Attribution of Contracts Concluded by Entities Other than the Host State to the Host State

Research Proposal – Doctoral Thesis

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Contents

Background

Foreign direct investments are often made in the form of direct contractual arrangements between the private investor and an entity of the host state, a subdivision, agency or a state-owned company rather than with the host state itself. Such investment contracts without privity with the host states are sometimes described as 'the second layer of obligations', given that they are concluded 'in addition to the protection offered by the relevant investment treaty'.[1]

Thus, the question of attribution of such contracts to the state often arises in international investment arbitration practice. This question may be relevant both in the jurisdictional and in the merits phase of the arbitration proceedings.

First, the question may arise in context of determining a tribunal's jurisdiction *ratione personae*. The tribunal has to determine that the host state has standing before the tribunal, meaning that it has to decide whether the state manifested its will to be bound by the contract with the investor.[2] This issue arose in several investment arbitration proceedings so far, for example:

[1] Eric De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (Cambridge Studies in International and Comparative Law, Cambridge University Press 2014), p. 30.
[2] See: Csaba Kovács, *Attribution in International Investment Law* (Wolters Kluwer 2018), p. 244

Flemingo Duty Free v. Poland, *Hamester v. Ghana*, *Saipem v. Bangladesh, Impregilo v. Pakistan*, *Khan v. Mongolia*, *Noble Energy v. Ecuador*, *Generation Ukraine v. Ukraine*, *Cable Television v. St. Kitts and Nevis*. [3]

Second, the question of contract attribution also arises in context of umbrella clauses. This means that 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'.[4] The issue arose, for example in *EDF v. Romania*, *Hamester v. Ghana*, *Garanti Koza v. Turkmenistan*, etc.[5]

It is important to determine the rules applicable to the question of contract attribution, regardless of the purposes of contract attribution in an investment dispute.

Research Question

The main research question of this project is: which rules should be applied to the question of contract attribution. As a preliminary matter, the issue of **contract** attribution must be distinguished from the issue of **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.[6] Conversely, there are different potential legal frameworks that could be applied to the question of **contract** attribution. Crawford and Mertenskötter, for example, identify three approaches.[7]

The first approach is to apply relevant ARSIWA provisions on attribution. Some tribunals followed this approach.[8] Some authors also argue for this approach. For example, Petrochilos concludes that the question whether the state is a party to the contract is to be answered based on international law and international law determines it with recourse to ARSIWA' rules of attribution.[9] Some recent publications also subscribe to this view.[10]

However, many tribunals and authors express discomfort with applying ARSIWA to the question of contract attribution.[11] They regard ARSIWA as an inadequate set of rules to govern

[3] See Csaba Kovács, *Attribution in International Investment Law* (Wolters Kluwer 2018), pp. 245-259.
[4] Kovács, p. 255.
[5] See sections 1.2 and 2.2 below.
[6] 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 Investitionsrechtdem Staat zuzurechnen und somit als Staatshandlungen anzusehen sind.' (Emphasis Added).
[7] 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.
[8] 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.
[9] Georgios Petrochilos, 'Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine' (2013) 28 *ICSID Review* 262, at 271.
[10] Stéphanie Caligara, 'Attribution of Lawful Conduct in Investment Treaty Arbitration The 'It' Problem Solved?' working paper (2018).
[11] For example: James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 ICSID Review 127, 134. See section 1 below.

this issue because they merely apply in the context of state responsibility and not for the purposes of determining whether the state is a party to the contract.[12]

Thus, the second approach to this problem advocates for the application of domestic law (or the applicable contract law). Two recently published monographs on attribution in international law argue precisely for this approach.[13] This solution responds to the concerns that ARSIWA are not an appropriate legal framework to deal with the issue in question. However, applying domestic law may be a problematic solution from the policy perspective. Attribution would be significantly more difficult based on domestic law, in contrast to ARSIWA. This would lead to less attribution in practice and thereby less protection of the investments. Precisely for that reason, some authors argue that in order to protect transnational investments and prevent states from expropriating through their entities (acting as their agents) the tribunals need to apply attribution rules.[14] 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 the distinct legal personality when concluding any agreement with foreign investors.[15]

This concern is addressed in the third approach to the issue in question, which is to treat the attribution of investment contracts as a question of international law, but not one governed by the ARSIWA. This position could be a starting point of a potentially fruitful analysis. A research sub-question that arises here is whether general principles of law could be a useful point of reference. More precisely, whether based on the domestic rules on binding the non-signatories (rules of contract and agency law), certain general principles of law have emerged on the international plane. Park's study on non-signatories and international contracts could be a very useful point of departure in this respect.[16] In his study, Park deals with the so-called 'less than obvious parties' to the contract and provides certain theories based on which such parties can be held bound by such contracts. Similarly, the project at hand focuses on cases in which the state is not a party to a contract in question, but the investors argue that the state should be bound by such contract. Thus, the theories based on which a non-signatory can be treated as a party to the contract, which Park analyses in this article, may be very useful for this project.

Methods for answering the research question

The main research question could be characterized both as a *descriptive doctrinal* and as a *normative* one. As a general matter, descriptive doctrinal questions include the application of the positivist theory, looking into legally relevant sources (*lex lata*). An important part of this dissertation aims to determine what the law is by looking into the existing legal rules on contract

[12] See for example: Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Commentary to Part One, Chapter II, para 5, p. 39.
[13] Carlo de Stefano, *Attribution in International Law and Arbitration* (OUP 2020), p. 126. Kovács, 245.
[14] 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.
[15] Hamamoto, 458, 459.
[16] William W. Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma', *Multiple Parties in International Arbitration* (Oxford University Press, Permanent Court of Arbitration 2009).

attribution, as applied by investment arbitration tribunals. The aim of this part is to analyse and describe the doctrine from an internal point of view.

However, the question can also be characterized as a normative one, asking what the law should be - what ought to be the rules that should govern the issue of contract attribution in this context. The research would aim to determine what considerations such rules should be taking into account. For such purposes, external parameters of a utilitarian nature will be used. For example, application of the domestic law for the purposes of determining the issue of contract attribution may not be the solution that maximises protection of investments, as previously explained. This is because the application of the domestic rules of the state in question would discourage future investors to enter into contractual arrangements with the state agencies or entities.

Sources

As for the sources of international law, this dissertation will examine the following primary sources (as classified by Art. 38 of the ICJ Statute): 1) treaties – primarily bilateral investment treaties (BITs) and multilateral investment treaties (MITs), 2) customary international rules – certain ARSIWA provision on attribution (plus Commentary), 3) general principles of law – whether certain domestic rules on binding the non-signatories (rules of contract and agency law) have emerged as general principles of law. Further, the so called 'subsidiary means for the determination of rules of law' (judicial decisions as primary research sources and teachings of the most highly qualified publicists of the various nations as secondary sources of research) will be used. As for the 'judicial decisions', the research will encompass relevant international investment arbitration case-law, as well some other arbitration awards and court rulings outside of the investment context on the question of contract attribution to non-signatories).

