).
[663] Ibid, para 33.
[664] Ibid.

> [N]ot only was the Government confirming its approval of all contractual obligations undertaken by EGOTH in compliance with the laws of Egypt, but it was also guaranteeing to the investor its continuing agreement and support of the project. By the Minister signing not only 'approved' but also 'agreed' (which clearly means the undertaking of an obligation of its own) the Government also became a contractual party to the December Agreement.[665]

The Paris Court of Appeals, however, set aside the award, holding that the words 'approved, agreed and ratified' did not imply the Egyptian *government's intention* to be bound by the arbitration agreement.[666] The decision of the Court of Appeals was confirmed by the French Court of Cassation.[667]

This decision influenced future commercial arbitration practice under the auspices of ICC. In a later case, the ICC Tribunal held that a State official's signature of a contract on behalf of a State-owned company does not automatically constitute the State's consent to be bound by the arbitration agreement contained in the contract.[668]

This means that the State's intention to be bound 'by an arbitration agreement signed primarily by a State-owned entity should be expressed in unequivocal terms'.[669]

The *Westland* case is particularly relevant to this matter. In this case, the dispute arose between the English company Westland Helicopters Limited and the Arab Organization for Industrialization (AOI) – an organization set up in 1975 by Egypt, Saudi Arabia, the United Arab Emirates and Qatar with the aim of promoting defence industry interests of the four founding countries. Westland entered into a series of contracts with AOI containing an ICC arbitration clause. The Tribunal was asked to decide whether the arbitration clause is binding only for AOI or also for the States that founded the organization. It held:

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[665] Ibid, para 46.
[666] *Arab Republic of Egypt v. Southern Pacific Properties, Ltd. et al*, Court of Appeals of Paris, Decision in Appellate Review of Arbitral Awards between States and Private Parties (12 July 1984) in (1984) 23 (5) *International Legal Materials* 1048.
[667] *Southern Pacific Properties Ltd. Et Al. v. Arab Republic of Egypt*, Court of Cassation, Appellate Review of Arbitral Awards between States and Private Parties (6 January 1987) in (1987) 26 (4) *International Legal Materials* 1004.
[668] Emmanuel Gaillard, John Savage, *Fouchard, Gaillard, Goldman On International Commercial Arbitration* (Kluwer Law International 1999), pp. 293, 294 (Case No. 8035 (1995)).
[669] Ibid, p. 294.

> [T]he legal status of such a joint inter-State enterprise (…) to the extent that it can exist at all - cannot be relied upon in order to eliminate the liability of the States which are partners therein.[670]

Gaillard criticized the decision and argued that after determining the separate legal personality of AOI, the Tribunal should have decided whether the arbitration clause in the agreement between Westland and AOI 'revealed *an intention* on the part of the four States to be bound by the arbitration agreement'.[671]

In the setting aside proceedings, the Swiss courts established that AOI had a separate legal personality. The Swiss courts held that control of a legal person by a State, or the close link between the State and the entity in question, did not automatically mean that an arbitration clause binds the State without having signed it. The courts held that such a conclusion is objectively excluded when the entity concerned had legal personality, even if the State partly 'finances, supervises, controls and imposes on it very detailed rules of conduct'.[672] This holding is particularly noteworthy for its clear distinction between contract attribution and conduct attribution. The ARSIWA rules of attribution, such as Article 8, focus on the degree of control exercised by the State over a given entity. However, such control, while potentially sufficient for attributing conduct, does not automatically extend to the attribution of contractual obligations. A State's control over an entity does not in itself render the State a party to the SOE's contract. Contractual attribution requires inquiry into intention.

In *Amoco v Iran* it appears that the Tribunal also considered the State's lack of intention to be bound by the contract. The investor entered into a certain energy contract with the National Petrochemical Company (NPC) established under the laws of Iran.[673] The question before the Tribunal was whether the contract was binding on the Republic of Iran.[674] The Tribunal noted that NPC had 'a legal personality distinct from that of the

[670] *Westland Helicopters Ltd v Arab Organization for Industrialization, United Arab Emirates, Kingdom of Saudi Arabia, State of Qatar, Arab Republic of Egypt, and Arab British Helicopter Company, Arbitration,* Case No 3879, International Chamber of Commerce, Court of Arbitration, Interim Award - Jurisdiction (5 March 1984), p. 28.
[671] Emmanuel Gaillard and John Savage, *Fouchard, Gaillard, Goldman On International Commercial Arbitration* (Kluwer Law International 1999), p. 294 (emphasises added)
[672] *Arab Organization for Industrialization and others v Westland Helicopters Ltd*, Decisions of the Court of Justice of Geneva and the Federal Tribunal (excerpts), Annulment of Award with respect to Egypt (19 July 1988) (1989) 28 *International Legal Materials* 687.
[673] *Amoco International Finance Corporation v. The Government of The Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company And Kharg Chemical Company Limited,* IUSCT Case No 310-56-3, Partial Award (14 July 1987), para 1 (emphasis added).
[674] Ibid, para 160.

State' and that it 'contracted only for itself'.[675] In a paragraph that became frequently quoted, the Tribunal held:

> In certain circumstances, the separate legal personality of an entity *fully controlled* by the State can be discarded and the State considered as bound by the terms of a contract entered into by such an entity. […] Such a conclusion, however, can legitimately be drawn only if this entity acted as *an instrument* of the State.[676]

Additionally, in the same paragraph the Tribunal found that the State had *no intention* itself to engage in the industrial and commercial endeavours at stake and left NPC to take the financial and commercial risks associated with them.[677] This reasoning is very interesting. It was clearly important to the Tribunal to determine the intention of the State to be bound. As argued in this thesis, the intention plays an important role in the rules on binding the non-signatories, which may potentially be applied as the GPL when determining whether the contract in question binds the State.

In a more recent case already discussed in this Chapter – the *Dallah case* (see above sections 3.2. and 3.3) the ICC Tribunal found that the Government of Pakistan was 'a true party' to the contract based on its 'direct involvement in the negotiation and performance of the contract':

> Arbitral as well as judicial case-law has widely recognised that, in international arbitration, the effects of the arbitration clause may extend to parties that did not actually sign the main contract but that were directly involved in the negotiation and performance of such contract, such involvement raising the presumption that the common intention of all parties was that the non-signatory party would be a true party to such contract and would be bound by the arbitration agreement.[678]

The Tribunal also held that the level of control that the State exercised over the entity has a certain legal value:

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[675] Ibid.
[676] Ibid, para 162 (emphasis added).
[677] Ibid.
[678] *Dallah Real Estate and Tourism Holding Company (Appellant) v The Ministry of Religious Affairs, Government of Pakistan (Respondent)* [2010] UKSC 46, Judgment (3 November 2010), para 36 (contains exact quotation of selected paragraphs from the Award) (emphasis added).

> The control exercised by the State over the Trust becomes, within that framework, an element of evidence of the interest and the role that the party exercising such control has in the performance of the agreement concluded by the Trust, and provides the backdrop for understanding the true intentions of the parties. [679]

As already explained, this decision had different epilogues before the English and the French courts (see above Sections 3.3 and 3.4 of this Chapter). The Arbitral Tribunal accepted jurisdiction over the Government, but the UK Supreme Court rejected enforcement of the arbitral award precisely on the ground that Pakistan was not a party to the contract and therefore to the arbitration agreement. The Court held:

> [T]here was no material sufficient to justify the Tribunal's conclusion that the Government's behaviour showed and proved that the Government had always been, and considered itself to be, a *true party* to the Agreement and therefore to the arbitration agreement. On the contrary, all of the material up to and including the termination letter shows that the *common intention* was that the parties were to be Dallah and the Trust. On the face of the Agreement the parties and the signatories were Dallah and the Trust. The Government's role was as guarantor, and beneficiary of a counter-guarantee. The assignment clause showed that the Government was not a party. It permitted the Trust to assign or transfer its rights and obligations under the Agreement to the Government without the prior consent in writing of Dallah. The arbitration clause related to any dispute between the Trust and Dallah. [680]

The Paris Court of Appeal ruled on this very same issue only a few months later, and it held that there is comprehensive evidence based on which it can be concluded that the Government of Pakistan was the *true party* to the Agreement and the arbitration clause therein. Given that the Government *acted as if the Contract was its own*, the Court concluded that the Government was in fact the true Pakistani party in this economic transaction. [681]

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[679] Ibid, para 36 (contains exact quotation of selected paragraphs from the Award).
[680] Ibid, para 145 (emphasis added).
[681] *Gouvernement du Pakistan - Ministère des affaires religieuses v.société Dallah Real Estate and TourismHolding Company,* Cour d'appel de Paris (Pôle 1 - Ch. 1), Nº rép. gén.: 09/28533, 09/28535 et 09/28541 (17 February 2011).

For both courts the crucial question was whether the Government was a true party to the contract. While the UK court answered this question with reliance on the common intention of the parties, the French court relied more on the actions of the Government. The Tribunal, on the other hand, was persuaded that the State was bound by the arbitration agreement based on its active involvement in negotiation and performance of the contract. Interestingly, State control over the entity was a contributing factor in reaching this conclusion. However, the control was not assessed in abstract, but in relation to the execution of the contract.

In *Nilko v Bangladesh* (analysed in Chapter I, Section 1.1 above) the Tribunal also had to decide whether the State consented to arbitration. It held that since Claimant failed to show 'any intent of the Government of Bangladesh to be bound by the ICSID arbitration agreement' and since no such intent can be implied in the circumstances, Bangladesh did not consent to ICSID arbitration.[682]

In *Khan v Mongolia*, the Tribunal had to determine whether it had jurisdiction over a company, which did not sign a contract containing an arbitration clause that represented a basis for the Tribunal's jurisdiction. To determine whether a non-signatory of the contract is bound by the arbitration agreement contained therein the Tribunal held that it must determine 'the common intention of the signatory and non-signatory parties to the contract'. [683] It further held that such intention 'may be inferred from their conduct in connection with the negotiation, performance, and termination of the contract'.[684] It concluded that the non-signatory acted as the 'real party' of the contract in question.[685] More specifically, the Tribunal held that the non-signatory was *performing the obligations* of the contract signatory and that other signatories did not object to that. [686] On this basis, the Tribunal determined 'the common intention' that the non-signatory become a party to the contract in question.[687]

In sum, international tribunals do accept the theory of implied consent, since they showed willingness to look beyond formal signatories of the contract in order to

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[682] *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No. ARB/10/18, Decision on Jurisdiction (19 August 2013), para 256.
[683] *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, UNCITRAL, Decision on Jurisdiction (25 July 2012), para 329.
[684] Ibid.
[685] Ibid, para 338.
[686] Ibid, para 341 (emphasis added).
[687] Ibid.

determine whether a non-signatory showed an intention to be bound by such a contract. Circumstances of the case, focusing on the non-signatory's behaviour, will help the Tribunal to decide whether such non-signatory showed its intent to be contractually bound.

