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Thesis title:

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Università Commerciale Luigi Bocconi
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The Colour of Authority: Attribution Issues in International Law and Arbitration

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ABSTRACT

This dissertation aims to clarify, critically discuss and propose solutions for the application of international rules of "attribution" (or attributability, imputation, imputability) of conducts (acts and omissions) to States in the domains of public international law, international investment law and international business law.

Chapter I offers a reconstruction of the definition of attribution for the purposes of State responsibility for internationally wrongful acts, drawing from the history and *travaux* of the process of codification of the international law of State responsibility that resulted in the adoption by the International Law Commission in 2001 of the text of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). This part emphasises the preliminary operation of rules of attributability in comparison to the other "secondary" rules of international law. In addition, it discusses the threshold principle of the supremacy of international law in order to convey the autonomous dimension of imputability issues in international law vis-à-vis municipal law. Last, it illustrates the distinction between issues of attribution, on one hand, and issues of jurisdiction and of State immunity, on the other hand.

Chapter II illustrates the application of attribution rules in public international law, as resulting from the early arbitral practice, the decisions of the World Court and the awards of the Iran-US Claims Settlement Tribunal, and eventually codified by ARSIWA. Accordingly, it explains the tests for imputability of conducts of State organs (*de jure* and *de facto*) *ex* ARISIWA Article 4, State 'entities' *ex* ARSIWA Article 5, and individuals *ex* ARSIWA Article 8. The rule of attribution of acts *ultra vires ex* ARSIWA Article 7 is also analysed, which applies to the conducts of State organs and State 'entities', but not of (private) individuals.

Chapter III elucidates the application of attribution rules by international investment Tribunals. This Chapter is similar in structure to Chapter II, which is a consequence of the vicinity of international investment law to public international law with regard to the topic of imputation of conducts to a Party. In addition, this part on attribution issues in Investor-State Dispute Settlement (ISDS) embarks on further critical discussion, chiefly on the dialecticts between *lex generalis* (customary international law) and *lex specialis* (international investment law), and on the distinction between treaty claims and contract claims for the purposes of the operation of umbrella clauses.

Chapter IV is less 'conventional', in that it aims to clarify issues of "attribution" in international business litigation between States and State-owned entities (SOEs), on one side, and foreign businesses, on the other side. Accordingly, the analysis is based on awards rendered in the context of international commercial arbitration and on domestic courts' decisions. In this part, "attribution" is intended in a-technical fashion in relation to various issues, such as the extension of the subjective scope of a dispute resolution agreement or of contractual undertakings from a parastatal entity to its establishing State, or the possibility to enforce an award rendered against the State on the assets of its SOEs (*reverse attribution*), and viceversa.

One of the central messages of this dissertation is the emphasis on the logical, technical and 'objective' tenets of the international rules of attribution of acts and omissions to States. Such a peculiar nature is held to justify their role and influence in the treatment ('*selon le droit international*') of the 'State' (*i.e.*, its organs, instrumentalities, and 'private' agents) quite irrespective of the design of a given dispute settlement system or of the proper law applicable to the objective element of liability, so as to possibly ensure coherent resolutions of attribution, immunity and, eventually, enforcement issues by different adjudicators of issues of international law.

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Milan, 31 January 2016

Carlo de Stefano

'If a trader is always a trader, a State remains a State'

Lord Wilbeforce
I Congreso del Partido
[1983] 1 AC 244

INTRODUCTION

A STUDY ON ATTRIBUTION

This treatise proceeds from a comprehensive observation and verification of the persistent role of States as canonical sources of *authority*, which may be ultimately defined as their prerogative to unilaterally, but *legitimately*, compel the behaviour of natural and legal persons.[1] As observed by Michael Reisman, this dimension of legitimacy distinguishes the authority of the State from the *power* possibly exercised by human beings and other economic and social organizations.[2] This authority justifies the character of States as being '*full*' subjects of international law ('*the State remains the central building block of the international legal order*').[3] Hence, the scientific interest in a study devoted to the elucidation of the international rules of *attribution*, which is the set of tests and principles allowing the identification of such conducts of the State being susceptible to trigger its international responsibility. On one side, an abstract concept of 'State' inevitably orients the interpreter in the application of the rules of attribution. On the other side, the idea of 'State' itsef is influenced by the functioning of attribution, which ultimately qualifies given acts or

[1] Joseph E Stiglitz *et al* (Arnold Heertje ed), *The Economic Role of the State* (Basil Blackwell, in association with Bank Insinger de Beaufort NV 1989) 21.
[2] W Michael Reisman, *Nullity and Revision. The Review and Enforcement of International Judgments and Awards* (Yale University Press 1971) 4-6.
[3] Christian Tomuschat, 'In the Twilight Zones of the State' in Isabelle Buffard, James Crawford, Alain Pellet and Stephan Wittich (eds), *International Law Between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff Publishers 2008) 479.

omissions as being imputable or not to the sovereign. Accordingly, the illustration of the international rules of attribution presumes a constructivist coil, where the law is but an element of a broader scenario informed by socio-political, historical and economic factors.[4] Nevertheless, the definition of 'the State according to international law' ('*l'Etat selon le droit international*')[5] is central in order to understand the contemporary world order, which – notwithstanding recent phenomena of administrative decentralization, functional externalization of nation-wide public services, and massive (although at present declining) privatization (in one word: subsidiarity)[6] – continues to be governed in essence by the (international) public law tenets elaborated in connection with the liberal revolutions of the XVIII century.[7] In particular, the principles of the institutional, territorial and functional unity of the State and of the irresponsibility of the sovereign for the conducts of 'private' individuals still remain as fundamental pillars of the law of State responsibility for international delinquencies, notwithstanding '*transition from the 'night-watchman' state to*

[4] Wolfgang G Friedmann, 'The Growth of State Control over the Individual, and its Effect upon the Rules of International State Responsibility' (1938) 19 British Year Book of International Law 118; Wolfgang G Friedmann, 'Some Impacts of Social Organization on International Law' (1956) 50 American Journal of International Law 475, 481: '*No theoretical distinction can provide certainty. It can only provide guidance for individual decisions.*'; Wolfgang G Friedmann, *The Changing Structure of International Law* (Stevens & Sons 1964).

[5] Mathias Forteau, 'L'État selon le droit international: une figure à géométrie variable?' (2007) 111 Revue Générale de Droit International Public 737.

[6] Rosalyn Higgins, 'The Concept of "The State": Variable Geometry and Dualist Perceptions' in Laurence Boisson de Chazournes and Vera Gowland-Debbas (eds), *The International Legal System in Quest of Equity and Universality. Liber Amicorum Georges Abi-Saab* (Martinus Nijhoff Publishers 2001) 547; Martti Koskenniemi, 'The Future of Statehood' (1991) 32 Harvard International Law Journal 397; Christoph H Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?' (1993) 4 European Journal of International Law 447, 450; Anne van Aaken, 'Blurring Boundaries between Sovereign Acts and Commercial Activities: A Functional View on Regulatory Immunity and Immunity from Execution' in Anne Peters, Evelyne Lagrange, Stefan Oeter and Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Brill 2015) 131; Joel P Trachtman, 'L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity' (1992) 33 Harvard International Law Journal 459, 462; Sébastien Miroudot and Alexandros Ragoussis, 'Actors in the International Investment Scenario: Objectives, Performance and Advantages of Affiliates of State-Owned Enterprises and Sovereign Wealth Funds' in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy: World Trade Forum* (Cambridge University Press 2013) 51; Pier Angelo Toninelli, 'The Rise and Fall of Public Enterprise. The Framework' in Pier Angelo Toninelli (ed), *The Rise and Fall of State-Owned Enterprise in the Western World* (Cambridge University Press 2000) 3.

[7] *See* Benjamin Constant, *De la liberté des Anciens comparée à celle des Modernes*, Athénée Royal de Paris, 1819.

one actively moulding the economic and social life of the nation'.[8] This relative 'immobility' of the architectural structure of the international legal order should not be considered as an element of backwardness of international law ('*statolâtrie*', as recalled by Hélène Ruiz Fabri).[9] On the contrary, the 'classic' rules of State responsibility for internationally wrongful acts represent an effective instrument to foster the accountability of sovereigns in their cross-border relationships, which should not be undermined and diminished by the transformation of the political and economic systems at the national and transnational level (at least in the absence of an effective equivalent alternative for legal redress). At the same time, the unprecedented evolution of the international society faces the international jurist with the challenge to ensure the answerability of States in relation to the entirety of *their* conducts, which are identified upon application of the international rules of attribution. While certain cases may appear to be cristal-clear with regard to the issue of attribution (for instance, the physical apprehension of an alien by police forces), other cases may beget more reasoned analysis as to the conclusion of a given conduct as being an 'act of the State' (for instance, the issue by regulatory bodies of guidelines or codes of conduct to the private sector). Thus, the international rules of attribution assist the interpreter in the normative operation to *bridge* given acts and omissions to the person of the State, whereas 'sensory' skills may fail to capture the circumstance of the involvement of the sovereign. Accordingly, the tests of attribution under customary international law disclose a normative *synaesthesia* of the various manifestations of the phenomenology of State authority, with a view to ensure effective enforcement of the international regime of State responsibility.

[8] Wolfgang G Friedmann, *Law in a Changing Society* (Stevens & Sons, 2° edn 1972) 475.
[9] Hélène Ruiz Fabri, 'Genèse et disparition de l'État à l'époque contemporaine' (1992) 38 Annuaire Français de Droit International 153.

A question that may arise is whether a (new) study on attribution issues in international law and arbitration may be helpful to the international community and scholarship, or just represents a '*tedious*' doctrinal exercise.[10] Scholars have already provided some answers to this question. Starke has justified its seminal article on imputability in international delinquencies focusing on terminological issues for the sake of a more scientific application of attribution doctrines:

> The main point intended to be made is simply that a knowledge of the doctrine of imputability clarifies both the rules and the terminology, and leads to greater exactness in their application.[11]

Gordon Christenson has emphasised the role of attribution by adapting his contribution to the dichotomy, on one side, and the interaction, on the other side, between "primary" and "secondary" rules of international law:

> Not much is new in the rules of who acts on behalf of a State as outlined by writers and codified in drafts. The commentary on various draft articles on attribution is wearisome and seems mechanical if not doctrinaire. Indeed, the remarkable acquiescence by nations in those rules suggests plodding dullness, lack of either novelty or controversy. Far more exciting are the substantive norms that make up the core of State Responsibility. When viewed as part of a comprehensive process, however, the principles of attribution assume broad theoretical importance, for they are the connection between a wide range of international obligations and conduct by those whose actions constitute acts of the State. A State is responsible to other States to ensure that its conduct meets these obligations. It is essential, then, if States are to be held accountable for wrongful conduct, that the international community define what action properly is attributable to them.[12]

The present study wishes to prolonge the previous doctrinal efforts to explain the nature and functioning of attribution rules with the awareness that scientific elucidation is still demanded. This dissertation investigates the application of imputability rules in the province of public international law disputes, to the inclusion of State-to-State litigation and investor-State arbitration. With regard to 'classic' inter-state dispute settlement, critical problems are still

[10] Gordon A Christenson, 'Attributing Conduct to the State: Is Anything New?' (1990) 84 American Society of International Law Proceedings 51.
[11] J G Starke, 'Imputability in International Delinquencies' (1938) 19 British Year Book of International Law 104.
[12] Gordon A Christenson, 'The Doctrine of Attribution in State Responsibility' in Richard B Lillich (ed), *International Law of State Responsibility for Injuries to Aliens* (University Press of Virginia 1983) 321.

outstanding in relation to the attribution of the acts or omissions of 'independent' State organs exercising functions of a regulatory or administrative nature (such as central banks and independent authorities), to the definition of *governmental authority* for the purposes of imputation of the conducts of parastatal entities, and to the determination of the thresholds of State 'control' either on *de facto* organs, on one side, or on 'private' individuals, on the other side.[13] With regard to investor-State arbitration, it matters to clarify the operation of the dialecticts between *lex generalis* (customary international law) and *lex specialis* (international investment treaties) in relation to attribution issues. In particular, it will be determined to what extent international investment agreements (IIAs) and Tribunals deviate or *may* deviate from customary international law rules of imputability.[14] In addition, this dissertation also investigates the treatment of State organs and State instrumentalities in international commercial arbitration or international business disputes involving a public and a private party before municipal courts. To this extent, it will be studied whether a consistent adoption of criteria of "attribution" under public international law, on one side, and private law and private international law, on the other side, is practicable for the purposes of review of the activities of public bodies in international litigation.[15] One of the central messages of this treatise is the emphasis on the logical, technical and 'objective' features of the international rules of attribution of acts and omissions to States. This peculiar nature is held to justify their role and influence in the treatment of the 'State' (*i.e.*, its organs, instrumentalities, or even 'private' agents) quite irrespective of the proper law applicable to the objective element of liability and of the structure of a given dispute settlement system, so as to possibly ensure coherent resolutions of attribution, immunity and, eventually, enforcement issues by different

[13] *See infra* Chapter II.
[14] *See infra* Chapter III.
[15] *See infra* Chapter IV.

adjudicators. In this respect, this treatise may be seen as a hommage to the Italian tradition of international law (Dionisio Anzilotti, Roberto Ago, Giorgio Sacerdoti, and many others), which has historically addressed issues of public international law and of conflict-of-laws in a coordinated fashion with an emphasis on the potential for convergent legal solutions rather than strictly and imperviously separate analysis.[16]

[16] Roberto Ago, 'The European Tradition in International Law: Dionisio Anzilotti. Rencontres avec Anzilotti' (1992) 3 European Journal of International Law 92; Giorgio Sacerdoti, *I contratti tra Stati e stranieri nel diritto internazionale* (Giuffrè 1972).

CHAPTER I

THE MEANING OF ATTRIBUTION

1. Notion

'*[I]mputability […] is one of the most delicate aspects of the entire theory of responsibility.*'[17] As corporate entities, States do not possess as such physical personification,[18] but '*can act only by and through their agents and representatives*', namely such natural or juridical persons acting *on their behalf*.[19] The body of rules of attribution (attributability, imputation or imputability) functions as a legal *bridge* (a *link*) between the State and the conducts being susceptible to trigger its international responsibility, so as to complete the physiologic – not normative – gap between the acts and omissions of State 'agents' and the State itself. Therefore, attribution stands as a basic and indispensable constituent element of the law of

[17] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Separate Opinion of Judge Ago, 27 June 1986, para 19, ICJ Reports 1986, 181, 190.

[18] Hans Kelsen, *(The) Pure Theory of Law* (University of California Press, 2° edn 1960, translated 1967) 290-312; Dionisio Anzilotti, *Corso di diritto internazionale, Volume Primo: Introduzione – Teorie generali* (Athenaeum, 3° edn 1928) 418; Mario Marinoni, *La responsabilità degli stati per gli atti dei loro rappresentanti secondo il diritto internazionale* (Athenaeum 1913) 33; Tomaso Perassi, *Lezioni di diritto internazionale,* Parte Prima (Edizioni Italiane 1942) 97; Theodor Meron, 'International Responsibility of States for Unauthorized Acts of Their Officials' (1957) 33 British Year Book of International Law 85, 86: '*Imputability, which is the attribution of an act of an official to the State, is necessitated by the fact that all acts are those of individuals, while the international consequences of such acts - at least according to traditional international law - are imposed on the State which is the subject of rights and obligations*.'; Luigi Condorelli and Claus Kress, 'The Rules of Attribution: General Considerations' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 237; Ian Brownlie, 'State Responsibility and the International Court of Justice' in Malgosia Fitzmaurice and Dan Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing 2004) 11, 12; Christian Tomuschat, 'Attribution of International Responsibility: Direction and Control' in Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013) 7.

[19] *German Settlers in Poland,* Advisory Opinion No 6, 10 September 1923, PCIJ Series B No 6, 22.

responsibility of States for internationally wrongful acts.[20] Attribution represents the subjective element for the configuration of State responsibility.[21] At the same time, it does not represent a state of mind or, more precisely, a psychological element, such as negligence or malice.[22] Nor it is to be assimilated to principles governing the link of causation between an act of an agent of the State and a given injury.[23] It rather consists in a variety of tests, whose

[20] Dionisio Anzilotti, *Corso di diritto internazionale, Volume Primo: Introduzione – Teorie generali* (Athenaeum, 3° edn 1928) 418; C F Amerasinghe, 'Imputability in the Law of State Responsibility for Injuries to Aliens' (1966) 22 Revue Égyptienne de Droit International 91, 96; James Crawford, *State Responsibility. The General Part* (Cambridge University Press 2013) 113; David D Caron, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules of State Responsibility' in Richard B Lillich and Daniel B Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational Publishers, Inc 1998) 109, 110, 127-128: '*The rules of attribution are thus a set of trans-substantive rules that delineate one of the potential boundaries of State responsibility. The rules seek to define when the act complained of should be regarded as an act of the State.*'; Luigi Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984) 189 Recueil des Cours 9, 24; Claus Kress, 'L'organe de facto en droit international public' (2001) 105 Revue Générale de Droit International Public 93, 95; Rosalyn Higgins, 'Issues of State Responsibility before the International Court of Justice' in Malgosia Fitzmaurice and Dan Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing 2004) 1, 2; Mathias Forteau, 'L'État selon le droit international: une figure à géométrie variable?' (2007) 111 Revue Générale de Droit International Public 737, 738; Rüdiger Wolfrum, 'State Responsibility for Private Actors: an Old Problem of Renewed Relevance' in Maurizio Ragazzi (ed), *International Responsibility Today. Essays in Memory of Oscar Schachter* (Martinus Nijhoff Publishers 2005) 423, 424; Jörn Griebel and Milan Plücken, 'New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in *Bosnia v. Serbia*' (2008) 21 Leiden Journal of International Law 601, 602-603.

[21] Pierre-Marie Dupuy, 'Quarante ans de codification du droit de la responsabilité internationale des États: un bilan' (2003) 107 Revue Génerale de Droit International Public 305, 316-319.

[22] Gaetano Arangio-Ruiz, 'State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance' in *Le droit international au service de la paix, de la justice et du développement. Mélanges Michel Virally* (Éditions A Pedone 1991) 25; Hazel Fox, 'The International Court of Justice's Treatment of Acts of the State and in Particular the Attribution of Acts of Individuals to the State' in Nisuke Ando, Edward McWhinney and Rüdiger Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda*, Volume 1 (Kluwer Law International 2002) 147, 155-156: '*The conclusion must be that even when an organ acts, the attribution of its act depends on the proof of knowledge and consent on the part of the State, the precise nature of these elements being largely determined by the content of the primary obligation*.'

[23] Dionisio Anzilotti, *Corso di diritto internazionale, Volume Primo: Introduzione – Teorie generali* (Athenaeum, 3° edn 1928) 228. '*L'imputazione giuridica si distingue così nettamente dal rapporto di causalità; un fatto è giuridicamente proprio di un soggetto, non perché prodotto o voluto da questo, nel senso che tali parole avrebbero nella fisiologia o nella psicologia, ma perché la norma glielo attribuisce*'. A certain hesitation on this specific point is found in Ian Brownlie, *System of the Law of Nations. State Responsibility. Part I* (Clarendon Press 1983) 133, who refers to imputability as '*causal connection between the corporate entity of the state and the harm done.*'; Hildebrando Accioly, 'Principes généraux de la responsabilité internationale d'après la doctrine et la jurisprudence' (1959) 96 Recueil des Cours 349, 358: '*Il s'agit ici de la situation connue comme* lien de causalité*, qui établit un rapport direct, de cause à effet, entre le dommage réel et l'acte illicite, ou plutôt entre le manquement à une obligation et l'Etat*'. *See also* League of Nations, Committee of Experts for the Progressive Codification of International Law, Second Session, 12-29 January 1926, Annex to Questionnaire No 4, 'Responsibility of States for Damage Done in Their Territories to the Person or Property of Foreigners', Report of the Sub-Committee (Mr Gustavo Guerrero, Rapporteur), Conclusions, para 3, League of Nations publication, V.Legal, 1926.V.3, document C.46.M.23.1926.V and League of Nations publication, V.Legal,

operative result is the imputation of given acts to the person of the State. In this respect, subjective element may be interpreted as meaning "personal" or as comprising the subjective side of the act of the State.

As provided by Article 2 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA),[24] attribution is a requisite (or pre-requisite) for the application of the regime of State responsibility for internationally wrongful acts:

> *Article 2*
>
> *Elements of an internationally wrongful act of a State*
>
> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> (a) is attributable to the State under international law; and
>
> (b) constitutes a breach of an international obligation of the State.[25]

1926.V.11, document C.96.M.47.1926.V, (1926) 20 American Journal of International Law Special Supplement 176, 201-202: '*A State is responsible for damage incurred by a foreigner attributable to an act contrary to international law or to the omission of an act which the State was bound under international law to perform*'.

[24] Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), Annex to A/RES/56/83, 12 December 2001.

[25] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (ARSIWA Commentaries), in Report of the International Law Commission on the Work of its Fifty-Third Session, 23 April, 1 June, 2 July and 10 August 2001, document A/56/10, Yearbook of the International Law Commission, 2001, Volume II (Part Two), 34, document A/CN.4/SER.A/2001/Add.1 (Part 2). *Cf* Dionisio Anzilotti, *Corso di diritto internazionale, Volume Primo: Introduzione – Teorie generali* (Athenaeum, 3° edn 1928) 418: '*Perché si abbia un fatto illecito internazionale occorre dunque: A) Che si tratti di un comportamento di uno Stato, ossia imputabile ad uno Stato; B) che il comportamento sia diverso da quello imposto dalla norma*'. It is evident that *damage* is not per se an indefeasable constitutive element of an internationally wrongful act. *Cf* Brigitte Stern, 'Et si on utilisait la notion de préjudice juridique? Retour sur une notion délaissée à l'occasion de la fin des travaux de la C.D.I. sur la responsabilité des États' (2001) 47 Annuaire Français de Droit International 3. This is clearly spelt out in the investment case of *Total SA v The Argentine Republic*, ICSID Case No ARB/04/01, Decision on Objections to Jurisdiction, 25 August 2006, para 89, fn 51: '*A basic issue in the present dispute is whether Argentina has committed an internationally wrongful act, that is whether it has breached the international obligations contained in the BIT by conduct attributable to it. As held by the I.L.C. these two conditions are sufficient to establish such a wrongful act giving rise to international responsibility. Having caused damage is not an additional requirement, except if the content of the primary obligation breached has an object or implies an obligation not to cause damages.*' *Adde*, James Crawford, First report on State Responsibility, by Mr James Crawford, Special Rapporteur, 24 April, 1, 5, 11 and 26 May, 22 and 24 July, 12 August 1998, para 112 *et seq*, document A/CN.4/490 and Add. 1-7, Yearbook of the International Law Commission, 1998, Volume II (Part One), 1, 28, document A/CN.4/SER.A/1998/Add.1(Part 1): '*the question whether damage is a prerequisite for a breach becomes a matter to be determined by the relevant primary rule. It may be that many primary rules do contain a requirement of damage, however defined. Some certainly do. But there is no warrant for the suggestion that this is necessarily the case, that it is an a priori requirement.*'.

The structure of the internationally wrongful act as comprising a subjective (attribution) and an objective (breach of an international obligation) element is firmly rooted in customary international law since early arbitral practice and early decisions of the World Court. Thus, the Mexico-US General Claims Commission deliberated in the case of the *Dickson Car Wheels*:

> Under international law, apart from any convention, in order that a State may incur responsibility it is necessary that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard.[26]

Even more accurately, the Permanent Court of International Justice has formulated the threshold rule in the *Phosphates in Morocco* case:

> This act being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States.[27]

In point of legal theory, the rules of attribution embody a section of the law of State responsibility, whose application is *preliminary*[28] to the other categories of norms (for instance, the existence of circumstances excluding wrongfulness, remedies, countermeasures, dipute settlement and other rules pertaining to the *mise en oeuvre* of State responsibility).[29] Once the subjective element has been ascertained, it shall be coupled with the objective element, which entails the existence of the violation of a substantive obligation of international law incumbent upon the State.[30] Based on the distinction between "primary" and

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[26] *Dickson Car Wheel Company (USA) v United Mexican States*, July 1931, 4 RIAA 669, 678; *Claim of the Salvador Commercial Company ("El Triunfo Company")*, 8 May 1902, 15 RIAA 455, 477; *Eastern Steamship Lines, Inc (United States) v Germany (War-Risk Insurance Premium Claim)*, 11 March 1924, 2 RIAA 71.
[27] *Phosphates in Morocco*, Judgment, 14 June 1938, PCIJ Series A/B No 74, 10, 22.
[28] ICTY, Appeals Chamber, *Tadić*, IT-94-1-A, Judgement, 15 July 1999, 41, para 104.
[29] J G Starke, 'Imputability in International Delinquencies' (1938) 19 British Year Book of International Law 104, 106: '*Responsibility only begins where imputability ends.*'; Gordon A Christenson, 'The Doctrine of Attribution in State Responsibility' in Richard B Lillich (ed), *International Law of State Responsibility for Injuries to Aliens* (University Press of Virginia 1983) 321, 324.
[30] Hints of a reversed logical sequence are also found in the international legal scholarship. For instance, Theodor Meron seems to consider the objective element as having a prior consideration to the prongs of imputability. *Cf* Theodor Meron, 'International Responsibility of States for Unauthorized Acts of Their Officials' (1957) 33 British Year Book of International Law 85, 86.

"secondary" rules, which is at the basis of the 'Ago revolution' that permitted to overcome the long-standing *impasse* in the process of codification of the law of State responsibility,[31] principles of attribution are canonically included within the latter.[32] To a closer inspection, imputability rules are vested with a function rendering them more peculiar than the other secondary rules, in that they provide for criteria possibly based on structural, technical, mechanical and logical (*i.e.*, "objective") elements. This is the two-fold nature of imputation rules: they are classified as "subjective", at the same time being based on objective features (for instance, the institutional status of organ, the functional empowerment of governmental authority of an entity formally separated from the State machinery, or a factual link of a

[31] Roberto Ago, First Report on State Responsibility, by Mr Roberto Ago, Special Rapporteur, 'Review of previous work on codification of the topic of the international responsibility of States', 7 May 1969 and 20 January 1970, paras 2-5, 65, 89, document A/CN.4/217 and ADD.1, Yearbook of the International Law Commission, 1969, Volume II, 125, 126-127, 135-136, 138-139, document A/CN.4/SER.A/1969/Add.1: '*Nevertheless, as a result of the exceptional difficulties inherent in the subject, the uncertainties with which it has always been fraught, and the divergences of opinion and interests in the matter, previous codification efforts have not proved successful, their resumption having been postponed until a more propitious moment. On the strong recommendation of the General Assembly of the United Nations, the International Law Commission has now decided to make a fresh attempt in that direction, with the firm intention of overcoming the obstacles and of ultimately succeeding in the task, so far unaccomplished, of preparing a draft codification for submission to States. […] The continued confusion of State responsibility with other topics was undoubtedly one of the reasons which prevented it from becoming ripe for codification.*' The expression 'Ago revolution' is borrowed from Alain Pellet, 'The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 75, 76-77. The *manifesto* of the 'Ago revolution' was already revealed, at the latest, in Roberto Ago, Report by Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility (Approved by the Sub-Committee), 16 January 1963, document A/CN.4/152, Yearbook of the International Law Commission, 1963, Volume II, 187, 251, document A/CN.4/SER.A/1963/ADD.1: '*In my opinion, the first step must be to define the general theory of responsibility. That theory exists. Its application in practice has yielded uneven results; it has proved more fruitful and effective in certain fields of international relations than in others. But that is no reason for denying that it exists or that certain principles have a general scope transcending the particular case of responsibility to which they are applied. State responsibility should therefore be considered as a whole.*' For a concise and efficacious illustration of the disticntion between "primary" and "secondary" rules of State responsibility, *see* James Crawford, First report on State Responsibility, by Mr James Crawford, Special Rapporteur, 24 April, 1, 5, 11 and 26 May, 22 and 24 July, 12 August 1998, para 12 *et seq*, document A/CN.4/490 and Add. 1-7, Yearbook of the International Law Commission, 1998, Volume II (Part One), 1, 6, document A/CN.4/SER.A/1998/Add.1(Part 1).