Current state of research on the topic

As noted already, the issue of contract attribution may arise in both the jurisdictional and the merits phases of investment arbitration proceedings.[17]

First, it may arise in context of determining tribunal's jurisdiction *ratione personae*. 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. In order to establish its jurisdiction *ratione personae*, tribunals have to determine that the host state is indeed 'involved in the particular dispute as a contracting party'.[18] Thus, the tribunal must determine 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'.[19]

This question differs from the issue weather a contract claim may be decided by an investment tribunal. As a general matter, claims deriving from an investment contract may be decided by an investment tribunal either on the basis of a broad dispute resolution treaty provision submitting any investment dispute to arbitration or on the basis of a dispute resolution provision in a contract itself.[20] A broad dispute resolution clause referring to 'any dispute relating to an

[17] See ft. 2 above.
[18] Kovács, *Attribution in International Investment Law*, p. 244
[19] Ibid, p. 244
[20] Ibid, pp. 243, 244

investment' has been interpreted as including claims that arise from the contractual relations between an investor and a host state.[21] This means that tribunals may establish jurisdiction to determine the host state's contractual liability.[22] The literature on distinguishing treaty claims from contract claims is very rich and this project does not need to deal with this matter extensively to answer the research question.

Second, the question of contract attribution can also arise in context of umbrella clauses. The purpose of the umbrella clause is to 'bridge the protections offered under contract law with those offered under international investment law'.[23] The umbrella clause usually 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 is focusing on 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 as well.

De Stefano notes that 'the preponderant majority of investment tribunals' takes the position 'that the separate juristic personality of parastatal entities precludes their inclusion in **the 'it' of the umbrella clause**.'[24] 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.[25] States may also create duties for their organs to ensure or monitor performance of contracts concluded between their instrumentalities and foreign investors, as in ECT Article 22.[26] Finally, 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'.[27]

In some cases, the broad wording of the umbrella clause itself was enough for tribunals to conclude that contractual arrangement of a state entity is attributable to the state. For example, in *BIVAC v Paraguay*, the investor entered into a contract with the Ministry of Finance of Paraguay. The Parties in dispute did not dedicate much attention to the question of contract attribution to the state and the rules applicable to this matter. The tribunal merely referred to the broadly worded umbrella clause which provides that the contracting parties "shall observe **any obligation** it may have entered into with regard to investments of the other Contracting Party." It concluded that the words "any obligation" are all encompassing and that:

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[21] August Reinisch, 'The Scope of Investor-State Dispute Settlement in International Investment Agreements' (2013) 21 Asia Pacific Law Review 3, at 9.
[22] 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.
[23] Kovács, *Attribution in International Investment Law*, p. 255
[24] Carlo De Stefano, *Attribution in International Law and Arbitration* (Oxford Univeristy Press 2020), p. 127.
[25] Ibid, p. 129. See: Australia-Chile BIT 1996/China BIT 1988, Article 11: 'A Contracting Party shall, subject to its law, adhere to any written undertakings given by a competent authority to a national of the other Contracting Party with regard to an investment in accordance with its law and the provisions of this Agreement.' Also: Australia-Poland BIT 1991 Article 10: 'A Contracting Party shall, subject to its law, do all in its power to ensure that a written undertaking given by a competent authority to a national of the other Contracting Party with regard to an investment is respected'.
[26] Ibid, p. 129.
[27] 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, at 207.

> 'on a plain meaning they are undoubtedly capable of being read to include a contractual arrangement entered into by BIVAC and the Ministry of Finance of Paraguay, whereby the alleged breaches of the Ministry are attributable to the State'.[28]

The tribunal's approach however does not resolve the problem. The umbrella clause obliges the state, as a contracting party to the BIT to observe the obligations that it ('the state') undertook towards the investor. The umbrella clause itself, however, cannot answer the question whether the state in fact entered into such obligation towards the investor.

As noted in literature 'the umbrella clause itself, as an international law provision, does not join the State to a contract to which it is not otherwise a party.' [29] The clause merely 'raises the question whether the host State is bound by the contractual undertaking, the breach of which is alleged to constitute a breach of the umbrella clause'.[30] 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'.[31]

In other words, the application of an umbrella clause, as a treaty provision, is based on a premise that contract has been breached.[32] That is to say 'the umbrella clause functions as a lift to international investment law, but does not change the inner nature of a contract claim'.[33] The applicable contract law, determines whether a contractual breach has occurred and only after the breach of contract has been found, the umbrella clause may intervene, thereby enabling an investor 'to transpose a contract claim and its legal consequences' from municipal law to 'international forum'.[34]

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 V. Veeder the idea of internationalisation of a translational contract was developed by Lena Goldfields' counsel in the *Lena Goldfields v. USSR* and it was, in Veeder's words 'a gigantic first step for international commercial arbitration, almost equivalent to the caveman's discovery of fire'.[35]

Building upon this term, Jean Ho explains that whether a contract claim can be elevated to treaty obligations depends on whether the so called 'internationalisation of the umbrella clause' is accepted or not. If it is accepted then 'contractual obligations can be elevated to treaty obligations', while if it is rejected 'contractual obligations are not promoted to treaty

[28] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay* (ICSID Case No. ARB/07/9), Decision of the Tribunal on Objections to Jurisdiction (English) 29 May 2009 , para 141.
[29] Kovács, *Attribution in International Investment Law*, p. 255
[30] Ibid, p. 255
[31] Ibid, p. 256
[32] Ibid, p. 255
[33] De Stefano, *Attribution in International Law and Arbitration*, pp. 126, 127.
[34] Ibid, pp. 126. Kovács, *Attribution in International Investment Law*, p. 256.
[35] V. V. Veeder, 'The Lena Goldfields Arbitration: The Historical Roots of Three Ideas' (1998) 47 ICLQ 747, at 772.

obligations'.[36] Given that the rules of interpretation do not provide a 'conclusive answers 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'.[37] The first one rejects umbrella clause internationalisation, meaning that an umbrella does not convert contractual obligations (governed by the proper law of the contract – probably national law) into international obligations (to which international law applies).[38] The second degree of internationalisation advocates for partial internationalisation of an umbrella clause, meaning that it breach of contract can reach the level of a treaty violation **if** the host State acted in its sovereign capacity.[39] Finally, the third degree of umbrella clause internationalisation is in favour of internationalisation, meaning that any breach of a contractual obligation represents a breach of an international obligation.[40] Given that the umbrella clause internationalisation is highly contested, Ho concludes that seeking the investment contract protection through the applicable general international law (MST of aliens and the law on expropriation of alien property) is more stable than seeking the protection through umbrella clause internationalisation.[41]