3.11. Conclusion

The question of binding the non-signatories to arbitrate in international commercial arbitration has been heavily influenced by the theory of implied consent. There is no reason not to apply this theory in investment arbitration as well as a GPL.

It may be challenging to determine whether the State in fact intended to be bound by the contract in question, which is why the role played by the parties in the contract's negotiation and performance may be of crucial importance.[688] Along those lines, Sinclair notes:

> there may be *circumstances* in which the existence of delegated powers indicates that the State entity and the State itself are essentially identical or, put differently, indicate that the State itself *intended* to be bound by a contract concluded by its agent or alter ego.[689]

The typical circumstances which could indicate such an intention is the party's involvement in negotiation, performance and termination of the contract. While some tribunals requested the proof of intention of the party to be bound by the arbitration clause contained in such a contract as an additional subjective element, this is not a universal requirement (the subjective element is clearly not required, for instance, in France). Moreover, the presence of the arbitration clause in the contract is not relevant in all investment arbitration cases. It is only relevant if the Tribunal's jurisdiction is based on such a contract, while it is not relevant if its jurisdiction is treaty-based.

Applied to the present context, the principle of implied consent would allow the Tribunal to attribute the investment contract to the State, if such State was directly involved in contract performance or formation. Similarly, as with the theory of apparent authority, this principle aims to establish the 'real parties to the contract' beyond the mere formal signatories. However, unlike the theory of apparent authority, which is applicable

[688] Csaba Kovács, *Attribution in International Investment Law* (Wolters Kluwer 2018), p. 259
[689] Anthony Sinclair, 'Bridging the Contract/Treaty Divide' in Christina Binder et al. (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009), p. 104 (emphasis added).

already (and exclusively) in the phase of contract negotiation, the theory of implied consent can be applied both in the context of negotiation and performance of the contract.

The State's participation in contract performance and termination was often enough for tribunals to find in favour of attribution. However, they usually fail to distinguish between *contract* attribution and *conduct* attribution. Thus, for example, the fact that the State terminated the contract was enough to conclude that such *conduct* is attributable to the State. Such reasoning is not acceptable for the reasons already explained. However, this does not mean that the State's involvement in contract negotiation, performance, and sometimes even contract termination is without relevance. The principle of implied consent allows the tribunals to investigate those circumstances.

The State's involvement in the process of contract negotiation represents a fact potentially useful both for the principle of implied consent and for the principle of apparent authority. This is a factual pattern where both principles could be potentially applied. However, in order to apply the principle of apparent authority, the State's direct involvement in the process of contract negotiation is not necessary. Putting the entity in question in a certain position suffices to establish apparent authority. On the contrary, the State's direct involvement is crucial for establishing its implied consent to the contract. Thus, the principle of apparent authority and the principle of implied consent have separate spheres of application, but certain circumstances may warrant the application of both principles.

4. Veil Piercing

The doctrine of piercing the corporate veil developed as an exception to a fundamental rule of corporate law – a rule that a parent corporation is not liable for the acts of its subsidiaries. This exception is applicable to situations where a company's separate personality is *abused* to commit fraud, misuse of rights, and so on. As a general matter, the doctrine of veil piercing or alter ego has been accepted in many jurisdictions around the world.

Born argues that 'authorities from virtually all jurisdictions' hold that that clause may nevertheless bind a non-signatory to a contract containing an arbitration clause if that party is an ‘alter ego’ of the party to the contract.[690] In other words, the doctrine of ‘piercing the corporate veil’ allows the tribunal to disregard the separate legal personality of an entity and extend the arbitration agreement to a third party hiding behind such entity.[691]

A fundamental difference between veil piercing and implied consent is that the former relies on legal and equitable considerations, while the latter is based on consent.

The following nine subsections examine veil-piercing doctrine across various domestic legal systems, while the tenth and final subsection examines the application of this doctrine by international courts and tribunals.

4.1. Brazil

Under Brazilian law, veil piercing is authorized when corporate personality is abused through the *deviation from purpose* or *commingling of assets*.[692] Article 50 of the Brazilian Civil Code provides:

> In case of abuse of juridical personality, characterized by the purpose deviation, or by the commingling of assets, the judge may, at the request of the party, or of the Public Prosecutor’s Office when it is up to him to intervene in the process, disregard it for certain and precise obligations has their effects extended to the personal assets of managers or partners directly or indirectly benefited by the abuse.

Deviation from purpose is further defined in Article 50 as ‘the use of the legal entity for the purpose of harming creditors and for the commission of unlawful acts of any nature’. *Commingling of assets* is defined as:

> the absence of de facto separation between assets characterized by the repetitive fulfilment by the corporation of obligations of the partner or the administrator or vice versa; transfer of assets or liabilities without effective consideration, except those of proportionally insignificant value; and other acts of non-compliance with equity autonomy.

[690] Gary Born, *International Commercial Arbitration* (Wolters Kluwer 2021), Chapter 10.01 [D]
[691] Mohamed S. Abdel Wahab, 'Extension of arbitration agreements to third parties: A never ending legal quest through the spatial-temporal continuum' in Franco Ferrari, Stefan Kröll (eds) *Conflict of Laws in International Arbitration* (Otto Schmidt/De Gruyter European law publishers 2010), p. 160.
[692] Marcelo Lauar Leite, 'Piercing the corporate veil in Brazilian, Canadian, and Spanish Civil Law,' (2023) 21 *Cadernos de Dereito Actual,* p. 85.

Thus, in case of *deviation from purpose*, specific intent is required for veil piercing; while in case of *commingling of assets*, the proof of specific intent is not required.[693]

The application of Article 50 of the Brazilian Civil Code is limited to relations between private persons governed by the Civil Code, while relations governed by consumer, labour, competition, and environmental law *do not require the abusive conduct*.[694] As one commentator notes 'a simple breach of contract is reason enough to call partners of limited liability corporations to answer for social obligations'.[695] Thus, outside of such 'social obligations' the proof of abusive conduct seems to be necessary for the application of the veil piercing doctrine.

However, in a 2024 decision, the Brazilian Supreme Court ordered the transfer of funds from X Brazil and Starlink Brazil to the Federal Government due to non-compliance with judicial orders by the social network X. The Court held that the companies were jointly liable on the grounds that they formed a *de facto economic group*.[696]

This stance has faced criticism as mere insolvency or insufficient assets to fulfil financial obligations may justify bankruptcy but does not warrant veil piercing (which requires *evidence of abuse of right*).[697]

4.2. China

Chinese law also recognizes the veil-piercing doctrine. If shareholders abuse the independent status of the company in a way that causes serious damage to the interests of any company's creditors, the law provides for joint and several liability of such shareholders.[698] The Supreme Court of PCR issued a Notice, which lists three common acts of abuse of separate corporate personality: confusion of personalities (failure to maintain separate identities of companies), excessive domination and control (failure to maintain separate identities of the company and its shareholders), and significant capital inadequacy.[699]

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[693] Ibid, 90.
[694] Ibid, p. 88.
[695] Ibid, p. 88.
[696] Flávia Maia, Isadora Peron, 'Starlink, X ordered to transfer \$3.3m to Brazilian government' *International Valor* (16 September 2024).
[697] 'Piercing the corporate veil and recent decisions of the Brazilian Supreme Court in the X/Starlink case', 28 October 2024 - available at https://www.baptista.com.br/piercing-the-corporate-veil-and-recent-decisions-of-the-brazilian-supreme-court-in-the-x-starlink-case/?lang=en.
[698] Article 20, paragraph 3 of the Company Law of the People's Republic of China.
[699] Notice by the Supreme People's Court of Issuing the Minutes of the National Courts' Civil and Commercial Trial Work Conference, Section II (4). See according to: Zhenyong Ye et al, 'The Recent

In one case, the Supreme People's Court took into account different aspects of the transaction process, company address, employees, company business, financial settlement, tax receipt issuance, etc.[700] In another case, the Supreme Court held:

> [F]or the affiliated companies that do not hold shares of each other, the confusion of personalities and asking affiliated companies to take the joint and several liability, requires solid evidence proving that the involved companies confused their superficial personality elements with each other (i.e., employees, business, and finance, etc.) to the severe extent that each individual company's property may not be distinguished, resulting in a loss of separate personalities, which shall be deemed the confusion of personalities. Such confusion made it difficult for the creditor to identify the true debtor, allowing the affiliated company to evade the debt in a huge amount, which eventually jeopardized the creditor's interest.[701]

What is important for the Chinese veil-piercing doctrine is the abuse of separate legal personality, which may be established through various factors.

4.3.England

English courts would be willing to lift the corporate veil only if the distinct legal personality appears to be a mere sham or façade.[702]

Hashem v Shayif is a landmark case on veil piercing. The Court held that the common theme in all the cases in which the court pierced the company's veil is 'that the company was being used by its controller in an attempt to immunise himself from liability for some wrongdoing which existed entirely dehors the company'.[703]

In this case, the Court held that 'the ownership and control of a company are not of themselves sufficient to justify piercing the veil'.[704] It further held that the veil piercing requires some kind of 'impropriety' which must be 'linked to the use of the company

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Judicial Development of "Piercing The Corporate Veil" in China' *JunHe Special Report* (16 December 2020), available at: https://www.junhe.com/legal-updates/1352?locale=en.

[700] Civil No.656 [2018], Retrial, Civil Division, Supreme People's Court. See: Zhenyong Ye et al, 'The Recent Judicial Development of "Piercing The Corporate Veil" in China' *JunHe Special Report* (16 December 2020), available at: https://www.junhe.com/legal-updates/1352?locale=en.

[701] Civil No.3168 [2016], Retrial, Civil Division, Supreme People's Court. See: ibid

[702] Mohamed S. Abdel Wahab, 'Extension of arbitration agreements to third parties: A never ending legal quest through the spatial-temporal continuum' in Franco Ferrari and Stefan Kröll (eds), *Conflict of Laws in International Arbitration* (Otto Schmidt/De Gruyter European law publishers 2010), p. 160.

[703] *Hashem v Shayif & Anor,* EWHC 2380 (Fam), England and Wales High Court Judgment (22 September 2008).

