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Between chaos and coherence – Attribution tests in the practice of international investment tribunals

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"[T]here has been a certain tendency for investment tribunals to seize on the Articles as a tabula in naufragio, 'a plank in a shipwreck.'"[1]

1. Introduction

Investment protection and international law are closely intertwined. Bilateral Investment Treaties (BITs) are international treaties governed by the Vienna Convention on the Law of Treaties (VCLT) or customary international law.[2] The prohibition of expropriation without compensation, the various rules of foreign law, the customary condition of diplomatic protection or the principles of good faith and equity are all legal institutions deeply rooted in international law.

The relationship between investment protection and state responsibility dates back to the middle of the 20th century. In the 1950s and 1960s, the International Law Commission under the leadership of García Amandor, aimed to find or develop substantive rules for the protection of foreign property.[3] This attempt failed due to the lack of consensus between developed and developing States, a dynamic that has determined the institutional and substantive characteristics of international investment protection, including the notion of attribution in investment law.

The failure of the International Law Commission to develop substantive rules paved the way, initially under the guidance of Robert Ago and later James Crawford, for the development of the ILC's rules on state responsibility (ARSIWA). To remedy earlier shortcomings, the draft Articles did not seek to develop substantive rules on state responsibility in the first place. The sharp distinction between primary and secondary

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[1] James Crawford: Investment Arbitration and the ILC Articles on State Responsibility, *ICSID Review - Foreign Investment Law Journal,* Volume 25, Issue 1, 1 March 2010, p. 135. DOI: https://doi.org/10.1093/icsidreview/25.1.127

[2] The Vienna Convention on the Law of Treaties entered into force in 1980, Article 4 of which provides that the VCLT itself (but not its customary law rules) does not apply to contracts concluded before the VCLT itself entered into force for the contracting states.

[3] James Crawford: Investment Arbitration and the ILC Articles on State Responsibility, *ICSID Review - Foreign Investment Law Journal,* Volume 25, Issue 1, 1 March 2010, p. 127.

rules was precisely intended to avoid identifying the substantive obligations of states (which, moreover, were not only subject to intense debate, but also differed considerably from one specialized field to another), and to codify secondary rules of state obligations.[4] In other words, to establish the conceptual elements of State responsibility (international obligation, breach, attribution), the ways in which responsibility can be invoked, possible grounds for circumstances excluding wrongfulness and the legal consequences of international violations (continued performance of obligations, cessation and reparation).

Despite the change in the ILC's purpose, the concept of state responsibility has remained relevant to investment protection. Notably, around 60% of the more than one hundred international decisions on state responsibility have been handed down by investment arbitral tribunals.[5] Interestingly, despite the paramount relevance of ARSIWA for investment arbitration, there is strikingly little in-depth adjudicatory analysis regarding applying certain provisions of ARSIWA or excluding them under Article 55 *(lex specialis).*[6]

This article is structured as follows. The first main part will elaborate on how the traditional notion of attribution (Article 4, 5 and 8 of ARSIWA) is handled in investment arbitration. The second main part will focus on non-traditional attribution issues outside the scope of establishing international responsibility, such as preliminary questions necessary to establish the jurisdiction of the arbitral tribunal, questions on the applicability of the umbrella clause, questions relating to certain declarations of the State (right of representation in the conclusion of contracts), the person authorised to make the unilateral declaration or the person qualified to make the declaration as well as certain issues relevant to decide about the state's involvement in private contracts in situations of corruption. The last part serves as a conclusion.

2. Attribution issues in investment arbitration

The first part of ARSIWA is directly relevant in investor-State disputes, as these provisions relate to international obligations of States towards all other subjects of international law.[7] Moreover, Parts Two and Three, although regulating the responsibility between

[4] Ibid, p. 128.
[5] Ibid, p. 128.
[6] See Jürgen Kurtz: The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration, *ICSID Review - Foreign Investment Law Journal*, Volume 25, Issue 1, 1 March 2010, 200-217. at 201.
[7] See ARSIWA commentary, p. 32. DOI: https://doi.org/10.1093/icsidreview/25.1.200

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States, may also apply by analogy to the relationship between States and other international entities.[8]

Investment disputes feature attribution issues in two main contexts.[9] The first *group* includes questions of attribution, where investment tribunals touch upon attribution issues while interpreting ARSIWA provisions. Typical attribution issues arising in investment disputes relate to Article 4 (State organ), Article 5 (entity vested with the exercise of governmental authority) and Article 8 (entity under the direction or effective control of the State) of ARSIWA. Article 7, governing the responsibility for *ultra vires* acts, is rarely invoked in such cases.

The second group includes investment disputes, where the notion of attribution is used outside the state responsibility context. Such disputes present a double challenge to arbitral tribunals: first, arbitrators have to distinguish between attribution issues for state responsibility purposes and attribution issues for other purposes, and second, they have to identify the applicable attribution tests for the latter. These cases involve the final determination of issues where, on the one hand, there is a dispute as to whether the question of attribution is at issue and, on the other hand, there is a question as to the law (international or even national) that is applicable. In this latter category of cases, the notion of attribution is relevant across a wide range of legal contexts, such as (i) deciding about preliminary questions necessary to establish the jurisdiction of the tribunal (e.g. Article 25 of the ICSID Convention); (ii) to appraising the applicability of the umbrella clause; (iii) evaluating the declarations of the State for purposes of deciding about a person's or an entity's capacity to validly represent the State at the time of concluding a contract, or in making a binding a unilateral declaration, or for purposes of a lawful claim of estoppel; and (iv) finally, attribution can be relevant in deciding whether the investor State was indeed implicated in corruption case in concluding contracts.[10]

[8] Crawford: Investment Arbitration and the ILC Articles, p. 132. However, the Wintershall v. Argentina tribunal reached an opposite conlcusion and opined that that the provisions of ARSIWA apply only to relations between States. Wintershall Aktiengesellshaft v. Argentina, ICSID Case No. ABR/04/14, 8 December 2008 (Nariman, Bernárdez, Bernardini), Award, paras 110-113.

[9] For a similar dichotomy see Csaba Kovács, who distinguishes between the narrow (stricto sensu) and broad (lato sensu) notions of attribution. Stricto sensu attribution refers to the standards set forth in ARSIWA, whereas lato sensu, refers to rules of attribution in other contexts. Csaba Kovacs: Attribution in Investment Arbitration: from Stricto Sensu to Lato Sensu. Kluwer Arbitration Blog, 29 October 2018. http://arbitrationblog.kluwerarbitration.com/2018/10/29/attribution-from-stricto-sensu-to-lato-sensu/ (last accessed September 15, 2022).