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 state is bound by a certain contract in the first place and by reference to which rules this can be determined. This preliminary question is independent of the 'degree of umbrella clause internationalisation'. However, many tribunals failed to draw this distinction, by treating **contract** attribution as a question of **conduct** attribution.[42] 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 ARSIWA rules on attribution apply. If there is a partial internationalisation, it is necessary to determine whether the state acted in its sovereign capacity, which means that other international rules apply - in particular, the rules on state immunity. Finally, if there is no internationalisation, domestic law is to be applied in order 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 in order to determine whether a contract in question is attributable to the state. The applicable legal framework is of crucial importance for the outcome. In the vast majority of analysed cases where tribunals decided to apply ARSIWA to the issue of contract attribution, they managed to establish the

[36] Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018), p. 197.
[37] Ibid, p. 198 and 204.
[38] Ibid, pp. 224, 225.
[39] Ibid, pp. 224, 225.
[40] Ibid, p. 205.
[41] Ibid, pp. 224, 225.
[42] 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.

link between the state and the relevant state entity.[43] On the contrary, in almost all cases where tribunals applied domestic law to the issue of contract attribution, they concluded that the contract in question could not be attributed to the state based on the lack of privity. The application of different rules would often lead to different results, which is why selection of the appropriate rules is of crucial importance.

1. The ARSIWA Provisions on Attribution

1.1. Doctrine

There has been an ongoing debate in literature whether the international rules of attribution are appropriate legal framework to be applied to the contractual undertakings made 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.[44]

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.[45]

However, the majority of authors question such a broad application of the ARSIWA because the rules were designed to define the state only for the purposes of state responsibility for wrongful acts.[46] More precisely, 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 **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'.[47] The ARSIWA Commentary itself stipulates that the provisions on attribution are not designed to answer the

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[43] Tribunals attributed contracts concluded by entities other than the host state based on 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.

[44] Georgios Petrochilos, 'Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine' (2013) 28 ICSID review 262, at 271.

[45] Ibid.

[46] Kovács, *Attribution in International Investment Law*, 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.

[47] Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility', 134.

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.[48]

Olleson agrees that ARSIWA's provisions on attribution are not applicable to the issues different from determining whether conduct is attributable to the state:

> Although the relevant rules codified in the Articles (…) apply to all question 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 to the State in order to determine whether an internationally wrongful act has occurred, and are not as such applicable to other issues.[49]

Hamamoto dealt with this issue in the context of the umbrella clauses. He explains that the rules on attribution cannot explain the applicability of the umbrella clause in the situation when an investor concludes a contract with an entity established by the host state, but with a distinct legal personality. [50] This is because there is no privity between the host state and the investor.[51]

Privity of contract is a common law concept, allied to consideration: 'only the person who has given consideration for a promise can enforce it'.[52] Although the term itself is not often used in international law, the idea of privity has been influential.[53] 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.[54]

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[48] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Commentary to Part One, Chapter II, para 5, p. 39.
[49] Simon Olleson, 'Attribution in Investment Treaty Arbitration' (2016) 31 ICSID review 483, p. 463.
[50] Shotaro Hamamoto, 'Parties to the 'Obligations' in the Obligations Observance ('Umbrella') Clause' (2015) 30 *International Centre for Settlement of Investment Disputes Review* 449, p. 449.
[51] Shotaro Hamamoto, 'Parties to the 'Obligations' in the Obligations Observance ('Umbrella') Clause' (2015) 30 *International Centre for Settlement of Investment Disputes Review* 449, p. 449.
[52] 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.
[53] Ibid, p. 204.
[54] Ibid, p. 221.

Lack of privity between the investor and the host state prevents the application of the umbrella clause and may lead to a lack of the tribunal's jurisdiction. This may deprive many investors from efficient protection of their rights before international forums thereby leaving them in the hands of domestic courts. Precisely with the aim of avoiding such an outcome, many tribunals applied ARSIWA to the question of contract attribution. As it stems from the analysis below, the number of cases in which the ARSIWA were applied to the question of contract attribution stands, in departure from the majority view in the literature. Only a handful of authors subscribe to this position that ARISWA governs this question.

1.2. Cases

In practice, many tribunals applied ARSIWA to the question of contract attribution. Many of them examined the entering into, performance and alleged breach of the contract based on the same rules.[55] However, entering into a contract, on the one hand, is different from contract performance, breach and termination on the other. The latter naturally may entail the questions of governmental interference with an investment contract which could lead to a treaty breach. ARSIWA can naturally be applied in order 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 whether the state undertook the obligation towards the investor in the first place.

In *Eureko v. Poland*, the tribunal failed to distinguish between the questions of contract attribution and conduct attribution. Thus, it applied 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 investment contract could be attributed to the Republic of Poland. 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'.[56] 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**'.[57] (Emphasis Added) It applied ARSIWA in order to conclude that Poland was responsible for the actions of the State Treasury under international law.[58]

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 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 actions taken in respect of such contract could be attributed to the state.

Similarly, in *EnCana v. Ecuador*, tribunal also failed to recognize the issue of contract attribution, as a question separate and different from attribution of conduct. In this case, investors entered into certain investment contracts with the Ecuadorian State Oil Company.[59]

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[55] Kovács, *Attribution in International Investment Law*, p. 245.
[56] *Eureko B.V. v. Republic of Poland,* Ad Hoc Arbitration, Partial Award, 19 August 2005 , para 126.
[57] Ibid, para 127.
[58] Ibid, paras 128, 138.
[59] *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.

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 for the purposes of the BIT.[60] The attribution was established pursuant to the relevant ARSIWA provisions and on the basis of the facts that the entity in question was subject to instructions from the President, and that the Attorney-General had and exercised authority 'to supervise the performance of … contracts.[61]

In *Noble Ventures v Romania*, the tribunal formally distinguished question of contract attribution from conduct attribution, whereas it treated the two issues as one question to be answered by ARSIWA. In this case, the investors entered into a contract with the Romanian State Ownership Fund (SOF). The question was whether the contractual obligations of SOF could be attributed to Romania. Claimant argued that **contractual obligations** of SOF should be treated in the same way as SOF's **actions**.[62] The state, however, argued that contractual obligations (defined by reference to municipal law), could not be expanded or transformed by the principle of attribution.[63]

The tribunal correctly noted that there were **two different questions** to be answered in this context. First was whether the acts of the entity in question could be attributed to the state. Second question was whether the state had entered into the contract in question, the breach of which could consequently, by reason of the umbrella clause, be regarded as a violation of the BIT.[64]

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.[65] The tribunal overlooked, what it had rightly noted earlier in the Award that there were two different questions here. 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 both may well be questions of attribution, but only the first one deals with attribution of the **act**, whereas the second one deals with attribution of the **contract** and cannot be answered by reference to the rules dealing with attribution of the **act – conduct or omission**.

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. 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 an entity distinct from the state.[66] The state, however, also argued that the treaty in question was not applicable to '**breaches of contracts** by entities that are not the State'[67] (Emphasis added).