[704] Ibid, para 159.

structure to avoid or conceal liability'.[705] Thus, it seems to be necessary to show both 'control of the company by the wrongdoer(s) and impropriety' – using the company as a façade to conceal the wrongdoing.[706] The veil can be pierced even if the façade company 'was not originally incorporated with any deceptive intent'.[707]

In the context of arbitration, in an early case, *Roussel-Uclaf v. G.D. Searle* the English High Court held that a subsidiary can rely on the arbitration agreement to which it is not a party.[708] The ruling was based on the English Arbitration Act (now section 82(2)) which states that 'party to an arbitration agreement include any person claiming under or through a party to the agreement'. The Court held that the parties were 'so closely related on the facts in this case that it would be right to hold that the subsidiary can establish that it is within the purview of the arbitration clause'.[709]

However, the ruling was overturned in *City of London v. Sancheti,* where the English Court of Appeal held that *Roussel-Uclaf* was 'wrongly decided on this point and should not be followed'.[710] The Court held that 'a mere legal or commercial connection' to the relevant agreements 'is not sufficient' to bind a non-party.[711]

The Court did not clarify what beyond a mere legal or commercial connection would be sufficient to bind a non-signatory.[712] It has therefore been argued that, were a parent company abuses its control over a subsidiary for illegitimate purposes or in cases of fraud, the arbitration agreement can bind a non-signatory.[713] This means that the veil-piercing theory can be used to bind the signatories of the arbitration agreement.

4.4. France

French law has different concepts which perform the functions of the 'corporate veil piercing'.[714] Particularly important are French doctrines of *société fictive* - the company used as a mere façade vis-à-vis third parties and *confusion de patrimoines* - a complete

[705] Ibid, paras 160, 161.
[706] Ibid, para 163.
[707] Ibid, para 164.
[708] *Roussel-Uclaf v. G. D. Searle & Co. Ltd. and G.D. Searle & Co*. [1978] 1 Lloyd's Rep 225.
[709] Ibid.
[710] *City of London v. Sancheti*, [2008] EWCA 1283, Judgment of the Court of Appeal of the United Kingdom (21 November 2008), para 34.
[711] Ibid.
[712] Kate Davies, 'A Ghost Laid to Rest?' *Kluwer Arbitration Blog* (12 March 2009).
[713] Ibid, relying on *Adams v. Cape Industries Inc*; *Jones v. Lipman*; *BCCI v. Adham*; *Glencore v. Dalby*.
[714] Carsten Gerner-Beuerle and Michael Schillig, 'Veil-piercing' in *Comparative Company Law* (Oxford University Press 2019), p. 873.

commingling of assets.[715] These doctrines constitute exceptions to the principle of separate legal personality. When applying these two doctrines, the following indicators are taken into account: identical directors and shareholders, similar objects, centralization of management of the participating companies at the same place, constant business transactions between the participating companies, or a common pool of clients.[716] However, what is essential for both concepts is the 'occurrence of abnormal or irregular financial flows of assets between the participating companies'.[717]

Under French law, veil piercing has not played a significant role in binding the non-signatories, likely because French law recognises the group of companies doctrine, which is considerably less demanding than veil-piercing theory (see Section 3.4. above).

4.5. Germany

German law recognizes the veil piercing doctrine. In an early decision, the Federal Court of Justice held that 'the reality of life and the power of factual circumstances and economic necessities' may justify, under certain circumstances, pushing aside the separateness and autonomy of a legal entity.[718]

There are different theories which perform functions of veil piercing under German law. There are two so-called 'true piercing the corporate veil' theories: *Mißbrauchslehre* (abuse approach) and *institutionelle Durchgriffslehre* (institutional approach). The abuse approach is based on the idea that a separate legal personality may be disregarded if the corporation is deliberately abused for unfair or dishonest purposes.[719] The institutional approach focuses on the question of whether the separation of members and corporation is objectively in conflict with the legal order.[720]

The principle of veil piercing was applied in cases where shareholders engaged in abusive conduct that damaged the company's assets and ultimately led to insolvency.[721] This enabled direct shareholder liability for causing the company's insolvency. The concept was transformed into 'tortious liability for damage caused intentionally and in

[715] Ibid, p. 881.
[716] Ibid, p. 882.
[717] Ibid.
[718] Bundesgerichtshof, Ref.: II ZR 280/55 Urt. (07.11.1957) (footnotes omitted); Carsten Gerner-Beuerle and Michael Schillig, 'Veil-piercing' in *Comparative Company Law* (Oxford University Press 2019), p. 842.
[719] Carsten Gerner-Beuerle and Michael Schillig, 'Veil-piercing' in *Comparative Company Law* (Oxford University Press 2019), p. 842.
[720] Ibid.
[721] Ibid, pp. 843, 844.

violation of good morals' (section 826 of the German Civil Code) in a 2007 judgement of the Federal Court of Justice.[722] Two points in this judgment are particularly relevant. First, it was established that the shareholder exercised actual power over the company and was able to control its management.[723] What mattered was not the formal legal structure, but the existence of factual control. Second, regarding the intention to cause damage, the Court held:

> In terms of intention it is sufficient that the acting shareholder is aware of the fact that a transaction authorised or carried through by him or with his approval reduces the company's estate in violation of good morals. In this respect the shareholder must, at the time of the transaction, recognize the potential insolvency of the company as a foreseeable consequence of his acts.[724]

Veil piercing can be applied in the arbitration context. For example, if a third party used an insolvent company as a party to the arbitration agreement, in order to render the opposing party's claim futile, such third party can be liable under the above-mentioned section 826 of the German Civil Code.[725] In one case,[726] a limited liability company initiated arbitration against another limited liability company. The Respondent company filed a counterclaim against both the Claimant company and its managing director (third party, who signed the arbitration agreement not on his behalf but on behalf of the company). The Tribunal ruled against the Claimant and the managing director and ordered them to pay 2.5 million to the Respondent. Thus, the managing director was subject to arbitration even though he did not sign the arbitration agreement on his own behalf. The High Regional Court of Bremen enforced the award.

In line with this decision, some authors argue in favour of extending the arbitration agreement signed by a limited liability company to its shareholders, based on the piercing of the corporate veil (shareholder misused the legal form of the limited liability

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722 Bundesgerichtshof, Ref.: II ZR 3/04 (16.07.2007) (Trihotel).
723 Carsten Gerner-Beuerle and Michael Schillig, 'Veil-piercing' in *Comparative Company Law* (Oxford University Press 2019), p. 847.
724 Bundesgerichtshof, Ref.: II ZR 3/04 (16.07.2007) (Trihotel). Translation according to: Carsten Gerner-Beuerle and Michael Schillig, 'Veil-piercing' in *Comparative Company Law* (Oxford University Press 2019), p. 847.
725 Wolfram Buchwitz, *Schiedsverfahrensrecht* (Springer 2019), p. 238
726 OLG Bremen 2 Sch 2/2005 (10.11.2005) as referred to in Wolfram Buchwitz, *Schiedsverfahrensrecht* (Springer 2019), p. 238.

company and was generally also acting in bad faith).[727] Born, for example, specifically commenting on German law, argues in favour of binding the non-signatory on the basis of veil piercing theory.[728] Other authors, however, argue against it.[729] The argument against applying this doctrine to the issue of binding the non-signatories is based on the reasoning that material liability cannot establish jurisdiction of the arbitral tribunal (which must be based on the will of all parties involved).[730]

The most recent judgment of the German Federal Court suggests that the doctrine should not readily be applied in the context of non-signatories.[731] The Court held that even if a parent company or a shareholder is liable based on the veil piercing doctrine, this does not extend the arbitration agreement to such company or shareholder. Arbitration agreement can, however, be extended to such third party based on its conduct that can be interpreted as an acceptance of the agreement.

Accordingly, although the veil-piercing theory is generally accepted under German law, it remains uncertain whether it can be applied as a basis for binding the non-signatories. While arguments have been advanced in support of this view, the most recent judgment of the German Federal Court of Justice appears to cast doubt on such application.

4.6.India

In a landmark case *Vodafone v Union of India*, a tax dispute between Vodafone Group and the Indian Tax Authorities, the Supreme Court of India held that in order to justify veil piercing the Tax Authorities must prove that the transaction in question was a sham or tax avoidance:

> The burden is on the Revenue to allege and establish abuse, in the sense of tax avoidance in the creation and/or use of such structure(s). In the application of a judicial anti-avoidance rule, the Revenue may invoke the 'substance over form' principle or 'piercing the corporate veil' test only

[727] Werner Müller, Annette Keilmann, 'Beteiligung am Schiedsverfahren wider Willen?' (2007) *SchiedsVZ*, pp. 112, 113. On page 113 they refer to a few authors who argue in favour if applying the veil piercing doctrine, the issue of binding the non-signatories.

[728] Gary Born, *International Commercial Arbitration* (Wolters Kluwer 2021), Chapter 10.01 [D]: 'Indeed, some German authorities question (**wrongly**) whether the veil-piercing theory, which is traditionally used for purposes of substantive liability, may ever be used to bind non-signatories to arbitration agreements' (emphasis added).

[729] Werner Müller, Annette Keilmann, 'Beteiligung am Schiedsverfahren wider Willen?' (2007) *SchiedsVZ*, pp. 112, 113 – authors themselves argue against applying the doctrine of veil piercing to bind the non-signatories of the arbitration agreement.

[730] Ibid, p. 113.

[731] Bundesgerichtshof, Ref.: I ZB 33/22 Urt. (09.03.2023).

> after it is able to establish on the basis of the facts and circumstances surrounding the transaction that the impugned transaction is a sham or tax avoidant.[732]

Ultimately the Court ruled in favour of Vodafone, holding that 'the said Offshore Transaction evidences participative investment and not a sham or tax avoidant preordained transaction'.[733]

The veil piercing doctrine was also applied in *Delhi Development Authority v. Skipper Construction Company*. The Supreme Court held that several companies were created to defraud people:

> The concept of corporate entity evolved to encourage and promote trade and commerce, but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned.[734]

Thus, the veil piercing doctrine is recognized under Indian law, but for the corporate veil to be lifted, the circumstances must indicate some form of bad faith, such as fraud, tax evasion, or the use of the corporate form as a sham to conceal wrongdoing or evade obligations.