[32] Jean Combacau and Denis Alland, '"Primary" and "Secondary" Rules in the Law of State Responsibility: Categorizing International Obligations' (1985) 16 Netherlands Yearbook of International Law 81. *Contra* Giorgio Gaja, 'Primary and Secondary Rules in the International Law on State Responsibility' (2014) 97 Rivista di Diritto Internazionale 981, 989. For a critique of the 'myth' of secondary rules, *cf* Paul Reuter, 'Trois observations sur la codification de la responsabilité internationale des États pour fait illicite' in *Le droit international au service de la paix, de la justice et du développement — Mélanges Michel Virally* (Éditions A Pedone 1991) 389, 395-396.

person with the State). Therefore, attribution rules may be possibly more precisely described as 'trans-substantive' rules or rules that are preliminary to the application of the other secondary rules and, *a fortiori*, of the applicable primary rules of international law.[33]

The terminological binomy attribution–attributability is generally preferred to imputation–imputability,[34] as confirmed by the choice adopted in ARSIWA for the title of the second chapter of Part One.[35] Indeed, the term *imputation* has been meant to yield a certain degree of confusion with the concept of psychological element, which, as above mentioned, is per se stranger to the mechanism of attribution, while possibly being enshrined within the analysis of the existence of an internationally wrongful act (where dictated by the applicable primary norm).[36] In addition, 'imputation' has been considered to suggest resort to a legal

[33] David D Caron, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules of State Responsibility' in Richard B Lillich and Daniel B Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational Publishers, Inc 1998) 109, 110; David D Caron, 'The ILC Articles on State Responsibility: the Paradoxical Relationship Between Form and Authority' (2002) 96 American Journal of International Law 857, 871.

[34] The term "imputability" is largely used by J G Starke, 'Imputability in International Delinquencies' (1938) 19 British Year Book of International Law 104; Dionisio Anzilotti, *Corso di diritto internazionale, Volume Primo: Introduzione – Teorie generali* (Athenaeum, 3° edn 1928) 418; Theodor Meron, 'International Responsibility of States for Unauthorized Acts of Their Officials' (1957) 33 British Year Book of International Law 85; C F Amerasinghe, 'Imputability in the Law of State Responsibility for Injuries to Aliens' (1966) 22 Revue Égyptienne de Droit International 91; Ian Brownlie, 'State Responsibility and the International Court of Justice' in Malgosia Fitzmaurice and Dan Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing 2004) 11, 16. Indeed, "imputability" has been preponderantly used in the previous phase of the codification of the law of State responsibility (*cf* Roberto Ago, Report by Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility (Approved by the Sub-Committee), 16 January 1963, document A/CN.4/152, Yearbook of the International Law Commission, 1963, Volume II, 187, 253, document A/CN.4/SER.A/1963/ADD.1) and by the ICJ in seminal cases such as *Hostages* and *Nicaragua*. *See United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Judgment, 24 May 1980, ICJ Reports 1980, 3, 29; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, 27 June 1986, ICJ Reports 1986, 14.

[35] ARSIWA Commentaries 38.

[36] Roberto Ago, Third Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur, 'The internationally wrongful act of the State, source of international responsibility', 5 March, 7 April, 28 April and 18 May 1971, para 50, document A/CN.4/246 and Add.1-3, Yearbook of the International Law Commission, 1971, Volume II (Part One), 199, 214, document A/CN.4/SER.A/1971/Add.1 (Part 1): '*the Commission was particularly anxious to avoid the ambiguities inherent in notions which can evoke very different ideas because of their meaning in certain municipal criminal law systems. It is for that reason that at the end of the discussion of the second report on State be better for it to avoid using the expressions "imputability" and "imputation" and that when speaking in its own name it would be better for it to use the term "attribution" to indicate the simple fact of attaching to the State a given action or omission. That conclusion is reflected in this report.*'

fiction, which the drafters of ARSIWA wished to definitely avoid.[37] Nevertheless (and inevitably so), the terminology should not engender substantial implications, since a fictional character is consubstantial to the rules of attribution or imputation.[38] Attribution is a normative technique, governed by international law, which is exactly designed to transfer a given conduct from a natural or juridical person to the person of the State (*Zurechnung*).[39] It definitely entails a fictitious mechanism based on the structure of the State (a fiction itself) as corporate entity.[40] However, the term *attribution* may suggest more objective features of such rules, which is possibly more consistent with their two-fold nature, as attempted to describe above.

[37] International Law Commission, Statement of the Chairman of the Drafting Committee, Mr Bruno Simma, 13 August 1998, 6.

[38] C F Amerasinghe, 'Imputability in the Law of State Responsibility for Injuries to Aliens' (1966) 22 Revue Égyptienne de Droit International 91, 92: '*imputation is the result of an intellectual operation*'; Claus Kress, 'L'organe de facto en droit international public' (2001) 105 Revue Générale de Droit International Public 93, 95, fn 2; Mathias Forteau, 'L'Ètat selon le droit international: une figure à géométrie variable?' (2007) 111 Revue Générale de Droit International Public 737, 738: '*Mais si ce qui peut être attribué à l'Etat en droit international varie en fonction de la règle internationale que l'on entend mettre en œuvre, ne s'en déduit-il pas que l'opération d'attribution est d'ordre normatif en droit international, par conséquent que l'Etat est nécessairement construit par celui-ci?*'.

[39] Dionisio Anzilotti, *Corso di diritto internazionale, Volume Primo: Introduzione – Teorie generali* (Athenaeum, 3° edn 1928) 228, 418: '*Caratteristica dell'imputazione giuridica è di essere un puro effetto della norma; una volizione, un atto sono imputabili a un dato subietto soltanto perché la norma lo stabilisce*'; Wilhelm Wengler, *Völkerrecht*, Bd 1 (Springer Verlag 1964) 33; Roberto Ago, 'Le délit international' (1939) 68 Recueil des Cours 415, 450: '*Cette imputation dont on parle ici, cette Zurechnung, comme disent les Allemands, n'est évidemment pas un lien créé par la nature: elle est le résultat d'une opération logique effectuée par une règle de droit, donc un lien juridique.*'; Constantin Th Eustathiades, 'Les sujets du droit international et la responsabilité internationale: nouvelles tendances' (1953) 84 Recueil des Cours 397, 479: '*On sait que l'imputation est une opération logique accomplie par un système de droit, en vertu de laquelle en présence d'une certaine situation on crée un lien juridique entre un sujet donné et un tort ou fait illicite.*'; James Crawford, *State Responsibility. The General Part* (Cambridge University Press 2013) 113-114.

[40] Gaetano Arangio-Ruiz, 'State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance' in *Le droit international au service de la paix, de la justice et du développement. Mélanges Michel Virally* (Éditions A Pedone 1991) 25. *See* Gaetano Arangio-Ruiz, Second Report on State Responsibility, by Mr Gaetano Arangio-Ruiz, Special Rapporteur, 9 and 22 June 1989, para 173, document A/CN.4/425 and Add.l, Yearbook of the International Law Commission, 1989, Volume II (Part One), 1, 51, document A/CN.4/SER.A/1989/Add. 1 (Part 1): '*Attribution does not really seem to be an operation carried out by legal rules, notably by national or international law - or not in the same sense, surely, in which the qualification of an act as wrongful and the "imputation" of responsibility are legal operations.*'

2. Primacy of International Law

Although ARSIWA Article 3 establishes a principle of primacy of international law, vis-à-vis municipal law, with regard to the '*characterization of an act of a State as internationally wrongful*',[41] nevertheless the same concept may be adapted to the rules concerning the subjective element of the internationally wrongful act, as inferred from the provision of ARSIWA Article 4.2: '*[a]n organ* includes *any person or entity which has that status in accordance with the internal law of the State*' (*emphasis added*).[42] This is a clear indication that attribution is an independent and autonomous normative process in relationship to domestic law, the latter representing an important, but not decisive, factor for a determination of imputability. As Starke has remarked:

> It is always to be remembered that the imputation of liability results from rules of international law operating in an autonomous manner, and depends only in an indirect and secondary degree on municipal law. […] Consequently imputability for the purpose of state responsibility depends directly on rules of international law operating of their own force.[43]

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[41] *See* Harvard Law School (Manley O Hudson, Director), 'Research in International Law (Nationality, Responsibility of States, Territorial Waters). Drafts of Conventions Prepared in Anticipation of the First Conference on the Codification of International Law, The Hague, 1930', 1 April 1929, Part II, 'Responsibility of States' (Edwin M Borchard, Rapporteur), Article 2, (1929) 23 Special Number American Journal of International Law Special Supplement 133: '*The responsibility of a state is determined by international law or treaty, anything in its national law, in the decisions of its national courts, or in its agreements with aliens, to the contrary notwithstanding.*'; Harvard Law School, Draft Convention on the International Responsibility of States for Injuries to (the Economic Interests of) Aliens (Louis B Sohn and R R Baxter, Rapporteurs), Article 2 (*Primacy of International Law*), (1961) 55 American Journal of International Law 545: '*1. The responsibility of a State under Article 1 is to be determined according to this Convention and international law, by application of the sources and subsidiary means set forth in paragraph 1 of Article 38 of the Statute of the International Court of Justice. 2. A State cannot avoid international responsibility by invoking its municipal law.*'

[42] ARSIWA Commentaries 36, 42.

[43] J G Starke, 'Imputability in International Delinquencies' (1938) 19 British Year Book of International Law 104, 105-106; Theodor Meron, 'International Responsibility of States for Unauthorized Acts of Their Officials' (1957) 33 British Year Book of International Law 85, 87, 88: '*Imputability is an independent process of international law*'; C F Amerasinghe, 'Imputability in the Law of State Responsibility for Injuries to Aliens' (1966) 22 Revue Égyptienne de Droit International 91, 96; Roberto Ago, 'Le délit international' (1939) 68 Recueil des Cours 415, 461: '*L'imputation, comme toute opération juridique, ne peut avoir lieu dans un ordre juridique donné que par l'effet des règles du même ordre*'; Brigitte Stern, 'The Elements of an Internationally Wrongful Act' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 193, 201: '*on the one hand, there must be conduct which is* attributable *to a State, and on the other hand, that conduct must be* wrongful*. These two conditions are naturally determined by the international legal order, and by the international legal order alone.*'; James Crawford,

On one side, States exercise the highest degree of freedom in the organization of their internal structure. On the other side, the international law of imputability of internationally wrongful acts follows its own criteria, not to be understood in isolation from municipal practices. This consideration elucidates the possibility of divergence between the norms of attributability of conducts to the State under municipal and international law.

3. Customary Status of the Rules of Attribution in the Articles on Responsibility of States for Internationally Wrongful Acts

ARSIWA do not have the form and binding scope of an international treaty.[44] At the culminating end of the works of codification of the law of State responsibility, the preponderant consensus within the ILC and the international community indicated not to adopt the text of ARSIWA as basis for a convention to be opened for signature by States, by proposing to reserve such an option for '*a later stage*'.[45] This is clear from the choice to maintain the denomination of "articles", rather than "convention", notwithstanding the

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Thomas Grant and Francesco Messineo, 'Towards An International Law of Responsibility: Early Doctrine' in Laurence Boisson de Chazournes and Marcelo Kohen (eds), *International Law and the Quest for its Implementation. Liber Amicorum Vera Gowlland-Debbas* (Brill 2010) 377, 396-397 (emphasising the contribution of Heinrich Triepel and Dionisio Anzilotti on the principle of primacy of international law with regard to the issue of attribution).

[44] James Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge University Press 2002) 58-60; James Crawford, Jacqueline Peel and Simon Olleson, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading' (2001) 12 European Journal of International Law 963, 969; James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 American Journal of International Law 874, 889-890; Bruno Simma, 'The Work of the International Law Commission and its Fifty-Third Session (2001)' (2002) 71 Nordic Journal of International Law 123, 136-137; Christian J Tams, 'All's Well that Ends Well: Comments on the ILC's Articles on State Responsibility' (2002) 62 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 759, 768-770: '*Finally, and perhaps most importantly, it is by no means sure that the adoption in form of a non-binding resolution would diminish the importance of the text.*'; James Crawford and Simon Olleson, 'The Continuing Debate on a UN Convention on State Responsibility' (2005) 54 International & Comparative Law Quarterly 959.

[45] A/RES/56/83, 12 December 2001, 1. *See* Shabtai Rosenne, 'State Responsibility – *Festina Lente*' in Shabtai Rosenne, *Essays on International Law and Practice* (Martinus Nijhoff Publishers 2007) 533, 535-537.

adoption of a 'treaty-like' form.[46] Indeed, on 12 December 2001, the UN General Assembly, upon recommendation of the ILC, resolved:

> *The General Assembly*,
>
> […]
>
> 3. *Takes note* of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action;[47]

It is to be found what the ranking of ARSIWA is within the sources of international law, notably whether they represent a codification of international law. For the sake of this treatise, the objective is not to demonstrate that the whole body of secondary rules enshrined in ARSIWA are elevated to concepts of common currency in international law, so as to reflect '*what actually happens in the life of international society.*'[48] Instead, it suffices to show that rules of attribution in ARSIWA do correspond to the content of customary international law, in particular those provided by ARSIWA Articles 4 (conduct of organs of a State), 5 (conduct of persons or entities exercising elements of governmental authority), 7 (excess of authority or contravention of instructions) and 8 (conduct directed or controlled by a State). An accurate inspection of the *travaux préparatoires* displays that rules of imputability never orginated serious divergences. This holds true even in relation to the works of the unsucessful 1930

[46] Karl Zemanek, 'Appropriate Instruments for Codification. Reflections on the ILC Draft on State Responsibility' in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz,* Volume II (Editoriale Scientifica 2004) 897.
[47] A/RES/56/83, 12 December 2001, 2.
[48] Report of the International Law Commission on the Work of its Twenty-Fifth Session, 7 May-13 July 1973, document A/9010/REV.1, Yearbook of the International Law Commission, 1973, Volume II, 161, 190, para 11, document A/CN.4/SER. A/1973/Add. 1. *See* James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 ICSID Review – Foreign Investment Law Journal 127, 128: '*The fact that the Articles have been so widely used does not mean that they necessarily constitute general international law. An adjudicator must always consider the relationship between each of the ILC Articles and general international law. One of the things that the Commission learned about codification at a very early stage is that it is impossible to write down any proposition of international law without engaging in an act of creation. Questions will arise as to the precise formulation of the rule, even if there is no doubt about it in principle. It is equally difficult to segregate a rule into those parts which constitute a declaration of the existing law and those that do not. The two relate to each other in subtle ways.*'

Hague Conference for the Codification of International Law,[49] and may be affirmed with regard to the *travaux* of the ILC under the chairmanship of Roberto Ago, at the latest.[50] The ICJ has significantly relied upon the draft articles adopted by the ILC on first reading and upon ARSIWA, and have invariably established the customary character of the rules of attribution contained therein.[51] In international legal scholarship, recognition of such a

[49] Roberto Ago, First Report on State Responsibility, by Mr Roberto Ago, Special Rapporteur, 'Review of previous work on codification of the topic of the international responsibility of States', 7 May 1969 and 20 January 1970, para 39, document A/CN.4/217 and ADD.1, Yearbook of the International Law Commission, 1969, Volume II, 125, 132, document A/CN.4/SER.A/1969/Add.1: '*Serious divergences* [at the 1930 Hague Conference for the Codification of International Law] *appeared, however, which related less to the principles concerning responsibility as such than to the substantive principles governing the treatment of foreigners, the two questions being closely connected in the draft under consideration*.' The Third Committee of the Hague Conference for the Codification of International Law never explicitely contemplated a distinction between primary and secondary norms, the codification undertaking being eminently focused on the substantive rules on reparation by States for the injuries inflicted to aliens in their territory. However, the majority of the articles proposed by the Third Committee established rules that were later classified as of 'attribution' (Articles 1, 6, 7, 9, 10). This is an important pointer that, even at the time of the Codification Conference, there was inequivocal consensus in the community of nations as to the codification of imputability rules, also by virtue of a plethora of arbitral case law that already clarified their fundamental tenets. *See* Third Committee of the Conference for the Codification of International Law, The Hague, 13 March – 12 April 1930, Text of Articles on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, League of Nations publication, V.Legal, 1930.V.7, document C.228.M.115.1930.V, (1930) 24 Special Supplement American Journal of International Law 188.

[50] Roberto Ago, Third Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur, 'The internationally wrongful act of the State, source of international responsibility', 5 March, 7 April, 28 April and 18 May 1971, para 16, document A/CN.4/246 and Add.1-3, Yearbook of the International Law Commission, 1971, Volume II (Part One), 199, 201-202, document A/CN.4/SER.A/1971/Add.1 (Part 1).

[51] Helmut Philipp Aust, 'Through the Prism of Diversity: the Articles on State Responsibility in the Light of the ILC Fragmentation Report' (2006) 49 German Yearbook of International Law 165, 171; Stephan Wittich, 'The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts Adopted on Second Reading' (2002) 15 Leiden Journal of International Law 891, 917; Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 European Journal of International Law 387; Ian Brownlie, 'State Responsibility and the International Court of Justice' in Malgosia Fitzmaurice and Dan Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing 2004) 11, 12, referring to *Gabčikovo-Nagymaros Project (Hungary v Slovakia)*, Judgment, 25 September 1997, ICJ Reports 1997, 7; James Crawford, 'The International Court of Justice and the Law of State Responsibility' in Christian J Tams and James Sloan, *The Development of International Law by the International Court of Justice* (Oxford University Press 2013) 85. The rules of attribution provided by the draft articles have been held to be of a customary character in various disputes before the ICJ. *See United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Judgment, 24 May 1980, ICJ Reports 1980, 3; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, 27 June 1986, ICJ Reports 1986, 14; *Differences Relating to Immunity from Legal Process of a Special-Rapporteur of the Commission of Human Rights*, Advisory Opinion, 29 April 1999, ICJ Reports 1999, 62; *Armed Activities in the Territory of the Congo (DRC v Uganda)*, Judgment, 19 December 2005, ICJ Reports 2005, 168; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports 2007, 43. Outside the jurisdiction of the ICJ, *cf* ICTY, Appeals Chamber, *Tadić*, IT-94-1-A, Judgement, 15 July 1999.

character is broadly accepted and fostered,[52] even though minoritarian positions to the contrary are recorded.[53] A comprehensive survey by the Secretary-General of the United Nations on the application of ARSIWA by international jurisdictions and other organs has revealed that rules of attribution constitute the body of secondary rules that is most frequently applied in case law.[54] This entails a further confirmation of the wide application of the rules contained in Chapter II of Part One of ARSIWA and its contemporary vitality.[55]

The foregoing brief remarks support the view that the adoption of ARSIWA in the form of the legal instrument of an international treaty would not affect the conclusion that the rules of attributability established therein correspond to customary international law. Although not having binding legal force, such rules constitute the most authoritative legal model of codification of customary international law on the topic (*ratio scripta*). In addition, it should be considered that in the field of international responsibility in general '*informal sources are still dominating*'.[56] Accordingly, ARSIWA's rules of attribution may be described as the most persuasive picture of unwritten customary international law and – as far as they are concerned – do not require transposition into a binding and tangible international

[52] *Ex multis*, Alain Pellet, 'Remarques sur la jurisprudence récente de la C.I.J. dans le domaine de la responsabilité internationale' in Marcelo Kohen, Robert Kolb and Djacoba Liva Tehindrazanarivelo (eds), *Perspective of International Law in the 21st Century. Liber Amicorum Professor Christian Dominicé* (Martinus Nijhoff Publishers 2012) 321, 322, 332; James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 ICSID Review – Foreign Investment Law Journal 127, 133; Rosalyn Higgins, 'The Concept of "The State": Variable Geometry and Dualist Perceptions' in Laurence Boisson de Chazournes and Vera Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality. Liber Amicorum Georges Abi-Saab* (Martinus Nijhoff Publishers 2001) 547, 559.

[53] Gregory Townsend, 'State Responsibility for Acts of De Facto Agents' (1997) 14 Arizona Journal of International & Comparative Law 635.

[54] Report of the Secretary-General, 'Compilation of decisions of international jurisdictions and other international organs', document A/62/62 (1 February 2007), document A/62/62/Add.1 (17 April 2007) and document A/65/76 (30 April 2010). The collection showed that 59 out 182 references by international courts specifically concerned the attribution of an internationally wrongful act to State.

[55] Maurizio Arcari, 'Le juge et la codification du droit de la responsabilité: quelques remarques concernant l'application judiciaire des articles de la CDI sur la responsabilité de l'État pour fait internationalement illicite' in Nerina Boschiero et al (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (TMC Asser Press 2013) 19, 20-22.

[56] Christian Tomuschat, 'Attribution of International Responsibility: Direction and Control' in Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013) 7, 12.

convention in order to achieve an allegedly higher status within the sources of international law.[57] Their nature of *imperfected* acts is not of impediment as to the conclusion that they reflect customary international law, consistent with a rationalist posture rather than a strict voluntarist approach to international law making.[58]

4. "Act of the State" and *Act of State*

The set of international rules of attribution operates to determine what conduct may be qualified as an 'act of the State under international law', an expression adopted by Roberto Ago in his capacity as Special Rapporteur for the topic of State responsibility.[59] Attribution doctrines are to be clearly distinguished from the *act of State* doctrine applied by common law courts. The latter doctrine represents a rule of decision pertaining to the merits of proceedings imposing to a domestic court not to sit in judgment on the validity of an official act of a foreign State executed within its jurisdiction.[60] While attribution (as well as sovereign immunity) rules derive from customary international law, the *act of State* doctrine is based on '*constitutional underpinnings*',[61] appearing as an expression of the municipal principle of

[57] David D Caron, 'The ILC Articles on State Responsibility: the Paradoxical Relationship Between Form and Authority' (2002) 96 American Journal of International Law 857, 867-868: '*To my surprise, I found that the Tribunal did not assess the articles but, instead, tended to accept them as given*'.
[58] W Micheal Reisman, 'Unratified Treaties and Other Imperfected Acts in International Law' (2002) 35 Vanderbilt Journal of Transnational Law 729; Roberto Ago, 'Nouvelles réflexions sur la codification du droit international' (1988) 92 Revue Générale du Droit International Public 539, 540, 573.
[59] This concept is clearly elucidated in *Eastern Steamship Lines, Inc (United States) v Germany (War-Risk Insurance Premium Claim)*, 11 March 1924, 7 RIAA 71, 73.
[60] *Underhill v Hernandez*, 168 US 250, 18 S Ct 83 (1897); *Ricaud v American Metal Co*, 246 US 304 (1917); *Luther v Sagor* [1921] 3 KB 532; *Bernstein v NV Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F2d 375 (1954); *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 84 S Ct 923 (1964); *Alfred Dunhill of London, Inc v Republic of Cuba et al*, 425 US 682, 96 S Ct 1854 (1976); *Kirkpatrick and C, Inc et al v Environmental Tectonics Corp, International*, 493 US 400, 110 S Ct 701 (1990).
[61] *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 423 (1964).

separation of powers applied in international relations.[62] On one hand, the *act of State* doctrine proceeds from domestic law and commands a national judge to defer to a foreign sovereignty. On the other hand, attribution operates in the context of an international dispute, as being a requisite for the imposition of international responsibility to a sovereign.

5. Attribution and Jurisdiction

'*Questions of attribution, a chapter of international responsibility, are logically distinct from issues of jurisdiction*'.[63] As to the jurisdiction of a domestic court, the criteria embodied within the rules for the application of the doctrine of sovereign immunity do not necessarily coincide with the prongs of attribution for the purposes of international responsibility for internationally wrongful acts.[64] However, a normative convergence between such two normative regimes not only is found in positive international law, but also is desirable from a policy viewpoint.[65] As to the jurisdiction of an international court or Tribunal, attributability does not stand as a jurisdictional issue affecting its power to adjudicate a given dispute.

[62] Howard Thayer Kingsbury, 'The "Act of State" Doctrine' (1910) 4 American Journal of International Law 359; George Grenville Phillimore, 'Immunité des Ètats au point de vue de la juridiction ou de l'exécution forcée' (1925) 8 Recueil des Cours 413, 436; ECS Wade, 'Act of State in English Law: Its Relation with International Law' (1934) 15 British Year Book of International Law 98; F A Mann, 'The Sacrosanctity of Foreign Acts of State' (1943) 59 Law Quarterly Review 42; Richard A Falk, *The Role of Domestic Court in the International Legal Order* (Syracuse University Press 1964) 139; Martin Domke, 'Act of State: Sabbatino in the Courts and in Congress' (1964) 3 Columbia Journal of Transnational Law 99; Michael Singer, 'The Act of State Doctrine of the United Kingdom: An Analysis with Comparisons to United States Practice' (1981) 75 American Journal of International Law 283; Thomas H Hill, 'Sovereign Immunity and Act of the State Doctrine. Theory and Policy in the United States' (1982) 46 Rabels Zeitschrift für Ausländisches und Internationales Privatrecht 118, 123; Hazel Fox, 'Reexamining the Act of State Doctrine: An Integrated Conflicts Analysis' (1992) 33 Harvard International Law Journal 521; Harold H Koh, 'International Business Transactions in United States Courts' (1996) 261 Recueil des Cours 9, 77.

[63] Christian Tomuschat, 'Attribution of International Responsibility: Direction and Control' in Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013) 7, 33.

[64] David D Caron, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules of State Responsibility' in Richard B Lillich and Daniel B Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational Publishers, Inc 1998) 109, 164.

[65] *See infra* para 6 of this Chapter, para 4.2 of Chapter II, para 4.2.2 of Chapter III, and para 5 of Chapter IV.