[10] For the role of attribution being used outside the state responsibility context see e.g. Christina Binder and Stephan Wittich: A Comparison of the Rules of Attribution in the Law of State Responsibility, State Immunity,

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2.1. The impact of investment disputes on the traditional notion of attribution

Before delving into a detailed assessment of how different notions and standards of attribution are invoked and interpreted in investment disputes, a few general observations are due on the role of attribution in establishing state responsibility in the light of investment disputes. First, the customary law status of the ARSIWA provisions is now generally recognised in investment arbitration.[11] Tribunals are familiar with the general doctrine of State responsibility[12] and regularly apply the various attribution tests based on ARSIWA.[13] However, it also appears that there are still cases, where tribunals confuse basic ARSIWA tests, even in cases where the application of the various attribution tests is mutually exclusive (either a State body, or a body empowered to exercise governmental authority, or a body under the effective control of the State).[14]

2.1.1. Attributability of the conduct of public bodies (Article 4 ARSIWA)

The attributability of the conduct of public authorities is a particularly important and frequent issue in international investment arbitration. Since states cannot act themselves, they cannot breach their investment protection obligations.

Under Article 4 of ARSIWA:
"1. The conduct of any State organ shall be considered an act of that State under international law, whether legislative, executive, judicial or any other function, and regardless of its place in

and Custom. In Gábor Kajtár, Başak Çalı, and Marko Milanovic (Eds.): *Secondary Rules of Primary Importance* in *International Law. Attribution, Causality, Evidence, and Standards of Review in the Practice of International Courts and Tribunals.* OUP 2022, pp. 242-262.

[11] See e.g. Schreuer-Dolzer pp. 216-227; Crawford-Mertenskötter: The Use of the ILC's Attribution Rules in Investment Arbitration. In Meg Kinnear, Geraldine Fischer, Jara Minguez Almeida, Luisa Fernanda Torres,Mairée Uran Bidegain (Eds.): *Building International Investment Law: The First 50 Years of ICSID*, Kluwer, 2015, pp. 27-42.

[12] "As States are juridical persons, the question necessarily arises whether acts committed by natural persons or separate entities, which are allegedly in violation of international law, are attributable to the State." Hamester v. Ghana, para 147.

[13] See e.g. Jan de Nul N.V., Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, paras 84-89.

[14] For more information, see Luca Schicho: Attribution and State Entities: Diverging Approaches in Investment Arbitration, *The Journal of World Investment & Trade,* Vol. 12.2011, pp. 283-298. DOI: https://doi.org/10.1163/221190011X00210

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the State's system of organization and its character as an organ of the central government or of a territorial unit of the State.
2. The body includes any person or entity having that status under the internal law of the State."

Article 4 is designed to be as broadly applicable as possible and thus covers all organs of the state, regardless of their position in the organisational hierarchy or their distance from central government. Investment tribunals therefore applied Article 4 to a wide range of state organs, such as a Minister, the armed forces and police, the Treasury, the legislature and the courts.[15] Article 4 also applies to autonomous provinces and the member states of federal states,[16] such as California.

In *Methanex v. United States,* the plaintiff sued the federal US government for the adoption of state laws in California,[17] claiming that they violated NAFTA provisions on several points (e.g. national treatment, corruption, unlawful expropriation).[18] The impugned legislation featured a ban in California on the use of MTBE, a gasoline additive. Methanex, which was the largest supplier of the methanol component of MTBE, alleged that the governor of California engaged in corruption in enacting the law, as the ban was introduced in exchange for campaign contributions, and thus was only disguised as an environmental measure. Furthermore, Methanex argued that the measure discriminated against it, and served to favour one of its US rivals, which was producer of ethanol, MTBE's substitute. The arbitral tribunal attributed California's conduct to the United States, but ultimately found no infringement and dismissed the claim.[19]

Investment disputes typically use a so called "structural test" to identify state organs within the meaning of Article 4.[20] According to this test, any organ that is part of the structure of the State under State law will automatically be considered a *de jure* State organ under Article 4.[21] Given the clear-cut nature of the test, investment arbitrations revolving around the interpretation of *de jure* state organs are rare, yet not

[15] See Schreuer-Dolzer, p. 217.
[16] See e.g. the decision on the status of the Argentine province of Tucumán, Vivendi v. Argentina, Award, 21 November 2000, para 49.
[17] The California Executive Order D-5-99 of 25th March 1999, The California Phase Three Reformulated Gasoline Regulations of September 2000.
[18] Methanex Corporation v. USA, Final Award on Jurisdiction and Merits (NAFTA Chapter 11 Arbitration), 3 August 2005, (Rowley, Reisman, Veeder).
[19] Methanex Corporation v. USA, Final Award, p. 294.
[20] See for example Maffezini v. Spain, Decision on Jurisdiction, 25 January 2000, para 77.
[21] See, e.g., Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/02, Award (31 October 2012) (Hanotiau, Williams, Khan), para 356.

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unprecedented. For example, Poland has unsuccessfully argued that the conduct of the Polish Minister of the Treasury was not attributable to it.[22] Likewise, Ukraine has unsuccessfully denied that the conduct of the Kyiv City State Administration was attributable to it.[23]

The above test, however, does not mean that if a body is not structurally part of the organisation of the State under national law, it cannot be a State organ within the meaning of Article 4. Such entities may qualify as *de facto* State organs if the test of full dependence is met. This test is rarely applied in arbitral practice. For example, in *Hamester v. Ghana*, the claimant relied on the jurisprudence of the International Court of Justice[24] to argue that the conduct of the Ghana Cocoa Board was attributable to Ghana.[25] The applicant argued, exceptionally, that the Ghana Cocoa Board, although was not *de jure* Ghanaian State organ, was *de facto* an organ by virtue of its total dependence on the Ghanaian State.

Another recurring attribution issue under Article 4 of ARSIWA concerns the need to distinguish between *de jure gestionis* and *de jure imperii* acts. Some respondents argue that while the public acts of a State are attributable to that State from a State responsibility perspective, its private, commercial acts are not.[26]

In Noble Ventures v. Romania, the arbitral tribunal rightly pointed out that although the distinction between *de jure imperii* and *de jure gestionis* acts is of great importance in the law of immunity, this distinction is far from being relevant for state responsibility. According to the tribunal, ARSIWA does not refer to such a distinction among the attribution rules but applies other tests that do not support such a separation of public and commercial acts.[27]

In Bayindir v. Pakistan, the arbitral tribunal also made it clear that the distinction between *de jure imperii* and *de jure gestionis* acts is irrelevant from a state responsibility perspective not only for the purposes of Article 4 of ARSIWA, but also for the purposes of Article 8 of

[22] Partial Award, 19 August 2005, pp. 128-131.
[23] ICSID Case No. ARB/00/9. Award, 16 September 2003, 10.2 para.
[24] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43, 392. para.; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14, at pp. 62-64).
[25] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010) (Stern, Cremades, Landau), at 148-162.
[26] Duke Energy v. Peru, para 238; Noble Ventures, para 82; Bayindir v. Pakistan, para 129.
[27] Noble Ventures v. Romania, para 82.