In a recent judgment, the Supreme Court of India made several important remarks regarding the application of the veil-piercing doctrine to the question of binding the non-signatories.[735] The dispute arose between a State-owned entity Oil and Natural Gas Corporation Limited (ONGC) and its contractual partner Discovery Enterprises Private Limited (DEPL). The contract contained an arbitration clause, based on which ONGC initiated arbitration against DEPL. However, ONGC argued that another company - Jindal Drilling and Industries Limited (JDIL) was also bound by the arbitration agreement. JDIL was not a signatory, but it belonged to the same group. ONGC argued that the two companies constitute 'a single economic entity' which is why 'the corporate

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[732] *Vodafone International Holdings B.V vs Union of India & Anr*, Supreme Court of India (20 January 2012), para 68.
[733] Ibid, para 91.
[734] *Delhi Development Authority vs Skipper Construction Company(P) Ltd. & Another*, Supreme Court of India (6 May 1996).
[735] Oil And Natural Gas Corporation Ltd v. M/S.Discovery Enteprises Pvt.Ltd, Supreme Court of India (27 April 2022).

veil should be lifted to compel the non-signatory, JDIL, to arbitrate'. ONGC also argued that 'DEPL is an alter ego and agent of JDIL'. In its interim award, however, the Tribunal rejected to join JDIL a party to the arbitration. The case finally reached the Supreme Court of India.

The Court decided to set aside the interim award.[736] It held that the Tribunal 'has not enquired into the facts at all, despite the contention of ONGC that JDIL is a necessary party'. The Court held that 'since the application of the group of companies doctrine and the lifting of the corporate veil involves mixed questions of law and fact', the Tribunal failed to examine all the relevant facts to determine 'whether there was sufficient material to establish the application of the group of companies doctrine'. The relevant facts that the Tribunal failed to consider according to the Court were *inter alia*: close corporate and functional unity between DEPL and JDIL and the fact that the executives of JDIL had been closely associated with the negotiation of the agreement.

What can be observed in this case is that the Court apparently mixed factors relevant for determining implied consent (participation in negotiations), with facts typically used in the context of veil piercing or the group of companies (factual unity). In addition, it appears that veil piercing and group of companies are used somewhat interchangeably, without veil piercing explicitly requiring a finding of bad faith.

4.7. South Africa

Section 20(9) of the South African Companies Act 71 of 2008 allows piercing the corporate veil in cases of *unconscionable abuse* of the company's juristic personality. South African courts applied the principle of veil piercing in numerous cases. There are numerous cases where the principle of veil piercing was applied.

In *Shipping Corporation of India v Evdomon*, the Supreme Court of Appeal held that piercing the corporate veil generally requires the presence of fraud or other improper conduct in the establishment, use or management of the company.[737]

In *Cape Pacific v Lubner,* the Supreme Court of Appeal held that policy considerations strongly supported piercing the corporate veil in relation to the fraudulent or improper

[736] Ibid.
[737] *Shipping Corporation of India Ltd v Evdomon Corporation and Another* (686/91) [1993] ZASCA 167; 1994 (1) SA 550 (AD); [1994] 2 All SA 11 (A) (12 November 1993), p. 43.

dealings of the two companies in order to reveal the third company as the true 'villain of the piece'.[738]

In *Knoop NO v Birkenstock Properties*, the Free State High Court (Bloemfontein) held that the corporate veil may be lifted where the use or the establishment of a corporate entity is 'borne out of deceit'. The court held:

> where a corporate entity was properly established but has been misused in a particular instance to perpetrate fraud, or a dishonest or improper purpose, there is no reason in principle why its separate personality cannot be disregarded in relation to the transaction in question while giving full effect to it in other respects.[739]

Finally, in *Ex Parte: Gore NO*, the High Court of South Africa (Western Cape High Court, Cape Town) held 'the involvement of fraud or other improper conduct has generally been present in the cases in which the veil has been lifted or pierced'.[740]

Thus, the South African courts would be willing to pierce the veil in cases of fraud, deceit, improper or dishonest conduct.

4.8. Switzerland

Swiss law recognizes the so-called 'Durchgriff' doctrine - the corporate veil can be pierced in case of abuse of rights (such as appropriating the shareholders' equity from the subsidiary or mixing the assets of the subsidiary with its own).[741]

The Federal Supreme Court confirmed that, according to its established case law, veil piercing is accepted under certain conditions. It held that in cases of economic identity between entities, it is permissible to disregard their legal independence and to 'reach through' one entity to another if invoking the independence of one or the other legal entity would constitute an abuse of law.[742] According to one Swiss commentator on this decision this means that a corporate veil can be pierced where: 1) a corporation and its

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[738] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* (9/93) [1995] ZASCA 53; 1995 (4) SA 790 (AD); [1995] 2 All SA 543 (A) (19 May 1995), p. 35.

[739] *Knoop NO and Others v Birkenstock Properties (Pty) Ltd and Others* (7095/2008) [2009] ZAFSHC 67 (4 June 2009), paras 15, 16.

[740] *Ex Parte: Gore NO and Others,* Case No. 18127/2012, Western Cape High Court, Cape Town (13 February 2013).

[741] Nathalie Voser, 'Chapter 9: The Swiss Perspective on Parties in Arbitration: "Traditional Approach With a Twist regarding Abuse of Rights" or "Consent Theory Plus"' in Stavros Brekoulakis, Julian David Mathew Lew et al. (eds) *The Evolution and Future of International Arbitration* (Kluwer Law International 2016)161-182, paras. 9.64 and 9.72.

[742] Swiss Federal Supreme Court Decision, 4A_160/2009 (25 August 2009), para 4.3.1.

majority shareholder are operating as a single economic entity despite the fact that they are formally separate due to the corporate veil; and (2) it would be inequitable to uphold the legal distinction between them.[743] Importantly, the Court held that in the case of such veil piercing, if a contract claim can be asserted against the majority shareholder, this means that all rights and obligations from the respective agreement (including the arbitration clause) are directly binding for the majority shareholder.[744]

This clearly indicates that veil piercing doctrine was used for the purposes of contract attribution.[745] A non-signatory can be bound by a contract concluded by a separate legal person, if there is an economic identity between the two, and where preserving such separate personality would result in an abuse of rights (would be inequitable).

4.9. United States

Corporate veil piercing and its variant, the alter ego doctrine, are well-established under the U.S. law. This is a 'long standing rule of commercial conduct' recognized both in the U.S. and other legal systems.[746] The doctrine of the alter ego is strongly influenced by equity. As one court found, the separate status of corporations 'should be disregarded only where necessary to do equity'.[747] Factors that courts consider when deciding on the application of this doctrine are: inadequate capitalization; putting and taking funds in or out of a corporation for personal purposes; overlap in ownership, officers, directors, and personnel; common office space, addresses, telephone numbers; corporations are treated as independent profit centres, etc.[748]

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[743] Georg von Segesser, 'Piercing the Corporate Veil - Effect on the Arbitration Clause and Jurisdiction', *Kluwer Arbitration Blog* (24 November 2009).

[744] Swiss Federal Supreme Court Decision, 4A_160/2009 (25 August 2009), para 4.3.1 and Georg von Segesser, 'Piercing the Corporate Veil - Effect on the Arbitration Clause and Jurisdiction', *Kluwer Arbitration Blog* (24 November 2009).

[745] Nathalie Voser, 'Chapter 9: The Swiss Perspective on Parties in Arbitration: "Traditional Approach With a Twist regarding Abuse of Rights" or "Consent Theory Plus"' in Stavros Brekoulakis, Julian David Mathew Lew et al. (eds) *The Evolution and Future of International Arbitration* (Kluwer Law International 2016), pp. 161-182 at para 9.56.

[746] Timothy Nelson, 'Bridas v Government of Turkmenistan: U.S. Courts Uphold an Arbitrator's Power to Hold A Foreign Sovereign Liable for the Acts of its State-Owned Enterprise' (2006) 24 (3) *ASA Bulletin*, p. 599.

[747] *Arriba Ltd v Petroleos Mexicanos,* 962 F.2d 528, 536 (5th Cir 1992)

[748] *Passalacqua Builders, Inc, and Safeco Insurance Company of America and General Insurance Company of America, Cross-Appellees v Resnick Developers South, Inc, Jack Resnick, Burton Resnick, 90079, Inc, Jack Resnick & Sons, Inc, Sunrise Builders, Inc, Jack Resnick & Sons of Florida, Inc, Resnick of Boca, Inc, Jfam Investments, Inc, Resnick Development Corporation, Pearl Resnick, Judith Resnick, Ira Resnick, Marilyn Katz, Stanley Katz, Susan Abrams, John Doe, John Does, Inc, Cross-Appellants,* 933 F.2d 131 (2d Cir 1991).

The theory of veil piercing focuses on the conduct of a parent company that demonstrates *abandonment of separateness*, and it is applied when needed to do *equity.* Even though it is developed in the context of corporate law, it represents a valuable theory of contract attribution.

The Court of Appeals for the Second Circuit held in *American Fuel* that an alter ego can be held liable for the obligations of its instrumentality based on the veil piercing theory if two conditions are met: 1) alter ego exercised complete control over the instrumentality regarding the transaction in question and 2) such control was used to defraud or otherwise injure the party seeking to pierce the veil.[749] The same Court held in *Thomson-CSF* that an agreement of its subsidiary may bind an alter ego company if its 'conduct demonstrates a virtual abandonment of separateness'.[750]

A prominent case addressing the alter ego doctrine in the context of a SOE is *First National City (FNC) Bank v Banco Para el Comercio Exterior de Cuba (Bancec)*.[751] Bancec was an autonomous credit institution established by the Cuban Government but enjoying separate juridical capacity. Shortly after Bancec tried to collect a letter of credit issued by FNC Bank in support of a certain contract, all FNC Bank assets in Cuba were seized and nationalized by the Cuban Government. After Bancec brought a suit on the letter of credit, FNC claimed the right to set off the value of its seized assets in Cuba. Bancec argued that its separate juridical status shielded it from the acts of the Cuban Government. The case finally reached the U.S. Supreme Court. The key question before the Court was whether Bancec, as a SOE was the alter ego of the Cuban State. The Court held that the separate status of government instrumentalities cannot be ignored, but also is not absolute. It held:

> The corporate form will not be blindly adhered to where doing so would cause such an injustice. Having dissolved respondent and transferred its assets to entities that may be held liable on petitioner's counterclaim, Cuba cannot escape liability for acts in violation of international law simply by retransferring assets to separate juridical entities. To hold otherwise would permit governments to avoid the requirements of

[749] *American Fuel Corp v Utah Energy Dev't Co, Inc,* 122 F.3d 130, 134 (2d Cir 1997)
[750] Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773 (2nd Cir. 1995).
[751] *FNC Bank v. Banco Para el Comercio*, 462 U.S. 611 (1983).