Instead, attribution represents a question of merits consisting in the establishment of a requisite for the finding of international responsibility of a State. Regardless, it is possibly open to States to qualify as of (international) jurisdiction issues of attribution. This appears to be the choice adopted by the US and Iran in the Algiers Accords of 19 January 1981 to establish the jurisdiction of the Iran-US Claims Tribunal pursuant to the Claims Settlement Declaration Article VII(3)-(4).[66]

6. Attribution and Immunity

Sovereign immunity and attribution are different legal apects of the same socio-political requirement to bestow certain conducts to the person of the State as actor in a dimension of internationality (or transnationality), both contributing to define the State '*selon le droit international*'.[67] The international law of State immunity operates in the context of proceedings between a foreign sovereign and a natural or juridical person pending before a national judge, imposing to the latter to refrain from adjudication of certain, not all, disputes (*restrictive* theory of State immunity).[68] The international law of attribution dictates the

[66] Declaration of the Government of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), 19 January 1981, 1 IRAN-US CTR 11-12 (1981-1982):

> Article VII
>
> For the purposes of this Agreement:
> […]
> 3. "Iran" means the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.
> 4. The "United States" means the Government of the United States, any political subdivision of the United States, and any agency, instrumentality or entity controlled by the Government of the United States or any political subdivision thereof.

[67] Mathias Forteau, 'L'État selon le droit international: une figure à géométrie variable?' (2007) 111 Revue Générale de Droit International Public 737, 752-754.

[68] *See infra* Chapter IV, para 4. For a doctrinal review, *cf* Dionisio Anzilotti, 'L'esenzione degli stati stranieri dalla giurisdizione (Saggio di critica e di ricostruzione)' (1910) 5 Rivista di Diritto Internazionale 477; André Weiss, 'Compétence ou incompétence des tribunaux a l'égard des États étrangers' (1923) 1 Recueil des Cours

criteria to qualify given conducts as imputable to the State in the context of (public) international disputes.[69] Accordingly, they serve markedly different purposes:

> The restrictive theory of sovereign immunity does not constitute a limit on the international responsibility of States, but rather a limit on the municipal immunity of States for certain activities. The restrictive theory of immunity serves to make available certain municipal court remedies, not to alter the international responsibility of the State.[70]

521; George Grenville Phillimore, 'Immunité des Ètats au point de vue de la juridiction ou de l'exécution forcée' (1925) 8 Recueil des Cours 413; Charles Fairman, 'Some Disputed Applications of the Principle of State Immunity' (1928) 22 American Journal of International Law 566; Gerald G Fitzmaurice, 'State Immunity from Proceedings in Foreign Courts' (1933) 14 British Year Book of International Law 101; Eleonor W Allen, *The Position of Foreign States Before National Courts, Chiefly in Continental Europe* (The Macmillan Company 1933); Gaetano Morelli, 'Limiti dell'ordinamento statuale e limiti della giurisdizione' (1933) 25 Rivista di Diritto Internazionale 382; Jean-Paulin Niboyet, 'Les immunités des États étrangers engagés dans des transactions privées' (1936) 43 Revue Générale de Droit International Public 525; Charles Carabiber, 'De quelques aspects nouveaux de l'immunité de juridiction des Ètats' (1938) 33 Revue Critique de Droit International 369; Charles Rousseau, 'Compétence des tribunaux internes à l'égard des États étrangers' (1939) 46 Revue Générale de Droit International Public 427; Rolando Quadri, *La giurisdizione sugli Stati stranieri* (Giuffrè 1941); J E S Fawcett, 'Legal Aspects of State Trading' (1948) 25 British Year Book of International Law 34; Jean-Paulin Niboyet, 'Immunité de juridiction et incompétence d'attribution' (1950) 39 Revue Critique de Droit International Privé 139; Hersch Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 British Year Book of International Law 220; Charles Freyria, 'Les limites de l'immunité de juridiction et d'exécution des États étrangers' (1951) 40 Revue Critique de Droit International Privé 207; Jean-Flavien Lalive, 'L'immunité de juridiction des Etats et des organisations internationales' (1953) 84 Recueil des Cours 205; Louis Cavaré, 'L'immunité de juridiction des États étrangers' (1954) 58 Revue Générale de Droit International Public 177; NCH Dunbar, 'Controversial Aspects of Sovereign Immunity in the Case Law of Some States' (1971) 132 Recueil des Cours 197; Riccardo Luzzatto, *Stati stranieri e giurisdizione nazionale* (Giuffré 1972); Sompong Sucharitkul, 'Immunities of Foreign States Before National Authorities' (1976) 149 Recueil des Cours 87; Leo J Bouchez, 'The Nature and Scope of State Immunity from Jurisdiction and Execution' (1979) 10 Netherlands Yearbook of International Law 1; Ian Sinclair, 'The Law of Sovereign Immunity. Recent Developments' (1980) 167 Recueil des Cours 113; James Crawford, 'Execution of Judgments and Foreign Immunity' (1981) 75 American Journal of International Law 820; James Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions' (1983) 54 British Year Book of International Law 75; Peter D Troboff, 'Foreign State Immunity: Emerging Consensus on Principles' (1986) 200 Recueil des Cours 235; Christoph H Schreuer, *State Immunity: Some Recent Developments* (Cambridge University Press 1988) 69-70; Joe Verhoeven (ed), *Le droit international des immunités: contestation ou consolidation?* (Larcier 2004); Natalino Ronzitti and Gabriella Venturini, *Le immunità giurisdizionali degli Stati e degli altri enti internazionali* (CEDAM 2008); Sally El Sawah, *Les immunités des États et des organisations internationales. Immunités et procès équitable* (Larcier 2012); Anne Peters, Evelyne Lagrange, Stefan Oeter and Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Brill 2015); Hazel Fox and Philippa Webb, *The Law of State Immunity* (Oxford University Press, 3° edn revised and updated 2013) 25 *et seq*.

[69] Dionisio Anzilotti, 'La responsabilité internationale des États a raison des dommages soufferts par des étrangers' (1906) 13 Revue Générale de Droit International Public 5, 13.

[70] David D Caron, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules of State Responsibility' in Richard B Lillich and Daniel B Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational Publishers, Inc 1998) 109, 164.

Regardless, it is possible to emphasise the overlap or coincidence of criteria adopted within the application of the law of State immunity before the municipal judge and the international rules of attribution resorted to by an international jurisdiction.[71]

The distinction between immunity and attribution issues has already been acknowledged in early arbitral practice. In the case of the *Zafiro*, the British-American Mixed Claims Commission observed:

> We have no difficulty in distinguishing those cases from the one before us. The *Exchange* [[72]] case had to do with the immunity of warships in foreign ports. So also the other cases first cited have to do with claims to immunity from process while in foreign ports. That is quite a different question from the one before us, which is not one of what immunity the *Zafiro* might have claimed in Hong Kong, but of *what responsibility attaches to the United States for her action*, in Manila Bay, where and while she was acting as a supply ship for Admiral Dewey's squadron, in the naval operations he was then and there conducting, and was under his orders through a naval officer put on board to carry them out. (*emphasis added*)[73]

It should be explained that a comparison between the law of sovereign immunity and the law of attribution is rendered possible only in case of activities undertaken by State organs *ex* ARSIWA Article 4 and 'persons' *ex* ARSIWA Article 5. As below discussed, the conduct of 'private' individuals *ex* ARSIWA Article 8 does not require any official capacity or exercise of governmental authority for the purposes of attribution.[74] Therefore, their activities do not regularly offer any commonality in scope as possible ground for application of the doctrine of sovereign immunity, which under its restrictive tenets only covers the acts of State that embody an exercise of its sovereignty (*acta jure imperii*), unless otherwise waived (for instance, by way of express or implied consent).[75] This reveals a constant problem in the functioning of State immunity, which displays a combination of *ratione materiae* and *ratione*

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[71] Emmanuel Gaillard, 'Effectivité des sentences arbitrales: immunité des Etats et autonomie des personnes morales dépendant d'eux' in Isabelle Pingel-Lenuzza (ed), *Droit des immunités et exigences du procès équitable. Actes du colloque du 30 avril 2004* (Éditions A Pedone 2004) 119, 124.
[72] *The Schooner Exchange v McFaddon et al*, 11 US 116 (1812).
[73] *D Earnshaw and Others (Great Britain) v United States (Zafiro case)*, 30 November 1925, 6 RIAA 160, 162.
[74] *See infra* Chapter II, para 5.3.
[75] Carlo de Stefano, 'Arbitration Agreement as Waivers to Sovereign Immunity' (2014) 30 Arbitration International 59.

personae elements.[76] Nevertheless, the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004 (UNCSI), which is not yet entered into force, clearly endorses a *ratione materiae* (functional) approach to the law of State immunity.[77] Indeed, a State activity is held to be either governmental or commercial (*tertium non datur*) on the basis of its nature and, only on a subsidiary ground, of its purpose.[78]

6.1 State Organs

UNCSI Article 2.1(b)(i), (ii) and (iv) places under the mantle of sovereign immunity the '*State and its various organs*', '*constituent units of a federal State or political subdivisions of the State*', and '*representatives of the State acting in that capacity*', such as heads of State, heads of government, and ministries.[79] Constituent units and political subdivisions are demanded to fulfil the dual requirement to be entitled to perform acts in the exercise of sovereign authority and to actually act in that capacity (entitlement and actual performance). This requirement invariably applies to both organs of the central and peripheral level of government. Indeed, immunity from jurisdiction (adjudication) is attracted by *acta jure imperii* (in exercise of *sovereign authority*) in any event. The requirement to act in

[76] Gerald G Fitzmaurice, 'State Immunity from Proceedings in Foreign Courts' (1933) 14 British Year Book of International Law 101, 121: '*The truth is that a sovereign State does not cease to be a sovereign State because it performs acts which a private citizen might perform*'. Lord Wilbeforce had to observe in *I Congreso del Partido* [1983] 1 AC 244: '*If a trader is always a trader, a State remains a State*'.

[77] United Nations Convention on Jurisdictional Immunities of States and Their Property, Annex to A/RES/59/38, 2 December 2004. *See* David P Stewart, 'The UN Convention on Jurisdictional Immunities of States and Their Property' (2005) 99 American Journal of International Law 194; Gerhard Hafner and Ulrike Köhler, 'The United Nations Convention on Jurisdictional Immunities of States and Their Property' (2004) 35 Netherlands Yearbook of International Law 3; Gerhard Hafner and Leonore Lange, 'La Convention des Nations Unies sur les immunités juridictionnelles des Etats et de leurs biens' (2004) 50 Annuaire Français de Droit International 45; Isabelle Pingel-Lenuzza, 'Observations sur la convention du 17 janvier 2005 sur les immunités juridictionnelles des Etats et de leurs biens' (2005) 122 Journal du Droit International (Clunet) 1045.

[78] UNCSI Article 2.2.

[79] Ian Brownlie, *System of the Law of Nations. State Responsibility. Part I* (Clarendon Press 1983) 138.

sovereign (governmental) capacity seems to exclude from the cover of immunity such conducts not falling, even incidentally, in the scope of the office or authority of the organ. Presumably, such conducts embodies acts of a private or personal nature (similarly to purely private acts not attributable to the State pursuant to the *ultra vires* rule *ex* ARSIWA Article 7). Nevertheless, the proviso does not prevent per se the exclusion of immunity as to *acta jure imperii* not having any connection with the governmental capacity of the organ in question. In any event, it is to be underlined that UNCSI proceeds from the cardinal assumption that '*jurisdictional immunities of States and their property are generally accepted as a principle of customary international law*', as clarified by the Preamble of the Convention. The denial of immunity is conceived as an exception to the general rule, on the basis of a catalogue of enumerated justifications – generally *ratione materiae* – provided by the Convention ('list method').[80]

ARSIWA Article 4 considers as attributable both *acta jure imperii* and *acta jure gestionis* executed by all categories of State organs.[81] As David Caron has accurately remarked:

> If, for example, a Ministry of Defense were to enter into a contract for the purchase of goods and later repudiate the contract, then it seems clear that Ministry may be subject to suit in given municipal courts depending on the terms of the contract and

[80] The same structural framework is adopted in the US Foreign Sovereign Immunities Act 1976 (FSIA) and in the UK State Immunity Act 1978 (SIA). *Cf* US Foreign Sovereign Immunities Act 1976 (FSIA), 28 USC §§ 1602-1611; UK State Immunity Act 1978 (SIA), *The Public General Acts* (1978), London, HM Stationery Office, Part I, Chapter 33, 715. *See also* Singapore State Immunity Act 1979, Pakistan State Immunity Ordinance 1981, South Africa Foreign State Immunities Act 1981, Canadian State Immunity Act 1982, Malawi Immunities and Privileges Act 1984, Australian Foreign State Immunities Act 1985. *Cf* the relevant texts in Codification Division of the Office of Legal Affairs of the Secretariat of the United Nations, *Materials on Jurisdictional Immunity of States and Their Property*, United Nations Legislative Series, Book 20, 1982, document ST/LEG/SER.B/20 (Sales No E/F.81.V.10); Andrew Dickinson, Rae Lindsay and James P Loonam, *State Immunity. Selected Materials and Commentary* (Oxford University Press 2004).

[81] Luigi Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984) 189 Recueil des Cours 9, 74: '*En conclusion, il nous semble justifié d'affirmer qu'en matière d'imputation à l'Etat des comportements de ses organes il n'y a aucune distinction à faire entre les comportements par lesquels s'exercent les prérogatives de la puissance publique et les autres: tous sont attribuables à l'Etat, le fait qu'ils constituent ou non une infraction dépendant du contenu des normes internationales en jeu.*'

> the nature of the transaction, and that the State of which the Ministry is an organ may be internationally responsible for the repudiation.[82]

This concept has been extensively clarified in the case of *Noble Ventures v. Romania* by an international investment Tribunal established under aegis of the International Centre for Settlement of Investment Disputes (ICSID):

> The distinction plays an important role in the field of sovereign immunity when one comes to the question of whether a State can claim immunity before the courts of another State. However, in the context of responsibility, it is difficult to see why commercial acts, so called acta iure gestionis, should by definition not be attributable while governmental acts, so call acta iure imperii, should be attributable. The ILC draft does not maintain or support such a distinction.[83]

It may be submitted that the *noyau dur* of international disputes arises out of breaches of international law based on *acta jure imperii* (for instance, unlawful use of force by a State against another State). Thus, on a descriptive perspective, a final finding of State responsibility is usually adjudicated in relation to attributable acts that would be immune from jurisdiction before the national judge.[84] Nevertheless, States, as Parties to international treaties, are at liberty to contract international obligations arising out of contractual breaches triggered through *acta jure gestionis* undertaken by State organs.[85] This may be the case of a State organ producing transboundary pollution to the detriment of neighbouring States. Instead, this is *not* the case of an *umbrella clause* inserted in international investment agreements (IIAs) (clause of observance of obligations or undertakings, *clause de*

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[82] David D Caron, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules of State Responsibility' in Richard B Lillich and Daniel B Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational Publishers, Inc 1998) 109, 164.

[83] *Noble Ventures, Inc v Romania,* ICSID Case No ARB/01/11, Award, 12 October 2005, para 82.

[84] *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 260: '*Only the State in the exercise of its sovereign authority ("*puissance publique*"), and not as a contracting party, may breach the obligations assumed under the BIT.*'; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005, para 83: '*When an investor invokes a breach of a BIT by the host State (not itself party to the investment contract), the alleged treaty violation is by definition an act of* 'puissance publique*'.*'

[85] Luigi Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984) 189 Recueil des Cours 9, 145; Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 European Journal of International Law 387, 392.

couverture).[86] Indeed, the umbrella clause (similar to an 'elevator') grants to an investor the possibility to file a contract claim before an international investment Tribunal, but does not ultimately transform the applicable law to the cause of action from domestic to international.

All the acts of State organs being immune from jurisdiction (*acta jure imperii*) are attributable to the State. Not all the acts attributable to the State (*acta jure imperii* and *acta jure gestionis*) are immune from jurisdiction. It is therefore demonstrated that the number of conducts of State organs that are attributable to the State under public international law is normatively larger than the number of conducts of State organs being immune from jurisdiction before a domestic judge.

6.2 State Instrumentalities

UNCSI Article 2(b)(iii) grants immunity also to '*agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State*'. Instead, UNCSI Article 10.3 underlines that immunity does not apply to '*a State enterprise or other entity established by a State which has an independent legal personality*' in relation to its activities *jure privatorum*.[87] Therefore, both State organs and instrumentalities benefit from immunity according to the same criteria, namely in connection to their *acta jure imperii* only. It is the international law of attribution to provide different tests for State organs and the *èmanations de l'État*. The core of the functional test enshrined in ARSIWA Article 5 is the finding of the exercise of elements of governmental authority by the instrumentality in the particular instance in question. This functional test of attribution should coincide with the nature test

[86] *See infra* Chapter III, para 2.2.
[87] *See infra* Chapter IV, para 4.4.

dictated by the law of State immunity to define governmental vis-à-vis commercial acts.[88] This entails that – differently from the set theory analysis undertaken for State organs – the number of conducts of 'State entities' that are attributable to the State under public international law is normatively equal to the number of conducts of 'State entities' being immune from jurisdiction before a domestic judge. In this respect, coordination between the national and international judiciary is of threshold importance in order to avoid jurisdictional lacunae susceptible to frustrate the effectivity of the right to legal redress of aliens against sovereigns.[89] As noted by Gordon Christenson:

> if immunity follows, the acts are attributable. A State cannot have it both ways. It cannot escape responsibility by claiming non-State action on the one hand while maintaining sovereign immunity on the other.'[90]

To this extent, overlap of international and civil liabilities is possible in the case of conducts of State organs, in that their *acta jure gestionis* may be both imputable and non-immune from jurisdiction. Instead, the conducts of State instrumentalities are *either* imputable and immune from adjudication (*acta jure imperii*), on one side, *or* non-attributable and subject to domestic jurisdiction (*acta jure gestionis*), on the other side (*tertium non datur*). Accordingly, States should not overlook the legal implications of the use of the defence of immunity of their

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[88] James Crawford, *State Responsibility. The General Part* (Cambridge University Press 2013) 130. *See*, in particular, Harvard Law School, Draft Convention on the International Responsibility of States for Injuries to (the Economic Interests of) Aliens (Louis B Sohn and R R Baxter, Rapporteurs), Article 17(2), (1961) 55 American Journal of International Law 545:

> Article 17
> *(Levels of Government)*
>
> […]
> 2. The terms "organ of a State", "agency of a State", "official of a State", and "employee of a State", as used in this Convention, do not include any organ, agency, official, or employee of any enterprise normally considered as commercial which is owned in whole or in part by a State or one of the entities referred to in paragraph 1 if such enterprise is, under the law of such State, a separate juristic person with respect to which the State neither accords immunity in its own courts nor claims immunity in foreign courts.

[89] Michel Cosnard, *La soumission des États aux tribunaux internes. Face à la théorie des immunités des États* (Éditions A Pedone 1996) 226.

[90] Gordon A Christenson, 'The Doctrine of Attribution in State Responsibility' in Richard B Lillich (ed), *International Law of State Responsibility for Injuries to Aliens* (University Press of Virginia 1983) 321, 330.

parastatals before municipal judges, since this very argument may be employed against them (*venire contra factum proprium*) before an international jurisdiction to support a finding of empowerment to exercise elements of governmental authority.[91]

7. Plan of the Study

This chapter has provided a reconstruction of the definition of *attribution* for the purposes of State responsibility for internationally wrongful acts, by emphasising the preliminary operation of rules of attributability in contrast to the other "secondary" rules of international law. In addition, it has discussed the threshold principle of the supremacy of international law in order to elucidate the autonomous dimension of imputability issues in international law vis-à-vis municipal law. Last, it has offered an attempt at distinction between issues of attribution, on one hand, and issues of jurisdiction and of State immunity, on the other hand. Hereinafter, this treatise proceeds as follows. Chapter II illustrates the application of attribution rules in public international law, as resulting from the early arbitral practice, the decisions of the World Court and the awards of the Iran-US Claims Settlement Tribunal, and eventually codified by ARSIWA. Accordingly, it explains the tests for imputability of conducts of State organs (*de jure* and *de facto*) *ex* ARISIWA Article 4, State 'entities' *ex* ARSIWA Article 5, and individuals *ex* ARSIWA Article 8. The rule of attribution of acts *ultra vires ex* ARSIWA Article 7 is also analysed, which applies to the conducts of State organs and State 'entities', but not of 'private' individuals. Chapter III elucidates the application of attribution rules by international investment Tribunals. This Chapter is similar in structure to Chapter II, which is

[91] As to early arbitral practice, *see Dickson Car Wheel Company (USA) v United Mexican States*, July 1931, 4 RIAA 669, 685. As to the practice of the Iran-US Claims Tribunal, *see SeaCo, Inc v The Islamic Republic of Iran, The Iranian Meat Organization, Iran Express Lines, and Star Line Co*, 11 IRAN-US CTR 210, 215 (1986-II).

a consequence of the vicinity of international investment law to public international law with regard to the topic of imputation of conducts to a Party. In addition, the treatise of attribution issues in Investor-State Dispute Settlement (ISDS) requires further critical discussion, chiefly on the dialecticts between *lex generalis* (customary international law) and *lex specialis* (international investment law), and on the distinction between treaty claims and contract claims for the purposes of the operation of umbrella clauses. Chapter IV is less 'conventional', in that it aims to clarify issues of "attribution" in international business litigation between States and State-owned entities (SOEs), on one side, and foreign businesses, on the other side. Accordingly, the analysis is based on awards rendered in the context of international commercial arbitration and on domestic courts' decisions involving sovereign parties. In this Chapter, 'attribution' (or 'imputation') is intended in a-technical fashion in relation to various issues, such as the extension of the subjective scope of a dispute resolution agreement or of contractual undertakings from a parastatal entity to the State, or the possibility to enforce an award rendered against the State on the assets of a SOE (*reverse attribution*), and viceversa. All the legal fields herein analysed (public international law, international investment law, and international business law) pay markedly critical and still unsettled problems, which this treatise aims to clarify and resolve through persuasive propositions.

CHAPTER II

ATTRIBUTION ISSUES IN PUBLIC INTERNATIONAL LAW

1. State Organs

1.1 Notion

'*According to a well-established rule of international law, the conduct of any organ of a state must be regarded as an act of that state. This rule, which is of a customary character, […].*'[92] The ICJ addressed with these words in the *Cumaraswamy affaire* the canonical rule of attribution to the State of the acts and omissions of its organs, which has been codified by ARSIWA Article 4:

> *Article 4*
>
> *Conduct of organs of a State*
>
> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.[93]

The principle of imputability of the conducts of State organs may even appear to be tautological or the result of a circular line of reasoning: it is self-explanatory that a State is to

[92] *Differences Relating to Immunity from Legal Process of a Special-Rapporteur of the Commission of Human Rights*, Advisory Opinion, 29 April 1999, ICJ Reports 1999, 62, 87; *Armed Activities in the Territory of the Congo (DRC v Uganda)*, Judgment, 19 December 2005, ICJ Reports 2005, 168, 242; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, para 385, ICJ Reports 2007, 43, 202.
[93] ARSIWA Commentaries 40.

be held liable for the acts of the 'persons' making up its machinery.[94] However, correlated problems of qualification and categorization have frequently arisen in international law practice. Hence, the function of ARSIWA Article 4 is to encompass all the varieties of such persons capable of engaging the international responsibility of a State on the basis of their institutional link with its apparatus. Notwithstanding the marked degree of detail in relation to the various ramifications of the public powers (to the inclusion of the sub-national level), from the standpoint of international law State organs should not to be categorized in overly technical manner upon reference to definitions and status of internal law. What is relevant is the exercise of some power or authority as expression of the governance of a State, holistically considered, irrespective of formality and internal allocation of powers and competences ('*quelle que soit l'autorité de l'Etat dont elle procède*').[95] Indeed, in early arbitral practice, a plethora of generic references is found to State 'authorities',[96] 'agents',[97]

[94] Gordon A Christenson, 'Attributing Acts of Omission to the State' (1990-1991) 12 Michigan Journal of International Law 312, 333.

[95] Institut de Droit International, 'Responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers' (Leo Strisower, Rapporteur), Résolution du 1 septembre 1927, Session de Lausanne, (1927) 33(III) Annuaire de l'Institut de Droit International 330-335, Article I(1).

[96] *Alabama claims of the United States of America against Great Britain*, 14 September 1872, 29 RIAA 125, 131; *Underhill Cases*, 1903-1905, 9 RIAA 155-161; *Affaire relative à l'acquisition de la nationalité polonaise (Allemagne contre Pologne)*, 10 July 1924, 1 RIAA 401; *Owner of the Sarah B Putnam (United States) v Great Britain*, 6 November 1925, 6 RIAA 156-157; *La Masica Case (Great Britain, Honduras)*, 7 December 1916, 11 RIAA 549, 554; *Union Bridge Company (United States) v Great Britain*, 8 January 1924, 6 RIAA 138, 142; *Laura M B Janes et al (USA) v United Mexican States*, 16 November 1925, 4 RIAA 82; *Francisco Mallén (United Mexican States) v USA*, 27 April 1927, 4 RIAA 173, 178; *J J Boyd (USA) v United Mexican States*, 12 October 1928, 4 RIAA 380; *William E Chapman (USA) v United Mexican States*, 24 October 1930, 4 RIAA 632.

[97] *Administrative Decision No II*, 1 November 1923, 7 RIAA 23, 24; *Poggioli case (of a general nature)*, 1903, 10 RIAA 669, 673; *Miliani Case (of a general nature)*, 1903, 10 RIAA 584, 587; *Claims of Charles Oberlander and Barbara M Messenger against the Government of Mexico (United States of America/Mexico)*, 19 November 1897, 29 RIAA 327; *Queirolo*, 30 September 1901, 15 RIAA 407; *Don Juan B Sanguinetti*, 30 September 1901, 15 RIAA 403-404; *Don Jeronimo Sessarego*, 30 September 1901, 15 RIAA 400-401; *Don Luis Chiessa*, 30 September 1901, 15 RIAA 399-400; *Don Pablo Vercelli*, 30 September 1901, 15 RIAA 406-407; *Don José Miglia*, 30 September 1901, 15 RIAA 411-412; *Don Lorenzo Roggero*, 30 September 1901, 15 RIAA 408, 409; *Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters (United States) v Germany (Sabotage Cases)*, 16 October 1930, 8 RIAA 84, 86, *see* L H Woolsey, 'The Arbitration of the Sabotage Claims Against Germany' (1939) 33 American Journal of International Law 737.

and 'officials' or 'officers',[98] the latter being more often ascribed to the executive branch. The concept of *organ* has been eventually preferred in the course of the process of codification of the law of State responsibility, since it exactly indicates the mechanism of (organic) "identification" (*agency*) between a particular person and the person of the State, which is at the basis of the canonical rule of attribution. This is the proper meaning of the expression '*acting on behalf of the State*', which was central in the doctrinal exercise undertaken by Roberto Ago in the codification process.