[60] Ibid, para 154.
[61] Ibid, para 154.
[62] *Noble Ventures, Inc. v. Romania (ICSID Case No. ARB/01/11),* Award, 12 October 2005 , para 65.
[63] Ibid, para 66.
[64] Ibid, para 68.
[65] Ibid, para 80.
[66] *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon* (ICSID Case No. ARB/07/12), Decision on Jurisdiction, 11 September 2009 , para 50.
[67] Ibid, para 50.

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 Art. 5 of the ARSIWA.[68] 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.*[69]

In *Deutsche Bank v Sri Lanka*, the investor entered into a contract with the state's national petroleum corporation. The question arose whether such contract represented the state's obligation.[70] The state, whose lead counsel was James Crawford, correctly pointed out to a preliminary question – which law (international or domestic) governed the question of contract attribution. It submitted that domestic law (in this case English law) was the relevant law to determine this issue.[71] The state argued that this question was not one of state responsibility for a particular transaction but rather whether the conduct of an entity in entering into an investment contract could be attributed to the state. In state's view, the international law rules of attribution (concerned only with attribution of conduct to the State for the purposes of determining its international responsibility for wrongful acts) should not govern this question.[72]

The tribunal somehow missed this point and turned strait away to the facts which support attribution based on the ARSIWA provisions. It held that there was considerable evidence as to the significant control exercised by the government 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.[73]

This case serves as a good example of how tribunals try to avoid a persuasive legal argument by relaying on facts which strongly implicate the existence of a connection between the entity that entered into an investment contract and the state.

In *Ampal v Egypt* the investor entered into a contract with the Egyptian Gas Holding Company (EGAS). The state argued that:

> 'The characterisation of the contracting party as organ of the State under the ILC Articles is wholly irrelevant when it comes to determining whether a State is **bound by a contract**. What is relevant is whether the State itself has entered into the contract.' [74] (Emphasis added)

[68] Ibid, para 52.
[69] Ibid, para 60.
[70] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/09/2), Award, 31 October 2012* , para 392.
[71] Ibid, para 393, 394.
[72] Ibid, para 399.
[73] Ibid, para 405.
[74] *Ampal-American Israel Corporation v Egypt, (ICSID Case No. ARB/12/11), Decision on Liability and Heads of Loss, 21 February 2017* , para 78.

The tribunal formally addressed this argument, but it failed to deal with 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 are not applicable to contractual breaches'.[75] The state's argument was not that ARSIWA were not applicable to the **contractual breaches**, but that it was not applicable 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:

> 'the 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'.[76] (Emphasis added)

The tribunal clearly failed to differentiate between the issues of entering into a contract and contract termination. The question whether an investment contract was terminated 'with the blessing' of the government deals with the issue of a government's interference into contract which can potentially be qualified as a treaty breach. Indeed, ARSIWA should be applied in order to determine whether such acts can be attributed to the state. 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 ARSIWA can be applied in the context of contractual breach or termination, it cannot be applied, by the way of analogy, to the question of entering into a contract.

In *Strabag v. Libya*[77], the tribunal considered whether, pursuant to the treaty umbrella clause it had jurisdiction to adjudicate the claims arising out of alleged breaches of contract concluded between the investor on one side and a series of state-owned Libyan entities on the other.

The state 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 application of international law, and 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 Art. 5 of ARSIWA).[78]

The tribunal concluded:

> 'Reviewing the overall circumstances cumulatively, including the public importance of the functions carried out by [the state-owned Libyan entities] and

[75] Ibid, para 81.
[76] Para 146
[77] *Strabag SE v. Libya* (ICSID Case No. ARB(AF)/15/1), Award 29 June 2020
[78] Ibid, paras 167–70.

> 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].[79] (Emphasis added)

The tribunal here, as in many other cases, treated the issues of contract performance and contract conclusion in the same way, although these are two different questions as explained above. The tribunal was convinced that factual circumstances had strongly indicated government's involvement in the contract formation. In order to accommodate such finding the tribunal applied ARSIWA, as a set of rules that would lead to the desirable outcome of attribution.

As noted earlier, in the vast majority of cases where the tribunals applied ARSIWA to the question of contract attribution, they reached a conclusion that such contracts are in fact attributable to the state in question. However, in a minority of cases the application of ARSIWA did not lead to such attribution.

One such example is *Jan de Nul v Egypt*. In this case, the issue of contract attribution arose in the jurisdictional phase of the proceedings, but the tribunal decided that the matter should not be dealt with in the jurisdictional phase but in the merits phase, since it involves the issue of state responsibility. As in many other cases, here too the question of **contract** attribution was treated as attribution of an **act**. In this case, the investors entered into a contract with the Suez Canal Authority (SCA). The state objected that there was no dispute with a contracting party, given that the SCA was an independent legal personality under Egyptian law.[80] Claimants, on the other 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 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.[81] 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 there was no attribution of SCA's conduct to the respondent state. It applied ARSIWA and held that the respondent state cannot be held liable for the SCA's actions and omissions.[82] Here again, the tribunal failed to distinguish the issue of contract attribution from attribution of the acts and omissions. However, contrary to the majority of cases where ARSIWA application led to a contract attribution, in this case, facts failed to satisfy the ARSIWA requirements.

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[79] Ibid, paras 187.
[80] *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.
[81] Ibid, para 85.
[82] *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.

In *Bosh v Ukraine* tribunal indirectly applied ARSIWA to the question of contract attribution. In this case, the investor entered into 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 who entered into the contract in question. Thus, it had to determine whether the term 'Party' from the umbrella clause was limited to the two state parties or extended to the entities controlled by the parties.[83]

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 in concluding that the university had an autonomous status.[84] 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:

> 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]. [85]

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. [86] Thus, the tribunal concluded that contract of the state university was not attributable to the state, but it is not perfectly clear based on which rules. Although the tribunal looked into domestic law, ARSIWA rules eventually determined the issue. Here too, as in many other cases, the tribunal failed to distinguish question of contract attribution from the question of conduct attribution.

2. The Law of the Contract or Domestic Law

2.1. Doctrine

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

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. [87]

[83] *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine* (ICSID Case No. ARB/08/11), Award, 25 October 2012 , para 243.
[84] Ibid, para 244.
[85] Para 246.
[86] Para 246.
[87] Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications*, p. 31.

Hobér explains that the issue whether a state itself is party to a contract is governed by the law of the contract in question.[88] Similarly, Crawford argues that 'when international investment tribunals deal with questions of contractual liability, those questions are governed by the **proper law of the contract**'.[89] Further, contrary to the assumption that when a state organ has entered into a contract, the state is responsible for compliance with the contract, Crawford submits that this will in fact depend on what is specified in the proper law of the contract.[90]

Kovács submits that the attribution of contractual undertakings involves primarily the interpretation of the contract in question by reference to the law of the contract.[91] 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'.[92] 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'.[93]

The approach that the **governing law of the contract** determines the issue of whether the host state is a party to the contract is sometimes described in literature as the 'majority view' and 'the settled position'.[94] Although this does seem to be the majority view in doctrine, the question is far from being settled, given that some recent cases and publications speak in favour of applying ARSIWA provisions on attribution, instead of the governing contract law.[95]

Moreover, as already noticed, applying domestic law may not be the best solution from the policy perspective, since it leads to less attribution which implies less protection of the investments.