> international law simply by creating juridical entities whenever the need arises.[752]

In this case, the U.S. Court lifted the veil of the foreign SOE in order to prevent the foreign State behind it from benefiting from a claim, while escaping liability to the opposing party.

Moreover, the U.S. courts have applied the veil piercing doctrine in the context of an investor-State dispute. In *Bridas v Government of Turkmenistan*, an Argentine corporation – Bridas – entered into a joint venture agreement (JVA) to exploit oil and gas resources with Turkmenneft, an entity designated by the Government of Turkmenistan.[753] Based on this JVA Bridas initiated ICC arbitration against the Government and Turkmenneft. The parties agreed to arbitrate in Houston, Texas and both parties have relied exclusively on U.S. law.[754] The issue arose whether this agreement binds the Government of Turkmenistan. The Tribunal held that the Government was a proper party to the arbitration. The Federal District Court in Houston upheld the award, holding that the Government was 'bound by the JVA under principles of agency and estoppel', but the US Court of Appeals of the Fifth Circuit held that the Government was bound based on an alter-ego theory.[755] The Court of Appeals first held that the alter ego doctrine (as a variation of the piercing the corporate veil doctrine) should be applied only in exceptional cases. Second, it recognized that the doctrine of alter ego consists of two elements: the lack of financial independence of the entity from the Government and using of financial separateness of the entity 'to commit a fraud or another wrong on plaintiffs'.[756]

The Court first addressed the 'fraud or injustice' prong. It held that this prong is satisfied based on the 'Government's manipulation of Turkmenneft to prevent Bridas from recovering any substantial damage award'.[757] In reaching this conclusion, the Court relied on the following facts: the Government was destroying the value of the JVA; the Turkmenneft was undercapitalized and rendered immune from seizure despite its obligation to arbitrate under the JVA and potential liability for any adverse award; the Government issued a number of decrees attempting to limit its potential exposure to

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[752] Ibid, at 462.
[753] *Bridas S.A.P.I.C. v. Govt. of Turkmenistan*, 447 F.3d 411(5th Cir. 2006).
[754] Ibid, fn. 5.
[755] *Bridas S.A.P.I.C. v. Govt. of Turkmenistan*, 447 F.3d 411(5th Cir. 2006).
[756] Ibid.
[757] Ibid.

liability.[758] The Court did not require proof of specific intent to defraud, but relied on certain conduct of the Government which implied that it used the entity to commit fraud or injustice against the investor.

With respect to the second prong, namely, control, the Court of Appeals held that the District Court was wrong when finding that the Government did not 'exercise complete domination and control' over the entity. The District Court took into account a range of private and public law factors.[759] The Court of Appeals held that the District Court was wrong because it elevated 'the form over the substance of the relationship' between the entity and the Government with respect to the transaction with Bridas. The Court of Appeals relied in particular on the District Court's finding that the Government 'did not really deal with Turkmenneft at arm's length'.[760]

The Court of Appeals held that the subsidiary's 'zero balance' and exclusive reliance on another entity (here the Government) to service its debts, represents 'strong evidence that the subsidiary lacks an independent identity'.[761] Furthermore, the Court held that 'intentionally bleeding a subsidiary to thwart creditors is a classic ground for piercing the corporate veil'.[762] In assessing the control prong, the Court placed significant emphasis on financial considerations. Its reference to intentional draining of the entity under the control analysis, indicates a certain overlap between the control requirement and fraud and injustice element.

Although this case may be regarded as controversial (American court piercing the veil of a former Soviet SOE), what is significant from the perspective of this thesis is that, under U.S. law, veil piercing is an established doctrine, and the alter ego theory

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[758] Ibid.

[759] Private law factors (1) the parent and subsidiary have common stock ownership; (2) the parent and subsidiary have common directors or officers; (3) the parent and subsidiary have common business departments; (4) the parent and subsidiary file consolidated financial statements; (5) the parent finances the subsidiary; (6) the parent caused the incorporation of the subsidiary; (7) the subsidiary operated with grossly inadequate capital; (8) the parent pays salaries and other expenses of subsidiary; (9) the subsidiary receives no business except that given by the parent; (10) the parent uses the subsidiary's property as its own; (11) the daily operations of the two corporations are not kept separate; (12) the subsidiary does not observe corporate formalities; (13) whether the directors of the 'subsidiary' act in the primary and independent interest of the 'parent'; (14) whether others pay or guarantee debts of the dominated corporation; and (15) whether the alleged dominator deals with the dominated corporation at arm's length. Public law factors: (1) whether state statutes and case law view the entity as an arm of the state; (2) the source of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property.

[760] *Bridas S.A.P.I.C. v. Govt. of Turkmenistan*, 447 F.3d 411(5th Cir. 2006).

[761] Ibid.

[762] Ibid.

constitutes its variation. The doctrine requires two essential elements: control and fraud or injustice, and the courts were willing to apply it to SOEs in order to reach the States behind them.

Finally, the alter ego doctrine was applied in *Crystallex v Venezuela*. After the ICSID tribunal awarded $1.2 billion to Crystallex (a Canadian gold mining company) against Venezuela, Crystallex filed an action in the U.S. District Court to attach the property of PDVSA (Petróleos de Venezuela, S.A.), the State-owned oil company of Venezuela, arguing that this company was the alter ego of Venezuela. The District Court applied the Foreign Sovereign Immunities Act of 1976 (FSIA) and the common law exception recognized by SCOTUS in *FNC Bank v. Bancec* (1983). Based on the alter ego doctrine the Court concluded that Venezuela's control over PDVSA was sufficient to allow Crystallex to attach PDVSA's shares and satisfy its award against Venezuela.[763] The Court of Appeals agreed and held:

> Under the Foreign Sovereign Immunities Act, there is a strong presumption that a foreign sovereign and its instrumentalities are separate legal entities. But the Supreme Court made clear in *Bancec* and *Rubin* that in extraordinary circumstances—including where a foreign sovereign exerts dominion over the instrumentality so extensive as to be beyond normal supervisory control—equity requires that we ignore the formal separateness of the two entities. This clears that bar easily. Indeed, if the relationship between Venezuela and PDVSA cannot satisfy the Supreme Court's extensive control requirement, we know nothing that can.[764]

In this case, the extensive control test was applied to rebut the presumption that the State and the SOE were separate legal entities. No fraud or injustice was required. However, the purpose of the veil piercing here was to attach the assets of the SOEs to satisfy the award against the State. The purpose was not to determine contractual partners (like in *Bridas*). It appears that while the extensive control test might be applicable in cases

[763] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, Order of the U.S. District Court for the District of Delaware (9 August 2018), p. 38. Note that in *Dole Food v Patrickson*, the U.S. Supreme Court significantly limited the protections provided by FSIA to State-owned companies. The lower level subsidiaries of State-owned companies are considered to fall outside the Act and shall be treated like any other foreign corporation. See: *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003) and Mark A. Cymrot, 'Welcome to the Jury System: Supreme Court Limits Sovereign Immunity for State-Owned Companies' (2005) 6 *Business Law International*, pp. 361, 362.

[764] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, Opinion of the US Court of Appeals for the Third Circuit (29 July 2019), p. 44.

involving sovereign immunity, for determining parties to the contract, control still must be coupled with fraud or injustice.

4.10. International law

Finally, the principle of veil piercing has been recognized in international law. In *Barcelona Traction* the ICJ held that the principle has been established in municipal law and is 'equally admissible to play a similar role in international law'.[765]

In *Westland Helicopters v AOI,* the question arose whether States could potentially be held responsible for the acts of an international organization of which they are members.[766] Nowadays it is generally accepted that International organizations enjoy international personality.[767] In this case, however, the Tribunal particularly relied on equity which 'in common with the principles of international law, allows the corporate veil to be lifted, in order to protect third parties against an abuse which would be to their detriment', as held in *Barcelona Traction*.[768]

The veil piercing principle is widely accepted in international commercial arbitration.[769] As one ICC commercial arbitration tribunal explained, typical elements which would warrant the application of this principle include: a *significant measure of direct control* of the subsidiary's activities by the parent or shareholder; the *insolvency of the subsidiary*; cessation of *meaningful activities* by the subsidiary and its own management; the actual control and management of the subsidiary by the parent which has contributed to making illusory recourse against the subsidiary; *wrongful conduct* by the subsidiary at the direction of the parent towards the person seeking to pierce the

[765] Barcelona Traction (*Belgium v. Spain*), Judgment (5 February 1970), ICJ Reports 1970, p. 3, para 58.
[766] *Westland Helicopters Ltd v Arab Organization for Industrialization, United Arab Emirates, Kingdom of Saudi Arabia, State of Qatar, Arab Republic of Egypt, and Arab British Helicopter Company, Arbitration,* Case No 3879, International Chamber of Commerce, Court of Arbitration, Interim Award - Jurisdiction (5 March 1984). The question of liability of Member States for the debts of an international organization also arose in International Tin Council case which involved proceedings before New York Supreme Court, English courts and European Court of Justic before finally being settled by an agreement. See: Matthias Hartwig, 'International Tin Council (ITC)' in *Max Planck Encyclopaedia of International Law* (2011).
[767] August Reinisch, 'Do We Know What We Love When We Say that We Love International Organizations?' (2024) 21 *International Organizations Law Review*, p. 437.
[768] *Westland Helicopters Ltd v Arab Organization for Industrialization, United Arab Emirates, Kingdom of Saudi Arabia, State of Qatar, Arab Republic of Egypt, and Arab British Helicopter Company, Arbitration,* Case No 3879, International Chamber of Commerce, Court of Arbitration, Interim Award - Jurisdiction (5 March 1984), p. 32.
[769] See, for example, Ad hoc award of 1991, (1992) 2 ASA Bull 202 – according to Stavros Brekoulakis, 'Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories' (2017) 8 *Journal of International Dispute Settlement* 610, p. 615.

corporate veil.[770] Not all of these elements would have to be established in order to apply the veil-piercing theory. As Born explains, the essence of this theory is domination of one party over the other party's affairs and actions, and/or the exercise of such power for committing certain injustice on a third party or to evade certain legal obligations.[771] Different elements should be considered as factors, which in combination may warrant the application of this theory.

To summarize, the veil piercing principle has usually been applied in limited circumstances, which makes it less useful for contract attribution than the two other theories analysed in this dissertation. As the ICJ stated in *Barcelona Traction*, typical circumstances in which this principle is applicable are 'to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations'.[772] Thus, certain elements of *bad faith* on the side of the one 'hiding' behind the 'veil of separateness' should be present. This does not necessarily mean that one must look for the intent to defraud. Avoiding legal obligations (contractual, for instance) may be enough.