The forms of state or governement of a given country are mere elements of the factual context, which is taken into consideration for the qualification of a person as organ for the purposes of imputation under international law.[99] Even the domestic constitutional principle of the separation of powers has no particular standing in international law, at least for the sake of attribution. In early arbitrations, cases are found of 'mixed' organs exercising the role of security forces, as well as judicial functions.[100] Thus, the inclusion of a given organ into a specific branch of government may be addressed as a '*matter of internal organization and local fashion*' that is relevant as a question of fact.[101]

The status of State organ, although representing a strong *prima facie* case for attribution of an internationally wrongful act, does not invariably entail imputability to the State it belongs to. This is the case of State organs put at the disposal of another State,

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[98] *Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (Finland, Great Britain)*, 9 May 1934, 3 RIAA 1479, 1501; *Metzger Case*, 1903, 10 RIAA 417; *Union Bridge Company (United States) v Great Britain*, 8 January 1924, 6 RIAA 138; *H G Venable (USA) v United Mexican States*, 8 July 1927, 4 RIAA 219; *Maal Case*, 1903, 10 RIAA 730, 733; *Owners, Officers and Men of the Wanderer (Gr Br) v United States*, 9 December 1921, 6 RIAA 68; *Hayden's*, in Moore, III (GPO 1898) 2995.
[99] Ian Brownlie, *System of the Law of Nations. State Responsibility. Part I* (Clarendon Press 1983) 133, 136, 150.
[100] *Laura M B Janes et al (USA) v United Mexican States*, 16 November 1925, 4 RIAA 82 ('police magistrate').
[101] Ian Brownlie, *System of the Law of Nations. State Responsibility. Part I* (Clarendon Press 1983) 142; Luigi Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984) 189 Recueil des Cours 9, 63. '*Dans cette logique, l'emprise de l'organisation étatique sur ces entités ou leur «étiquetage» constituent certes des indices sérieux d'imputabilité (étant donné que normalement tous ceux à qui l'on confie des fonctions publiques sont soumis à un régime centralisé de surveillance et de contrôle), mais somme toute des indices secondaires: ce qui explique qu'on ne se soucie pas ici d'analyser quand, par quels moyens et sous quelles formes cette emprise est réalisée.*'

regulated by ARSIWA Article 6.[102] Indeed, their conducts result in being attributed to the receiving State in so far as they constituted an exercise of its '*elements of the governmental authority*'.[103]

1.2 Role of Domestic Law

As above mentioned, ARSIWA Article 4.2 represents a corollary of the principle of supremacy of international law. [104] Indeed, the qualification of a person as State organ under international law is not dependent upon the status of organ according to internal law. This rule represents a major change with respect to the text of the draft articles adopted on first reading, where the status of organ under the internal law of its State constituted a required element of the attribution rule.[105] The term '*includes'* does not entail a mechanism of *renvoi* such as that operating in private international law.[106] This means that the status of organ '*in accordance with the internal law of the State*' is not automatically received by and incorporated in international law. As already submitted, imputation to the State of the acts of its organ as

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[102] ARSIWA Commentaries 43-44.

[103] *Affaire Chevreau (France contre Royaume-Uni)*, 9 June 1931, 2 RIAA 1113.

[104] *See supra* Chapter I, para 2.

[105] 'Draft Articles on State Responsibility' in Report of the International Law Commission on the Work of its Twenty-Seventh Session, 5 May – 25 July 1975, document A/10010/Rev.1, Yearbook of the International Law Commission, 1975, Volume II, 47, 51, 60, document A/CN.4/SER.A/1975/Add.l:

> *Article 5*
>
> *Attribution to the State of the conducts of its organs*
>
> For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.

[106] Mathias Forteau, 'L'État selon le droit international: une figure à géométrie variable?' (2007) 111 Revue Générale de Droit International Public 737. *Adde*, Roberto Ago, Third Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur, 'The internationally wrongful act of the State, source of international responsibility', 5 March, 7 April, 28 April and 18 May 1971, para 117, document A/CN.4/246 and Add.1-3, Yearbook of the International Law Commission, 1971, Volume II (Part One), 237, document A/CN.4/SER.A/1971/Add.1 (Part 1): '*The State machinery is always a fact for the international legal system; its structures are not "received" into that system and do not acquire the character of legal strutures in it, even if international law takes them into consideration for its own purposes. One must not be misled by the use of the term "referral" ("renvoi") which is sometimes used to describe this phenomenon.*'

subjective element of the internationally wrongful act is normatively governed by international law only.[107] Hence, international law may qualify a person as organ of a State, notwithstanding the absence of official status under municipal law of that State. There are two competing instances in this respect. On one hand, international law acknowledges the maximum degree of liberty of sovereign States as to their internal organization (*self-organization*).[108] On the other hand, it dictates a principle of (institutional) unity and continuity of the State, so that matters of internal machinery not be the ground for the circumvention of rules of imputability of internationally wrongful acts.[109] In any event, the ritual status of organ pursuant to domestic law is not to be regarded as irrelevant. On the contrary, it usually represents the prior – and almost always sufficient – step for the determination of the status of organ *under international law*. The autonomous definition of State organ established by international law intervenes on a supplementary and residual basis in exceptional cases where a person – not having the official status of organ (or receiving an incorrect classification) according to internal law – acts *in fact* on behalf of the State.[110] Thus, ARSIWA Article 4.2 embodies the ground for the legal foundation of the doctrine of the *de*

[107] Roberto Ago, 'Le délit international' (1939) 68 Recueil des Cours 415, 465: '*En un mot: c'est exclusivement dans l'ordre juridique interne que l'organe de l'Ètat a la qualité juridique d'organe; du point de vue de l'ordre international, cette qualité d'organe n'est considérée que comme une condition de fait nécessaire pour pouvoir examiner sa conduite et apprécier comme une conduite juridique de l'Ètat*.'

[108] Luigi Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984) 189 Recueil des Cours 9, 62; Alwyn V Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, Greenman and Company 1938) 23.

[109] *Aguilar-Amory and Royal Bank of Canada claims (Great Britain v Costa Rica) (Tinoco case)*, 18 October 1923, 1 RIAA 369, 378.

[110] International Law Commission, Statement of the Chairman of the Drafting Committee, Mr Bruno Simma, 13 August 1998, 6. On this point, *cf* Paolo Palchetti, 'Comportamento di organi di fatto e illecito internazionale nel progetto di articoli sulla responsabilità internazionale degli Stati' in Marina Spinedi, Alessandra Gianelli and Maria Luisa Alaimo (eds), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti: problemi e spunti di riflessione* (Giuffrè 2006) 3, 6; Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 European Journal of International Law 387, 388.

facto organ, which has only rather recently received a conclusive systematization within the international rules of attribution.[111]

1.3 Functions of the Central Government

1.3.1 Legislative

The acts of the legislative branch are usually considered as attributable, as well as decrees of a normative character emanated by the Executive.[112] The principle is firmly rooted throughout the history of codification of responsibility of States for internationally wrongful acts,[113] in legal scholarship,[114] and in early arbitral case law.[115] Statutes or laws of expropriation or confiscation infringing international law constitute canonical examples of imputable acts.[116]

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[111] *See infra* para 3 of this Chapter. Reference is clearly made to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports 2007, 43.

[112] *Certain German Interests in Polish Upper Silesia*, Judgment No 7, 25 May 1926, PCIJ Series A No 7, 3, 18-19, 23 (Polish law of 14th July 1920 concerning the transfer of the rights of the German Treasury and of members of reigning German Houses to the Treasury of the State of Poland); *Claim of the Salvador Commercial Company ("El Triunfo Company")*, 8 May 1902, 15 RIAA 467.

[113] Institut de Droit International, 'Responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers' (Leo Strisower, Rapporteur), Résolution du 1 septembre 1927, Session de Lausanne, (1927) 33(III) Annuaire de l'Institut de Droit International 330-335, Article I(1); League of Nations, Committee of Experts for the Progressive Codification of International Law, Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930), Bases of Discussions, No 2, League of Nations publication, V. Legal, 1929.V.3, document C.75.M.69.1929.V, (1930) 24 Special Supplement American Journal of International Law 3; Francisco V García Amador, 'Draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens', Article 2, Annex to International responsibility: Third report by F. V. García Amador, Special Rapporteur, 'Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens. Part II: The International Claim', 2 January 1958, document A/CN A/111, Yearbook of the International Law Commission, 1958, Volume II, 47, 71, document A/CN.4/SER.A/1958/Add.l.

[114] C F Amerasinghe, 'Imputability in the Law of State Responsibility for Injuries to Aliens' (1966) 22 Revue égyptienne de droit international 91, 98; Ian Brownlie, *System of the Law of Nations. State Responsibility. Part I* (Clarendon Press 1983) 135, 142.

[115] *Affaire de l'impôt sur les bénéfices de guerre (France contre Espagne)*, 15 June 1922, 1 RIAA 302; *Norwegian Shipowners' Claims (Norway v USA)*, 13 October 1922, 1 RIAA 307, 309.

[116] *German Settlers in Poland,* Advisory Opinion No 6, 10 September 1923, PCIJ Series B No 6, 22; *The Factory at Chorzów*, Judgement No 13, Merits, 13 September 1928, PCIJ Series A No 17, 2.

The conduct of the legislature may also be represented by an omission, namely failure to incorporate given rules in municipal legislation that are required by treaty obligations.

It has been pointed out that statutory law as such is not sufficient to *actually* engender State responsibility. As Benedetto Conforti submitted:

> A notre avis, l'activité normative abstraite, la simple adoption d'une loi, quoique contraire au droit international, n'implique pas en soi la responsabilité de l'Etat.[117]

This appears to be a reflection connected to the operation of the primary rule possibly at issue, namely that abstract legislative activity might not beget as such an international wrongful act. Although not exclusively related to the functioning of the attribution rule, this can explain the requirement, illustrated in legal scholarship, of some act of the Executive or of the Judiciary giving effect to legislation.[118] This situation has already been addressed in early arbitration practice:

> [O]rdinarily and in this case, claim for expropriation of property arises when possession of owner is interfered with (actual confiscation), and not when legislation is passed which makes later deprivation of possession possible.[119]

1.3.2 Executive

The most comprehensive category of attributable acts undoubtedly pertains to the executive branch, which embodies '*the most direct manifestation of state power*'.[120] The World Court has invariably established international responsibility of the State based on the conduct of its

[117] Benedetto Conforti, 'La Cour constitutionnelle italienne et le droits de l'homme méconnus sur le plan international' (2015) 119 Revue Générale de Droit International Public 353, 357. The function of a constitutional court is to be assimilated to the legislative power, rather than to the judiciary.
[118] James Crawford, *State Responsibility. The General Part* (Cambridge University Press 2013) 120-121; Dionisio Anzilotti, *Corso di diritto internazionale, Volume Primo: Introduzione – Teorie generali* (Athenaeum, 3° edn 1928) 426.
[119] *Mariposa Development Company and Others (United States) v Panama*, 27 June 1933, 6 RIAA 338.
[120] James Crawford, *State Responsibility. The General Part* (Cambridge University Press 2013) 119. Canonical examples are governmental orders to enforce or prevent a given conduct, or decrees of seizure, confiscation, or expropriation. See *Armstrong Cork Company Case — Decision No 18*, 22 October 1953, 14 RIAA 159; *Martini Case (of a general nature)*, 1903, 10 RIAA 644-669; *Différend concernant l'interprétation de l'article 79, par 6, lettre C, du Traité de Paix (Biens italiens en Tunisie — Échange de lettres du 2 février 1951) — Décisions nos 136, 171 et 196*, 25 June 1952, 6 July 1954 and 7 December 1955, 13 RIAA 389.

executive and administrative machinery.[121] In early arbitral cases and in the practice of the IRAN-US Tribunal, the same rule is applied with regard to acts and omissions of heads of state and government,[122] ministries,[123] agencies,[124] or the government in its entirety.[125] The rules of attribution in ARSIWA do not assume a given form of government (for instance, parliamentary or presidential republic, constitutional monarchy, theocratic State, etc…). To this extent, customary rules of attribution have been employed in connection with political and constitutional organs resulting from non-Western forms of government and not being

[121] *Elettronica Sicula SpA (ELSI) (United States of America v Italy)*, Judgment, 20 July 1989, ICJ Reports 1989, 15, 33; *Avena and Other Mexican Nationals (Mexico v United States of America)*, Judgment, 31 March 2004, ICJ Reports 2004, 12, 19; *LaGrand (Germany v United States of America)*, Judgment, 27 June 2001, ICJ Reports 2001, 466, 475, 499.

[122] *Orinoco Steamship Company Case*, 1903-1905, 9 RIAA 180; *Jarvis Case*, 1903-1905, 9 RIAA 208; *Turnbull, Manoa Company (Limited), and Orinoco Company (Limited) Cases*, 1903-1905, 9 RIAA 261; *Kummerow, Otto Redler and Co, Fulda, Fischbach, and Friedericy Cases*, 1903, 10 RIAA 369; *Aguilar-Amory and Royal Bank of Canada claims (Great Britain v Costa Rica) (Tinoco case)*, 18 October 1923, 1 RIAA 369.

[123] *Questech, Inc v The Ministry of National Defence of the Islamic Republic of Iran*, Case No 59, 20 September 1985, Award No 191-59-1, 9 IRAN-US CTR 107 (1985-II); *McCollough & Company, Inc v The Ministry of Post, Telegraph and Telephone, The National Iranian Oil Company and Bank Markazi*, Case No 89, 22 April 1986, Award No 225-89-3, 11 IRAN-US CTR 3, 6 (1986-II); *American Bell International, Inc v The Islamic Republic of Iran, The Ministry of Defense of the Islamic Republic of Iran, The Ministry of Post, Telegraph and Telephone of the Islamic Republic of Iran, and The Telecommunications Company of Iran*, Case No 48, 19 September 1986, Award No 255-48-3, 12 IRAN-US CTR 170, 174 (1986-III); *Otis Elevator Company v The Islamic Republic of Iran, and Bank Mellat (formerly Foreign Trade Bank of Iran)*, Case No 284, 29 April 1987, Award No 304-284-2, 14 IRAN-US CTR 283, 292 (1987-I); *Kaysons International Corporation v The Government of the Islamic Republic of Iran, The Ministry of Industries and Mines, The Alborz Investment Corporation, The Tolid Daru Company, The Payegozar, The Pakhs Alborz Company, and The KBC Company*, Case No 367, 28 June 1993, Award No 548-367-2, 29 IRAN-US CTR 222, 227 (1993); *Unidyne Corporation v The Islamic Republic of Iran acting by and through The Navy of the Islamic Republic of Iran*, Case No 368, 9 March 1994, Decision No DEC 122-368-3, 30 IRAN-US CTR 19 (1994); *State University of New York College of Environmental Science and Forestry v Ministry of Culture and Higher Education, and The Islamic Republic of Iran*, Case No B-71, 16 December 1986, Award No 277-B71-2, 13 IRAN-US CTR 277 (1986-IV); *Iowa State University of Science and Technology v Ministry of Culture and Higher Education, and The Islamic Republic of Iran*, Case No B-72, 16 December 1986, Award No 276-B72-2, 13 IRAN-US CTR 271 (1986-IV).

[124] *International Technical Products Corporation and ITP Export Corporation, its wholly-owned subsidiary, v The Government of the Islamic Republic of Iran and its agencies, The Islamic Republic Iranian Air Force and the Ministry of National Defense, acting for the Civil Aviation Organization*, Case No 302, 24 October 1985, Award No 196-302-3, 9 IRAN-US CTR 206, 238 (1985-II); *Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran, The Government of the Islamic Republic or Iran, Civil Aviation Organization, Plan and Budget Organization, Iranian Air Force, Ministry of Defence, Bank Melli, Bank Sakhteman, Mercantile Bank of Iran and Holland*, Case No 7, 22 June 1984, Award No 141-7-2, 6 IRAN-US CTR 219, 221 (1984-II).

[125] *Flexi-Van Leasing, Inc v The Government of the Islamic Republic of Iran*, Case No 36, 11 October 1986, Award No 259-36-1, 12 IRAN-US CTR 335, 348-351 (1986-III); *Arthur Young & Company v The Islamic Republic of Iran, Telecommunications Company of Iran, Social Security Organization of Iran*, Case No 484, 30 November 1987, Award No 338-484-1, 17 IRAN-US CTR 245, 257 (1987-IV); *James M Saghi, Michael R Saghi, Allan J Saghi v The Islamic Republic of Iran*, Case No 298, 22 January 1993, Award No 544-298-2, 29 IRAN-US CTR 20, 23 (1992).

characterized by the principle of separation of powers, as in the case of the Iranian Revolutionary Council.[126] As above mentioned, the categorization of an organ as belonging to a given State 'function' (legislative, executive, judiciary, or other) is not per se a threshold determination for the purposes of attribution of acts or omissions to the State. However, in case of controversial qualification, conducts are generally absorbed into the category of acts of the Executive, based on some exercise of 'governmental authority' (legitimate use of the public force, chiefly). Seconding Ian Brownlie's spectrum of State agents belonging to the executive/administrative power, it is possible to mention the following examples: ministers, (senior) police officials,[127] diplomatic (and consular) agents,[128] fishery protection officers, customs officials, '*and many others of higher or lower rank in the state service*'.[129]

It is apposite to delve more accurately into the conducts of armed forces.[130] The acts of official land,[131] sea,[132] and air[133] forces are imputable to their State, as far as their mililitary

[126] *Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran, The Government of the Islamic Republic or Iran, Civil Aviation Organization, Plan and Budget Organization, Iranian Air Force, Ministry of Defence, Bank Melli, Bank Sakhteman, Mercantile Bank of Iran and Holland*, Case No 7, 22 June 1984, Award No 141-7-2, 6 IRAN-US CTR 219, 226-226 (1984-II); *Charles P Stewart v The Islamic Republic of Iran*, Case No 12458, 9 February 1990, Award No 468-12458-2, 24 IRAN-US CTR 116, 119 (1990-I).

[127] *Don Jacinto Gadino*, 30 September 1901, 15 RIAA 414-416; *Gust Adams (United States) v Panama*, 21 June 1933, 6 RIAA 321, 322; *Cecelia Dexter Baldwin, Administratrix of the Estate of Harry D Baldwin, and Others (United States) v Panama*, 26 June 1933, 6 RIAA 328, 329; *In the matter of the death of James Pugh (Great Britain, Panama)*, 6 July 1933, 3 RIAA 1439; *Différend Dame Mossé — Décisions nos 144 et 157*, 17 January and 6 October 1953, 13 RIAA 486, 490. *Adde*, *Affaire Mantovani*, 17 March 1965, in Charles Rousseau, 'Chronique des faits internationaux' (July-September 1965) 69 Revue Générale de Droit International Public 835.

[128] *Asphalt Company Case (on merits)*, 1903, 9 RIAA 389.

[129] Ian Brownlie, *System of the Law of Nations. State Responsibility. Part I* (Clarendon Press 1983) 138-139.

[130] Alwyn V Freeman, *Responsibility of States for Unlawful Acts of their Armed Forces* (A W Sijthoff 1957).

[131] *Ex multis*, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, 27 June 1986, ICJ Reports 1986, 14; *Armed Activities in the Territory of the Congo (DRC v Uganda)*, Judgment, 19 December 2005, ICJ Reports 2005, 168; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports 2007, 43.

[132] *Opinion in the Lusitania Cases*, 1 November 1923, 7 RIAA 32; *D Earnshaw and Others (Great Britain) v United States (Zafiro case)*, 30 November 1925, 6 RIAA 160, 165; *José Maríia Vásquez Díaz, Assignee of Pablo Elías Velásquez (Panama) v US*, 27 June 1933, 6 RIAA 341; *Owners, Officers and Men of the Wanderer (Gr Br) v United States*, 9 December 1921, 6 RIAA 68. As to the Iran-US Claims Tribunal, *see Unidyne Corporation v The Islamic Republic of Iran acting by and through The Navy of the Islamic Republic of Iran*, Case No 368, 9 March 1994, Decision No DEC 122-368-3, para 9, 30 IRAN-US CTR 19 (1994).

operations are concerned,[134] but also in relation to their possible exercise of civil and political functions.[135] The status of armed forces is demanded to require a higher standard of prudence (due diligence) in their discipline and control in the discharge of their functions.[136] In early arbitral practice, numerous references are found to the requirement that troops belonging to army corps of belligerant forces be regular, defined and determined with precision.[137] The distinction between regular and irregular troops has relevance for the purposes of attribution. Indeed, irregulars may not be classified as *de iure* organs, without prejudice to a finding of *de facto* agency. Instead, the status of auxiliary corps, even though controversial, should be ascribed to the category of official organs.

A threshold question is whether imputability may rest upon conducts of ordinary soldiers (enlisted men), irrespective of their acts occurring under the control, at the presence and under direct command of their chiefs.[138] This issue was addressed in the early case of the

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[133] *Intrend International, Inc v The Imperial Iranian Air Force, The Islamic Republic of Iran and The Provisionary Revolutionary Government of Iran*, Case No 220, 27 July 1983, Award No 59-220-2, 3 IRAN-US CTR 110 (1983-II).

[134] *Poggioli Case (of a general nature)*, 1903, 10 RIAA 669, 670; *Dona Clara Lanatta, veuve de Campodonico*, 30 September 1901, 15 RIAA 416-417; *La Masica Case (Great Britain, Honduras)*, 7 December 1916, 11 RIAA 549, 554; *Paula Mendel and Others (United States) v Germany*, 13 August 1926, 7 RIAA 372; *Cornelia J Pringle, et al, (Santa Isabel Claims) (USA) v United Mexican States*, 26 April 1926, 4 RIAA 783; *Teodoro García and M A Garza (United Mexican States) v United States of America*, 3 December 1926, 4 RIAA 119; *Dunbar & Belknap*, in Moore, III (GPO 1898) 2998; *Glenn*, 1868, in Moore, III (GPO 1898) 3138. The rule is not only found in early cases, but also in diplomatic notes. *See Affaire Vracaritch*, in Charles Rousseau, 'Chronique des faits internationaux' (April-June 1962) 66 Revue Générale de Droit International Public 376-378.

[135] *Star and Herald*, in Moore, VI (GPO 1906) 775; *Irene Roberts Case*, 1903-1905, 9 RIAA 204-208; *Island of Palmas case (Netherlands, USA)*, 4 April 1928, 2 RIAA 829, 836.

[136] Ian Brownlie, *System of the Law of Nations. State Responsibility. Part I* (Clarendon Press 1983) 140.

[137] *Don Juan B Sanguinetti*, 30 September 1901, 15 RIAA 403-404; *Don Jeronimo Sessarego*, 30 September 1901, 15 RIAA 400-401; *Don Aquilino Capalleti*, 30 September 1901, 15 RIAA 438-439; *Don Ricardo Castiglione*, 30 September 1901, 15 RIAA 417-418; *Don Pablo Vercelli*, 30 September 1901, 15 RIAA 406-407; *Don Evangelista Machiavello and Don Francisco Olivari*, 30 September 1901, 15 RIAA 439, 440; *Don Lorenzo Roggero*, 30 September 1901, 15 RIAA 408, 409; *Cecelia Dexter Baldwin, Administratrix of the Estate of Harry D Baldwin, and Others (United States) v Panama*, 26 June 1933, 6 RIAA 328, 330.

[138] *Eis, et al (US v USSR)*, United States, Foreign Claims Settlement Commission, 2 March 1959, 30 ILR 116; *Don Ricardo Castiglione*, 30 September 1901, 15 RIAA 417-418: '*en présence de leurs chefs*'; *Don José Miglia*, 30 September 1901, 15 RIAA 411-412: '*soumises au commandement de leurs chefs*'; *Irene Roberts Case*, 1903-1905, 9 RIAA 204-208; *Crossman Case (interlocutory)*, 1903, 9 RIAA 356, 357: '*In the present case it does not appear confirmed in any way that the troops obeyed superior orders, nor that the nearest military authorities could have avoided the damages done.*'; *J M Henriquez Case*, 1903, 10 RIAA 727, 728: '*There is no proof that*

Zafiro.[139] In point of fact, the Zafiro was a British merchant vessel that had been purchased by the US navy and registered as vessels of the US merchant navy in order to discharge the function of collier and supply ship. Accordingly, its original crew, made up of British officers and Chinese sailors, was enrolled in the American merchant service. The status of the vessel appears to be that of an *auxiliary*. While the vessel was anchored in the Manila Bay, the crew was granted shore leave and abandoned itself to acts of looting, pillage and destruction in the surrounding neighbourhoods. The Commission required a test of command and (effective) control of the State with respect to the navy personnel, in order to attribute their conducts to the latter.[140] At the same time, a State may be held liable for lack of due diligence ('*want of supervision*') for having left its militaries off-duty in given circumstances.[141] The crew of the Zafiro had clearly committed some purely private acts out of actual or apparent office. It is questionable whether the high threshold of command and control equally applies in case of delinquencies executed by armed forces *ultra vires*. In this respect, the strict test of command and control is superseded by the applicability of the rule of attribution of *ultra vires* acts and

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the injuries done to the building were in consequence of, or as an incident to, the occupancy of said building as a place of rendezvous under official orders, bur it has more the appearance of reckless and undirected action of ungoverned soldiery.'; *D Earnshaw and Others (Great Britain) v United States (Zafiro case)*, 30 November 1925, 6 RIAA 160, 163: '*But it is not necessary that an officer be on the very spot*'; *Ruden*, in Moore, II (GPO 1898) 1653-1655; *Terry and Angus*, 31 March 1847, in Moore, III (GPO 1898) 2993. *See also Louis B Gordon (USA) v United Mexican States*, Dissenting Opinion of Commissioner Nielsen, 8 October 1930, 4 RIAA 586, 591.

[139] *D Earnshaw and Others (Great Britain) v United States (Zafiro case)*, 30 November 1925, 6 RIAA 160.

[140] *D Earnshaw and Others (Great Britain) v United States (Zafiro case)*, 30 November 1925, 6 RIAA 160, 163-164: '*We have next to inquire whether at the time of the looting in question the Chinese crew were under discipline and officered so as to make the United States responsible, […] It is well settled that we must distinguish between soldiers or sailors under the command of officers, on the one hand, and, on the other hand, bodies of straggling and marauding soldiers not under the command of an officer, or marauding sailors not under command or control of officers. […] In the case before us, we think the officers were not actually present at the houses when the looting was done. […] we feel that there was no effective control of the Chinese crew at the time when the real damage took place.*'

[141] *D Earnshaw and Others (Great Britain) v United States (Zafiro case)*, 30 November 1925, 6 RIAA 160, 164-165: '*we cannot agree that letting this Chinese crew go ashore uncontrolled at the time and place in question was like allowing shore leave to sailors in a policed port where social order is maintained by the ordinary agencies of government*.'

omissions of State organs (or persons or entities *ex* ARSIWA Article 5).[142] A similar line of argument may be resorted to also with regard to *de facto* organs.[143] The absence of an official and formal institutional link would realistically demand a marked degree of control (equivalent to the one between the military commanders and their subordinates) from *de jure* to *de facto* organs. But, once a finding of *de facto* agency has been established, the regime of attribution of conducts of State organs has to be applied in its entirety, to the inclusion of the *ultra vires* rule and the imputability of *acta jure gestionis* performed in official capacity.