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ARSIWA.[28] That is to say, in the case where the State directs or exercises effective control over an entity, it will be entirely irrelevant for the purposes of attribution to the State whether the act in question is of a public or private nature.[29] Both *de jure imperii* and *de jure gestionis* acts may be attributable to the State.[30]

However, the irrelevance of the distinction between *de jure imperii* and *de jure gestionis* acts may not be automatically true to every ARSIWA provision. Even in the absence of relevant case law, it can be presumed with reasonable level of certainty that while this distinction will also not be relevant for the purposes of Article 11 of ARSIWA,[31] the difference between these concepts will be decisive for the purposes of attribution under Article 5 of ARSIWA, for example, where an act is attributable based on the exercise of elements of governmental power and that the person or entity is acting in that capacity in the case in question.

2.1.2. Conduct by persons or entities exercising elements of governmental power (Article 5 of ARSIWA)

If it cannot be proven that the (allegedly) internationally wrongful act was committed by a de jure or de facto state organ, Article 5 of ARSIWA may still be applicable. Under this Article: *"The conduct of a person or entity which does not qualify as a public body under Article 4 but which is entitled by the law of the State to exercise elements of governmental authority, provided that the person or entity acts in that capacity in the particular case, shall also be considered an act of the State."*

The above attribution test consists of two conjunctive conditions: (i) the law of the state entitles the person or entity to exercise elements of governmental power, and (ii) the person or entity is acting in that capacity in the case at hand. The key question for the application of Article 5 is what constitutes "governmental authority" within the meaning of this Article. This will be answered by the 'functional test', i.e. what constitutes elements of governmental power as opposed to, for example, commercial or other non-sovereign

[28] For example, in the case of Hamester v. Ghana the Panel stated: *"In so far as any act of Cocobod has been found not attributable to the State because it is an act de jure gestionis, the Tribunal has then considered whether it has been performed under the direct command of the State, such as to be attributable by application of Article 8 of the ILC Articles."* Hamester, para 203.
[29] Bayindir v- Pakistan, paras 129-130.
[30] Hamester v. Ghana, para 180.
[31] Whether the conduct subsequently recognised by the State as its own was of a public or commercial nature is irrelevant, the point is that it was recognised and accepted as its own, and the extent of that acceptance. For further details, see ARSIWA, p. 53.

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activities. The ARSIWA commentary's interpretation of this question already anticipates that it will be decided on a case-by-case basis, as the elements of governmental power must be interpreted in the light of the given society and its culture, history, and customs.[32]

The entity exercising the elements of government power may change over time. Several disputes involved former government bodies, which have been transformed into economic corporations and then were privatised. Other disputes seen public enterprises, privatised former state-owned enterprises, or market actors that are legally empowered to exercise government power, such as market regulation, price fixing, restriction of personal freedom.

A typical example is the case of Helnan v. Egypt, where the plaintiff entered into a private law contract with the Egyptian Company for Tourism and Hotels (EGOTH) for a hotel development project. The project failed, despite the plaintiff's investment, because the Egyptian State first downgraded the hotel and then EGOTH terminated the contract with the investor. According to the applicant, EGOTH's conduct was imputable to Egypt, because it acted, even if not as part of the public administration, in the exercise of governmental authority.[33] The arbitral tribunal rejected the applicant's claim in respect of Article 4, but found that EGOTH's conduct was attributable to Egypt under Article 5.[34]

In the Hungarian case of Dan Cake v. Hungary,[35] the attributability of the conduct of a court and the liquidator was the relevant issue. In reaching a decision against the defendant on the basis of a serious procedural defect, it was not ultimately necessary to analyse the status of the liquidator in detail from an attribution point of view, but it was clear that the panel had considered the position of the liquidator under Article 5 of ARSIWA. However, the tribunal did not go so far as to find that the liquidator exercised governmental authority, because according to the panel, the liquidator's conduct, did not violate international law. It is also noteworthy that the arbitral panel made reference to a distinction between public authority and governmental authority, a distinction which is not supported by international jurisprudence.[36]

[32] ARSIWA Commentary Article 5, p. 43.
[33] Helnan International Hotels A/S v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Decision on Objection to Jurisdiction, 17 October 2006, paras 85-86.
[34] Helnan International v. Egypt, para 93.
[35] Dan Cake S.A. v. Hungary, ICSID Case No. ARB/12/9 (Paulsson, Landau, Mayer), Decision on Jurisdiction and Liability, 24 August 2015.
[36] Dan Cake S.A. v. Hungary, paras 158-160.

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Article 55 of ARSIWA enables the parties to apply special rules in derogation from the general rules of ARSIWA. According to Article 55 of ARSIWA: *"These Articles shall not apply if and to the extent that the conditions for the commission of an internationally wrongful act or the content or application of the international responsibility of a State are governed by special provisions of international law."* This provision is also relied on by arbitral tribunals.

In UPS v. Canada,[37] the plaintiff claimed that Canada Post's unlawful anti-competitive conduct was attributable to Canada, as Canada Post was created by the Canada Post Corporation Act 1981 as a part of the Canadian state. The act specifically referred to Canada Post as "an institution of the Government of Canada"; "an agent of Her Majesty in right of Canada".[38] In addition, Canada Post was granted significant regulatory powers under the Act, including the right to define mail, set rates for service, place mailboxes in public places and access mailboxes in private buildings.[39] In other words, the applicant argued that Canada Post's conduct was attributable to Canada under either Article 4 or Article 5 of ARSIWA.

Canada did not dispute either the authority of ARSIWA or the status of Canada Post in Canadian law, merely argued that they were all irrelevant because the dispute was governed by *lex specialis* rules.[40] Canada also expressly invoked Article 55 of ARSIWA.[41] The tribunal, in examining the provisions of Chapter 15 of the NAFTA, concluded that Articles 1502(3)(a)[42] and 1503(2)[43] contained specific provisions on the entry rules for state-owned enterprises and state monopolies.[44] In other words, Chapter 15 of NAFTA in its view does contain a *lex specialis* regime with respect to the attributability of the conduct

[37] United Parcel Service of America Inc. v. Canada, Award on the Merits (NAFTA Chapter 11 Arbitration), 11 June 2007, paras 59-62.
[38] UPS v. Canada, para 50.
[39] ibid.
[40] UPS v. Canada, paras 54-55.
[41] UPS v. Canada, para 55.
[42] *"Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any privately owned monopoly that it designates and any government monopoly that it maintains or designates: (a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges"*
[43] *"Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapters Eleven (Investment) and Fourteen (Financial Services) wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges."*
[44] UPS v. Canada, para 62.