2.2. Cases

In *William Nagel v. Czech Republic*, the tribunal dealt with the issue of contract attribution for the purposes of the umbrella clause. In this case, the investors entered into a contract with the Prague radio communication entity. 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.[96]

In reaching this conclusion, the tribunal heavily relied on Czech domestic law. It held that based on the domestic law the entity in question was a distinct and independent legal entity.[97] It further held, based on the domestic law, that a state enterprise was not responsible for the liabilities of

[88] Kaj Hobér and others, 'State Responsibility and Attribution' in Federico Ortino, Christoph Schreuer and Peter Muchlinski (eds), *The Oxford Handbook of International Investment Law*, vol 1 (Oxford University Press 2008), p. 53.
[89] Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility', p. 134.
[90] Ibid, p. 134.
[91] Kovács, *Attribution in International Investment Law*, p. 259
[92] Ibid, p. 245.
[93] De Stefano, *Attribution in International Law and Arbitration*, p. 126.
[94] Kovács, *Attribution in International Investment Law*, p. 244 and 256.
[95] Stéphanie Caligara, 'Attribution of Lawful Conduct in Investment Treaty Arbitration - The 'It' Problem Solved?' (2019) Law & Society: International & Comparative Law eJournal (in favour of ARSIWA application). See also case-law analysed in section 2.2 below.
[96] *William Nagel v. The Czech Republic (SCC Case No. 049/2002), Final Award, 9 September 2003* , para 161.
[97] Ibid, para 162.

the state or other persons, and that the state was not responsible for liabilities of the state enterprise, unless otherwise provided by the law.[98]

In *Impregilo v. Pakistan*, the investor concluded two contracts with the Pakistan Water and Power Development Authority (WAPDA). It argued that breach of contracts by the Authority constituted a violation of the umbrella clause. The tribunal denied the applicability of the umbrella clause. It held that the contracts in question were not concluded with the state, but with an entity separate and distinct from the state.[99] The tribunal applied domestic law of Pakistan in determining the status of WAPDA.[100]

Hamamoto notes 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.[101]

His suggestion is to interpret the term 'party' in the umbrella clause in accordance with the international law rules on treaty interpretation and not with the domestic law of any state.[102] This would mean that the term 'party' would include an entity having a domestic legal personality distinct from the State. [103] This interpretation was followed by some tribunals, as explained in the previous chapter.

In *Amto v. Ukraine*, the investor entered into numerous contracts with the national nuclear power company owned by the state. The investor initiated court proceedings against the company in the Ukraine and it was successful in its claims.[104] 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, due to the lack of contractual relationship between the investor and the state. Tribunal agreed with state:

> 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**. [105] (Emphasis added)

The tribunal clearly held that the entity in question was a separate legal entity different from the state, which seems to be a conclusion stemming from the Ukrainian law. The tribunal held earlier in the Award that Energoatom was 'a separate legal entity owned by the Respondent' and that 'Ukrainian law provides for the separate legal responsibility of the State and state owned legal entities'.[106]

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[98] Ibid, para 165.
[99] *Impregilo S.p.A. v. Islamic Republic of Pakistan, Decision on Jurisdiction, 22 April 2005* , para 223. See also: Shotaro Hamamoto, 'Parties to the 'Obligations' in the Obligations Observance ('Umbrella') Clause' (2015) 30 ICSID Review 449, 458.
[100] *Impregilo S.p.A. v. Islamic Republic of Pakistan, Decision on Jurisdiction, 22 April 2005*, para 199.
[101] Hamamoto, 'Parties to the 'Obligations' in the Obligations Observance ('Umbrella') Clause', p. 459.
[102] Ibid, p. 459.
[103] Ibid, p. 459.
[104] *Limited Liability Company Amto v. Ukraine (SCC Case No. 080/2005),* Final Award, 26 March 2008 , para 21.
[105] Ibid, para 110.
[106] Ibid, para 101.

In *EDF v. Romania*, the investor entered into two contracts with state-owned entities.[107] The investor argued breach of the umbrella clause based on a state's failure to observe its obligations under these 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.[108]

Although it was unclear whether the investor relied on the attribution of the conducts of the two entities to the state in order to establish responsibility, the tribunal observed that the attribution of such conduct 'did not render the State directly bound by the [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**.[109] 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's, Professor Greenwood (not publically 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'[110] (Emphasis added).

It is not perfectly clear in this case, based on which law did the tribunal decide that the contracts in question were not attributable to the state. It seems like a common sense argument, but it would be desirable to take 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 that the same law governs the contract attribution. This is also supported by the fact that earlier in the Award, the tribunal held that both state entities possess 'legal personality under Romanian law separate and distinct from that of the State'.[111]

In *Hamester v. Ghana*, the investor entered into a contract with the Ghana Cocoa Board.[112] It relied on the umbrella clause arguing that even if all its claims were contract claims, the umbrella clause elevated them into treaty claims.[113] 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.[114] 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.[115] 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.[116] The tribunal also noted that in some cases the ambit of the umbrella clause was in fact extended to contracts concluded by separate entities,

[107] *EDF (Services) Limited v. Romania (ICSID Case No. ARB/05/13),* Award, 8 October 2009 , para 46.
[108] Ibid, paras. 314-317.
[109] Ibid, para 319.
[110] Ibid, para 319.
[111] Ibid, para 190.
[112] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, Award, 18 June 2010 , para 22.
[113] Ibid, para 339.
[114] Ibid, paras 342-348.
[115] Ibid, para 347.
[116] Ibid.

by reference to the international law principles of attribution. The tribunal, however, chose to follow the reasoning of other tribunals.[117] It concluded that contractual commitments of a **separate entity** from the state, could not be elevated by the umbrella clause into treaty commitments of the state itself. Furthermore, a violation by such entity, if found, could not have constituted a treaty violation.[118] In this case, it is not perfectly clear which law was applied in reaching the conclusion 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 Cocoa Board was an entity separate from the state.

In *Tethyan v. Pakistan* the investor entered 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.**'[119] (Emphasis added)

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 here applied domestic law in determining the status of the authority which entered into contract with the investor. The tribunal held that ARSIWA were not applicable to the 'non-treaty claim'. However, it must be noted that 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 tribunals' choice. Regardless of this choice, it is important to recognize the issue of contract attribution as a separate question, different from the question which law should govern a non-treaty claim.