1.3.3 Judiciary

The attributability of the acts of the judicial power is a rule of common currency in customary international law.[144] Likewise, attribution also operates in relation to the acts performed by public officials in charge of ancillary functions to the judiciary, as it was the case of co-ownership trustees (*syndics*), liquidators and sequestrators appointed by decree by the Italian government for the administration of property of enemies seized in time of war.[145] However, it had been repeatedly submitted in earlier times that the independence of the judiciary from the executive power should have prevented imputability to the State. The issue was already

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[142] *Don Francisco Grocce*, 30 September 1901, 15 RIAA 448-449: '*et que, même en admettant que les soldats qui ont commis de pareils actes ne se trouvaient actuellement sous les ordres d'aucun officier, on ne saurait laisser impuni un fait qui mérite un châtiment.*'

[143] *See infra* para 3 of this Chapter.

[144] *Elettronica Sicula SpA (ELSI) (United States of America v Italy)*, Judgment, 20 July 1989, ICJ Reports 1989, 15, 36; *Avena and Other Mexican Nationals (Mexico v United States of America)*, Judgment, 31 March 2004, ICJ Reports 2004, 12, 27; *Differences Relating to Immunity from Legal Process of a Special-Rapporteur of the Commission of Human Rights*, Advisory Opinion, 29 April 1999, ICJ Reports 1999, 62. As to early case law, *see H G Venable (USA) v United Mexican States*, 8 July 1927, 4 RIAA 219; *Francisco Mallén (United Mexican States) v USA*, 27 April 1927, 4 RIAA 173; *William T Way (USA) v United Mexican States*, 18 October 1928, 4 RIAA 391, 400; *Ethel Morton (USA) v United Mexican States*, 2 April 1929, 4 RIAA 428; *B E Chattin (United States) v United Mexican States*, 23 July 1927, 4 RIAA 282; *Clyde Dyches (USA) v United Mexican States*, 9 April 1929, 4 RIAA 458.

[145] *Différend Société Verdol — Décisions nos 20 et 34*, 5 April and 16 November 1949, 13 RIAA 94, 96; *Différend Joseph Ousset — Décisions nos 93 et 170*, 14 April 1951 and 5 July 1954, 13 RIAA 252; *Currie Case — Decision No 21*, 13 March 1954, 14, 21-27.

resolved by Dionisio Anzilotti in favour of attributability to the State of the conducts of judges, as a corollary of the irrelevance of the principle of separation of powers at the international level for the purposes of imputation.[146] The concept has been elucidated in the case of the *Biens italiens en Tunisie*:

> Si, dans certaines sentences arbitrales du XXe siècle, on trouve exprimée l'opinion que l'indépendance des tribunaux, conforme au principe de la division des pouvoirs généralement reconnu dans les pays civilisés, exclut la responsabilité internationale de l'Etat du fait des actes du pouvoir judiciaire contraires au droit, cette théorie semble aujourd'hui universellement et justement répudiée par la doctrine et la jurisprudence internationales. La sentence rendue par l'autorité judiciaire est une émanation d'un organe de l'Etat, tout comme la loi promulguée par l'autorité législative, ou la décision prise par l'autorité executive.[147]

The responsibility of States for internationally wrongful acts on the basis of attribution of acts or omissions of the judiciary is historically related to two 'families' of primary norms: on one side, the set of substantive obligations, whose violation gives rise to a denial of justice; on the other side, immunity rules.

Denial of justice is a concept of arduous definition in international law.[148] It is based on a finding of a state judge's wilful departure from the rule of law in a fashion of

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[146] Dionisio Anzilotti, *Corso di diritto internazionale, Volume Primo: Introduzione – Teorie generali* (Athenaeum, 3° edn 1928) 427: '*L'indipendenza del potere giudiziario è un principio di diritto costituzionale, che ha di mira i rapporti tra questo e gli altri poteri dello Stato: di fronte agli Stati esteri, invece, vi è lo Stato subietto del diritto internazionale, cioè lo Stato nella sua unità, non i singoli poteri dello Stato.*'; Dionisio Anzilotti, 'La responsabilité internationale des États a raison des dommages soufferts par des étrangers' (1906) 13 Revue Générale de Droit International Public 285, 296-298; Eduardo Jiménez de Aréchaga, 'International Law in the Past Third of a Century' (1978-I) 159 Recueil des Cours 1, 278: '*the judgment given by a judicial authority emanates from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive.*'; Djamchid Momtaz, 'Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 237, 239-40.

[147] *Différend concernant l'interprétation de l'article 79, par 6, lettre C, du Traité de Paix (Biens italiens en Tunisie — Échange de lettres du 2 février 1951) — Décisions nos 136, 171 et 196*, 25 June 1952, 6 July 1954 and 7 December 1955, 13 RIAA 389, 438.

[148] Edwin M Borchard, *The Diplomatic Protection of Citizens Abroad or The Law of International Claims* (The Banks Law Publishing Co 1915) 81: the municipal judge's decision should be '*grossly unfair and notoriously unjust*'; Clyde Eagleton, 'Denial of Justice in International Law' (1928) 22 American Journal of International Law 538; Dionisio Anzilotti, 'La responsabilité internationale des États a raison des dommages soufferts par des étrangers' (1906) 13 Revue Générale de Droit International Public 5, 21; Alwyn Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, Greenman and Company 1938) 40; Constantin T Eustathiades, *La responsabilité internationale de l'État pour les actes des organes judiciaires et le problème du déni de justice en droit international*, Tome II (Éditions A Pedone 1936) 424; Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press 2005) 57.

arbitrariness and unfairness that results in being outrageous and intolerable to an international common sense of juridical and even societal propriety.[149] In early arbitral practice, denial of justice broadly encompassed cases of unlawful detention, failure to investigate and to collect evidence, failure to apprehend or punish, lack of due process, summary executions, and lack of care in custody.[150] If brought to abstraction, the state duties underlying the entirety of such instances may be abscribed to the concept of due diligence obligations. Not only mixed arbitral commissions liberally interpreted the doctrine of denial of justice, but also – in line with various projects of codification[151] – applied it to arbitrary conducts of the executive powers, although generally connected to the activities of the local judges, as in the case of episodes of arrest and subsequent detention, refusal to issue documents or failure to bring to trial (denial of *access* to justice).[152]

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[149] *Elettronica Sicula SpA (ELSI) (United States of America v Italy)*, Judgment, 20 July 1989, ICJ Reports 1989, 15, 76: '*It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*', referring to *Asylum (Colombia v Peru)*, Judgment, 20 November 1950, ICJ Reports 1950, 266, 284.

[150] *Jesús Navarro Tribolet, et al, Next of Kin of Robert Tribolet, Deceased (USA) v United Mexican States*, 8 October 1930, 4 RIAA 598, 600; *Francisco Quintanilla (United Mexican States) v United States of America*, 16 November 1926, 4 RIAA 101-104; *Davy Case (on merits)*, 1903, 9 RIAA 467; *J W and N L Swinney (USA) v United Mexican States*, 16 November 1926, 4 RIAA 98; *Margaret Roper (USA) v United Mexican States*, 4 April 1927, 4 RIAA 145, 147-148; *Alexander St J Corrie (USA) v United Mexican States*, 5 March 1929, 4 RIAA 416, 417; *Gust Adams (United States) v Panama*, 21 June 1933, 6 RIAA 321, 323; *Cecelia Dexter Baldwin, Administratrix of the Estate of Harry D Baldwin, and Others (United States) v Panama*, 26 June 1933, 6 RIAA 328, 331-333; *Salome Lerma Vda De Galvan (United Mexican States) v USA*, 21 July 1927, 4 RIAA 273; *George Adams Kennedy (USA) v United Mexican States*, 6 May 1927, 4 RIAA 194; *George David Richards (USA) v United Mexican States*, 23 July 1927, 4 RIAA 275, 276; *Louis B Gordon (USA) v United Mexican States*, 8 October 1930, 4 RIAA 586, 590, where a denial of justice was not established: '*it cannot be said decision amounts to an outrage, or that it is rendered in bad faith, or shows a wilful neglect of duty or insufficiency of governmental action so far short of international standards as to constitute a denial of justice.*'

[151] Francisco V García Amador, 'Draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens', Article 4.2, Annex to International responsibility: Third report by F. V. Garcia Amador, Special Rapporteur, 'Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens. Part II: The International Claim', 2 January 1958, document A/CN A/111, Yearbook of the International Law Commission, 1958, Volume II, 47, 71, document A/CN.4/SER.A/1958/Add.l.

[152] *Jesús Navarro Tribolet, et al, Next of Kin of Robert Tribolet, Deceased (USA) v United Mexican States*, 8 October 1930, 4 RIAA 598, 600; *Francisco Quintanilla (United Mexican States) v United States of America*, 16 November 1926, 4 RIAA 101-104; *Claims of Charles Oberlander and Barbara M Messenger against the Government of Mexico (United States of America/Mexico)*, 19 November 1897, 29 RIAA 327, 335; *Laura M B Janes et al (USA) v United Mexican States*, 16 November 1925, 4 RIAA 82, 86, 88: '*Denial of justice, in its broader sense, may cover even acts of the executive and the legislative; in cases of improper governmental action of this type, a nation is never held to be liable for anything else than the damage caused by what the executive or the legislative committed or omitted itself. In cases of denial of justice in its narrower sense,*

A State's obligation to grant immunity from legal process is eminently incumbent to their judges.[153] Public international law provides for various categories of immunity, which can be ordered in three groupings: State immunity from jurisdiction and execution, immunities of international organisations, and diplomatic immunities. Pursuant to Article 6.1 of the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI), a national judge is obliged to raise questions of immunity *in limine litis* and even *proprio motu*, in the absence of a party's motion to this extent.[154] Accordingly, a court's failure to grant immunity or immunities is definitely imputable to the State and may result in a finding of international responsibility, provided that the substantive criteria dictated by the relevant rules of exemption from suit have been misapplied.[155] The Italian Constitutional Court has famously decided that the ICJ Judgment in the case of *Jurisdictional Immunities of*

Governments again are held responsible exclusively for what they commit or omit themselves. Only in the event of one type of denial of justice, the present one, a State would be liable not for what it committed or omitted itself, but for what an individual did' (Mexican police magistrate); *Teodoro García and M A Garza (United Mexican States) v United States of America*, 3 December 1926, 4 RIAA 119; *Charles S Stephens and Bowman Stephens (USA) v United Mexican States*, 15 July 1927, 4 RIAA 265-268; *Francisco Mallén (United Mexican States) v USA*, 27 April 1927, 4 RIAA 173, 178; *F R West (USA) v United Mexican States*, 21 July 1927, 4 RIAA 270, 272; *Louise O Canahl (USA) v United Mexican States*, 15 October 1928, 4 RIAA 389; *Glenn*, 1868, in Moore, III (GPO 1898) 3138; *The Interoceanic Railway of Mexico (Acapulco to Veracruz) (Ltd), and the Mexican Eastern Railway Company (Ltd), and the Mexican Southern Railway (Ltd) (Great Britain) v United Mexican States*, 18 June 1931, 5 RIAA 178, 185: '*The Commission deem that these examples, which could be supplemented by many others, show that non-judicial authorities also can be guilty of a denial or undue delay of justice, and if it could, in the case now before them, be shown that such authorities had been guilty of that international delinquency, they would not hesitate to declare themselves competent […]*'; *Laura M B Janes et al (USA) v United Mexican States*, 16 November 1925, 4 RIAA 82, 86, 88: '*Denial of justice, in its broader sense, may cover even acts of the executive and the legislative.*'

[153] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports 2012, 99; *Differences Relating to Immunity from Legal Process of a Special-Rapporteur of the Commission of Human Rights*, Advisory Opinion, 29 April 1999, ICJ Reports 1999, 62, 88; *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, Judgment, 14 February 2002, ICJ Reports 2002, 3, 22; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment, 4 June 2008, para 196, ICJ Reports 2008, 177, 244.

[154] UNCSI Article 6.1:

> *Article 6*
> *Modalities for giving effect to State immunity*
>
> 1. A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.

[155] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports 2012, 99.

the State be not applicable and enforceable within the Italian jurisdiction.[156] The function of a constitutional judge is to be assimilated to the legislative power, rather that to the Judiciary.[157] Accordingly, decisions of a constitutional court do not ordinarily entail *as such* the breach of the applicable international obligation of the State. However, said breach may later occur on the basis of the application of the principle of law encapsulated by the Constitutional Court by the judge of the referral.[158]

1.3.4 'Any other functions': Central Banks and Independent Authorities

In harmony with the purpose to encompass all the varieties of persons that can engage the international responsibility of the State, ARSIWA Article 4 provides for an open-ended catalogue of powers, not only consisting of the legislative, executive and judicial branches, but also comprising '*any other functions*'. This 'catch-all' proviso certainly includes the acts and omissions of central banks, independent authorities or administrative agencies, entrusted with regulatory and administrative functions. These are clearly State 'organs', but qualifications as persons or entities empowered by the law to exercise elements of the governmenthal authority (*i.e.*, parastatals) are recorded in the scholarly debate.[159] James Crawford suggests solving the taxonomy issue upon the finding of the precise relationship of the 'entity' concerned with the government on a rather casuistic basis.[160] Investor-state arbitration provides for relevant practice establishing that the circumstance of a public entity

[156] Corte Costituzionale, Judgment No 238, 22 October 2014, (2015) 109 American Journal of International Law 400, note Riccardo Pavoni.
[157] *See supra* para 1.3.1.
[158] Benedetto Conforti, 'La Cour constitutionnelle italienne et le droits de l'homme méconnus sur le plan international' (2015) 119 Revue Générale de Droit International Public 353.
[159] Jane Chalmers, 'State Responsibility for Acts of Parastatals Organized in Corporate Form' (1990) 84 American Society of International Law Proceedings 60.
[160] James Crawford, *State Responsibility. The General Part* (Cambridge University Press 2013) 128.

benefitting of separate juristic personality under domestic law does not preclude a finding of '*de iure*' organ.[161] The distinction between legal personality of public and private law appears to be vested of threshold importance. The former would attract a 'public body' into the 'official' boundaries of the State as *de jure* organ.[162] On the contrary, the latter is usually a necessary prerequisite for the operation of the attribution rule under ARSIWA Article 5 as to State instrumentalities ('State entities').[163]

1.4 Territorial Units of the State

The principle of (territorial) unity of the State dictates that from the standpoint of international law the forms of state and administration are legally irrelevant.[164] The delegation of governmental powers and authority from the state (primary level) to sub-state territorial entities (secondary level) does not exempt the central government from attribution of the acts of the organs of the peripheric level.[165] This normative mechanism is preserved irrespective of the independence accorded to local autonomies by constitutional or statutory law or of the

[161] *Eureko BV v Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 August 2005, para 120; *Toto Costruzioni Generali SpA v The Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction, 11 September 2009, para 46, 56: '*Moreover, the CDR acts as an agent of the State*'.
[162] *See infra* Chapter III, para 3.1
[163] *See infra* para 4 of this Chapter and Chapter III, para 4.
[164] Christian Tomuschat, 'Attribution of International Responsibility: Direction and Control' in Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013) 7, 11; André JJ de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the *Tadić* Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia' (2001) 72 British Year Book of International Law 255, 265.
[165] Institut de Droit International, 'Responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers' (Leo Strisower, Rapporteur), Résolution du 1 septembre 1927, Session de Lausanne, (1927) 33(III) Annuaire de l'Institut de Droit International 330-335, Article II: '*L'Etat est responsable du fait des collectivités qui exercent sur son territoire des fonctions publiques*'; Harvard Law School (Manley O Hudson, Director), 'Research in International Law (Nationality, Responsibility of States, Territorial Waters). Drafts of Conventions Prepared in Anticipation of the First Conference on the Codification of International Law, The Hague, 1930', 1 April 1929, Part II, 'Responsibility of States' (Edwin M Borchard, Rapporteur), Article 3, (1929) 23 Special Number American Journal of International Law Special Supplement 133.

effective control of the State on its political subdivisions.[166] The rule has been formulated by the PCIJ in the *Upper Silesia* case:

> Again, communes, outside their own sphere of activity, also exercise functions as organs of the State itself; they are subject to the control of the State authorities as regards both the activities which are directly incumbent upon them and those which they undertake in virtue of powers delegated by the State. An essential and necessary bond therefore unites the commune and the State of which it forms part;[167]

Accordingly, the principle is readily applied to constituent States of federal States,[168] autonomous regions,[169] autonomous territories,[170] overseas provinces,[171] territories under military occupation,[172] counties,[173] municipalities,[174] mayors of a municipality,[175] municipal

[166] *Estate of Hyacinthe Pellat (France) v United Mexican States*, 7 June 1929, 5 RIAA 534, 536: '*le principe de la responsabilité internationale, souvent dite indirecte, d'un Ètat fédéral pour tous les actes des Ètats particuliers qui donnent lieu à des réclamations d'Ètats étrangers. Cette responsabilité indirecte ne saurait être niée, pas même dans les cas où la Constitution fédérale dénierait au Gouvernement central le droit de contrôle sur les Ètats particuliers, ou le droit d'exiger d'eux qu'ils conforment leur conduite aux prescriptions du droit international.*' *But see Montijo*, 25 July 1875, in Moore, II (GPO 1898) 1421, 1441, which posits the question why all taxpayers of a federation should be affected by the delinquencies of one of its constituent units.

[167] *Certain German Interests in Polish Upper Silesia*, Judgment No 7, 25 May 1926, PCIJ Series A No 7, 3, 75.

[168] *Montijo*, 25 July 1875, in Moore, II (GPO 1898) 1421, 1440; *Eliza (US v Peru)*, 27 November 1867, in Albert de La Pradelle and Nikolaos Politis, *Recueil des Sentences Arbitrales*, II, 1856-1872 (Éditions A Pedone 1923) 271, 277: '*les États particuliers ne sont, vis-à-vis des États étrangers, que des organes de l'État fédéral*'; *Tunstall*, 1878, in Moore, VI (GPO 1906) 662; *Cases of Amelia de Brissot, Ralph Rawdon, Joseph Stackpole and Narcisa de Hammer v Venezuela (the steamer* Apure *case)*, 1885, 29 RIAA 240, 256: '*The ultimate responsibility of Venezuela for these wrongs is in nowise dependent upon her form of government; or the domestic distribution of her powers. For redress of injuries done her citizens, the United States must look to Venezuela, and not to any of her political subdivisions.*'; *Estate of Hyacinthe Pellat (France) v United Mexican States*, 7 June 1929, 5 RIAA 534, 535; *Jesús Navarro Tribolet, et al, Next of Kin of Robert Tribolet, Deceased (USA) v United Mexican States*, 8 October 1930, 4 RIAA 598, 600; *Irene Roberts Case*, 1903-1905, 9 RIAA 204-208; *Francisco Mallén (United Mexican States) v USA*, 27 April 1927, 4 RIAA 173, 181; *William T Way (USA) v United Mexican States*, 18 October 1928, 4 RIAA 391; *Salome Lerma Vda De Galvan (United Mexican States) v USA*, 21 July 1927, 4 RIAA 273.

[169] *Différend Héritiers de SAR Mgr le Duc de Guise*, Decisions Nos 43, 87, 107 and 162, 3 April, 18 December 1950, 15 September 1951 and 20 November 1953, 13 RIAA 150.

[170] *Star and Herald*, in Moore, VI (GPO 1906) 775.

[171] *Island of Palmas case (Netherlands, USA)*, 4 April 1928, 2 RIAA 829, 836.

[172] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, para 118, ICJ Reports 1971, 16, 54: '*Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States*.'

[173] *Davy Case (on merits)*, 1903, 9 RIAA 467.

[174] *Pieri Dominique and Co Case*, 14 August 1905, 10 RIAA 139.

[175] *Elettronica Sicula SpA (ELSI) (United States of America v Italy)*, Judgment, 20 July 1989, ICJ Reports 1989, 15, 32.

police.[176] Likewise, the same rule was adapted in earlier times to colonies,[177] protectorates,[178] and capitulations.[179]

1.5 Minor Officials

The proviso '*whatever position it holds in the organization of the State*' is meant to render as attributable to the State the acts of *every* officer making up the machinery of the State, irrespective of its hierarchic ranking. The provision undoubtedly refers to the old question of the responsibility of States for acts of minor (subordinate, 'petty') officials, which is nevertheless firmly established in international law.[180] As affirmed in the *Moses* case:

> An officer or person in authority represents pro tanto his government, which in an international sense is the aggregate of all officers and men in authority.[181]

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[176] *J W and N L Swinney (USA) v United Mexican States*, 16 November 1926, 4 RIAA 98.
[177] *Union Bridge Company (United States) v Great Britain*, 8 January 1924, 6 RIAA 138; *Paula Mendel and Others (United States) v Germany*, 13 August 1926, 7 RIAA 372; *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (sentence sur le principe de la responsabilité) (Portugal contre Allemagne)*, 31 July 1928, 2 RIAA 1011, 1013.
[178] *Cayuga Indians (Great Britain) v United States*, 22 January 1926, 6 RIAA 173.
[179] *Affaire des biens britanniques au Maroc espagnol (Espagne contre Royaume-Uni) (Spanish Zone of Morocco)*, 1 May 1925, 2 RIAA 615, 649.
[180] Clyde Eagleton, *The Responsibility of States in International Law* (New York University Press 1928) 45-49; Jean-Pierre Quéneudec, *La responsabilité internationale de l'État pour les fautes personnelles de ses agents* (LGDJ 1966) 55-68; Alwyn V Freeman, *Responsibility of States for Unlawful Acts of their Armed Forces* (A W Sijthoff 1957) 23; David D Caron, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules of State Responsibility' in Richard B Lillich and Daniel B Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational Publishers, Inc 1998) 109, 130; Hazel Fox, 'The International Court of Justice's Treatment of Acts of the State and in Particular the Attribution of Acts of Individuals to the State' in Nisuke Ando, Edward McWhinney and Rüdiger Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda*, Volume 1 (Kluwer Law International 2002) 147, 158; Ian Brownlie, 'State Responsibility and the International Court of Justice' in Malgosia Fitzmaurice and Dan Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing 2004) 11, 12; Ian Brownlie, *System of the Law of Nations. State Responsibility. Part I* (Clarendon Press 1983) 135: '*In any case an administration is for legal purposes to be seen as integral and thus as a system of government. A minor official acting on behalf of the government is by definition a person whose acts and omissions are subject to the control of the state by way of command and authority.*'
[181] *Moses*, in Moore, III (GPO 1898) 3127, 3129. *Adde*, *Maal Case*, 1903, X RIAA 730, 730: '*the acts of their subordinates in the line of their authority, however odious their acts may be, the Government must stand sponsor for.*'

Accordingly, the international responsibility of States may be triggered on the basis of the acts and omissions of lower officials, since they participate to the same exercise of authority of their superiors. Indeed, they are supposed to enforce their policies. However, such a rule of attributability has not always received unanimous consensus in early arbitral cases and projects of codification.[182] For instance, Mixed Claims Commissions have formerly recognised imputability only on the basis of conducts of the organs that are responsible for a State's foreign policy and external relations.[183] As already submitted, the principle of (institutional) unity of the State dictates attribution of conducts of every agent of the State. Early arbitral practice itself already offered a plethora of cases, where the acts and omissions of 'petty' officials have been definitely attributed to their State, be such conducts an expression of the executive power (a local custom authority,[184] port captain,[185] Mexican *mayor* and *capitán primero*,[186] sheriff,[187] local police,[188] deputy constable,[189] jail keeper[190]) or of judicial functions (judge of first instance,[191] district court,[192] Venezuelan *jefe civil*,[193] rural

[182] *See* Harvard Law School (Manley O Hudson, Director), 'Research in International Law (Nationality, Responsibility of States, Territorial Waters). Drafts of Conventions Prepared in Anticipation of the First Conference on the Codification of International Law, The Hague, 1930', 1 April 1929, Part II, 'Responsibility of States' (Edwin M Borchard, Rapporteur), Article 7(a)-(b), (1929) 23 Special Number American Journal of International Law Special Supplement 133.
[183] *Bensley*, 1844, in Moore, III (GPO 1898) 3016.
[184] *Lewis*, in Moore, III (GPO 1898) 3019, 3020; *Only Son*, 1854, in Moore, IV (GPO 1898) 3404; *Owner of the Sarah B Putnam (United States) v Great Britain*, 6 November 1925, 6 RIAA 156, 157; *Pieri Dominique and Co Case*, 14 August 1905, 10 RIAA 139; *Lacaze*, 19 March 1864, in Albert de La Pradelle and Nikolaos Politis, *Recueil des Sentences Arbitrales*, II, 1856-1872 (Éditions A Pedone 1923) 290, 293; *Case of the Whale Ship "Canada" (United States v Brazil)*, 11 July 1870, in Moore, II (GPO 1898) 1733, 1742-1744.
[185] *William Lee*, in Moore, IV (GPO 1898) 3405-3407.
[186] *Estate of Jean-Baptiste Caire (France) v United Mexican States*, 7 June 1929, 5 RIAA 516.
[187] *Francisco Quintanilla (United Mexican States) v United States of America*, 16 November 1926, 4 RIAA 101-104; *Francisco Mallén (United Mexican States) v USA*, 27 April 1927, 4 RIAA 173, 181.
[188] *J W and N L Swinney (USA) v United Mexican States*, 16 November 1926, 4 RIAA 98; *Margaret Roper (USA) v United Mexican States*, 4 April 1927, 4 RIAA 145, 147; *Alexander St J Corrie (USA) v United Mexican States*, 5 March 1929, 4 RIAA 416, 417.
[189] *Francisco Mallén (United Mexican States) v USA*, 27 April 1927, 4 RIAA 173, 175.
[190] *Gertrude Parker Massey (USA) v United Mexican States*, 15 April 1927, 4 RIAA 155, 157.
[191] *Elettronica Sicula SpA (ELSI) (United States of America v Italy)*, Judgment, 20 July 1989, ICJ Reports 1989, 15, 36.
[192] *LaGrand (Germany v United States of America)*, Judgment, 27 June 2001, ICJ Reports 2001, 466, 477.
[193] *Davy Case (on merits)*, 1903, 9 RIAA 467.

judge,[194] bankruptcy court,[195] mixed court of first instance,[196] a Mexican *alcalde*,[197] an *administrateur-séquestre*[198]). In other instances, attributability was eventually recognised not really on the basis of the acts of subordinate employees, but upon resort to the doctrine of vicarious liability of the State on the basis of the conduct of chief officers. References have been variously addressed to the rules of obedience and *respondeat superior*,[199] as well as to various doctrines of State 'fault' (*culpa in eligendo*, *in custodiendo*, *in instruendo*, *in vigilando*).[200] The abandonment of theses doctrines is consistent with the *Gestalt* of ARSIWA Article 4 (institutional unity of the State), which imputes to the State the acts of minor officials *themselves*, without any requirement to resort to a different act or omission of a superior organ (*direct responsibility*).[201]