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of state-owned enterprises and monopolies to the State,[45] hence *lex generalis* rules of international law (in this case, Articles 4 and 5 of ARSIWA) do not apply.[46]

The reach of the *lex specialis* principle in arbitral practice is limited due to the fact that when *lex generalis* rules are reflected in customary law, such as is the case with ARSIWA, the *lex specialis* rules must be clear and unambiguous in the contract.[47] This has been an obstacle on several occasions to rely on *lex specialis* rules of attribution under Article 22 of the European Energy Charter Treaty ("public and privileged undertakings")[48] as the *lex specialis* rule of reference, rather than ARSIWA.[49]

2.1.3. Conduct by a person or entity acting under the instruction, direction or control of a State (Article 8)

Even if there is no *de jure* or *de facto* state organ in the case at hand, nor has the entity committed the act in question in the exercise of governmental authority, the host State may still be liable for that act under Article 8 of ARSIWA. According to this Article, *"The conduct of a person or a group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting under the instructions or under the direction or control of that State when engaging in the conduct."*

Investment disputes decided under Article 8 of ARSIWA are less frequent, because of the high threshold for proving an effective control, but they are far from exceptional. In order to show effective control, the plaintiff must demonstrate that the relevant entity acted

[45] For a critique of this decision, see Jürgen Kurtz, p. 209, Martins Paparinskis, Investment Arbitration and the (New) Law of State Responsibility, 24 *EJIL* (2013), pp. 617-647, at 629, DOI: https://doi.org/10.1093/ejil/cht025, and Stephan Wittich, International Investment Law. In André Nollkaemper - Ilias Plakokefalos (Eds.): *The Practice of Shared Responsibility in International Law,* CUP 2017, pp. 822-848. at 830. DOI: https://doi.org/10.1017/9781316227480.033

[46] On the correctness of the decision, see Crawford, Investment Arbitration and the ILC Articles, p. 131.On the application of the lex specialis rule in investment protection disputes, see also Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v. Mexico, ICSID Case No. ARB (AF)/04/05, (Cremades, Rovine, Siqueiros) Award, 21 November 2007, para, in which the Panel also invoked Article 55 of ARSIWA in applying NAFTA against ARSIWA.

[47] "[T]he Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so." Elettronica Sicula S.P.A. (ELSI), Judgment, I.C.J. Reports 1989, p. 15, para. 50.

[48] Act XXXV of 1999 on the proclamation of the Final Act of the European Energy Charter Conference, the European Energy Charter Convention, Decisions in respect of the Energy Charter Convention and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects. Published 31 March 1999.

[49] For details, see Michael Feit, Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity. 28 *Berkeley J. Int'l L.* (2010) 142-177. at p. 171.

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under the control of the host State with respect to each specific violation. Proving this is not only difficult, but it also requires the arbitral tribunal to examine the smallest details of the case in order to assess the extent of State control.

In *Bayindir v. Pakistan,* the claimant, a Turkish motorway construction company, brought proceedings under the Pakistan-Turkey BIT. It alleged that the Pakistani motorway operator had terminated its contract with it, and hence breached the most favoured nation principle, the principle of national treatment, the principle of fair and equitable treatment, and committed an unlawful expropriation.[50] As the National Highway Authority (NHA) of Pakistan was a public corporation established by Act XI of 1991 (National Highway Authority Act) for the purpose of planning, development, operation and maintenance of highways in Pakistan, the attributability of the NHA's unlawful conduct to Pakistan necessarily arose in the dispute.[51]

The arbitral tribunal examined the details of the conduct of the Turkish national highway manager and concluded that although the conduct of the highway manager was not attributable to either under Article 4),[52] or under Article 5,[53] it found the acts attributable under Article 8 of ARSIWA. This means that in the panel's view, the unlawful conduct of the Turkish motorway operator was in each case under the direction and effective control of the Turkish State.[54]

2.2. Non-traditional attribution issues in investment disputes

Besides cases which feature attribution tests under ARSIWA for state responsibility purposes, arbitral tribunals are increasingly faced with attribution questions that arise under legal contexts other than establishing the responsibility of respondent State. Such cases present tribunals with a double challenge. On the one hand, arbitrators have to distinguish between attribution issues for state responsibility purposes and those questions of attribution that, in fact, serve other purposes. On the other hand, they have to define the applicable attribution tests for attribution scenarios outside the context of ARSIWA.

[50] Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan, Award, ICSID Case No. ARB/03/29, 27 August 2009.
[51] Bayindir v. Pakistan, paras 111-117.
[52] Bayindir, paras 118-119.
[53] Bayindir, paras 120-123.
[54] Bayindir, para 125.

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2.2.1. Attribution for the purpose of establishing ICSID jurisdiction

In order to establish the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID), in addition to a BIT, the dispute must be between "a Contracting State" and a natural or legal person of another Contracting State. According to Article 25 of the ICSID Convention: *"The jurisdiction of the Centre shall extend to any dispute arising directly out of an investment dispute between a Contracting State (or any subordinate body or agency of that Contracting State which it notifies to the Centre) and natural or legal persons of another Contracting State, provided that the parties to the dispute consent in writing to the submission of the dispute to the Centre. If the parties have given their consent, neither party may unilaterally withdraw it."*[55]

It is far from clear which body's conduct can be considered that of one of the Contracting States" under Article 25. Investment tribunals usually decide this issue on the basis of the attribution tests of ARSIWA. This also means that in such cases, the question of jurisdiction is interpreted on the basis of an attribution standards borrowed from State responsibility context, even though neither State responsibility nor breach of its international obligation has (yet) been established.[56]

The jurisdictional decision in Maffezini v. Spain clearly indicates that although the panel's decision was based on Articles 4 and 5 of ARSIWA, it concerned the establishment of the jurisdiction of the ICSID Centre and not the attributability of an internationally wrongful act. In light of the fact that the arbitral tribunal found that SODIGA met both the structural and functional tests, the claimant was able to establish prima facie that SODIGA was a State organ entitled to act on behalf of Spain. However, even the tribunal itself acknowledged that the assessment of whether SODIGA was responsible for the acts, whether they were unlawful, whether the acts were of a public or of a commercial nature and, finally, whether they could be attributed to Spain, were different questions, which had to be decided on the merits of the case.[57]

[55] ICSID Convention Article 25(1).
[56] See, e.g., Emilio Agustin Maffezini v. Kingdom of Spain, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB 97/7 (25 January 2000), paras 71-89; Salini Costruttori S.P.A. and Italstrade S.P.A. v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, (Briner, Cremades, Fadallah), paras 28-35.
[57] Maffezini, para 89.

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Scholars, such as Olleson[58] and Schreuer[59] also clearly point out that even though these cases also raise attribution issues, they are significantly different from questions of establishing international responsibility under ARSIWA, given their different nature and purpose, which makes the application of ARSIWA's attribution rules problematic in such cases.