4.11. Conclusion

The doctrine of veil piercing is generally accepted in all of the jurisdictions analysed in this thesis. Indeed, some commentators argue that the doctrine is recognised across virtually all legal systems (see above beginning of Section 4). Nevertheless, some nuances emerge with regard to its application in the context of binding non-signatories.

First, in some jurisdictions, veil piercing is expressly accepted as a basis for binding the non-signatories. This appears to be the case in England, Switzerland and the United States.

Second, in certain jurisdictions the doctrine is recognised, but there is still little or no evidence on its application specifically for the purpose of binding the non-signatories. This can be observed, for instance in Brazil, China and South Africa.

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[770] ICC Award No. 8385 (1995), U.S. company v. Belgian company, 1241.0.1. 1061 (1997) – according to Emmanuel Gaillard and John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999), pp. 285, 286.

[771] Gary Born, *International Commercial Arbitration* (Wolters Kluwer 2021), Chapter 10.01[D]. (emphasis added).

[772] Barcelona Traction *(Belgium v. Spain)* Judgment (5 February 1970), ICJ Reports 1970, p. 3, para 56.

Third, some jurisdictions adopt a more restrictive approach. In Germany, although veil piercing is generally accepted, its application to bind non-signatories remains uncertain, largely due to the strong emphasis placed on the parties' consent. Nevertheless, as observed above (Section 4.5.) several authors argue in favour of applying the doctrine to this context.

Finally, in some jurisdictions veil piercing may even operate under a comparatively lower threshold in the context of binding the non-signatories. For example, in India courts appear to be willing to bind the non-signatories without requiring the strict showing of bad faith, typically associated with veil piercing. This seems to be the consequence of the acceptance of the group of companies doctrine under Indian law.[773] Some degree of confusion between veil piercing and a group of companies can be observed. Perhaps due to the same reason (acceptance of the group of companies doctrine) the veil piercing has not played a particularly significant role in the context of binding the non-signatories in France.

Although some overlap between the two doctrines may arise, veil piercing and group of companies are two different principles. The group of companies principle is primarily grounded in consent. Mere membership in the same corporate group is generally insufficient.[774] Some form of participation in the negotiation, performance or other conduct indicating consent to be bound is usually required. This is why this doctrine is analysed in Section 3 (implied consent) above.

A common characteristic of veil piercing across jurisdictions is that it is applied in exceptional circumstances, which makes it the least attractive of all three principles analysed in this dissertation. Another common characteristic is that typically veil piercing requires two elements. The first concerns control, meaning that the controlling entity exercises such dominance over a controlled entity that the later lacks genuine independence. This may be evidenced by factors such as overlapping ownership, comingling of assets, confusion of identities, control over management, and operation

[773] Similarly, in a recent high-profile case (although not in the context of binding the non-signatories) Brazilian court applied 'de facto economic group' theory which does not require abusive conduct (typically required for veil piercing under Brazilian law) – see above Section 3.1. Also in the U.S. in *Crystallex* the Court did not require proving of bad faith when applying the veil piercing theory. However, as discussed above (Section 4.9.) the purpose of veil piercing in *Crystallex* was to allow the attachment of the assets of a SOE rather than to determine contractual parties. Accordingly, in the specific context of binding non-signatories, *Bridas* remains the leading authority under the U.S. law requiring showing of control coupled with fraud or injustice.
[774] Gary Born, *International Commercial Arbitration* (Wolters Kluwer 2021), Chapter 10.01 [D].

of the entities as a single economic unit. The second element relates to bad faith (fraud or other improper conduct), meaning that the entity was used in a manner that would render it inequitable to maintain its separate legal personality.

Applied to the present context, investment tribunals frequently examine the degree of control and influence exercised by the State over the entity in question. It is important to distinguish, however, between control over the entity itself and control over the entity's contractual behaviour. When assessing the State's involvement in the performance of the contract, the analysis is suitable for the theory of implied consent. In contrast, when the focus is on the extent of State control over the entity as a whole, the discussion may shift toward the doctrine of veil piercing. However, for the latter to apply, an additional element of bad faith must typically be established.

Chapter VI: Conclusion

The question of how, and under which legal rules, investment contracts concluded by SOEs can be attributed to the State remains unresolved in both arbitral practice and legal scholarship. The practice of arbitral tribunals offers divergent approaches, and academic literature has so far paid surprisingly limited attention to this issue. This thesis fills this gap by proposing a coherent legal framework based on the GPL.

Chapter I examined typical scenarios in which this problem arises and highlighted its increasing importance. This question is likely to gain even more relevance in the future, given the growing role of SOEs. Additionally, the renewed reliance on contract-based arbitration, partly as a response to the backlash against investment treaty arbitration, further increases the relevance of the topic.

Chapter II outlined the two legal frameworks that have thus far been applied to the issue of contract attribution in investment arbitration. The first framework consists of the ARSIWA rules of attribution, which investment tribunals frequently invoke. However, this thesis argues that these provisions were not designed to address the attribution of contracts and therefore should not be applied to this issue. The question of whether a *contractual breach* should be assessed under the ARSIWA rules of attribution is a distinct issue. Ultimately, it depends on whether the investor can frame its claim as a treaty violation. If the Tribunal is concerned with an alleged breach of an investment treaty, the claim may be characterized as a potential violation of international law, thereby engaging State responsibility and making the ARSIWA rules of attribution applicable. However, the ARSIWA attribution framework does not govern the preliminary question of whether the State is a party to the contract.

The second framework for addressing the issue of contract attribution is domestic law, a position supported by the literature. Doctrinal support focuses on the idea that *the applicable domestic contract law* should govern the contract attribution issue. However, in practice, tribunals that have opted to apply domestic law have rarely engaged directly with contract law doctrines. Instead, they have tended to rely on domestic rules on the *separate legal personality* of the SOEs, often leading to an automatic conclusion that the State cannot be considered a party to the contract. This often predetermined the outcome, without due consideration of the factual circumstances of the State's involvement in the negotiation or performance of the contract.

Considering the limitations associated with these two legal frameworks, this thesis proposes an alternative approach grounded in the GPL. However, before turning to the justification for applying the GPL and the identification of the relevant principles (analysed in Chapters IV and V), Chapter III addressed an important preliminary issue: the broader context of attribution involving SOEs in different fields of international law. The central insight is that attribution is not a uniform concept, and its legal consequences depend on the purpose for which it is invoked. Accordingly, this Chapter emphasized the importance of purpose-driven attribution.

For example, when an SOE commits internationally wrongful act and the question arises whether a State should bear responsibility under international law, then the ARSIWA provide the applicable rules of attribution. They apply regardless of whether the violation concerns customary international law, investment treaties, or human rights treaties. This is because attribution aims to determine State responsibility. However, SOEs may also appear in other roles. When an SOE acts as a contractual party, the goal of attribution (in a broad sense) is not to establish State responsibility, but to determine whether the State is a party to the contract. Thus, the ARSIWA rules of attribution are not a suitable legal framework for attributing legal relations, such as contracts. Another example comes from the WTO law, where the issue arose whether a financial contribution by an SOE constitutes a subsidy attributable to the State (through the 'public body' concept). Here too, the ARSIWA rules of attribution are not an appropriate framework. Thus, Chapter III analysis laid the groundwork for the thesis's central claim that a separate legal framework, different from ARSIWA rules of attribution, is needed to resolve the issue of *contract attribution.*

Chapter IV addressed the rationale for applying the GPL to the issue of contract attribution in investment arbitration. The GPL are particularly valuable in situations where a normative gap exists (as is the case here). In the historical period preceding the establishment of ICSID and the broader investment treaty regime, arbitral tribunals frequently relied on the GPL (such as the prohibition of unjust enrichment and protection of the acquired rights) in the context of what has been described as 'internationalization of contracts'. These principles proved suitable for contracts that were neither purely domestic nor inter-State in nature. Subsequently, in the jurisprudence of the Iran-US Claims Tribunal, a more specific trend emerged: the application of principles drawn from domestic contract law. This Tribunal showed willingness to apply contract law doctrines in resolving disputes that fell within the international legal framework. Building on this, the central argument of this thesis is that *principles of contract (and agency) law* should be applied here as *the general principles of law*.

Chapter V constitutes the core of this thesis, as it examines the principles used to bind the non-signatories in comparative law. The Chapter focuses on three key doctrines: apparent authority, implied consent and veil piercing. The Chapter examines how these principles are treated across jurisdictions representing different legal families and different regions of the world, allowing for a meaningful comparative analysis. This comparative foundation is then complemented by an assessment of the principles' soundness and persuasiveness, which is based on their recognition and acceptance at the international level (particularly in international commercial arbitration, and to some extent in international investment arbitration).

The apparent authority principle is based on the reasonable belief of a third party that an agent (signatory) was authorized to act on behalf of the principal (non-signatory). This belief must be based on the words or conduct of the non-signatory, which creates the appearance of authority. Apparent authority rests on a hybrid foundation: it draws on implied consent (inferred from conduct) and is reinforced by the broader principle of equity and good faith, which serve to protect legitimate expectations of third parties.

Meanwhile, the principle of implied consent rests more squarely on the notion of consent, inferred from the conduct of the non-signatory that indicates a willingness to be bound, such as active participation in the negotiation, performance or termination of the contract.

Finally, the doctrine of veil piercing is grounded primarily in equitable considerations and the principle of good faith, rather than consent. It is invoked when the separation of legal entities is abused. Moreover, veil-piercing doctrine clearly requires investigating the factual relationship between the entity that entered into the contract and the entity behind the veil. Such a relationship will often include the analysis of the level of control of one entity over another. General control of one entity over another, coupled with bad faith or abuse of legal personality, may be enough to justify contract attribution.

In contrast to the veil-piercing principle, apparent authority and implied consent principles require more than such general control over the entity. They demand a specific connection to the contract in question, such as involvement in negotiation, execution or performance. Control, in this context, must be contract specific.

Another point of distinction among different principles for binding the non-signatories lies between implied consent and apparent authority. Apparent authority is typically relevant during the negotiation phase, where the conduct or statements of the non-signatory create a reasonable belief that the signatory is authorized to act on its behalf. In contrast, the doctrine of implied consent is broader in scope. It may be invoked not only during the negotiations, but also throughout the performance (and even termination) of the contract. As such, implied consent provides a basis for binding a non-signatory at various stages in the contractual relationship.