Finally, it should be mentioned that the rule of irresponsibility of States for the acts of their subordinate officials had been traditionally corroborated by reference to the rule of exhaustion of local remedies. This especially pertains to judicial decisions. Notably, an alien should appeal contested judgments before a higher judge in the same jurisdiction and, in turn, to a supreme court. Accordingly, the issue of attributability of conducts of lower judges would

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[194] *J W and N L Swinney (USA) v United Mexican States*, 16 November 1926, 4 RIAA 98; *Margaret Roper (USA) v United Mexican States*, 4 April 1927, 4 RIAA 145, 147-148.
[195] *H G Venable (USA) v United Mexican States*, 8 July 1927, 4 RIAA 219.
[196] *George David Richards (USA) v United Mexican States*, 23 July 1927, 4 RIAA 275, 276.
[197] *William T Way (USA) v United Mexican States*, 18 October 1928, 4 RIAA 391; *Donoughho* in Moore, III (1898) 3012, 3014.
[198] *Différend concernant l'interprétation de l'article 79, par 6, lettre C, du Traité de Paix (Biens italiens en Tunisie — Échange de lettres du 2 février 1951) — Décisions nos 136, 171 et 196*, 25 June 1952, 6 July 1954 and 7 December 1955, 13 RIAA 389, 432.
[199] *The Lottie May Incident (Great Britain, Honduras)*, 18 April 1899, 15 RIAA 23, 30.
[200] *Différend concernant l'interprétation de l'article 79, par 6, lettre C, du Traité de Paix (Biens italiens en Tunisie — Échange de lettres du 2 février 1951) — Décisions nos 136, 171 et 196*, 25 June 1952, 6 July 1954 and 7 December 1955, 13 RIAA 389, 432; *Différend Joseph Ousset — Décisions nos 93 et 170*, 14 April 1951 and 5 July 1954, 13 RIAA 252, 265.
[201] Gordon A Christenson, 'The Doctrine of Attribution in State Responsibility' in Richard B Lillich (ed), *International Law of State Responsibility for Injuries to Aliens* (University Press of Virginia 1983) 321, 326; Gordon A Christenson, 'Attributing Acts of Omission to the State' (1990-1991) 12 Michigan Journal of International Law 312, 335; Theodor Meron, 'International Responsibility of States for Unauthorized Acts of Their Officials' (1957) 33 British Year Book of International Law 85, 98; C F Amerasinghe, 'Imputability in the Law of State Responsibility for Injuries to Aliens' (1966) 22 Revue Égyptienne de Droit International 91, 95.

not even arise. However, the rule of exhaustion of local remedies is a requirement of admissibility of a claim of diplomatic protection, and does not concern attributability proper. Seemingly, the argument had gained importance when the international scholarship did not doctrinally distinguish between primary and secondary rules, attribution rules then standing as a mere appendix of the law of diplomatic protection for injuries to aliens.[202]

2. Attribution of *Ultra Vires* Acts

> Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent.[203]

The issue of the responsibility for unauthorized acts of State organs has been frequently interlocked with the above discussed and equally traditional problem of the responsibility for the conducts of subordinate officials. A distinction between the two questions is required. The *ultra vires* rule is designed to impute to the State the conducts of organs (either of a higher or lower level) executed in excess of authority or in contravention of instructions, provided that the organ was acting in its official capacity, on the basis of a principle of (institutional) unity and continuity, as well as of accountability of the State.[204] Instead, the rule of attribution of acts of minor officials pertains to the possibility to categorise subordinate agents as 'State organs' for the purposes of a finding of international responsibility. Obviously, the *ultra vires* rule applies to every organ of the State, to the inclusion of minor officials. Both rules provide

[202] *See* the analysis in Roberto Ago, Third Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur, 'The internationally wrongful act of the State, source of international responsibility', 5 March, 7 April, 28 April and 18 May 1971, para 152, document A/CN.4/246 and Add.1-3, Yearbook of the International Law Commission, 1971, Volume II (Part One), 250, document A/CN.4/SER.A/1971/Add.1 (Part 1).
[203] *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, Advisory Opinion, 20 July 1962, ICJ Reports 1962, 151, 168.
[204] David D Caron, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules of State Responsibility' in Richard B Lillich and Daniel B Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational Publishers, Inc 1998) 109, 141

for the direct imputability of conducts to States, to the abandonment of any theory of vicarious responsibility or fault doctrine.[205]

The rule of attribution of *ultra vires* acts of organs unquestionably reflects customary international law,[206] as being codified by ARSIWA Article 7:

> *Article 7*
>
> *Excess of authority or contravention of instructions*
>
> The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

The *ultra vires* rule provided by customary international law is independent in its scope and application with regard to the existence of *ultra vires* rules in national jurisdictions governing the liability of States vis-à-vis their nationals.[207] The content of the international rule may well

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[205] Dionisio Anzilotti, 'La responsabilité internationale des États a raison des dommages soufferts par des étrangers' (1906) 13 Revue Générale de Droit International Public 285, 287-288, 292; Theodor Meron, 'International Responsibility of States for Unauthorized Acts of Their Officials' (1957) 33 British Year Book of International Law 85, 103-104. *Contra*, Edwin M Borchard, '"Responsibility of States" at the Hague Codification Conference' (1930) 24 American Journal of International Law 517, 530.

[206] *Armed Activities in the Territory of the Congo (DRC v Uganda)*, 19 December 2005, paras 213-214, 243, ICJ Reports 2005, 168, 242, 251; *Sea-Land Service, Inc v The Islamic Republic of Iran, Ports and Shipping Organization of Iran*, Case No 33, 20 June 1984, Award No 135-33-1, 6 IRAN-US CTR 149, 202 (1984-II): '*a State is responsible for acts of its officials - whether authorized, unauthorized, or even contrary to specific governmental instructions.*' But in early cases the *ultra vires* was not firmly established. *See Star and Herald*, in Moore, VI (GPO 1906) 775, 780: '*no government is responsible for the acts of its agents or subalterns which are not in perfect accord with the faculties conferred upon them by law or the instructions which the government itself may have given them*'; *William Yeaton*, in Moore, III (GPO 1898) 2944, 2947; *Claims of Charles Oberlander and Barbara M Messenger against the Government of Mexico (United States of America/Mexico)*, 19 November 1897, 29 RIAA 327, 335.

[207] *Contra*, Harvard Law School (Manley O Hudson, Director), 'Research in International Law (Nationality, Responsibility of States, Territorial Waters). Drafts of Conventions Prepared in Anticipation of the First Conference on the Codification of International Law, The Hague, 1930', 1 April 1929, Part II, 'Responsibility of States' (Edwin M Borchard, Rapporteur), Article 7(a), (1929) 23 Special Number American Journal of International Law Special Supplement 133: '*A state is responsible if an injury to an alien results from the wrongful act or omission of one of its higher authorities within the scope of the office or function of such authority, if the local remedies have been exhausted without adequate redress.*'; League of Nations, Committee of Experts for the Progressive Codification of International Law, Second Session, 12-29 January 1926, Annex to Questionnaire No 4, 'Responsibility of States for Damage Done in Their Territories to the Person or Property of Foreigners', Report of the Sub-Committee (Mr Gustavo Guerrero, Rapporteur), Conclusions, para 4, League of Nations publication, V.Legal, 1926.V.3, document C.46.M.23.1926.V and League of Nations publication, V.Legal, 1926.V.11, document C.96.M.47.1926.V, (1926) 20 American Journal of International Law Special Supplement 176, 187-188, 201-202: '*If the act of the official is accomplished outside the scope of his competence, that is to say, if he has exceeded his powers, we are then confronted with an act which, juridically*

diverge from the national rule applicable to the same agent at issue.[208] This is but an application of the principle of supremacy of international law.[209]

Although 'excess of authority' and 'contravention of instructions' represent two distinct prongs, nevertheless they result in the delimitation of the boundaries of the *agency* of a State organ. This perimeter is generally set by the nature of the functions entrusted to an organ and may additionally be circumscribed in relation to a specific act by the instructions of a superior organ. The international *ultra vires* rule prescribes attributability '*even if*' the State official exceeded or abused its powers, or acted contrary or opposite to directives.[210] The justification for the adoption of this solution by international law rests on a policy for security in international relations. Since a State cannot predict and prevent the entirety of the acts (including bona fide errors in judgment)[211] of their organs (acting either within or outside their authority), a risk theory turns out to be appropriate in order to warrant the other members of the international community from the dangerous consequences possibly deriving from the State freedom of internal self-organization.[212]

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speaking, is not an act of the State. It may be illegal, but, from the point of view of international law, the offence cannot be imputed to the State.'

[208] *Lacaze*, 19 March 1864, in Albert de La Pradelle and Nikolaos Politis, *Recueil des Sentences Arbitrales*, II, 1856-1872 (Éditions A Pedone 1923) 290, 302: '*L'acte fait par le fonctionnaire en dehors de sa compétence ou au mépris des lois qui règlent ses attributions n'est pas, il est vrai, au regard du droit interne, un acte de l'État, mais au point de vue international il en a tous les caractères intrinsèques*'.

[209] *See* Pierre-Marie Dupuy, 'Relations Between the International Law of Responsibility and Responsibility in Municipal Law' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 173, 176.

[210] *See especially* the case of *Thomas H Youmans (USA) v United Mexican States*, 23 November 1926, 4 RIAA 110, 115: '*acts of ten soldiers and one officer of the State of Michoacân, who, after having been ordered by the highest official in the locality to protect American citizens, instead of carrying out orders given them acted in violation of them in consequence of which the Americans were killed.*'

[211] *Lacaze*, 19 March 1864, in Albert de La Pradelle and Nikolaos Politis, *Recueil des Sentences Arbitrales*, II, 1856-1872 (Éditions A Pedone 1923) 290, 302. '*Mais une distinction a fini par s'établir entre les fautes de service et les fautes grossières des autorités: l'État répond des premières, comme d'un risque de ses services publics; il laisse les secondes à la charge de leurs auteurs*'; *Owners, Officers and Men of the Wanderer (Gr Br) v United States*, 9 December 1921, 6 RIAA 68, 74.

[212] Dionisio Anzilotti, *Corso di diritto internazionale, Volume Primo: Introduzione – Teorie generali* (Athenaeum, 3° edn 1928) 420; Dionisio Anzilotti, 'La responsabilité internationale des États a raison des dommages soufferts par des étrangers' (1906) 13 Revue Générale de Droit International Public 285, 289; Charles de Visscher, 'La responsabilité internationale des États' in *Bibliotheca Visseriana*, II (Brill 1924) 89, 92; Ian

Customary international law also requires that State organs '*acts in that capacity*', namely in their official capacity.[213] This appears to be rather logical: in order to be exceeded, an actual or (at least) apparent 'authority' must be in place. As a consequence, the *ultra vires* acts shall not be executed by the organ manifestly outside its scope of authority and general competence (outside the '*regular agencies of government*').[214] It should generally matter of acts related to the organ's office (*actes de fonction*) performed under cover, colour (or even claim) of authority.[215] The circumstance of an organ actually using the means put at its disposal by virtue of its office and duties ('*en se servant des moyens mis, à ce titre, à leur disposition*') is interpreted as sufficient ground for the operation of the *ultra vires* rule.[216] Purely private acts of organs are not attributable to the State, either executed in the exercise of their office or off-duty. In the former case, imputation does not intervene where the conducts at issue radically (and visibly) depart from the functions of the organ.[217] In the latter case,

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Brownlie, *System of the Law of Nations. State Responsibility. Part I* (Clarendon Press 1983) 145: '*The rule accords generally with a regime of objective responsibility*'.

[213] *Claim of the Salvador Commercial Company ("El Triunfo Company")*, 8 May 1902, 15 RIAA 455, 477.

[214] Ian Brownlie, *System of the Law of Nations. State Responsibility. Part I* (Clarendon Press 1983) 142.

[215] *Estate of Jean-Baptiste Caire (France) v United Mexican States*, 7 June 1929, 5 RIAA 516, 530: '*Mais pour pouvoir admettre cette responsabilité, dite objective, de l'Etat pour les actes commis par ses fonctionnaires ou organes en dehors des limites de leur compétence, il faut qu'ils aient agi au moins apparemment comme des fonctionnaires ou organes compétents, ou que, en agissant, ils aient usé de pouvoirs ou de moyens propres à leur qualité officielle.*'; *American Bible Society (US v Turkey)*, 1885, in Moore, VI (GPO 1906) 743: '*it is a rule of international law that sovereigns are not liable, in diplomatic procedure, for damages to a foreigner when arising from the misconduct of agents acting out of the range not only of their real but of their apprent authority.*'; *Davy Case (on merits)*, 1903, 9 RIAA 467; *Owners of the Jessie, the Thomas F Bayard and the Pescawha (Great Britain) v United States*, 2 December 1921, 6 RIAA 57, 59: '*any Government is responsible to other Governments for errors, in judgment of its officials purporting to act within the scope of their duties and vested with power to enforce their demands.*'; Court of Claims of the United States, No H-252, decided 7 December 1931, *Royal Holland Lloyd, a Corporation v The United States*, (1932) 26 American Journal of International Law 399, 410: '*any government is responsible to other nations for error in judgment of its officials purporting to act within the scope of their duties.*'

[216] Institut de Droit International, 'Responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers' (Leo Strisower, Rapporteur), Résolution du 1 septembre 1927, Session de Lausanne, (1927) 33(III) Annuaire de l'Institut de Droit International 330-335, Article I(3).

[217] *Estate of Jean-Baptiste Caire (France) v United Mexican States*, 7 June 1929, 5 RIAA 516, 531: '*l'Etat n'étant pas responsable dans le seul cas où l'acte n'a eu aucun rapport avec la fonction officielle et n'a été, en réalité, qu'un acte d'un particulier.*' *See* Francisco V García Amador, 'Draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens', Article 3.3, Annex to International responsibility: Third report by F. V. Garcia Amador, Special Rapporteur, 'Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens. Part II: The International Claim', 2 January 1958,

attribution never occurs, as far as the *ultra vires* rule is concerned.[218] A bright instance of purely private act is recorded in the early case of *Bensley*:

> The detention of the boy appears to have been a wanton trespass committed by the governor, under no color of official proceedings, and without any connection with his official duties.[219]

The *ultra vires* rule applies to both State organs and persons or entities pursuant to ARSIWA Article 5. The case law on attribution of *ultra vires* acts of (organs of) parastatal entities is definitely more rare. An example is found in the *Yeager* case with regard to the State-owned company Iran Air, where the act of bribery of an employee of said company was aptly qualified as a purely private act, as such not subject to the *ultra vires* rule of ARSIWA Article 7.[220] Investor-state arbitration, as discussed in the following chapter, definitely provides more cases on attribution of *ultra vires* acts of persons *ex* ARSIWA Article 5.[221]

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document A/CN A/111, Yearbook of the International Law Commission, 1958, Volume II, 47, 71, document A/CN.4/SER.A/1958/Add.l: '*the international responsibility of the State shall not be involved if the lack of competence was so apparent that the alien should have been aware of it and could, in consequence, have avoided the injury*'.

[218] *Alexander St J Corrie (USA) v United Mexican States*, 5 March 1929, 4 RIAA 416, 417; *Ethel Morton (USA) v United Mexican States*, 2 April 1929, 4 RIAA 428; *Louis B Gordon (USA) v United Mexican States*, 8 October 1930, 4 RIAA 586, 588: '*The principle is that the personal acts of officials not within the scope of their authority do not entail responsibility upon a State*'; *Teodoro García and M A Garza (United Mexican States) v United States of America*, 3 December 1926, 4 RIAA 119, 126: '*There is no question with regard to the rule of international law that a nation is responsible for acts of soldiers which are not acts of malice committed in their private capacity*.'

[219] *Bensley*, 1844, in Moore, III (GPO 1898) 3016, 3018. *Adde*, *Stanley M Parker v Mexico* in Moore, III (GPO 1898) 2996; *Carlock's* in Moore, III (GPO 1898) 2996; *Jeannaud* in Moore, III (GPO 1898) 3000, 3001.

[220] *Kenneth P Yeager v The Islamic Republic of Iran*, Case No 10199, 2 November 1987, Award No 324-10199-1, 17 IRAN-US CTR 92, 111 (1987-IV): '*There is no indication in this case that the Iran Air agent was acting for any other reason than personal profit, or that he had passed on the payment to Iran Air. He evidently did not act on behalf or in the interest of Iran Air. The Tribunal finds, therefore, that this agent acted in a private capacity and not in his official capacity as an organ of Iran Air.*'

[221] *See infra* Chapter III, para 3.3.

3. *De Facto* Organs

The rule of attribution to the State of the conducts of its *de facto* organs has historically been developed through the case law of Mixed Claims Commissions,[222] the International Court of Justice,[223] the Iran-US Claims Tribunal,[224] and the International Criminal Tribunal for the Former Yougoslavia (ICTY).[225] After decades of praetorian navigation, this norm has found its legal mooring on the provision of ARSIWA Article 4.2.[226] The rationale behind this rule is to prevent States from escaping international responsibility by having non-agents carry out acts that the State can not lawfully perform from the viewpoint of the international legality and consequently objecting that persons actually participating in governmental functions are not classified as State organs under national legislation.[227] As incisively remarked by the ICJ, the spirit of the rule on *de facto* organs is to make '*reality [...] prevail over appearances*.'[228] Once a person or entity has been established as being a *de facto* agent, the consequence is the application of the regime of attributability of conducts of State organs in its entirety, to the inclusion of the *ultra vires* rule.[229]

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[222] *Charles S Stephens and Bowman Stephens (USA) v United Mexican States*, 15 July 1927, 4 RIAA 265.
[223] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, 27 June 1986, paras 109-115, ICJ Reports 1986, 14, 62-65; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, paras 390-395, ICJ Reports 2007, 43, 204-206.
[224] *Kenneth P Yeager v The Islamic Republic of Iran*, Case No 10199, 2 November 1987, Award No 324-10199-1, 17 IRAN-US CTR 92, 102 (1987-IV).
[225] ICTY, Appeals Chamber, *Tadić*, IT-94-1-A, Judgement, 15 July 1999, 33-72, paras 80-162.
[226] *See supra* Chapter I, para 1.2 and para 1.2 of this Chapter.
[227] ICTY, Appeals Chamber, *Tadić*, IT-94-1-A, Judgement, 15 July 1999, 47-48, para 117; *Kenneth P Yeager v The Islamic Republic of Iran*, Case No 10199, 2 November 1987, para 45, Award No 324-10199-1, 17 IRAN-US CTR 92, 105 (1987-IV): '*Under international law Iran cannot, on the one hand, tolerate the exercise of governmental authority by revolutionary "Komitehs" or "Guards" and at the same time deny responsibility for wrongful acts committed by them.*'
[228] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, para 291, ICJ Reports 2007, 43, 204.
[229] James Crawford, *State Responsibility. The General Part* (Cambridge University Press 2013) 126: '*Once such a relationship is proved, however, a de facto organ functions just like any other, and all acts it performs in the exercise of state authority are attributable to the state*'.

Since one of the premises for a finding of *de facto* agency is the absence of the formal status of organ under domestic law, the rule hereby illustrated has been historically (and inextricably) developed in allegedly, but incorrectly, 'consubstantial' connection with the rule of attribution to the State of acts of private individuals, which is at present codified by ARSIWA Article 8.[230] Therefore, the doctrine of *de facto* organs has been mainly addressed into the realm of State responsibility for the acts of individuals, rather than in connection with the rule of attribution of conducts of State organs, which proceeds from a theory of (public law) agency. This legal framework has historically engendered a considerable degree of confusion as to the possibility to provide a more distinct definition of *de facto* organ in international legal scholarship.[231] In point of legal terminology, *de facto* organs *ex* ARSIWA Article 4.2 – Article 8(a) on first reading – are persons not having the formal status of organ under internal law, but nonetheless acting in fact on behalf of the State (agency). Instead, private individuals *ex* ARSIWA Article 8 are non-agents in fact acting on the instructions of or under the direction or control of the State.[232] The circumstance that Article 8(a) of the draft articles adopted on first reading has been longly considered as the predecessor of ARSIWA Article 8 has not certainly contributed to an earlier doctrinal and normative final systematization of the rule of *de facto* organs.[233] The 'closure of the debate' on this issue has

[230] *See infra* para 5 of this Chapter.
[231] Claus Kress, 'L'organe de facto en droit international public' (2001) 105 Revue Générale de Droit International Public 93, 96, 125; Frédéric Dopagne, 'La responsabilité de l'État du fait des particuliers: les causes d'imputation revisitées par les articles sur la responsabilité de l'État pour fait internationalement illicite' (2001) 34 Revue Belge du Droit International 492, 496; Gregory Townsend, 'State Responsibility for Acts of De Facto Agents' (1997) 14 Arizona Journal of International & Comparative Law 635, 641-642; Jörn Griebel and Milan Plücken, 'New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in *Bosnia v. Serbia*' (2008) 21 Leiden Journal of International Law 601, 608; Gordon A Christenson, 'Attributing Acts of Omission to the State' (1990-1991) 12 Michigan Journal of International Law 312, 333.
[232] *See infra* para 5.3 of this Chapter.
[233] James Crawford, *State Responsibility. The General Part* (Cambridge University Press 2013) 126: '*the present work will use the term only in the context of ARSIWA Article 4, even though it was introduced by Special Rapporteur Ago with reference to the predecessor of ARSIWA Article 8.*' However, Paolo Palchetti seems to exclude that the Ago's version engendered confusion. *Cf* Paolo Palchetti, 'Comportamento di organi di fatto e illecito internazionale nel progetto di articoli sulla responsabilità internazionale degli Stati' in Marina Spinedi,

definitely occurred with the *Bosnian Genocide* judgment, which finally anchored the doctrine of *de facto* organs to ARSIWA Article 4.[234] Hereinafter, it is provided an analysis of the relevant case law on the topic of *de facto* organs. To this extent, a clarification is required, namely that *Nicaragua* and *Tadić* are denifitely part of this review of international judicial decisions. However, they will be addressed under the treatise of ARSIWA Article 8 in deferential parallel to the placement attributed thereto by the ARSIWA Commentaries.

In the early case of *Stephens*, the Mexico-US General Claims Commission was confronted with the qualification of '*a sort of informal municipal guards organization*', called '*defensas sociales*'. The Commission asserted:

> It is difficult to determine with precision the status of these guards as an irregular auxiliary of the army, the more so as they lacked both uniforms and insignia; but at any rate they were "acting for" Mexico or for its political subdivisions.[235]

As above mentioned, auxiliary corps to the army should be ascribed into the category of *de jure* organs. However, in *Stephens* the guards were not formally registered, therefore not having a regular status. For this reason, *Stephens* may be regarded as one of the earliest cases on *de facto* agents.[236]

The Iranian Revolutionary Committees (Komitehs) are one of the chief examples of *de facto* organs. During the Iranian Revolution, an unofficial system of government emerged in

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Alessandra Gianelli and Maria Luisa Alaimo (eds), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti: problemi e spunti di riflessione* (Giuffrè 2006) 3, 10: '*L'interprete avrebbe dovuto in primo luogo accertare se l'individuo agente avesse la qualità di organo in base al diritto interno o fosse comunque legato allo Stato da un rapporto formale di diritto interno. In assenza di un tale legame, si sarebbe dovuto verificare se tale individuo avesse in fatto agito per conto dello Stato ai sensi dell'art. 8 del Progetto.*'

[234] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, paras 390-395, ICJ Reports 2007, 43, 204-206. *Cf* Paola Gaeta, 'Génocide d'Etat et responsabilité pénale individuelle' (2007) 111 Revue Général de Droit International Public 273.

[235] *Charles S Stephens and Bowman Stephens (USA) v United Mexican States*, 15 July 1927, 4 RIAA 265, 267.

[236] *See* Jérôme Reymond, *L'attribution de comportements d'organes* de facto *et d'agents de l'Etat en droit international. Etude sur la responsabilité internationale des Etats* (Schultess 2013) 134.

Iran in parallel to the official Legislature, Executive and Judiciary.[237] The Komitehs were local revolutionary committees, usually originating from 'neighbourhood committees', which served as local security forces empowered to arrest, confiscate property and imprison. Only in May 1979, they were officially recognised as Revolutionary Guards, which also obtained to retain a permant place in the State budget.[238] While it is evident that the acts of the Revolutionary Guards after the official recognition entail attribution as per *de jure* organs,[239] the Iran-US Claims Tribunal was confronted with attribution to Iran of the acts of the Komitehs in the interim period between February and May 1979. In *Yeager*, the Tribunal held:

> While there is some doubt as to whether revolutionary "Komitehs" or "Guard" can be considered "organs" of the Government of Iran, since they were not formally recognized during the period relevant to this Case, attributability of acts to the State is not limited to acts of organs formally recognized under internal law. Otherwise a State could avoid responsibility under international law merely by invoking its internal law. It is generally accepted in international law that a State is also responsible for acts of persons, if it is established that those persons were in fact acting on behalf of the State. *See ILC-Draft Article 8(a)*. (*emphasis added*)[240]

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[237] David D Caron, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules of State Responsibility' in Richard B Lillich and Daniel B Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational Publishers, Inc 1998) 109, 141.

[238] *Kenneth P Yeager v The Islamic Republic of Iran*, Case No 10199, 2 November 1987, Award No 324-10199-1, 17 IRAN-US CTR 92, 102 (1987-IV).