2.2.2. Umbrella clauses: law of contract v. law of treaty

Under the so-called *umbrella clauses,* the host State undertakes to honour its commitments to the investor without specifying the nature, source, or scope of its commitments. A typical umbrella clause provides that a contracting State is bound to honour all the obligations it has undertaken towards the investor of the other contracting State.[60] For example, the German-Hungarian BIT provides that *"Each Contracting Party will comply with all other obligations it has assumed in relation to the investment in the territory in its agreement with the investors of the other Contracting Party."*[61]

However, the interpretation of umbrella clauses varies considerably across different tribunals, and for a long time the most fundamental issues of umbrella clauses were also disputed.[62] Although the majority of the literature now agrees that umbrella clauses encompass contractual obligations undertaken by the State under domestic law,[63] in the arbitral practice is not consistent in this regard.[64]

Some arbitral tribunals assume that, if the umbrella clauses were interpreted broadly and hence were extending to private contracts, they would internationalise the provisions of

[58] Simon Olleson: Attribution in Investment Treaty Arbitration, *ICSID Review,* Vol. 31, No. 2 (2016) 457-483. at 467. DOI: https://doi.org/10.1093/icsidreview/siw005
[59] Rudolf Dolzer - Chrisoph Schreuer: *Principles of International Investment Law,* OUP, 2012, p. 227. DOI: https://doi.org/10.1093/law/9780199651795.003.0001
[60] See, for example, the provisions of the United Kingdom-Argentina Bilateral Investment Treaty (11 December 1990) Article 2(2); United States-Argentina Bilateral Investment Treaty (14 November 1991) Article II(2)c.; Italy-Jordan Bilateral Investment Treaty (21 July 1996) Article 2(2); Greece-Mexico Bilateral Investment Treaty (30 November 2000) Article 19(2); Germany-Pakistan Bilateral Investment Treaty (1 December 2009) Article 7(2).
[61] Treaty between the Federal Republic of Germany and the Hungarian People's Republic on the Promotion and Reciprocal Protection of Investments, Article 8(2).
[62] Anthony Sinclair: Bridging the Contract/Treaty Divide. In Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (Eds.): *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer,* OUP 2009, pp. 92-104. DOI: https://doi.org/10.1093/acprof:oso/9780199571345.003.0008
[63] On the correctness of the expansive interpretation of umbrella clauses, see Kjos, p. 247.
[64] Not converting the obligation: CMS Gas v. Argentina, Decision on Annulment, 2007, para 95 and MTD Equity v. Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004 (Sureda, Lalonde, Blanco), para 187; Marion Unlaube v. Costa Rica, ICSID Case No. ARB/08/1, Award, 16 May 2012 (Kessler, Berman, Cremades), para 190.

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the private contract by applying a kind of mirror effect, i.e. by internationalizing the breach of national law. For example, in SGS v. Pakistan, the arbitral tribunal rejected the interpretation of Article 11 of the Swiss-Pakistan BIT[65] as an umbrella clause, because it considered that such a clause would have the effect of elevating all possible breaches of a private contract to the level of an international convention, i.e. the BIT.[66]

In contrast in SGS v. Philippines,[67] a case with a very similar umbrella clause, the arbitral tribunal reached the opposite conclusion, and extended the protection of the Investment Protection Convention to private contracts under Article X(2) of the Switzerland-Philippines BI .[6869]

Finally, in Noble Ventures v. Romania, the panel found that even if the breach of a private law contract gives rise to a simultaneous breach of an international convention and thus to the liability of the host State, these breaches will exist independently of each other, almost in parallel, thus demonstrating the autonomy of the domestic and international legal order.[70]

The legal uncertainty did not end here, as the Noble Ventures tribunal extended the scope of the umbrella clause[71] of the US-Romanian BIT to private contracts by conflating the breach of a private contract with the breach of an international obligation, i.e. by interpreting the umbrella clause mechanism as an exception to the main rule of Article 3 of ARSIWA. In other words, in all these cases, the tribunals automatically classified the breach of a private contract as a breach of the BIT.[72]

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[65] "Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into." Switzerland-Pakistan Bilateral Investment Treaty **(**11 July 1995).

[66] SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan Case No. ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003 (Feliciano, Faurès, Thomas), paras 166-173.

[67] SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 (El-Kosheri, Crawford, Crivellaro), 115-116, para 127.

[68] "*Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.*" Philippines-Switzerland Bilateral Investment Treaty (31 March 1997).

[69] For a comparison and critique of SGS v. Pakistan and SGS v. Philippines, see Stanimir A. Alexandrov, Breaches of Contract and Breaches of Treaty: The Jurisdiction of Treaty-Based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan and SGS v. Philippines, 5 Journal of World Investment & Trade (2004) pp. 555-577.

[70] Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, 12 October 2005, para. 53.

[71] "Each Party shall observe any obligation it may have entered into with regard to investments." US-Romania Bilateral Investment Treaty (1994) Article II(2)()c.

[72] Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, 12 October 2005 (Böckstiegel, Lever, Dupuy), at 46-62.

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Such an inquiry was criticized by the arbitral tribunal in El Paso Energy International Co. v. Argentina, which explicitly stated that the application of umbrella clauses cannot have this result, since such an interpretation would completely erode the international law requirement of, for example, the principle of fair and equitable treatment, and hence would blur the boundaries between international law and domestic law.[73]

In *Hamester v. Ghana,*[74] the plaintiff Hamester entered into a Joint Venture Agreement with the Ghana Cocoa Board, which was established by the Ghana Cocoa Board Act. The joint venture agreement was governed by Ghanaian law. The claimant argued that Ghana, through the Ghana Cocoa Board, had breached the Joint Venture Agreement, which was also a breach of the BIT through the umbrella clause of the Ghana-Germany BIT.[75][76] Ghana challenged the tribunal's jurisdiction on the basis that it was not party to the Joint Venture Agreement and that the BIT did not cover investor claims arising from private law contracts anyway.[77] The panel did not apply the rules of ARSIWA to decide the jurisdictional issue. Instead, it declared them inapplicable in principle, and it cautiously stated that even if the rules of ARSIWA were applied, it would not be attributable to Ghana.[78]

Crawford, writing extra-judicially, classifies arbitrators directly into four main schools according to their interpretation of umbrella-clauses. The *first group* of arbitrators hold that the clause applies only if the intention of the parties is clear that a breach of any provision of a private contract is to be regarded as a breach of the BIT. The *second group* of adjudicators are of the view that only those breaches of private contracts are regarded as breaches of the BIT, which were committed by the state through its exercise of public authority. *The third* view internationalises the private contract, i.e. these panels treat violations of a private contract as violations of the international treaty. The *fourth view* holds that a breach of a private contract may give rise to a breach of the BIT, but does not

[73] El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Decision on Objections to Jurisdiction, 27 April 2006 (Caflisch, Stern, Bernadini), at 76-77.
[74] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24 (Stern, Cremades, Landau), Award, 18 June 2010.
[75] "Each Contracting Party shall observe any other obligation it has assumed with regard to its investments in its territory by nationals or companies of the other Contracting Party." BIT Article 9(2).
[76] Hamester v. Ghana, para 70.
[77] Hamester v. Ghana, para 91.
[78] Hamester v. Ghana, para 347.