Gavrilović v. Croatia also involved the question of contract attribution. The contract was rather peculiar. The five 'Gavrilović' companies were placed into bankruptcy and the bankruptcy court authorised the sale of the companies via public tender. After Mr Gavrilović's bid was accepted, the bankruptcy court, the liquidator, and Mr Gavrilović entered into a purchase agreement which was approved by the Ministry of Foreign Affairs. [120]

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[117] Ibid, paras 343-347. Referring to: *Impregilo v. Pakistan, William Nagel v. Czech Republic and CMS v. Argentina.*
[118] Ibid, para 348.
[119] *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.
[120] *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia* (ICSID Case No. ARB/12/39), Award, 25 July 2018 , paras 93-104.

The investor argued that the five companies were represented by the liquidator, 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 involvement** in 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.[121]

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.[122]

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.[123]

Thus, in this case, tribunal rejected to apply ARSIWA to the issue of contract attribution. As for the applicable law, it relied on Croatian domestic law. It noted that 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'.[124]

As it stems from the analysis of cases in this subchapter, whenever a tribunal opted for application of the domestic law to the issue of contract attribution, it concluded that contract was not attributable to the state. However, in *Garanti Koza v. Turkmenistan*, the outcome was the opposite, although it is not perfectly clear that domestic law was in fact applied.

[121] Ibid, paras 833–49.
[122] Ibid, para 852.
[123] Ibid, para 856.
[124] Ibid, para 853.

In this case, the investor entered into a contract with 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:

> 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.[125]

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 how was the domestic law actually applied in this context. 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.[126] Finally, the tribunal interestingly 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'.[127] This is the exact wording used by Article 5 of the ARSIWA, which indicates that tribunal actually had ARSIWA in mind when deciding this issue although it stated that the matter should be decided based on domestic law. Thus, formally this case can be classified as the one where domestic law was applied (as the law of the contract), whereas in substance tribunal applied the ARSIWA reasoning when deciding the issue.

3. Taking the Middle Road – General Principles of Law

As previously noted, Crawford and Mertenskötter in their brief survey identify three different positions on the question whether the host State is a party to the contractual obligation: The first position is that the ARSIWA determine the question. The second position is that this is a question for international law, but not the ARSIWA. Finally, the third position is that this is a question for the proper law of the contract.[128]

We already determined that application of ARSIWA is problematic doctrinally. On the other hand, application of domestic law may turn out to be highly controversial due to policy reasons, namely in almost all cases where tribunals opted for application of domestic rules they concluded that contracts in question are not attributable to the state. This weakens the protection of the investments and can discourage investors from entering into investment contracts with

[125] *Garanti Koza LLP v. Turkmenistan (ICSID Case No. ARB/11/20),* Award, 19 December 2016 , paras 331-332.
[126] Ibid, paras 333-335.
[127] Ibid, para 335.
[128] Crawford and Mertenskötter, 'The Use of the ILC's Attribution Rules in Investment Arbitration', pp. 31-35.

the state entities in future. For that reason, we may have to search for a better solution. General principles of law have great potential of resolving this issue. If the result of the further research shows that certain general principles of law indeed emerged in this field, that would be in accordance with what Crawford and Mertenskötter describe as treating the attribution of contract as a question of international law, but not the one that can be answered to by reference to the ARSIWA.

When asked to decide whether a state is bound by a certain contract, tribunals need to find a set of rules which can answer this question. The rules should take into account general issues that tribunals may be interested in, such as: control, finances, decision making, instructions, etc. Some of these issues are tackled by the ARSIWA, which is why many tribunals applied ARSIWA, by analogy or otherwise, as a practical solution. However, as elaborated, there is a persuasive legal argument that ARSIWA should not govern the matter. An alternative solution would be to apply general principles of law. Such principles may well be designed to take into account factors similar to those used by ARSIWA. Thus, depending on the facts of the case, it could easily happen that the same result would be reached although different rules are applied (ARSIWA or GPL). However, the case may actually turn differently depending on applicable rules. This is why it is important to have a principled approach to this question.

3.1. Between a Challenge and an Opportunity

As a general matter, GPL recently attracted considerable attention in public international law and the ILC even appointed a Special Rapporteur for this topic.[129] Thus, this source has finally been recognized 'a fertile source of inspiration and guidance' after being neglected for a long time.[130] Recent decisions of investment arbitration tribunals prove their capability 'of applying sophisticated comparative public law analysis' when determining the content and existence of such general principles.[131] Given that the investment arbitration tribunals have already shown that they are comfortable with using GPL as such, answering the research question with reliance on this particular legal framework is appealing.

GPL usually play a gap-filling role.[132] They are used by international judges to fill the lacunae in the applicable law.[133] Applied to the project at hand, given that international law does not seem to offer an answer to our question and that domestic law may offer an undesirable solution

[129] 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 at 195. ILC, Report of the ILC, 70th Session, 3433rd meeting, 19 July 2018, UN Doc A/73/10, chap XIII, s A, para 363.
[130] Christian J. Tams, 'The Sources of International Investment Law: Concluding Thoughts' in Tarcisio Gazzini and Eric De Brabandere (ed), *International Investment Law: The Sources of Rights and Obligations* (1st ed. Martinus Nijhoff Pub. 2012) 319 at 324, 325.
[131] Stephan W. Schill, 'General Principles of Law and International Investment Law' in Tarcisio Gazzini and Eric De Brabandere (ed), *International Investment Law: The Sources of Rights and Obligations* (Martinus Nijhoff Pub. 2012) 133, at 137. Referring to *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, paras. 111–134 and *Mobil Corporation, Venezuela Holding et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 19 June 2010, paras. 169–185.
[132] Beatrice Bonafé and Paolo Palchetti, 'Relying on General Principles in International Law' in Catherine Brölmann, Radi, Yannick (ed), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar Publishing 2016), p. 172.
[133] 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, at 954.

from the policy perspective, GPL could actually be useful to fill this void. It has been argued that they indeed 'play an important role in the field of foreign investment', especially regarding the relationship between the host state and a foreign investor.[134] 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'.[135] Finally, 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.[136]

On the other hand, it should be noted that although GPL seem like a promising solution, there is a certain scepticism towards this source in literature, which indicates that their usefulness can only be determined after a more thorough research and analysis.

In his analysis of the role of general principles in international investment law, Daniel Peat takes such a sceptical view. He concludes 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'.[137] It should be noted, however, that Peat's study focuses on domestic public and administrative law which can help in interpreting 'vague provisions and broad standards of investment treaties'.[138] Conversely, the rules of binding the non-signatories, which are explored in this project, belong to the private law and they would not serve to interpret any broad standard, but would help to answer the question whether a non-signatory is bound by an international contract. Interestingly, it has been noted in literature that GPL 'have traditionally been associated with private law'[139] and that reliance on GPL has played an important part in providing legal rules 'on essentially private law matters'.[140] Thus, this is a different way of applying comparative law from the one that Peat describes as substantiating treaty standards or confirming interpretation made on other grounds.