[239] *William L Pereira Associates, Iran v The Islamic Republic of Iran*, Case No 1, 17 March 1984, Award No 116-1-3, 5 IRAN-US CTR 198, 226-227 (1984-I): '*Under public international law the Government of the Islamic Republic of Iran must be deemed responsible for the actions of the Revolutionary Guards.*'; *Sola Tiles, Inc v The Government of the Islamic Republic of Iran*, Case No 317, 22 April 1987, Award No 298-317-1, 14 IRAN-US CTR 223, 233 (1987-I): '*it is well settled that the Revolutionary Committees are among those organs whose acts are attributable to the Government of Iran, which is responsible for them as a matter of law.*'

[240] *Kenneth P Yeager v The Islamic Republic of Iran*, Case No 10199, 2 November 1987, Award No 324-10199-1, 17 IRAN-US CTR 92, 103, para 42 (1987-IV). The jurisprudence *Yeager* has been consistently applied in subsequent cases. *Jimmie B Leach v The Islamic Republic of Iran*, Case No 12183, 6 October 1989, Award No 440-12183-1, 23 IRAN-US CTR 239 (1989-III); *Leonard and Mavis Daley v The Islamic Republic of Iran*, Case No 10514, 20 April 1988, Award No 360-10514-1, 18 IRAN-US CTR 232, 238 (1988-I); *Robert R Schott v Islamic Republic of Iran, Ministry of Mines and Industries of Iran, Ministry of Housing and Urban Development of Iran, Revolutionary Guard of Iran, Bank Markazi Iran*, Case No 268, 14 March 1990, Award No 474-268-1, Separate Opinion of Howard M Holtzmann, 24 IRAN-US CTR 203, 234 (1990-I); *Computer Sciences Corporation v The Government of the Islamic Republic of Iran, Ministry of Finance, Ministry of National Defence, Iran Aircraft Industries, Information Systems Iran, Bank Mellat, Bank Tejarat, the successors of the following entities: Imperial Iranian Air Force, Imperial Iranian Ground Force, Imperial Iranian Navy, Imperial Iranian Gendarmerie, Imperial Iranian National Police, The Supreme Commander's Staff*, Case No 65, 16 April 1986, Award No 221-65-1, 10 IRAN-US CTR 269, 303 (1986-I); *Houston Contracting Company v National*

The ICJ rendered a definition of *de facto* organ in the *Nicaragua* case, where it basically established a test of (complete) dependence and (effective) control.[241] The ICTY in *Tadić* tried to "overrule" *Nicaragua* by replacing its definition with a test of dependence and (overall) control, although limited to *organised* military and paramilitary groups.[242] Both cases will be discussed in detail later.[243] The *Bosnian Genocide* case conclusively intervened on the question and consacrated the category of *de facto* organs to be intended in its normative autonomy and not in connection with the rule for individuals acting in fact under the instructions, directions or control of the State.[244] It should also to be remarked that various jurists, notably in the Italian scholarship, 'anticipated' this achievement at the doctrinal level in a context of normative uncertainty, which had not yet been resolved by the adoption of ARSIWA on second reading.[245] The ICJ established the requirements of strict control, on one side,[246] and complete and total dependence, on the other side:[247]

Iranian Oil Company, National Iranian Gas Company, and The Islamic Republic of Iran, Case No 173, 22 July 1988, Award No 378-173-3, 20 IRAN-US CTR 3, 123 (1988-III).

[241] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, 27 June 1986, paras 109-11, ICJ Reports 1986, 14, 62-65.

[242] ICTY, Appeals Chamber, *Tadić*, IT-94-1-A, Judgement, 15 July 1999, 62, 69, paras 145, 156.

[243] *See infra* paras 5.3.4.1 and 5.3.4.3 of this Chapter.

[244] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, paras 390 *et seq*., ICJ Reports 2007, 43, 204.

[245] André JJ de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the *Tadić* Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia' (2001) 72 British Year Book of International Law 255, 268: '*It seems right therefore to reserve the phrase '*de facto *organ' for an organ considered as such by virtue of the supplementary role of international law under Article 4, paragraph 2.*'; Paolo Palchetti, 'Comportamento di organi di fatto e illecito internazionale nel progetto di articoli sulla responsabilità internazionale degli Stati' in Marina Spinedi, Alessandra Gianelli and Maria Luisa Alaimo (eds), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti: problemi e spunti di riflessione* (Giuffrè 2006) 3, 10; Paolo Palchetti, *L'organo di fatto dello Stato nell'illecito internazionale* (Giuffrè 2007) 30 *et seq*. However, it is appropriate to recall that Anzilotti already distinguished the category of *de facto* organs from the acts of private individuals, *cf* Dionisio Anzilotti, *Corso di diritto internazionale, Volume Primo: Introduzione – Teorie generali* (Athenaeum, 3° edn 1928) 431: '*Ciò che distingue questa categoria* [fatti di individui] *dalla precedente* [fatti di organi]*, non è tanto la mancanza della qualità di organo dello Stato nell'autore, qualità, che, come si è visto, può mancare anche nei casi precedentemente esaminati, quanto il carattere oggettivo dei fatti stessi, che non si presentano esteriormente come un esercizio, legale o illegale, di attività statali e non ne rivestono le forme: in quelli l'autore, ne abbia o no il diritto poco importa, agisce* di fatto *come organo dello Stato; in questi no.*'

[246] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, para 391, ICJ Reports 2007, 43, 204.

> In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.[248]

The exceptional finding on *de facto* agency should accordingly be based on the absence of real autonomy of the person or group of persons vis-à-vis the State, so that they are ultimately established to represent a mere '*instrument*' of the State.[249] Instead, it may not be affirmed that 'persons' *ex* ARSIWA Article 8 do not retain their autonomy in carrying out their conducts, although under the istructions, direction or control by organs of the State.

It is to be noted a possible overlap of normative criteria for a finding on *de facto* organs pursuant to ARSIWA Article 4 and persons or entities ('State entities') pursuant to ARSIWA Article 5, in so far as certain subjects, not having the formal or official status of State organs, 'exercise elements of the governmental authority'. For instance, in *Yeager* the Komitehs were found to execute customs, immigration and security policies, which evidently embodies a manifestation of sovereign authority.[250] The decisive criteria in order to distinguish the two categories rest upon the official empowerment 'by law' or delegation of authority, which characterises persons or entities *ex* ARSIWA Article 5. The exceptional character of a finding of *de facto* agency would suggest that it can operate on a residual basis, only in so far as no element whatsoever of formality between a given person and the State has been established.

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[247] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, paras 392, 394, ICJ Reports 2007, 43, 205, 206.
[248] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, para 392, ICJ Reports 2007, 43, 205.
[249] Ibid
[250] *Kenneth P Yeager v The Islamic Republic of Iran*, Case No 10199, 2 November 1987, Award No 324-10199-1, para 61, 17 IRAN-US CTR 92, 110 (1987-IV).

4. Persons or Entities Empowered by the Law of the State to Exercise Elements of the Governmental Authority

4.1 Notion

ARSIWA do not limit the mechanisms of attribution to the conducts of State organs, but also regulate acts and omissions of persons or entities empowered by the law to exercise '*elements of the governmental authority*' ('State entities', to the inclusion of parastatal entities, State instrumentalities, State enterprises and SOEs in general). The rule is codified by ARSIWA Article 5:

> *Article 5*
>
> *Conduct of persons or entities exercising elements of governmental authority*
>
> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[251]

Demand for this rule emerged only at a rather advanced stage of the codification process, namely in Roberto Ago's Third Report on State Responsibility of 1971 by reference to '*public institutions separate from the State.*'[252] As explained in the Commentaries:

> The article is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.[253]

[251] ARSIWA Commentaries 43.
[252] Roberto Ago, Third Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur, 'The internationally wrongful act of the State, source of international responsibility', 5 March, 7 April, 28 April and 18 May 1971, document A/CN.4/246 and Add.1-3, Yearbook of the International Law Commission, 1971, Volume II (Part One), 253-254, document A/CN.4/SER.A/1971/Add.1 (Part 1): '*public corporations and other public institutions which have their own legal personality and autonomy of administration and management, and are intended to provide a particular service or to perform specific functions.*'
[253] ARSIWA Commentaries 43, para 1.

The scope of ARSIWA Article 5 comprehensively enshrines parastatal entities (an expression imported from Italian scholarship and practice,[254] and equivalent to the French '*émanations de l'État*'), either having a public law status or being privatized entities, or 'private' natural or juridical persons (for instance a stock exchange).[255] This is elucidated by the specific examples formulated in the Commentaries: '*private security firms contracted to act as prison guards*', '*private or State-owned airlines exercising powers in relation to immigration control or quarantine*', and '*railways companies granted with police powers*'.[256]

Historically, the socio-political phenomenon of entities being legally separated by the State and its organs, but entrusted by the State itself to undertake functions of public interest, appeared in the XX century with the fascist economic dirigism in Italy and the *New Deal* in the US.[257] These parastatals were characterised by a hybrid legal regime, a commixtion of public and private law.[258] The public side should have served to warrant the enforcement of the public policies, for which they were created (parastatals as State *instrumentalities*). The private side should have granted more efficiency, flexibility and celerity in their attainment. Hence, the concept of '*a corporation clothed with the power of government but possessed of the flexibility and initiative of a private enterprise*'.[259] In the Socialist States, the chief

[254] Roberto Ago, Third Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur, 'The internationally wrongful act of the State, source of international responsibility', 5 March, 7 April, 28 April and 18 May 1971, para 164, document A/CN.4/246 and Add.1-3, Yearbook of the International Law Commission, 1971, Volume II (Part One), 199, 254, document A/CN.4/SER.A/1971/Add.1 (Part 1): '*"para-State" institutions, i.e., institutions which possess an organization of their own and which, side by side with the State but separate from it, provide services and perform tasks of a public character.*'

[255] James Crawford, *State Responsibility. The General Part* (Cambridge University Press 2013) 128.

[256] ARSIWA Commentaries 43, paras 2, 5.

[257] Pier Angelo Toninelli, 'The Rise and Fall of Public Enterprise. The Framework' in Pier Angelo Toninelli (ed), *The Rise and Fall of State-Owned Enterprise in the Western World* (Cambridge University Press 2000) 3, 14-21.

[258] Roberto Ago, Third Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur, 'The internationally wrongful act of the State, source of international responsibility', 5 March, 7 April, 28 April and 18 May 1971, para 164, document A/CN.4/246 and Add.1-3, Yearbook of the International Law Commission, 1971, Volume II (Part One), 199, 254, document A/CN.4/SER.A/1971/Add.1 (Part 1): '*subject, in their activities, to a legal regime sui generis, which may partake sometimes of public law and sometimes of private law, according to requirements.*'

[259] Franklin D Roosevelt, Message to Congress Suggesting the Tennessee Valley Authority, 10 April 1933.

example of parastatals is represented by State economic monopolies and trading agencies, either as a result of a nationalization or as a creation of the political power. These economic and legal patterns were generally maintained after World War II, as in the case of the 'Partecipazioni Statali' (PPSS) in Italy, or installed from scratch in European countries or in the context of new Socialist experiences.[260] While redolent of the political power, parastatals formed by the State to discharge economic functions could compete on the market arena as every other business. Accordingly, they mainly execute *acta jure gestionis*. Paul de Visscher has acknowledged the trend in the Sixties:

> Nous voyons aujourd'hui se multiplier les personnes morales de droit public. Aux côtés de l'Etat et de ses subdivisions territoriales, nous voyons se constituer des établissements publics, des corporations publiques, des administrations personnalisées ou régies, et même des sociétés d'économie mixte sur lesquelles le pouvoir politique exerce un contrôle prépondérant. L'Etat, devenu commerçant et industriel, est contraint, pour des raisons de technique administrative et de bonne gestion, à se morceler lui-même en une poussière d'organismes publics ou semi publics, qui se voient tous dotés d'une personnalité juridique autonome.[261]

After the collapse of the Soviet Union, the paradigm of direct intervention of the State into the economy was conceptually challenged, which enacted a season of privatizations of State-owned companies. At the same time, a diffuse political idea of subsidiarity has led States to outsource their public functions, entrusting them to private 'autonomous' corporations.[262]

From the standpoint of the international law of attribution, it is not relevant whether the entity has public or private form, or whether it results from processes of nationalizations or privatizations. It may matter of a 100% State-owned company or of a privatized monopoly, where the State retains a *golden share*. What is decisive is a delegation of power by the State

[260] Wolfgang G Friedmann, 'Public and Private Enterprise in Mixed Economies: Some Comparative Observations' in Wolfgang G Friedmann (ed), *Public and Private Enterprise in Mixed Economies* (Stevens & Sons 1974) 359, 365.
[261] Paul de Visscher, 'La Protection Diplomatique des Personnes Morales' (1961) 102 Recueil des Cours 395, 409.
[262] Anne van Aaken, 'Blurring Boundaries between Sovereign Acts and Commercial Activities: A Functional View on Regulatory Immunity and Immunity from Execution' in Anne Peters, Evelyne Lagrange, Stefan Oeter and Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Brill 2015) 131.

enabling such entities to exercise some governmenthal authority (*acta jure imperii*).[263] Although being legally separated, independent and autonomous in their self-organization, such instrumentalities retain an undeniable vicinity and contact with the public sphere and they can and do participate in the exercise of governmental powers (*prerogatives de la puissance publique*) at given conditions.[264] The ambivalent character of parastatatals has invariably been remarked at the scholarly level:

> There are certain other types of legal person, which are neither private legal persons nor simple organs of the state (according to the pertinent system of internal law) but which are public in terms of their provenance and function. They may be described as public corporations, 'parastatal entities', or 'quasi-public' legal persons.[265]

The Iran-US Claims Tribunal conveyed the same concept in the *Int'l Technical Products* case, at the cost of engendering confusion between the category of State organs and 'State entities':

> Bank Tejarat is a government owned bank with a separate legal personality. Although in some respects it may be said to perform governmental functions, *i.e.*, to be a "state organ", for the most part it appears to act in a private commercial capacity. One normally would assume that when acquiring real property Bank Tejarat acts in the latter role.[266]

The forms of State instrumentalities are extremely multifarious and diversified in the internal practice of States. The Commentaries attempted to comprise them in the open formula of '*public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies*'.[267]

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[263] *Dickson Car Wheel Company (USA) v United Mexican States*, Dissenting Opinion of Commissioner Nielsen, July 1931, 4 RIAA 669, 688: '*It is true that, when conduct on the part of persons concerned with the discharge of governmental functions results in a failure to meet obligations imposed by rules of international law, a nation must bear the responsibility.*'

[264] Pierre-Marie Dupuy, 'Les émanations engagent-elles la responsabilité des Etats? Etude de droit international des investissements' (2006) EUI Working Paper LAW No 2006/7.

[265] Ian Brownlie, *System of the Law of Nations. State Responsibility. Part I* (Clarendon Press 1983) 162. *Adde*, Philippe Leboulanger, *Les contrats entre états et entreprises étrangères* (Economica 1985) 45.

[266] *International Technical Products Corporation and ITP Export Corporation, its wholly-owned subsidiary, v The Government of the Islamic Republic of Iran and its agencies, The Islamic Republic Iranian Air Force and the Ministry of National Defense, acting for the Civil Aviation Organization*, Case No 302, 24 October 1985, Award No 196-302-3, 9 IRAN-US CTR 206, 239 (1985-II).

[267] ARSIWA Commentaries 43, para 2. In the context of international economic disputes, *see* Luca Schicho, *State Entities in International Investment Law* (Nomos 2012) 70-81, who analyses State enterprises, regulatory

4.2 Exercise of Elements of Governmental Authority: a Critique

The practice of the World Court is not abundant in jurisprudence on 'State entities'.[268] Apart from a few early arbitration cases,[269] the bulk of case law on the subject has been rendered by the IRAN-US Claims Tribunal and by international investment Tribunals (in the context of the so called 'Investor-State Dispute Settlement' or ISDS), which will be discussed in the next chapter.[270] Far from representing a *lex specialis* on attribution issues, the jurisprudence of the Iran-US Claims Tribunal is particularly relevant for the evaluation of customary international law on attribution of conducts of *émanations de l'État*, notably State-owned companies.[271] The Tribunal has rendered numerous decisions involving Iranian 'State entities' operating in strategic sectors, such as energy and commodities,[272] banking, securities and exchange

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and supervisory entities, infrastructure and development agencies, privatization agencies, Public Private Partnerships (PPPs), and Sovereign Wealth Funds (SWFs).

[268] *See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, 27 June 1986, ICJ Reports 1986, 14, 45.

[269] *H G Venable (USA) v United Mexican States*, 8 July 1927, 4 RIAA 219 (order of Superintendent of the National Railways of Mexico that locomotives not leave Mexico); *Dickson Car Wheel Company (USA) v United Mexican States*, July 1931, 4 RIAA 669. The Mexican government had majority ownership in the National Railways of Mexico and direct possession of the railway, at the same time being entitled by law to make requisitions of the lines. *Adde*, *Union Bridge Company (United States) v Great Britain*, 8 January 1924, 6 RIAA 138, 141 (act of the Storekeeper of the Cape Government Railways).

[270] *See infra* Chapter III, para 4.

[271] David D Caron, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules of State Responsibility' in Richard B Lillich and Daniel B Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational Publishers, Inc 1998) 109, 126.

[272] *Dames and Moore v Iran*, Case No 54, 20 December 1983, Award No 97-54-3, 4 IRAN-US CTR 212, 218 (1983-III); *Oil Fields of Texas, Inc v Iran*, Case No 43, 8 October 1986, Award No 258-43-1, 12 IRAN-US CTR 308, 314 (1986-III); *Mobil Oil Iran, Inc v Iran*, Case No 74, 14 July 1987, Award No 311-74/76/81/150-3, 16 IRAN-US CTR 3, 18 (1987-III); *Houston Contracting Company v National Iranian Oil Company, National Iranian Gas Company, and The Islamic Republic of Iran*, Case No 173, 22 July 1988, Award No 378-173-3, 20 IRAN-US CTR 3, 123 (1988-III); *Phillips Petroleum Company Iran v The Islamic Republic of Iran, The National Iranian Oil Company*, Case No 39, 29 June 1989, Award No 425-39-2, 21 IRAN-US CTR 79, 112 (1988-III); *TME International, Inc v Iran*, Case No 357, 12 March 1990, Award No 473-357-1, 24 IRAN-US CTR 121 (1990-I); *Sedco, Inc v National Iranian Oil Company and The Islamic Republic of Iran*, Case No 129, 24 October 1985, Award No ITL 55-29-3, 9 IRAN-US CTR 248, 277 (1985-III); *United Painting Company, Inc v The Islamic Republic of Iran*, Case No 11286, 20 December 1989, Award No 458-11286-3, 23 IRAN-US CTR 351, 363 (1989-III); *Petrolane, Inc v Iran*, Case No 131, 14 August 1991, Award No 518-131-2, 27 IRAN-US CTR 64, 71 (1991-II).

controls,[273] public transportation, port and shipping,[274] industrial planning,[275] management of information systems,[276] healthcare,[277] education.[278] Whether 'public' institutions or parastatals operating within a 'non-western' social, political and economic system, such as the one resulting from the Iranian revolution, may be legally captured by the rule of attribution of ARSIWA Article 5 in an effective way remains a markedly controversial issue.[279] The body of rules of attribution (and, hence, the international law of State responsibility) is based on a liberal conception of the State as governmental apparatus, not as society-community, and on a rather market-based model of the economic system.[280] It is doubtful, at most, whether ARSIWA Article 5 is an effective legal device to enhance accountability of States for the acts of their instrumentalies, especially in the context of rather undefined experiences of State-

[273] *Eastman Kodak Company v Iran*, Case No 12384, 11 November 1987, Award No 329-227/12384-3, 17 IRAN-US CTR 153, 163 (1987-IV); *United Painting Company, Inc v The Islamic Republic of Iran*, Case No 11286, 20 December 1989, Award No 458-11286-3, 23 IRAN-US CTR 351, 363 (1989-III).
[274] *Sea-Land Service, Inc v The Islamic Republic of Iran, Ports and Shipping Organization of Iran*, Case No 33, 20 June 1984, Award No 135-33-1, 6 IRAN-US CTR 149, 202 (1984-II).
[275] *Fedders Corporation v Loristan Refrigeration Industries, General Industrial Corporation, National Industries Organization of Iran, and The Islamic Republic of Iran*, Case No 250, Decision No DEC 51-250-3, 28 October 1986, 13 IRAN-US CTR 97, 98 (1986-IV); *Bechtel, Inc v Iran*, Case No 181, 4 March 1987, Award No 294-181-1, 14 IRAN-US CTR 149, 157 (1987-I).
[276] *Computer Sciences Corporation v The Government of the Islamic Republic of Iran, Ministry of Finance, Ministry of National Defence, Iran Aircraft Industries, Information Systems Iran, Bank Mellat, Bank Tejarat, the successors of the following entities: Imperial Iranian Air Force, Imperial Iranian Ground Force, Imperial Iranian Navy, Imperial Iranian Gendarmerie, Imperial Iranian National Police, The Supreme Commander's Staff*, Case No 65, 16 April 1986, Award No 221-65-1, 10 IRAN-US CTR 269, 278 (1986-I).
[277] *Dames and Moore v Iran*, Case No 54, 20 December 1983, Award No 97-54-3, 4 IRAN-US CTR 212, 218 (1983-III).
[278] *Kathryn Faye Hilt v Iran*, Case No 10427, 16 March 1988, Award No 354-10427-2, 18 IRAN-US CTR 154, 158 (1988-I).
[279] Pierre-Marie Dupuy, 'Attribution Issues in State Responsibility. Commentary' (1990) 84 American Society of International Law Procedings 51, 72: '*there is a confusing use of a certain kind of legal ideology in the field of international economics litigation. At a time when the values of the free market and free enterprise are gaining ground all over the world, it is misleading to interpret the conduct of states, in particular in the Third World, with very liberal principles designed to protect individual property and private initiative in the industrialized countries. As Ms. Chalmers has shown, this attitude has led in several cases to precisely the opposite result. Thus, private investors have been deterred from taking initiative in countries that are able to successfully protect themselves behind the veil of the private corporate form.*' *Adde*, David D Caron, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules of State Responsibility' in Richard B Lillich and Daniel B Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational Publishers, Inc 1998) 109, 173.
[280] Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 European Journal of International Law 387, 389-390. *Contra*, James Crawford, 'Revising the Draft Articles on State Responsibility' (1999) 10 European Journal of International Law 435, 438-440.

driven economies and, ultimately, of non-western conception of the divide between public and private activities.[281] A definition of governmental authority (*prerogatives de la puissance publique*) and capacity is not provided by ARSIWA. The Commentaries famously assert:

> Beyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.[282]

Thus, David Caron has noted that '*the concept of "governmental authority," present in many of the articles concerned with attribution, is not only undefined but elusive when pursued*'.[283] The starting point for a more accurate and precise definition of the scope of operation of the rule of attribution *ex* ARSIWA Article 5 is its proper nature. Differently from ARSIWA Article 4 (as to State organs), which discloses an *institutional* link (the judicial doctrine of *de facto* organs establishes an institutional link *ex post facto*), and Article 8 (as to private individuals), which discloses a *factual* link, Article 5 provides for a *functional* test: attribution operates in exclusive relation to conducts of 'State entities' in the exercise of governmental authority, based on previous empowerment by law to act '*in that capacity*'. Hence, the target of the attribution rule is the specific act '*in the particular instance*'. This calls into question the distinction between *acta jure imperii* and *acta jure gestionis*, elaborated in the context of

[281] *Phelps Dodge Corp and Overseas Private Investment Corp v The Islamic Republic of Iran*, Case No 99, 19 March 1986, Award No 217-99-2, Dissenting Opinion of Hamid Bahrami, 10 IRAN-US CTR 121, 143 (1986-I). It must also be noticed that in the totalitarian political exeriences of a single party (a political party coincident with the State), it is rather the 'State' to be perceived as an instrument of the party. *Cf* Roberto Ago, Third Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur, 'The internationally wrongful act of the State, source of international responsibility', 5 March, 7 April, 28 April and 18 May 1971, para 165, document A/CN.4/246 and Add.1-3, Yearbook of the International Law Commission, 1971, Volume II (Part One), 199, 254, document A/CN.4/SER.A/1971/Add.1(Part 1). *See also* Djamchid Momtaz, 'Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 237, 244, who refers to the example of the Chinese Kuomintang's boycott of Japan in 1931-1932.

[282] ARSIWA Commentaries 43, para 6.

[283] David D Caron, 'The ILC Articles on State Responsibility: the Paradoxical Relationship Between Form and Authority' (2002) 96 American Journal of International Law 857, 861.

the law of State immunity from jurisdiction. Pursuant to UNCSI Article 10, a State cannot invoke immunity from adjudication in proceedings before a domestic judge arising out of a commercial transaction with an alien. UNCSI Article 2.2 clarifies the use of the term 'commercial transaction':

> In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.

This definition reveals that the purpose test has a secondary role in comparison to the nature test. Even more important for the present line of argument is the provision that the purpose of the transaction or contract should not be taken into consideration according to the practice of the State party to the dispute, but according to the practice of the forum State. If this principle is legitimately exported into the realm of the law of attribution of acts of parastatals, it may persuasively be inferred that a possible State purpose underlying the act of a 'State entity' should not be taken into decisive account. Consequently, it is the nature test to fulfil primary relevance for the purposes of attribution to the State of conducts of parastatal entities, notwithstanding its admittedly blurry contours.[284] According to this test, a governmental act is

[284] Rosalyn Higgins, 'Certain Unresolved Aspects of the Law of State Immunity' (1982) 29 Netherlands International Law Review 265, 268-272; Christoph H Schreuer, *State Immunity: Some Recent Developments* (Cambridge University Press 1988) 69-70; James Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions' (1983) 54 British Year Book of International Law 75; M Sornarajah, 'Problems in Applying the Restrictive Theory of Sovereign Immunity' (1982) 31 International & Comparative Law Quarterly 661, 669; Leo J Bouchez, 'The Nature and Scope of State Immunity from Jurisdiction and Execution' (1979) 10 Netherlands Yearbook of International Law 1, 8, 16; Ignaz Seidl-Hohenveldern, 'L'immunité de juridiction et d'exécution des États et d'organisations internationales' in Institut des Hautes Etudes Internationales de Paris, *Cours et Travaux* (Éditions A Pedone 1981) 133; Rolando Quadri, *La giurisdizione sugli Stati stranieri* (Giuffrè 1941) 83-93; Hersch Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 British Year Book of International Law 220, 220–226; J E S Fawcett, 'Legal Aspects of State Trading' (1948) 25 British Year Book of International Law 34, 34-36; Gamal M Badr, *State Immunity: An Analytical and Prognostic View* (Martinus Nijhoff Publishers 1984) 91, 96-97; Riccardo Luzzatto, 'La giurisdizione sugli Stati stranieri tra Convenzione di New York, norme internazionali generali e diritto interno' (2007) 23 Comunicazioni e Studi 1, 11-12.

a conduct that a private person cannot perform in any event.[285] The criteria may be stretched to comprise all the acts that a private competitor on the market arena cannot execute (principle of *competitive neutrality* of the State and SOEs).[286] Anne Van Aaken has described competititve neutrality (or *competitive equality*) as '*a principle of international economic law enshrined in the principles of non-discrimination as the most-favored nation clause as well as national treatment clauses. Both are widely found in the WTO agreements, regional trade agreements and bilateral investment treaties. They were also part of the formerly concluded Treaties of Friendship, Commerce and Navigation.*'[287] Competitive neutrality considerations may be promptly inserted in the context-based analysis of the nature test for the purposes of State immunity and attribution of conducts of parastatal entities.[288] As already submitted, the scope of acts of 'State entities' attributable to the State and the definition of State acts immune from the jurisdiction of domestic courts should converge to the maximum extent as possible.[289]

A different (although significantly correlated) attribution issue is the collusive interference of the State through its organs into a legal relationship between one of its

[285] *See infra* Chapter III, para 4.2.2.
[286] 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' (OECD Publishing 2011), Chapter I (*Ensuring an Effective Legal and Regulatory Framework for State-Owned Enterprises*): '*The legal and regulatory framework for state-owned enterprises should ensure a level-playing field in markets where state-owned enterprises and private sector companies compete in order to avoid market distortions*'; Antonio Capobianco and Hans Christiansen, 'Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options', OECD Corporate Governance Working Papers, No 1 (OECD Publishing 2011).
[287] Anne van Aaken, 'Blurring Boundaries between Sovereign Acts and Commercial Activities: A Functional View on Regulatory Immunity and Immunity from Execution' in Anne Peters, Evelyne Lagrange, Stefan Oeter and Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Brill 2015) 131, 173.
[288] *Cf* Lord Wilbeforce in *I Congreso del Partido* [1983] 1 AC 244, 278: '*The conclusion which emerges is that in considering, under the "restrictive" theory whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity.*'
[289] *See supra* Chapter I, para 6. *Cf* James Crawford, *State Responsibility. The General Part* (Cambridge University Press 2013) 130: '*Application of these concepts to attribution under ARSIWA Article 5 is useful, and achieves consistency between these different areas of international law*'.

instrumentalities and a foreigner. The IRAN-US Claims Tribunal addressed this situation in *Int'l Technical Products*:

> In the present case the evidence does not suggest that Bank Tejarat when taking possession of the building acted on instructions of the Government or otherwise performed governmental functions. Therefore, even if it were found that the Bank came into possession of the building in an illegal manner, this would not automatically establish responsibility of the Government under international law. Rather it must be established additionally that some other government organ (acting in that capacity) through acts or omissions participated in the transfer of the property to Bank Tejarat, thereby depriving Claimants of their property in violation of international law.[290]

In this event it would be ARSIWA Article 4 to operate, rendering as attributable both *acta jure imperii* and *acta jure gestionis*, in so far as the State organ was acting in its official capacity, which means that the conduct in question should not be a purely private act of a personal nature (argument *ex* ARSIWA Article 7).