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transform the private contract into an international treaty, i.e. the interpretation and application of the former remain governed by the national law of the given State.[79]

The essential difference between the latter two schools of thought lies in selecting the law governing the interpretation of a private contract: international law or the domestic law of the State. In any case, it is clear that when the umbrella clause applies, the State is not only precluded from infringing the investor's rights through its public acts but is also obliged to meet its investment protection obligations through its private law contracts.[80] Consequently, if the State violates the investor's rights under an investment treaty through a private contract that is attributable to it, it will also be in breach of the investment treaty. In this case, of course, the domestic law of the State will apply to determine whether such a breach has occurred with respect to the private contract.[81]

It is far from clear, however, whether international law or domestic law should be applied in the assessment of the attributability of a breach of a private contract and what attribution test will be applied for such an inquiry.

According to Petrochilos, rules of international law should also be applied to the interpretation of a private contract, and the rules of ARSIWA should be applied to the questions of attribution.[82] However, such a conclusion may be contested. For instance, in Bosh v. Ukraine,[83] which was cited by Petrochilos as an example, the panel examined Articles 4 and 5 of ARSIWA from a classical attributability perspective and found that the conduct of Taras Shevchenko National University in Kiev was not imputable to Ukraine.[84] In contrast, in Toto v. Lebanon, the arbitral tribunal found jurisdiction on the basis of Article 5 of ARSIWA, instead of deciding this question on the basis of Lebanese law with

[79] James Crawford: Treaty and Contract in Investment Arbitration. *Arb, Int'l* (2008) 24(3) 351. at. 366-368. o. DOI: https://doi.org/10.1093/arbitration/24.3.351

[80] An obligation protected by an umbrella clause may also be undertaken by the State by unilateral declaration. See Schreuer-Dolzer: *Investment Law,* 2012, pp. 177-178.

[81] It is not exceptional for an international arbitral tribunal to apply the internal law of a state. This was also the case in the Danubius Radio case, where the panel interpreted both the old (Act I of 1996) and the new media law (Act CLXXXV of 2010). Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő ZRT. v. Hungary, ICSID Case No. ARB/12/3 (17 April 2015) (Rovine, Lalonde, Douglas), para 75.

[82] Georgios Petrochilos: Attribution, in Katia Yannaca-Small (Ed.): *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, OUP 2010,287-322. at pp. 316-321.

[83] Georgios Petrochilos: Bosh International, Inc and B&P Ltd Foreign Investment Enterprise v. Ukraine - When is Conduct by a University Attributable to the State, 28 (2) ICSID Review (2013) pp. 262-272. DOI: https://doi.org/10.1093/icsidreview/sit018

[84] For further details, see *Bosh International, Inc and B & P Ltd Foreign Investments Enterprise v. Ukraine,* ICSID Case No. ARB/08/11, Award, 25 October 2012, (Griffith, Sands, McRae), pp. 163-184.

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whom Toto had concluded a private law contract.[85] Kaj Hobér, explicitly defends the applicability of ARSIWA in such cases on the basis of a policy argument, namely, that otherwise states would avoid liability.[86]

Other authors, such as Feit[87] and Hamamoto[88] argue, in contrast, that although international law govern private contracts, these rules are not the rules of ARSIWA. Recognising that the issues under consideration in the private contract (ie right of representation, jurisdiction) have nothing to do with state responsibility, these authors abandon the general applicability of ARSIWA's attribution standards and propose the application of other rules of international law, such as the general principle of the right of representation[89] or apparent authority.[90]

ARSIWA seems to support the correctness of the fourth view, also held by James Crawford, which supposes a sharp distinction between international treaties and private contracts, and between the laws that govern them. According to Article 3: *"International law shall prevail in determining whether an act of a State is an internationally wrongful act. This qualification shall not be affected if the same act is qualified as lawful by internal law."*[91]

The present author finds the above argument of the International Law Commission convincing. While it is true that compliance with domestic law is still relevant to the assessment of international responsibility, this is only if international law itself makes it so, for example, by making compliance with domestic law the international standard itself, or at least an element of it. Particularly in the field of human rights law, the content and proper application of domestic law may be relevant, as domestic law norms may appear as facts in the assessment of international minimum standards.[92]

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[85] Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12 (Feliciani, Moghaizel, van Houtte), Decision on Jurisdiction, 11 September 2009, paras 42-60.
[86] Kaj Hobér: State responsibility and Attribution, in Peter T Muchlinski, Federico Ortino, Christoph Schreuer (Eds.): *The Oxford Handbook of Investment Law,* OUP, 2008,549-583. at p. 582. DOI: https://doi.org/10.1093/oxfordhb/9780199231386.013.0014
[87] Michael Feit, Attribution and the Umbrella Clause - Is there a Way out of the Deadlock?, 21 *Minnesota Journal of International Law* (2012), 21-41. at pp. 38-40.
[88] http://www.kluwerarbitration.com/CommonUI/document.aspx?id=KLI-KA-Kinnear-2015-Ch03 Shotaro Hamamoto: Parties to the "Obligations" in the Obligations Observance ("Umbrella") Clause, 30(2) *ICSID Review* (2015), 449-464. at pp. 459-460. DOI: https://doi.org/10.1093/icsidreview/siv002
[89] Hamamoto argues for the right of representation of states, p. 463.
[90] Feit: Attribution and the Umbrella Clause, p. 38.
[91] ARSIWA Article 3 (Classification of State action as an international offence).
[92] ARSIWA Commentary, Article 3 (7).

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The position of the International Law Commission is based on the consistent jurisprudence of the International Court of Justice for ninety years. The Permanent Court of International Justice, in the case of the Serbia loans case, stated in 1929, when examining the applicability of French law: *"All treaties not concluded between States as subjects of international law are governed by the internal law of a State. And the question as to which law this is belongs to the field of private international law, as this branch of law is now called, or to the doctrine of conflict of laws."*[93]

In 1989, the International Court of Justice found in principle that the fact that an act of public authority is unlawful under domestic law does not necessarily mean that it is unlawful under international law. A national court's decision on unlawfulness may be relevant, for example, for assessing the arbitrariness of the act, but unlawfulness does not in itself give rise to arbitrariness. This also means that identifying illegality under domestic law with the international legal standard of arbitrariness would completely hollow out the latter of its independent content. Therefore, the mere fact that a domestic court has qualified an act as arbitrary under national law will not make it arbitrary under international law. Nevertheless, such an evaluation by domestic fora may of course be relevant in the international law assessment of the act.[94]

In other words, just as an international breach is distinct from a breach of domestic law,[95] so too is a breach of an investment treaty and a breach of a private contract. Consequently, a State can breach an investment treaty without breaching a private law contract (e.g. a concession), and *vice versa*, it can breach its private law contract without breaching the applicable investment treaty.[96] In other words, these are two independent legal issues, which must be decided in separate inquiries, each under its own applicable law. For instance, the State will be liable under rules of international law if it breached its international obligations. At the same time, the State will not be liable for a breach of a private law contract if the violation was committed against the investor by an entity which, under the domestic law of that State, had separate legal personality and was itself responsible for the performance of its contracts.[97]

[93] Payment of Various Serbian Loans Issued in France (Fr. v. Yugo.), 1929 P.C.I.J. (ser. A) No. 20 (July 12), 41.
[94] Elettronica Sicula case, para 124.
[95] In the words of the International Court of Justice, "Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision." Elettronica Sicula S.P.A. (ELSI), Judgment, I.C.J. Reports 1989, p. 15., para 73.
[96] See, e.g., Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 (Fortier, Crawford, Rozas), para 95.
[97] Vivendi v. Argentina (Annulment), para 96.