Finally, concrete determination and formulation of GPL is a difficult task, sometimes described as 'a task of colossal magnitude'.[141] Identifying GPL typically consist of three stages. First, the tribunal has to extract legal principle from the national legal rules.[142] Principles represent an

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[134] 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 and others, *The ICSID Convention : A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2 edn, 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'.

[135] Gazzini, 'General Principles of Law in the Field of Foreign Investment', p. 109.

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

[137] 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, at 677.

[138] Ibid, at 655.

[139] Gazzini, 'General Principles of Law in the Field of Foreign Investment', p. 13 and references in footnote 73.

[140] Robert Jennings and Arthur Watts, 'Introduction: Foundation of International law, Sources of International Law' in Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, vol 1 (9 edn, Longman 2008), p. 40.

[141] Schlesinger, 'Research on the General Principles of Law Recognized by Civilized Nations', at 734.

[142] Charles Kotuby, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press 2017), p. 19.

expression of certain fundamental values (which is why they are more general than rules).[143] Second, the tribunal has to determine whether the principle is universally recognized, meaning that it has to be accepted in many legal systems as a reasonable and appropriate solution.[144] This, of course, does not mean that such principle has to exist in every legal system, since that would grant certain isolated systems the power of veto. [145] Finally, the last stage is transferring the principle to the international plane. This typically requires certain modification of the domestic principle in order to fit into the international legal system, meaning that the principle will usually not have the same characteristic that it has in domestic law. [146] Thus, proving that a principle has indeed reached the level of GPL, is a challenging task that should not be underestimated.

3.2. GPL in Practice of Investment Tribunals

If Peat's study indeed proves that GPL have only been used for substantiating treaty standards or confirming interpretations made on other grounds, as a matter of rule, the practice of Iran-US Claims Tribunal is an exception to that rule.

In some cases decided by this Tribunal, 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 following provision:

> 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.[147] (Emphasis added)

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

> 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**.[148] (Emphasis Added)

Even when the parties' contract referred to national systems of law as the source of controlling rules without reference to PIL or GPL, the Iran-US Claims Tribunal often referred to them.[149] In many cases, the tribunal applied GPL to different contractual issues, such as: contract formation, performance, defects of consent and remedies for the breach of contract.

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[143] Ibid, p. 20.
[144] Ibid, p. 19.
[145] Ibid, pp. 22, 23.
[146] Ibid, pp. 19, 28.
[147] *Libyan American Oil Company v. The Government of the Libyan Arab Republic*, Award 12 Apr 1977 , para 123. See also: *Texaco Overseas Petroleum Co. And California Asiatic Oil Company v. Libya,* SENTENCE ARBITRALE AU FOND, 19 January 1977 , para 36 and *BP Exploration Company (Libya) Limited v. Government of The Libyan Arab Republic,* Ad Hoc Arbitration, Award (Merits), 10 October 1973 , para 1(7).
[148] *The American Independent Oil Company v. The Government of the State of Kuwait*, Ad Hoc Arbitration, Final Award 24 March 1982 , p. 2.
[149] 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.

For example, in *General Dynamics v. Iran*, the tribunal held that that GPL required parties to perform their contracts satisfactorily and with due diligence.[150]

In *Kimberly-Clark v. Bank Markazi Iran*, the tribunal found that two years of performance by the respondent ratified a disputed contract, despite the alleged initial unauthorized signature:

> Such performance of its obligations under the agreement by the Respondent for over two years would, in any event, have constituted an unequivocal ratification of the agreement, even if it had lacked the proper signatures.[151]

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.[152]

In *Harnischfeger v. Ministry of Roads and Transportation*, the tribunal held that escaping 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.[153]

Finally, in *Morrison v. Ministry of Roads & Transportation of Iran* the tribunal applied general principles 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.[154]

Thus, extracting general principles of law from domestic contract law provisions would not be such a novel solution in the world of international investment arbitration.

3.3. GPL Applicable to Contract Attribution

Two principles dealing with contract attribution are identified at this state of research. The first one is the principle of state unity, which applies when an investment contract is concluded between an investor on one side and a state organ on the other. The principle is also reflected

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[150] *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,* Award No. 123-283-3 (IUSCT (IRAN-US CLAIMS TRIBUNAL)), para 64.

[151] *Kimberly-Clark Corp. v. Bank Markazi Iran, Novzohour Paper Industries, Government of The Islamic Republic of Iran,* IUSCT Case No. 57, Award (Award No. 46-57-2), 25 May 1983 , para 16.

[152] *R.N. Pomeroy, K.S. Pomeroy and R.M. Pomeroy v. Government of The Islamic Republic of Iran,* IUSCT Case No. 40, Award (Award No. 50-40-3), 08 June 1983 , para 38.

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

[154] *Morrison-Knudsen Pacific Limited v. The Ministry of Roads and Transportation and The Islamic Republic of Iran,* IUSCT Case No. 127, Award No. 143-127-3, 13 July 1984 , para 79.

in Art. 4 of ARSIWA, but this provision cannot be applied as such to the issue of contract attribution for the reasons elaborated above. The second is the principle of representation, which can be applied to contracts between investors on one side and other state entities (different from state organs) on the other.

3.3.1. The Principle of State Unity

In *Texaco v. Libya* the tribunal referred to the 'principle of state unity' in deciding that the Ministry of Petroleum, which concluded the concession agreement with the investor, was 'a duly qualified organ of the Libyan Government' and that 'an act concluded' by such organ was binding upon the state.[155]

In *Siag v. Egypt*, the tribunal accepted claimant's argument that Article 4 of the ARSIWA (providing that 'the conduct of any State organ shall be considered an act of that State under international law') was 'a general principle of international law, which was not limited to the wrongful acts of a state organ'.[156]

In *SGS v Paraguay*, the contract was concluded between the investor and the Ministry of Finance of the Government of Paraguay. The tribunal was invited to decide whether its jurisdiction was precluded by the 'claims' contractual roots'.[157] It held that:

> it is challenging to draw a line between 'an ordinary commercial breach of contract and acts of sovereign interference or *jure imperii*, particularly in the context of a **contract entered into directly with a State organ** (here, the Ministry of Finance) (…). [O]ne can characterize every act by a sovereign State as a "sovereign act"—including the State's acts to breach or terminate contracts to which the State is a party. [158]

It was undisputable for the tribunal here that a contract concluded with a state organ – the Ministry of Finance – was indeed attributable to the state. A similar position was taken by *Eureko* tribunal (*see* section 1.2. above).

More thorough research and analysis must be conducted in order to determine whether this principle may indeed be applied as a general principle of law.

3.3.2. The Principle of Representation

Many authors, who dealt with this issue, found that the state should be regarded as an investor's contractual partner if the entity in question, in fact acted as an agent or representative of the state, which is to be concluded based on the state's involvement in the matter.