To illustrate the application of the GPL discussed in this thesis, it is useful to examine specific investment arbitration cases in which the issue of contract attribution to the State arose, and to assess how the proposed legal framework could be applied to those cases.

For example, in *Toto v Lebanon*, the question arose whether a contract concluded by an entity distinct from the State (Conseil Executif des Grands Projets succeeded by Council for Development and Reconstruction), which enjoyed financial and administrative autonomy, can be attributed to the State. The Tribunal held that the entity mainly acted as 'the agent and implementing authority of the Lebanese Government'.[775] It took into account the following circumstances: the entity was 'in charge of studying and implementing development and reconstruction projects'; it elaborated and implemented projects assigned to it by the Council of Ministers of the Lebanese government; funds for performance of the projects were 'provided for in the State budget'.[776] On this basis, the Tribunal concluded that the entity was 'exercising in the context of the Contract the governmental authority of the Republic of Lebanon' and its acts were attributable to the State based on Article 5 ARSIWA.[777]

It is noteworthy that none of the factors considered by the Tribunal related directly to the specific contract at issue. Instead, the Tribunal relied on more general indicators to conclude that the entity acted as an *agent* of the State. However, for a finding based on *apparent authority*, it must be demonstrated that the investor believed (in good faith and on the basis of the government's behaviour) that the entity was acting on behalf of the

[775] *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 September 2009), para 58
[776] Ibid, paras 58 and 59.
[777] Ibid, para 60.

State when entering into the contract. In the facts examined by the Tribunal there is little evidence of that.

Further, in order to apply the *implied consent* principle, the Government's involvement in the negotiation and conclusion of the contract is of crucial importance. Tribunal did not consider this.

As for the *veil piercing* principle, the Claimant did argue that the Government fully controlled the entity.[778] However, control alone would not be sufficient to justify the application of veil piercing, which requires bad faith (not indicated in the record).

As can be seen, the Tribunal held that it had jurisdiction over the State based on the Article 5 of the ARSIWA, concluding that the entity which entered into a contract with the investor was exercising governmental authority of the State 'in the context of the Contract'.[779] However, if the contract is to be considered binding on the State, the analysis should instead focus on the principles of apparent authority, implied consent and veil piercing, as discussed in this thesis. Yet none of the factors typically relevant for attributing contract to the State under these principles appear to be present in the facts examined by the Tribunal when establishing jurisdiction over the State. Consequently, the application of these principles would likely lead to a different conclusion, namely, a lack of jurisdiction over the State.

In *Deutsche Bank v Sri Lanka*, the issue arose whether a contract concluded between the investor and the CPC (Sri Lanka's national petroleum company, which was an SOE) could be attributed to the State. As noted above (see Chapter II, Section 1.2), this case exemplifies the confusion, largely due to the absence of a clearly defined applicable legal framework.

In this case, although the Tribunal found it unnecessary to make a definitive ruling on the alleged breach of the umbrella clause, given that other treaty breaches had already been established, it nonetheless offered certain observations on the matter.[780] The Tribunal applied two different tests. First, it relied on Article 4 of the ARSIWA to assess whether the entity could be regarded as a State organ. It held that 'State control of CPC is evident' and that there was 'considerable evidence as to the significant control

[778] Ibid, para 48.
[779] Ibid, para 60.
[780] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012), para 404.

exercised by the Government over CPC's personnel, finances and decision making'.[781] Additionally, it held that there was considerable evidence demonstrating that the SOE acted under the instruction of the State in negotiating, executing and breaching the contract.[782] Second, the Tribunal applied a veil-piercing analysis grounded in English law, through which it concluded that the entity lacked independence from the State.[783] This absence of independence was important to the Tribunal's reasoning in attributing the entity's contract to the State.

When reconsidering the tests applied by the Tribunal through the lens of the GPL developed in this thesis, two distinct doctrines emerge as potentially relevant: *veil piercing* and *implied consent*.

First, with respect to veil-piercing doctrine, the Tribunal's analysis focused on the lack of independence of the SOE. While this factor was deemed sufficient for attribution in the Tribunal's reasoning, the framework proposed in this thesis suggests that mere lack of independence is not, in itself, sufficient to justify piercing the corporate veil. Rather, veil-piercing requires an additional element, such as bad faith, abuse of legal personality, or intent to defraud. Unless such an element can be inferred from the factual record, the application of the veil-piercing doctrine will lead to non-attribution.

Second, the Tribunal also referred to the control exercised by the State, not only over the entity's personnel, finances and decision-making, but also in relation to negotiation, performance and breach of contract in question. If there is indeed concrete evidence demonstrating the State's involvement in these stages of the contractual process, then a compelling argument can be made that the State implicitly consented to be bound. The evidence on 'the significant control exercised by the Government over CPC's personnel, finances and decision making' is not necessarily relevant for the purpose of contract attribution. However, the Tribunal's finding that the entity acted under the instructions of the State when negotiating and executing the contract is relevant, because the contract could be attributed to the State based on the doctrine of implied consent.

The outcome in this case would not be different, given that the umbrella clause violation was addressed only in passing. However, this case nevertheless illustrates a confusion that this dissertation seeks to clarify by establishing the criteria to be considered when

[781] Ibid, para 405.
[782] Ibid, para 405.
[783] Ibid.

determining whether a contract binds a State. While general control over an entity, including financial control as such, is not in itself decisive, the State's involvement in the negotiation, conclusion, performance and breach of contract is highly relevant. Overall control, however, may become significant when coupled with evidence of bad faith or intention to evade contractual obligations.

A third illustrative example is *Strabag v Libya* (see above Chapter II, Section 1.2.).[784] Here, the Tribunal had to determine, for the sake of applying the umbrella clause, whether entering into contracts by certain SOEs was to be taken as if Libya entered into such contracts.[785] It held that SOEs in question 'were mandated to carry out functions deeply bound up with important State interests and that are normally exercised by State organs'.[786] On this basis, the Tribunal concluded that they were 'vested for that purpose with elements of governmental authority' in accordance with Article 5 of the ARSIWA.[787]

There appears to be some confusion in the Tribunal's reasoning between the concepts of governmental authority and public function (see above Chapter II, Section 1.2.). Tribunal seemed to consider as governmental functions: planning, programming, budgeting, and implementation of road investments; administering programs that improve housing, roads, bridges, water and utilities to Libyan residents, and so forth.[788]

Second, the Tribunal considered 'the circumstances surrounding the conclusion and implementation of the contracts' and based on that concluded that SOEs in question 'acted at the direction of Libyan State organs', which is why 'their conduct has to be considered as an act of the Libyan State' in accordance with Article 8 of the ARSIWA.[789]

Then, the Tribunal reviewed 'the overall circumstances cumulatively': 'the public importance of the functions' of the SOEs; lack of administrative and financial autonomy; the fact that the contracts in question are 'deeply bound with State interest'; 'overwhelming evidence that demonstrates that an array of public authorities had a major hand in the conclusion and performance of the contracts'.[790] The Tribunal held

[784] *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award (29 June 2020).
[785] Ibid, para 171.
[786] Ibid, para 173.
[787] Ibid, para 173.
[788] Ibid, para 174.
[789] Ibid, para 175.
[790] Ibid, para 187.

that all this represents 'an exceptional combination of circumstances compelling the conclusion that the Respondent did, indeed, "enter into" the obligations in the disputed contracts' within the meaning of the umbrella clause.[791]

This case also illustrates the confusion surrounding the applicable attribution test. Rather than applying a clearly defined legal standard, the Tribunal adopted a 'cumulative approach' considering a range of circumstances without articulating a concrete doctrinal basis. The result is 'an exceptional combination' that led the Tribunal to attribute certain contracts to the State.

Let us now consider how attribution using the legal framework developed in this thesis differs. By systematically applying the principles articulated in Chapter V, we can assess whether, and under what conditions, contracts on SOEs in question could be attributed to the State.

Among the various circumstances that the Tribunal considered, the most relevant is the assertion that the entities in question acted at the direction of State organs. However, the relevance of such direction depends on its specific connection to the conclusion and performance of the contract. General alignment with State interest, or broad structural integration into the public sector, is insufficient for contract attribution. For the application of the principle of *implied consent*, it is necessary to show evidence that the State itself (not merely some public authorities) participated in the negotiation or performance of the contract.[792]

Second, for the application of the *apparent authority* principle, the Tribunal would have to find, based on the circumstances surrounding the conclusion of the contracts, that it was reasonable for the investor to conclude that SOEs entered into a contract on behalf of the State of Libya.

The Tribunal also referred to the lack of administrative and financial autonomy of the entities involved. While this may suggest a high degree of control by the State, it is not sufficient to justify attribution under the *veil-piercing* doctrine. As elaborated above

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[791] Ibid, para 187.
[792] Claimant did argue that Strabag managers had conversations with senior Libyan officials regarding the possibility of doing construction work in Libya – see Ibid, para 57. This could be an argument relevant for applying the principle of *implied consent*. However, such argument would require a more concrete discussions concerning the conclusion of a contract, rather than merely general discussions about the possibility of entering into one.

(Chapter V, Section 4), veil-piercing requires not just control or lack of autonomy, but some form of bad faith.

The outcome in this case might have been different if the principles from this thesis were applied, leading potentially to a conclusion that the State could not be held responsible for the umbrella clause breach, since it was not a party to a contract whose breach was alleged to constitute such a violation.

Let us consider a final example, *Garanti Koza v Turkmenistan* (analysed above in Chapter II, Section 1.2). This case concerned a contract concluded between an investor and the State Concern 'Turkmenavtoyollary' (TAY). The issue of contract attribution arose in the context of the alleged breach of an umbrella clause. The Tribunal held that Turkmen law should be applied to determine 'whether a particular obligation was *created* by the Contract between Garanti Koza and TAY' for the State.[793] However, the Tribunal also held that 'the acts of TAY in furtherance of the Contract were attributable to Turkmenistan' based on certain contractual provisions.[794] Finally, the Tribunal applied the test from Article 5 of the ARSIWA and held that 'road and bridge construction is in any event a core function of government' and 'an entity empowered by a State to exercise elements of governmental authority is for that purpose acting as an organ of the State'.[795]

This reasoning raises several concerns. First, it remains ambiguous whether the Tribunal applied international law (Article 5 of the ARSIWA in particular) or domestic law to the question of contract attribution. Second, the Tribunal's reference to Article 5 of the ARSIWA is misplaced, as such, since the ARSIWA do not govern contract attribution. Moreover, the analysis conflated public functions in general with governmental authority, which must be exercised in a particular instance.