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Kjos proposes a three-step analysis to decide this issue, which can be reconstructed as follows:[98]

1. As the umbrella clause is a provision of the Investment Protection Convention, it must be interpreted in accordance with the rules of international law, namely, Articles 31-32 of the VCLT. Each convention, and therefore each umbrella clause, is different, so their scope must be decided on a case-by-case basis in accordance with the rules of interpretation of international law to clarify what is meant by the terms such as "commitment" or "undertakings".

2. The obligations of the parties and their possible breach will most likely be determined by the host State's internal law. In the case of a private contract, almost certainly, in the case of a non-contractual claim, most probably. In other words, the umbrella clause does not transform a private contract into an international treaty, nor does it internationalise it.

3. If a breach of a private contract is found based on the applicable domestic law, it also entails a breach of the umbrella clause. This gives the investor an international remedy: the Panel applies international law to determine the responsibility of the State and its consequences under international law.

That is, if an investor, in pursuing a claim under international law, inferring a breach from a breach of a private law treaty, the finding of such a breach will be based on national law.[99] The case of Impregilo v. Pakistan[100] well illustrates the importance of this in investment disputes. The Claimant sought to invoke the umbrella clause in Article 11 of the Swiss-Pakistan BIT on the basis of the most favoured nation principle under the Italian-Pakistan BIT.[101] However, Pakistan did not enter into a private law contract with the investor on its own behalf, but on behalf of a separate legal entity (Pakistan Water and Power Development Authority) and, as a consequence, the Panel concluded that Pakistan, not being a party to the private law contract, could not have breached the private law obligation that could activate the umbrella clause.[102]

[98] Kjos, pp. 248-253.
[99] Kjos p. 252.
[100] Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3 (Guillaume, Cremades, Landau) 22 April 2005.
[101] Impregilo v. Pakistan, para 220.
[102] Impregilo v. Pakistan, para 223.

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In Vivendi v. Argentina, the arbitral tribunal finally made the legal effects of a standard umbrella clause clear. The stressed that the French-Argentine BIT and the breach of a private contract are two separate issues. Both issues must be considered separately under their respective applicable laws: international law in the case of the BIT and Argentine law in the case of the concession contract. Accordingly, the interpretation of the BIT is governed by the rules of interpretation of international law, which may result in Argentina being held liable for a breach of its obligations under international law. By contrast, Argentina will not be liable for a private law contract concluded by the Province of Tucumán, which is a separate legal entity under its domestic law and is itself responsible for its own contractual obligations.[103]

The above distinction is of great importance irrespective of the distinction between international law and domestic law. In fact, the concept of attribution is an international law doctrine, while in domestic law there may be similar concepts, but they usually apply to different matters. In contrast to international law, which starts from the concept of the unity of the state, the internal law of states focuses primarily on how powers and responsibilities are divided between the different organs of the state. A treaty on investment protection under international law must be clearly distinguishable from private law contracts, which will be governed by the domestic law of the States.[104] The questions of liability under these contracts have nothing to do with questions of jurisdiction under international law.[105] In other words, it is wrong to think that because a public body is a party to a private law contract, the State will be liable for any breach of contract. This depends solely on what the law governing the contract (the State's own internal law) says about this breach. Typically, only the contracting entity will be liable, as a separate legal entity capable of contracting. Consequently, the rules of attribution have nothing to do with liability for breach of contract.[106]

[103] Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 (Fortier, Crawford, Rozas), para. 96. See also CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Decision on Annulment, 25 September 2007 (Guillaume, Elaraby, Crawford), para 95.
[104] See in particular Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration,* OUP, 2013, 171-176. DOI: http://doi.org/10.1093/acprof:oso/9780199656950.001.0001 For non-contractual claims, the question of applicable law is much more mixed. For more information, see Kjos, pp. 176-180.
[105] Bayindir, paras 111-139. See also Crawford-Mertensköttter: The Use of the ILC's Attribution Rules in Investment Arbitration.
[106] Crawford: Treaty and Contract in Investment Arbitration, p. 134.

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2.2.3. Application of the principle of *estoppel* in investment arbitration

The attribution tests of ARSIWA have also been considered for the purpose of establishing *estoppel* on the basis of statements that are attributable to the State. The well-known general principle of *estoppel* in international law derives from the principle of *legitimate expectation*, which is also found in Anglo-Saxon legal systems *(estoppel)* and continental legal systems *(venire factum contra proprium)*.[107] Because of the legitimate expectations of other states, the principle of *estoppel is* also closely related to the principle of good faith in international law.[108]

Under the principle of *estoppel*, a State may not dispute a fact or a situation to which it previously consented, by appropriate representation, in an *explicit* or *implicit* way, in a clear and unequivocal manner, provided that the other State has relied on such a consent.[109] From an attributability point of view, the representation requirement may be relevant. In Duke Energy v. Peru, for instance, the plaintiff argued that in interpreting the principle of estoppel,[110] the rules of ARSIWA should govern the question of attribution to the State.[111] The arbitral tribunal correctly pointed out, however, that since these are two substantively different legal contexts, the attribution rules of ARSIWA could not be applied in a case, which does not concern the question of establishing State responsibility.[112]

The functions of these two legal regimes differ significantly. While the purpose of State responsibility is to hold States responsible for their internationally wrongful conduct, the purpose of *estoppel* is to identify the conduct of a State on which another State may

[107] Thomas Cottier, Jörg Paul Müller: Estoppel. In Rüdiger Wolfrum (Ed.): *Max Planck Encyclopedia of Public International Law,* 2007. DOI: https://doi.org/10.1093/law:epil/9780199231690/e1401
[108] Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, 1st C.J. Reports 1984, p. 246, para. 130. For more, see Bin Cheng: General Principles of Law as Applied by International Courts and Tribunals, CUP, 2006, p. 144.
[109] Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 1.5 June 1962: I.C. J. Reports 1962, 6. pp. 32-33. For details of the principle, see Judge Spender's dissenting opinion, Case concerning the Temple of Preah Vihear, pp. 143-144.
[110] Can Peru be held responsible for the declaration by the National Tax Administration Superintendency (SUNAT) that it has breached its commitment to tax consolidation.
[111] "Claimant contends that SUNAT's alleged autonomy within the Peruvian legal system does not mean that it is distinct, for all purposes, from the rest of the Government. The International Law Commission (ILC) Articles on State Responsibility make it absolutely unambiguous that SUNAT is as much a part of the same Government as, for example, the Minister of Energy and Mines." Duke Energy International Peru Investments Ltd. v. Peru, ICSID Case No. ARB/03/28, Award and Partial Dissent, (Fortier, Tawil, Nikken) 25 July 2008, para 235.
[112] Duke Energy v. Peru, para 242.