As Crawford explains:

> Although in principle the State is not liable for the contractual obligations concluded by its territorial units (and other separate legal entities), nothing prevents the proper law of contract from providing a theory that establishes the

[155] *Texaco Overseas Petroleum Company, California Asiatic Oil Company v The Government of the Libyan Arab Republic* Introductory Note in 17 International Legal Materials (1978), pp. 179-180.
[156] *Siag v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009 , paras. 194-195.
[157] *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay* (ICSID Case No. ARB/07/29), Decision on Jurisdiction (English) 12 February 2010 , para 125.
[158] Ibid, para 134.

> **joint liability of the State**, based on **its involvement** in the economic operation formally concluded between a local government and an investor, consistent with the principle of privity of contract.[159]

The proper law of contract may establish theories, such as representation or agency, on the extension of substantive liability to the state in connection with the undertakings of its parastatals.[160] Such theories may include certain elements (such as governmental control and direction, or acting upon instructions received from the state), which may be similar to the requirements under ARSIWA Arts 5 and 8.[161]

As a general matter, civil law jurisdictions distinguish between genuine (direct) representation (where the agent acts in the name of the principal) and the so called indirect representation where the agent acts in his own name but for the benefit of another.[162] In principle, there is no such difference between direct and indirect representation in common law. The agent can bind the principal as long as the agent acts within the scope of his authority. An agent does not have to inform its contractual partner that he is acting for someone else.[163] The counter party must have acted in reasonable reliance on the conduct of the principal. Smits submits that 'courts around the world' have held that the principal can induce a reasonable person to think that an agent had the necessary authority to enter into a contract, if the principle remains silent or if he puts an agent in a certain position.[164]

Applied to the investment contracts, it is not difficult to imagine that certain state behaviour may lead the investor to believe that an entity which acts as a direct contractual partner of the investor is actually an agent or representative of the state.

Tribunals which held that a contract of the state entity is attributable to the state usually took into account the following factors: the entity was subject to instructions of state when entering into the contract, the state supervised the contract's performance, the entity exercised governmental authority when entering into a contract, the government controlled the entity's personnel, finances and decision-making, etc. It can be argued that a reasonable investor could have assumed, based on these factors that the entity in question indeed acted as a state representative.

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 whether the undertaking was made *on behalf* of the state in the first place.[165] In other words, in their view, the test should be whether a relevant entity *represented* the state at the time the undertaking was made.[166] They submit that tribunals which reached different conclusions on attribution

[159] Ibid., 147.
[160] De Stefano, *Attribution in International Law and Arbitration*, p. 128.
[161] Ibid, p. 128.
[162] Jan Smits, *Contract Law - A Comparative Introduction* (Edward Elgar 2017), p. 253.
[163] Ibid, p. 254.
[164] Ibid, p. 255.
[165] 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* 1, at 27.
[166] Ibid, at 27.

(*Eureko* and *Noble Ventures* on one side and *Nagel, Impregilo* and *Azurix* on the other) in fact applied the same representation test.[167]

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 situation, in Hamamoto's view, it has to be determined that 'the entity *represented* the host State in entering into the obligation in question', which cannot be done by the ARSIWA rules on attribution.[168]

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'[169] (Emphasis Added).

It may be challenging to determine whether the state in fact intended to be bound by the contract in question, but the role played by the parties in the contract's negotiation and performance could be relevant.[170]

In *Amoco v Iran* the investor entered into a certain energy contract with the National Petrochemical Company (NPC) established under the laws of Iran.[171] The question before the tribunal was whether the contract was binding on the Republic of Iran.[172] The tribunal noted that NPC had 'a **legal personality distinct from that of the State'** and that it 'contracted only for itself'.[173] 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.[174]

However, in the case at hand, 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.[175]

This reasoning is very interesting. It was clearly important to the tribunal to determine the intention of the state to be bound. The intention plays an important role for the rules on binding the non-signatories, which may potentially be applied as GPL when determining whether the state is bound by the contract in question.

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[167] Ibid, at 27.
[168] Hamamoto, 'Parties to the 'Obligations' in the Obligations Observance ('Umbrella') Clause', p. 464.
[169] Sinclair, 'Bridging the Contract/Treaty Divide', p. 104.
[170] Kovács, *Attribution in International Investment Law*, p. 259
[171] *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.
[172] Ibid, para 160.
[173] Ibid.
[174] Ibid, para 162.
[175] Ibid

As already noted, Park's contribution on non-signatories and international contracts is a useful point of departure for exploring whether certain domestic rules on binding the non-signatories of contracts can be treated as GPL to be applied to the question of contract attribution in the investment arbitration context.

In his study which predominately focuses on international commercial arbitration, Park deals with the issue of joinder of non-signatories of the arbitration agreement to the arbitration proceedings. However, many of his observations are applicable to the question of binding a non-signatory (in our case the host state) of an investment contract (concluded between an investor and the state entity). Park notes that most explanations of joinder in international arbitration relate to either (1) implied consent or (2) disregard of corporate personality.[176] The theory of implied consent is more appropriate to be applied in the case of contract attribution in investment arbitration, given that disregarding of corporate personality is suitable for cases of fraud and undercapitalization - usually not an issue in cases in our focus.

Park suggests that the effect of that agreement extends beyond the named signatories, by virtue of behaviour that suggests acceptance of the agreement by someone else.[177] As he further explains 'implied consent focuses on the parties' true intentions' and it is 'building on assumptions that permeate most contract law, joinder extends the basic paradigm of mutual assent to situations in which the agreement shows itself in behaviour rather than words'. [178]

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; acceptance of the contract by the non-signatory.[179]

As already noted, some international tribunals have focused precisely on the intention of the state in determining whether the state is bound by the contract entered into between its entity and an investor. In *Amoco*, for instance, the tribunal held that the state had **no intention** itself to engage in the industrial and commercial endeavours of the entity in question and left the entity to take financial and commercial risks associated with such endeavours. On this basis, the tribunal concluded that the state was not bound by the contract in question.[180]

Certain principles of binding the non-signatories may have crystalized as general principles of law applicable to the issue of contract attribution. Along those lines, De Stefano notes that the law applicable to the contract may be a national law or other laws including general principles of law. [181] McNair predicted, already decades ago, that GPL will prove fruitful in interpretation and application of investment contracts, which are not interstate contracts governed by public international law *stricto sensu*, but which can 'more effectively be regulated by general principles of law than by the special rules of any single territorial system'.[182]

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[176] Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma', p. 3.
[177] Ibid, p. 3.
[178] Ibid, p. 4.
[179] Ibid, p. 25.
[180] *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
[181] De Stefano, *Attribution in International Law and Arbitration*, pp. 126, 127.
[182] Lord McNair, 'The General Principles of Law Recognized by Civilized Nations' (1957) 33 *British Yearbook of International Law* , p. 15.

Thus, this question offers an opportunity for a fruitful research and interesting academic analysis, which may also be used as a practical guidance in investment arbitration disputes.

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