Let us now evaluate the facts of this case (as presented in the Award) through the framework established in this thesis to resolve the issue of contract attribution. The Tribunal relied on certain contractual provisions that suggest that SOE was acting on behalf of the Government. Such provisions could form a credible basis for applying the principle of *apparent authority*. If the State's conduct gave rise to a reasonable belief that the entity was acting on the State's behalf when entering into a contract, the contract

[793] *Garanti Koza LLP v. Turkmenistan,* ICSID Case No. ARB/11/20, Award (19 December 2016), paras 331-332 (emphasis added).
[794] Ibid, para 335.
[795] Ibid, para 335.

attribution to the State based on apparent authority is justified. Second, the fact that the entity was in charge of building roads and bridges (which is, according to the Tribunal, a function of the government) is completely irrelevant for contract attribution. However, if the Government was involved in the process of conclusion or performance of the contract, that could serve as proof of intent to be bound – important for applying the *implied consent* principle.

In conclusion, applying the new legal framework proposed in this thesis would bring clarity to what is currently confusing field. Whether the outcomes would be different largely depends on specific circumstances. Clearly not all such circumstances can be analysed or even predicted, but some can be explored.

First, let us consider a scenario in which two governments agree to enter into a contract, for example, for the construction of roads in one of the countries concerned (host State). Neither of the governments ultimately signs the contract. However, the Government representative of the host State is clearly involved in the initial phase, initiating the project and participating in the negotiation of the contract. The contract is formally concluded between the two SOEs (one from each State). In such a situation, it would be difficult to establish attribution based on the ARSIWA rules – it may be challenging to show that the SOE of the host State exercised elements of governmental authority when entering into the contract or that it acted under the effective control of the government at the moment of conclusion of the contract (which ARSIWA would require). At the same time, it is evident that the Government was directly involved in contract negotiation, as the initiative for entering into a contract came from the Government. This illustrates how the ARSIWA rules of attribution are ill-suited to the issue at hand. The relevant inquiry is whether the Government was involved in contract conclusion, not whether the entity was acting under governmental authority or effective control.

Let us now consider a second scenario in which an SOE enters into a certain long-term supply contract with a foreign investor. In this scenario, the Government is not involved at any stage of the contractual process: it neither initiates, negotiates, nor participates in contract performance. Nevertheless, the SOE performs certain public functions and is subject to significant control of the State, including financial oversight and appointment of management. In such circumstances, some tribunals would be willing (based on the degree of state control exercised over it) to attribute the contract to the State under the ARSIWA rules of attribution. By contrast, applying the GPL framework introduced here would likely lead to a different outcome. In the absence of apparent authority (no appearance to the investor that the SOEs acted as a Government representative when entering into a contract), no implied consent through the State behaviour (participating in negotiation and performance of the contract) and no element of bad faith coupled with control over the SOE, the contract cannot be attributed to the State.

Finally, it is useful to consider a third example comparing the application of domestic law with the GPL framework proposed in this thesis. Let us imagine a situation in which a State created an SOE for the sole purpose of entering into a contract with a foreign investor. The State also enacted legislation on the separate legal personality of that entity. Witness statements (presented in the course of the arbitrating proceedings) from the officials involved in the early stages of the project indicate that the adoption of this legislation was considered important by certain State officials precisely in order to enable the State to distance itself from transition in the event that difficulties were to arise. The contract itself does not contain an arbitration clause designating the applicable law. In such circumstances, some tribunals may apply domestic law on separate legal personality, which would lead to non-attribution of the contract to the State. By contrast, application of the GPL framework proposed here, in particular the veil-piercing principle, would lead to attribution given the combination of State control over the entity and the intent to avoid contractual obligations (bad faith).

While it is impossible to anticipate all possible scenarios that may arise, these examples illustrate how the applicable legal framework can make a meaningful difference where such a difference ought to be made, by ensuring that the contract is attributed to the State in circumstances where attribution is justified, without extending attribution to situations where it is not.

This thesis contributes to the literature by offering a structured legal framework specifically tailored for the attribution of contracts concluded by entities other than the host States in the context of international arbitration. It identifies and develops three key principles: apparent authority, implied consent and veil piercing – as principles to assess whether a contract can be attributed to the State. As such, this framework enhances the precision and consistency of attribution analysis in investment arbitration.

Finally, the focus of this thesis is attribution of investment contracts concluded by SOEs to the State – a question neither governed by the ARSIWA nor by domestic law.

However, both legal frameworks continue to play an important role in addressing other issues arising in relation to such contracts.

While carrying out their public functions, SOEs may enter into contracts with foreign investors, and they may also terminate or breach such contracts. This raises the question of whether conclusion, termination or breach of contract can be attributed to the State. By equating public functions with being empowered to exercise elements of governmental authority under Article 5 of the ARSIWA, arbitral tribunals may be tempted to attribute both contract as such and contractual breach and termination by the SOE to the State. Similarly, they might rely on Article 8 of the ARSIWA and conclude that the State had effective control over an SOE in the conclusion, breach and termination of the contract. This thesis proposes the application of the GPL to the question of *contract attribution*, for which the exercise of governmental authority and effective control over the SOE is irrelevant. The focus should be on principles of apparent authority, implied consent and veil piercing.

With respect to the question of *contract breach or termination*, applicable contract law should determine contractual liability based on breach or wrongful termination of the contract. However, the ARSIWA rules of attribution may be applied if such conduct can also qualify as a *breach of an international treaty* capable of engaging international responsibility of the State (breach of umbrella clause, wrongful expropriation, breach of fair and equitable treatment). Nevertheless, as already pointed out in the literature, the mere fact that SOE performs public functions is insufficient for attribution under ARSIWA Article 5. It must be demonstrated that SOE was specifically empowered to exercise elements of governmental authority in relation to termination or breach of contract and that such conduct constitutes a treaty breach. Alternatively, attribution may arise where there is sufficient evidence of the State's direct involvement in the contractual termination or breach, provided that this conduct likewise qualifies as a treaty violation, thereby triggering international State responsibility.

To conclude, this analysis identifies three different legal frameworks, each applicable to a different question. First, the question of contract attribution (important for determining the tribunal's jurisdiction over the State and for determining applicability of the umbrella clause) is governed by the GPL framework established in this thesis. Second, the ARSIWA rules of attribution remain applicable for determining international State responsibility for a treaty breach (which can be related to a breach and termination of an investment contract). Finally, the applicable contract law determines contractual liability of a State or an SOE, as a party to the contract.

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Abstract

Als wichtige globale Akteure, die in nahezu allen Volkswirtschaften weltweit tätig sind, schließen staatliche Unternehmen (‚State-owned entities' - SOEs) häufig Verträge mit ausländischen Investoren ab. Obwohl solche Verträge zwischen ausländischen Investoren und SOEs geschlossen werden, können die Regierungen der Gaststaaten auf verschiedene Weise involviert sein. Die Regierungen können beispielsweise Verhandlungen initiieren und den Vertragsabschluss später den SOEs überlassen. Umgekehrt können sie sich zunächst nicht an den Verhandlungen beteiligen, aber später eingreifen, um den Vertrag zu kündigen. Diese Dissertation untersucht die rechtliche Bedeutung solcher Beteiligungen von Regierungen. Sie analysiert, ob und unter welchen Umständen der Gaststaat als rechtlich an einen von dem SOE abgeschlossenen Vertrag gebunden angesehen werden kann.

Diese Frage wird besonders wichtig, wenn es zu einem Rechtstreit kommt. Ein Vertrag mit einem SOE enthält möglicherweise keine Streitbeilegungsklausel. In diesem Fall muss sich der Investor auf ein geltendes Investitionsabkommen stützen. Der Investor müsste jedoch nachweisen, dass nicht nur das SOE, sondern auch der Gaststaat Partei der Streitigkeit ist. Hier kommt der Frage der Vertragszurechnung entscheidende Bedeutung zu. Selbst wenn der Vertrag zwischen dem staatlichen Unternehmen und dem Investor eine Streitbeilegungsklausel enthält, kann es für den Investor dennoch wichtig sein, gegen den Staat vorzugehen, da dieser über größere finanzielle Mittel verfügt. Die Argumentation, dass der Staat an den Vertrag (einschließlich seiner Streitbeilegungsklausel) gebunden ist, könnte dies ermöglichen.

Bislang haben Investitionsschiedsgerichte zur Frage der Vertragszurechnung zwei unterschiedliche rechtliche Ansätze herangezogen: die Zurechnungsregeln der Artikel über die Staatenverantwortlichkeit (ARSIWA) und das innerstaatliche Recht des Gaststaates. Diese Dissertation untersucht beide Ansätze kritisch und schlägt einen dritten Ansatz vor, der auf allgemeinen Rechtsgrundsätzen basiert. Drei relevante Grundsätze werden dabei identifiziert: (i) die Anscheinsvollmacht, (ii) die stillschweigende Zustimmung und (iii) die Durchgriffshaftung. Dieser innovative Ansatz würde es Investitionsschiedsgerichten ermöglichen, die Faktoren zu bewerten, die für die Bestimmung der Vertragsparteien tatsächlich relevant sind.

As major global actors, which operate in virtually every economy worldwide, State-owned entities (SOEs) often enter into contracts with foreign investors. Although such a contract is ultimately concluded between a foreign investor and an SOE, the host State government may be involved in various ways. It may initiate negotiations and later leave the conclusion of the contract to the SOE. Conversely, it may not participate in negotiations at all but intervene later to terminate the contract. This dissertation examines the legal significance of such government involvement. It analyses whether and under what circumstances the host State can be considered legally bound by a contract concluded by the SOE.

The question becomes particularly important when a dispute arises. A contract with SOE may lack a dispute resolution clause, in which case the investor must rely on an applicable investment treaty. However, the investor would have to show that the host State (not only the SOE) is a party to the dispute. This is where the issue of contract attribution becomes crucial. Moreover, even if the contract between the SOE and the investor includes a dispute-resolution clause, it may still be important for the investor to pursue the State, which has deeper pockets. Arguing that the State is bound by the contract (including its dispute resolution clause) could enable this.

So far, investment tribunals have applied two legal frameworks to the question of contract attribution: the rules on attribution in the Articles on State Responsibility (ARSIWA) and the host State's domestic law. This dissertation critically examines both approaches and advances a third approach based on general principles of law. It identifies three relevant principles: (i) apparent authority, (ii) implied consent, and (iii) piercing the veil. This novel framework enables tribunals to assess the factors that are genuinely relevant for determining parties to the contract.