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legitimately rely.[113] Furthermore, whereas in the case of State responsibility, the wrongful conduct is the starting point for examining the question of attributability, in the case of *estoppel*, the finding of wrongfulness may be a potential result of the inquiry.[114]

In these two legal regimes, there is also an important difference between the basis of the attribution. In the case of State responsibility, the mere fact that the person engaging in the wrongful conduct is a *de jure* organ of the state organisation, even if committed *ultra vires* acts, establishes the responsibility of the State.[115] Whereas in the case of *estoppel*, only those parties can invoke this doctrine, who had a legitimate expectation that the other person was representing the State, and therefore the scope of relevant actors is significantly narrower compared to a state responsibility scenario, moreover, the *ultra vires* rule also do not apply in the context of estoppel.[116]

For the above reasons, the arbitral tribunal in Duke Energy v. Peru did not apply rules of ARSIWA in the context of estoppel, instead, it relied on the rules of representation governing the conclusion of international conventions. Among these rules, Article 46 of VCLT is of paramount importance, which governs the legal significance of internal legal provisions on the power to conclude contracts, as follows:

"*1. A State may not rely on the fact that it has recognised a contract as binding upon it in breach of a rule of internal law relating to the competence to conclude contracts in order to invalidate that recognition, unless the breach was manifest and concerned a rule of internal law of fundamental importance. 2. the infringement would be obvious to the eye if it were objectively apparent to any State acting in good faith and in accordance with normal practice in the matter.*"[117]

The tribunal therefore correctly concluded that the relevant test in the context of *estoppel* was whether the party relying on the declaration could have done so, "in accordance with normal practice and good faith".[118]

[113] Duke Energy v. Peru, paras 244-245.
[114] Duke Energy v. Peru, para 243.
[115] See e.g. ADF Group Inc. v. United States of America, ICSID Case No. ARB(AF)/00/1, Award (9 January 2003) (Feliciano, de Mestral, Lamm), para. 190; Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction (6 July 2007) (Fortier, Orrego Vicuña, Watts), para 190; Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, 12 October 2005 (Böckstiegel, Lever, Dupuy), para 81.
[116] Duke Energy v. Peru, 247, paras 249-250.
[117] Text laid down by Decree-Law No 12 of 1987 on the promulgation of the Treaty on the Law of Treaties, signed at Vienna on 23 May 1969 (published 15.IX.1987).
[118] Duke Energy v. Peru, para 249.

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2.2.4. Corruption and attribution in investment disputes

Issues of corruption also give rise to many misunderstandings concerning the issue of attribution. For example, in a case where a party wins a tender by bribery and the validity of the resulting contract is called into question because of corruption, the rules of international law will not apply.

The applicable law in such cases will be the domestic law, even if corruption will have State responsibility implications. The loss of a tender due to corruption on the part of an investor may raise questions of state responsibility and thus, that of confiscation, but this must be clearly distinguished from the (national law) question of whether the contract was concluded by means of bribery and, if so, what the consequences are under domestic law.[119]

In WDF v. Kenya,[120] the plaintiff won a 10+10-year concession to build and operate duty free shops at Nairobi and Mombassa international airports. The Kenyan authorities launched a fraud and corruption investigation into allegations that the plaintiff supported the election campaign of the Kenyan head of state in exchange for the contract. The proceedings ultimately led to the expropriation of the plaintiff's investment, which was unlawful according to the plaintiff.[121] The panel rejected the plaintiff's claim on the basis that neither English nor Kenyan law imputed the conduct of the Kenyan President to Kenya in any meaningful sense and that, given the legal context of the case, the attribution tests of ARSIWA did not apply.[122]

The arbitral tribunal in *Hamester v. Ghana* also made it clear that investments that violate international and domestic law principles of good faith are not protected. In particular, investments that were made by deception, fraud or corruption in violation of the law of the host state are not worthy of protection.[123] Irrespective of whether the conduct of the persons involved in such acts could be attributed to a State under ARSIWA, the rules of ARSIWA do not apply in such a case given that the State was not in breach of international law but of domestic law.

[119] James Crawford: Treaty and Contract in Investment Arbitration, pp. 134-135.
[120] World Duty Free Company Limited v. The Republic of Kenya, ICSID Case No. ARB/00/7, (Guillaume, Rogers, Veeder), Award, 6 October 2006.
[121] WDF. Kenya, para 62-79.
[122] WDF v. Kenya, paras 185-187.
[123] Hamester v. Ghana, para 123.

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3. Assessment of attribution concepts in arbitration – halfway between chaos and dogmatic order

The above overview suggests that arbitral tribunals are becoming more confident in delimiting what constitutes an attribution scenario under ARSIWA, which entails applying Articles 4-11, and what constitutes an attribution issue outside the context of State responsibility.

Nevertheless, some hesitation and a "playing it safe" attitude still manifests in the case practice.
As to the potential causes of the apparent conceptual chaos, which surrounds the concept of attribution in the arbitral practice, this analysis suggests a combination of a number of partly independent factors.

The most important are:

- diversity of dispute resolution fora;
- diversity of investment protection instruments;
- diversity of applicable laws (domestic, international);
- the language of investment treaties which are inevitably unclear and not standardised;
- the diversity of expertise required, with many areas of law involved;
- the different professional background and legal cultures of arbitrators;
- adjudicators' practical considerations, which motivates them e.g. to hide their professional opinions in order not to exclude themselves from future disputes.

Overall, the tribunals' adjudicatory inquiry regarding attribution tests presents a mixed picture from a doctrinal point of view. On the one hand, the burgeoning field of investment arbitration provides an excellent arena for identifying specific issues of attribution, which emphatically include legal scenarios outside the context of establishing international responsibility of States. On the other hand, certain awards contribute to the doctrinal chaos in the field of attribution, while others promote a more fine-grained and nuanced interpretation of ARSIWA's admission rules. The remaining inconsistencies notwithstanding, there is a gradually improving trend in the case practice of arbitral tribunals towards greater doctrinal clarity on the field of attribution.

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