4.3 Legal Criteria for the Identification of State Instrumentalities

ARSIWA does not provide a static definition of 'State entities'. This is explained by the *functional* nature of the rule of attribution under ARSIWA Article 5 focusing on the exercise of governmental authority. However, a *structural* test is not to be neglected, since the ground for the operation of the functional test of attribution is the establishment of a given person to be a State instrumentality. On the basis of the scholarly attempts at definition, on one side,[291]

[290] *International Technical Products Corporation and ITP Export Corporation, its wholly-owned subsidiary, v The Government of the Islamic Republic of Iran and its agencies, The Islamic Republic Iranian Air Force and the Ministry of National Defense, acting for the Civil Aviation Organization*, Case No 302, 24 October 1985, Award No 196-302-3, 9 IRAN-US CTR 206, 239 (1985-II).

[291] *Ex multis*, Karl-Heinz Böckstiegel, *Arbitration and State Enterprises. A Survey on the National and International State of Law and Practice* (Kluwer Law and Taxation Publishers 1984) 14: '*'State Enterprise' in this research project is understood to be any commercial enterprise predominatly owned or controlled by the state or by state institutions, with or without separate legal personality.*'

and the available case law, notably of the IRAN-US Claims Tribunal, on the other side,[292] it is possible to indicate a non-exhaustive list of symptoms of the status of 'State entity':

a) separate legal personality;

b) formation by the State;

c) performance of policies of public interest;

d) governmental oversight and supervision (accountability);

e) total, majority or partial ownership–shareholding by the State;

f) possibility to exercise authoritative powers by statute or bylaws;

g) appointment of directors by the Government;

h) permanent place in the State budget;

i) waiver from ordinary accounting rules;

j) expedite customs treatment or waiver from customs regulation;

k) facilitated tax regime;

l) grant of loans by public banks at a lower interest rate;

m) direct or indirect subsidisation from the government;

n) claim of jurisdictional immunity before domestic judges;

o) domestic regulatory immunity from competition and bankruptcy law.

In certain cases, the Tribunal's analysis even invested 'aesthetic' issues, since the recording of the *procès verbal* of the meeting of the corporate organs written on paper bearing the official Government emblem was retained as indicia for a finding of governmental control.[293] It must

[292] *Ex multis*, *Hyatt International Corporation, Hyatt Management, Inc, International Project System, Inc v The Government of the Islamic Republic of Iran, Bank Mellat (formerly known as Bank Omran), Alavi Foundation for the Oppressed, Iran Touring and Tourism Organization*, Case No 134, 17 September 1985, Award No ITL 54-134-1, 9 IRAN-US CTR 72, 88-97 (1985-II).

[293] *Economy Forms Corporation v Iran,* Case No 165, 14 June 1983, Award No 55-165-1, 3 IRAN-US CTR 42, 47 (1983-III); *Cal-Maine Foods, Inc v The Government of the Islamic Republic of Iran and Sherkat Seamourgh Company, Inc*, Case No 340, 31 May 1984, Award No 133-340-3, 6 IRAN-US CTR 52, 59 (1984-II); *Ultrasystems Incorporated v The Islamic Republic of Iran, Information Systems Iran*, Case No 84, 4 March

be remarked that it matters of an inductive process, which proceeds from an empirical and casuistic approach, so as to establish whether a person that is formally separate from the State can be ascribed to the category drawed by ARSIWA Article 5. The establishment of a single or even a plurality of elements of the foregoing open list is not per se decisive. In *Schering*, the circumstance of the Workers' Council having being initiated by the Iranian State was not retained as sufficient element to establish it as an entity controlled by the government, in the absence of proof of actual influence of the State on the life of the entity.[294] The repeated reliance of the Tribunal on the test of *governmental control* was dictated by the jurisdictional provisions contained in Artice VII of the Claims Settlement Declaration, which required the Respondent to be the Government, any political subdivision, and *any agency, instrumentality, or entity controlled* by the Government or any political subdivision, either of Iran or US.[295] The test was seemingly very broad in application, possibly involving the entirety of the above listed circumstances. In *Foremost*, the Tribunal identified the main thresholds of its 'typologic' method:

> The two main indicators of government control of a corporation are the identity of its shareholders and the composition and behaviour of its board of directors.[296]

In general, the *core* of the finding of a State instrumentality is a palpable degree of affiliation and mingling – either direct or indirect – between a government (or one of its ministries) and

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1983, Award No 27-84-3, 2 IRAN-US CTR 100, 105 (1983-I); *Phelps Dodge Corp and Overseas Private Investment Corp v The Islamic Republic of Iran*, Case No 99, 19 March 1986, Award No 217-99-2, 10 IRAN-US CTR 121, 143 (1986-I).

[294] *Schering Corporation v The Islamic Republic of Iran*, Case No 38, 13 April 1984, Award No 122-38-3, 5 IRAN-US CTR 361, 370 (1984-I). *See also Otis Elevator Company v The Islamic Republic of Iran, and Bank Mellat (formerly Foreign Trade Bank of Iran)*, Case No 284, 29 April 1987, Award No 304-284-2, 14 IRAN-US CTR 283, 293-295 (1987-I).

[295] *See supra* Chapter I, para 1.5.

[296] *Foremost Tehran, Inc v Iran*, Cases Nos 37 and 231, 10 April 1986, Award No 220-37/231-1, 10 IRAN-US CTR 228, 241-242 (1986-I).

the entity, ranging from a markedly decisive influence to a total management of the entity.[297] Governmental control may be inferred by *formal* indicia, such as clauses in the charter of the entity or bylaws of the State-owned company (for instance the mandatory provision of a minister sitting in person as Chairman or member of the Board of Directors or as President of the General Assembly), as well as by *practical* elements pertaining to the undertaking of the activity of the entity (fiscal regime, customs treatment, financial facilitations). It should be remarked that the use of the corporate form is but an option for the creation of a parastatal entity. For instance, the famous case of the Foundation of the Oppressed (Bonyad Mostazafan) involved a 'pious charity' created 'by the Revolution' for the purpose of management and utilization of the properties confiscated to the Pawlavi family, particularly for the supply of housing and other needs of the poor.[298]

4.4 Empowerment by Law

Not only an instrumentality should (be able to) exercise governmental authority, but it should also be formally delegated to do so. The expression 'by law' refers to a specific legal instrument empowering an entity with sovereign functions '*rather than legality under the general law.*'[299] The delegation of authority – expressly enumerating the powers – may be found in the Constitution, statutory law, governmental decree, or in the establishing statute,

[297] *Dickson Car Wheel Company (USA) v United Mexican States*, Dissenting Opinion of Commissioner Nielsen, July 1931, 4 RIAA 669, 685: '*the Mexican Government was in complete control of the Railways and managed them as any department of the Government was managed.*'

[298] *Hyatt International Corporation, Hyatt Management, Inc, International Project System, Inc v The Government of the Islamic Republic of Iran, Bank Mellat (formerly known as Bank Omran), Alavi Foundation for the Oppressed, Iran Touring and tourism Organization*, Case No 134, 17 September 1985, Award No ITL 54-134-1, 9 IRAN-US CTR 72, 91 (1985-II): '*The Foundation itself plays an investigative or prosecutorial role in the discovery and seizure of properties eligible for confiscation, and is empowered to call upon governmental agencies and institutions for aid in this pursuit*'; *Foremost Tehran, Inc v Iran*, Cases Nos 37 and 231, 10 April 1986, Award No 220-37/231-1, 10 IRAN-US CTR 228, 240 (1986-I); *PepsiCo, Inc v Iran*, Case No 18, 11 October 1986, Award No 260-18-1, 13 IRAN-US CTR 3, 19 (1986-IV).

[299] James Crawford, *State Responsibility. The General Part* (Cambridge University Press 2013) 130-132.

company bylaws or articles of association of the State entity.[300] In addition, the Commentaries undoubtedly clarify that the delegation of powers may be executed by public or private contract, in that it refers to '*private security firms […]* contracted *to act as prisons guards*'.[301] This is a symbol of the public trend to outsource sovereign functions to private (profit-oriented) businesses.[302] Such processes of *ratione materiae* decentralization of governmental functions are justified upon grounds of efficiency, technical expertise and ability to promptly operate in time of 'crisis' (for instance, wars or revolutionary upheavals).[303] However, it should not be overlooked that contractual arrangements allow governments to deliberatedly avoid verification or scrutiny by the parliamentary assemblies in relation to higly delicate and sensitive issues. Moreover, the State resort to 'private contractors' in the sectors of immigration, health security, police, prison administration and even military operation, may relieve the sovereign from accountability towards the persons possibly affected by such activities.[304] The chief example is that of Private Military Companies (PMCs), to the possible inclusion of proper '*mercenaries*'.[305] Pursuant to ARSIWA Article 5, their activities of a private nature would not be attributable to the State. This is the case of the majority of acts performed by PMCs: provision of IT services, logistic support, maintenance of weapons, intelligence services, training of military personnel, translation services, and even prison

[300] *Hyatt International Corporation, Hyatt Management, Inc, International Project System, Inc v The Government of the Islamic Republic of Iran, Bank Mellat (formerly known as Bank Omran), Alavi Foundation for the Oppressed, Iran Touring and tourism Organization*, Case No 134, 17 September 1985, Award No ITL 54-134-1, 9 IRAN-US CTR 72, 89 (1985-II).
[301] ARSIWA Commentaries 43, para 2 (*emphasis added*).
[302] Christian Tomuschat, 'In the Twilight Zones of the State' in Isabelle Buffard, James Crawford, Alain Pellet and Stephan Wittich (eds), *International Law Between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff Publishers 2008) 479, 494-496.
[303] Derek Jinks, 'State Responsibility for the Acts of Private Armed Groups' (2003) 4 Chicago Journal of International Law 83.
[304] Marina Spinedi, 'La responsabilità dello Stato per comportamenti di *private contractors*' in Marina Spinedi, Alessandra Gianelli and Maria Luisa Alaimo (eds), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti: problemi e spunti di riflessione* (Giuffrè 2006) 67, 68-69.
[305] *See* University Centre for International Humanitarian Law, *Expert Meeting On Private Military Contractors: Status And State Responsibility For Their Actions*, Geneva, 29-30 August 2005.

management (as in the UK is ordinarily done). Only acts entailing the exercise of exclusive prerogatives of the public power (*acta jure imperii*) are subject to imputation: military combat, security services (including prison guarding, and conducting of the 'hearing' of prisoners), and possibly the borderline case of escort services, which underly some (lawful) use of force delegated by the State.[306]

Political, social and economic processes of privatization and outsourcing may shift cases of attribution from ARSIWA Article 5 to Article 8 in a complementary fashion. In the case of private contractors not exercising governmenthal authority in the particular instance at issue, a contractual arrangement may be subsumed in the category of 'instructions' of the State demanded by ARSIWA Article 8 for the attribution to the State of conducts of private individuals.

5. Individuals

5.1 Notion

It is a universal rule of public international law that States are not responsible for the conducts of persons not having any sort of inclusion in their governmental machinery (either *ex ante* or *ex post facto*) or not having being entrusted by the State to exercise governmental authority.[307]

[306] James Crawford, *State Responsibility. The General Part* (Cambridge University Press 2013) 130.
[307] Rüdiger Wolfrum, 'State Responsibility for Private Actors: an Old Problem of Renewed Relevance' in Maurizio Ragazzi (ed), *International Responsibility Today. Essays in Memory of Oscar Schachter* (Martinus Nijhoff Publishers 2005) 423, 424; Gordon A Christenson, 'Attributing Acts of Omission to the State' (1990-1991) 12 Michigan Journal of International Law 312, 322; N Okany and A Constantinides, 'State Delegation of Public Functions to Private Entities: a Basis for Attribution under the Rules of State Responsibility' in Kalliopi Koufa (ed), *State Responsibility and the Individual: 2003 International Law Session* (Sakkoulas Publications 2006) 327, 332; Olivier de Frouville, 'Attribution of Conduct to the State: Private Individuals' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University

The rule of irresponsibility of governments for acts of 'private' individuals (ἰδιώτης in the Ancient Greece was said to be the man not taking care of the πόλις) represents the litmus principle demonstrating that international relations and international law are structurally inspired by a conception of the State as (governmental) apparatus, comprehensive of its (official) authorities and powers.[308] There are indeed certain axiological inconsistencies with the adoption of this mental framework by the law of international responsibility of States. Under customary international law, statehood is accepted to exist on the basis of the constituent elements of defined territory, permanent population and effective government, plus capacity to enter into international relations with other States (independence).[309] The law of diplomatic protection 'romantically' imposes the requirement of a genuine connection between the State exercising a diplomatic espousal and a protected subject, thus emphasising the political, economic and cultural bond attached to a link of real and effective nationality. [310] When it turns to the international rules of attribution of conducts to the State for the sake of international responsibility for internationally wrongful acts, the prongs of territoriality and nationality drastically yield to a test of linkage (institutional, functional, or factual) between the State-government and given persons.[311] The Rousseauian concept of the State as

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Press 2010) 257, 261; Riccardo Monaco, 'La responsabilità internazionale dello Stato per fatti degli individui' (1939) 18 Rivista di Diritto Internazionale 3, 193, 216.

[308] Benedetto Conforti, *Diritto internazionale* (Editoriale Scientifica, 9° edn 2013) 12-13.

[309] Montevideo Convention on the Rights and Duties of States, signed on 26 December 1933, entered into force on 26 December 1934, Article 1, 165 LNTS 19. *Cf* James Crawford, 'The Criteria for Statehood in International Law' (1976-1977) 48 British Year Book of International Law 93.

[310] *Nottebohm case (Liechtenstein v Guatemala)*, Second Phase, Judgment, 6 April 1955, ICJ Reports 1955, 4, 22-23: '*nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties*'. *See* J Mervyn Jones, 'The Nottebohm Case' (1956) 5 International & Comparative Law Quarterly 230; Paul de Visscher, 'L'Affaire Nottebohm' (1956) 60 Revue Générale de Droit International Public 238; Suzanne Bastid, 'L'affaire Nottebohm devant la C.I.J.' (1956) 45 Revue Critique de Droit International Privé 607. For an interesting analysis of *Nottebohm*, *see* Robert D Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50 Harvard International Law Journal 1.

[311] C F Amerasinghe, 'Imputability in the Law of State Responsibility for Injuries to Aliens' (1966) 22 Revue Égyptienne de Droit International 91, 92; Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 European Journal of International Law 387, 395. *Adde*, James Crawford, First Report on State Responsibility, by Mr James Crawford, Special Rapporteur, 24 April, 1, 5, 11 and 26 May, 22 and 24 July, 12 August 1998, para

community-society is rather neglected to this extent, a clear triumph of the ideology of political liberalism in the domain of international relations.[312]

The rule of irresponsibility of governments for the acts of private individuals has been firmly established in early cases in notable relationship to conducts occurring in the course of revolutionary uphevals, rebellions, mob violences and civil strives.[313] In the *Sambiaggio* case, the Italy-Venezuela Mixed Claims Commision affirmed:

> Revolutionists are not the agents of government and a natural responsibility does not exist. Their acts are committed to destroy government and no one should be held responsible for the acts of an enemy attempting his life. The revolutionists (in this case) were beyond governmental control.[314]

This rule of law has been comprehensively applied to the generality of cases concerning imputability of conducts of non-State actors.[315] Considering that early cases and doctrine did not yet envisaged the category of 'State entities', from an historical and systematic viewpoint this rule is but an application of the rule of responsibility of States for the acts and omissions of their agents and representatives *only*.[316] This frame is incisively captured by Brierly:

154, document A/CN.4/490 and Add. 1-7, Yearbook of the International Law Commission, 1998, Volume II (Part One), 1, 33, document A/CN.4/SER.A/1998/Add.1(Part 1).

[312] Benjamin Constant, *De la liberté des Anciens comparée à celle des Modernes*, Athénée Royal de Paris, 1819.

[313] Carlos Calvo, 'De la non-responsabilité des États à raison des pertes et dommages éprouvés par des étrangers en temps de troubles intérieurs ou de guerres civiles' (1869) 1 Revue de Droit International et de Legislation Comparée 417.

[314] *Sambiaggio Case (of a general nature)*, 1903, 10 RIAA 499. *Adde*, *Kummerow, Otto Redler and Co, Fulda, Fischbach, and Friedericy Cases*, 1903, 10 RIAA 369, 387: '*The Government is not liable to individuals for the damages which insurgents, revolutionists, or people in revolt, in whatever manner against the constituted authority may cause.*'; *Affaire des biens britanniques au Maroc espagnol (Espagne contre Royaume-Uni) (Spanish Zone of Morocco)*, 1 May 1925, 2 RIAA 615, 642; *Home Frontier and Foreign Missionary Society of the United Brethren in Christ (United States) v Great Britain*, 18 December 1920, 6 RIAA 42, 44: '*A Government can not be held liable as the insurer of lives and property under the circumstances presented in this case*'; *Annie Bella Graham Kidd (Great Britain) v United Mexican States*, 23 April 1931, 5 RIAA 142, 143-144.

[315] *Affaire des biens britanniques au Maroc espagnol (Espagne contre Royaume-Uni) (Spanish Zone of Morocco)*, 1 May 1925, 2 RIAA 615, *affaires Menebhi* 709, *Ziat, Ben Kiran* 729; *Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (Finland, Great Britain)*, 9 May 1934, 3 RIAA 1479, 1501: '*These acts must be committed by the respondent Government or its officials, since it has no direct responsibility under international law for the acts of private individuals.*'; *Porter*, in Moore, III (GPO 1898) 2998.

[316] *German Settlers in Poland,* Advisory Opinion No 6, 10 September, 1923, PCIJ Series B No 6, 22. *See* Francisco V García Amador, International Responsibility: Report by F V García Amador, Special Rapporteur, 20

> It is well-established law that a state does not guarantee the person or property of a foreigner on its territory. It is liable only for its own delinquencies, which means, since the state itself is an abstraction, for such injurious acts or omissions of 'authorities' of the state, as international law, on principles of which the main outlines at least are well settled, attributes to the state itself; it is not liable for the acts of a private individual, who is not an "authority" of the state.[317]

As a consequence, a *positive* formulation of the rule of attribution to the States of conducts of private persons or groups of persons (at present codified in ARSIWA Article 8) emerged rather recently in respect to the history of the codification of the law of State responsibility. Article 11.1 of the draft articles on State resposibility adopted on first reading still maintained a *negative* formulation of the provision ('Conduct of persons not acting on behalf of the State'),[318] in line with previous attempts at codification.[319] The current version of the rule rests upon a factual test, based on the two (alternative) prongs of State instructions, on one

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January 1956, para 43, document A/CN.4/96, Yearbook of the International Law Commission, 1956, Volume II, 173, 181, document A/CN.4/SER.A/1956/Add.l.

[317] J L Brierly, 'The Theory of Implied State Complicity in International Claims' (1928) 9 British Year Book of International Law 42.

[318] 'Draft Articles on State responsibility' in Report of the International Law Commission on the Work of its Twenty-Seventh Session, 5 May – 25 July 1975, document A/10010/Rev.1, Yearbook of the International Law Commission, 1975, Volume II, 47, 51, 60, document A/CN.4/SER.A/1975/Add.l:

Article 11

Conduct of persons not acting on behalf of the State

1. The conduct of a persons or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

[…]

See also James Crawford, First Report on State Responsibility, by Mr James Crawford, Special Rapporteur, 24 April, 1, 5, 11 and 26 May, 22 and 24 July, 12 August 1998, para 112 *et seq*, document A/CN.4/490 and Add. 1-7, Yearbook of the International Law Commission, 1998, Volume II (Part One), 1, 48, document A/CN.4/SER.A/1998/Add.1(Part 1).

[319] Institut de Droit International, 'Responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers' (Leo Strisower, Rapporteur), Résolution du 1 septembre 1927, Session de Lausanne, (1927) 33(III) Annuaire de l'Institut de Droit International 330-335, Article III; League of Nations, Committee of Experts for the Progressive Codification of International Law, Second Session, 12-29 January 1926, Annex to Questionnaire No 4, 'Responsibility of States for Damage Done in Their Territories to the Person or Property of Foreigners', Report of the Sub-Committee (Mr Gustavo Guerrero, Rapporteur), Conclusions, paras 5 and 8, League of Nations publication, V.Legal, 1926.V.3, document C.46.M.23.1926.V and League of Nations publication, V.Legal, 1926.V.11, document C.96.M.47.1926.V, (1926) 20 American Journal of International Law Special Supplement 176, 202; Third Committee of the Conference for the Codification of International Law, The Hague, 13 March – 12 April 1930, Text of Articles on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, Article 10, League of Nations publication, V.Legal, 1930.V.7, document C.228.M.115.1930.V, (1930) 24 Special Supplement American Journal of International Law 188.

side, and State direction or control, on the other side.[320] It should be remarked that the attribution rule *ex* ARSIWA Article 8 is still in contemporary times to be considered of an exceptional character, as such susceptible of restrictive, rather than extensive, interpretation.[321] The architecture of State responsibility appears to be framed by the policy to limit to the maximum extent attributability of conducts of private actors. However, this has not always been the case in the history of international relations. Before the analysis of the current status of customary law on attributability of acts of private individuals, the following paragraph will describe the historical evolution of the rule and its possible present connection with rules of a primary nature.

5.2 Complicity, *Patientia*, *Receptus*, and Due Diligence

The principle of accountability of States for the international delinquencies perpetrated by the members of their community has received marked acceptance in the previous centuries, which was significantly related to the feudal concept of 'collective responsibility' of Germanic origin. The former apogee of the doctrine of State *complicity* is traditionally bestowed to Vattel, who proposed a very reinforced version thereof.[322]

> If a sovereign who has the power to see that his subjects act in a just and peaceable manner permits them to injure a foreign nation, either the State itself or its citizens, he does no less a wrong to that nation than if he injured it himself. […] A sovereign who refuses to repair the evil done by one of his subjects, or to punish the criminal, or, finally, to deliver him up, makes himself in a way an accessory to the deed, and becomes responsible for it.[323]

[320] *See infra* para 5.3 of this Chapter.
[321] Paolo Palchetti, 'Comportamento di organi di fatto e illecito internazionale nel progetto di articoli sulla responsabilità internazionale degli Stati' in Marina Spinedi, Alessandra Gianelli and Maria Luisa Alaimo (eds), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti: problemi e spunti di riflessione* (Giuffrè 2006) 3, 5.
[322] Emer de Vattel, *Le droit des gens, ou principes de la loi naturelle, appliqués à la conduit et aux affaires des nations et des souverains* (Londres 1758) Livre II, Chapitre VI, §§ 73-77.
[323] Translation from the original French of the 1758 edition by Charles G Fenwick, Washington, 1916.

Before Vattel, Grotius had also proposed a theory of State complicity.[324] However, he precisely distinguished the acts of individuals, on one hand, and the acts of the State (related to the former), on the other hand:

> Most authorities on this subject still adhere essentially to the view enunciated by Grotius, who rejected the notion of "community liability" which was widely accepted in his day. In his opinion, the State could only be held responsible if its conduct with respect to the injurious act was inconsistent with its duties. The two most important and frequent forms of such conduct, according to Grotius, were *patientia* and *receptus*. The first of these two terms denotes the situation in which the State is aware of an individual's intention to perpetrate a wrongful act against a foreign State or sovereign, but fails to take the proper steps to thwart his designs; the second term denotes the situation in which the State receives an offender and, by refusing either to extradite or to punish him, assumes complicity in the offence. By such conduct, which constitutes tacit approval of the offence, the State tends to identify itself with the offender. And it is this tacit approval—and not the relationship between the individual and the community—which gives rise to the responsibility of the State. In other words, the responsibility of the State can only arise in such circumstances if its organs or officials have been guilty of an act or omission which in itself constitutes an international delinquency.[325]

García Amador and Ago ascribe Grotius into the opponents of the doctrine of State complicity.[326] However, both the conducts of (*ex ante*) *patientia* and (*ex post*) *receptus* were susceptible of a broad and liberal interpretation, so that in fact numerous early cases, although complying to the principle formulated by Grotius, were rightly held to support a complicity theory attributing on a derivative and indirect basis acts of private individuals to the State.[327]

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[324] Hugo Grotius, *De Jure Belli ac Pacis Libri Tres. Libri II* (Amsterdam 1646) 366.

[325] Francisco V García Amador, International Responsibility: Second Report by F V García Amador, Special Rapporteur, 'Responsibility of The State For Injuries Caused in its Territory to the Person or Property of Aliens. Part I: Acts And Omissions', 15 February 1957, para 11, document A/CN.4/106, Yearbook of the International Law Commission, 1957, Volume II, 104, 123, document A/CN.4/SER.A/1957/Add.l.

[326] Roberto Ago, Fourth Report on State Responsibility, by Mr Roberto Ago, Special Rapporteur, 'The internationally wrongful act of the State, source of international responsibility', 30 June 1972 and 9 April 1973, para 139, document A/CN.4/264 and Add.l, Yearbook of the International Law Commission, 1972, Volume II, 71, 121, document A/CN.4/SER.A/1972 /Add.1. *But see* Dionisio Anzilotti, 'La responsabilité internationale des États a raison des dommages soufferts par des étrangers' (1906) 13 Revue Générale de Droit International Public 5, 13: '*l'acte illicite, au point de vue du droit international, ast en pareil cas, l'omission de l'Ètat et non pas l'action positive des individus; et l'Ètat est donc tenu pour* son *fai, mais non en qualité de complice des individus, comme on l'a dit si souvent depuis Grotius*'.

[327] *Bovallins and Hedlund cases*, 1903, 10 RIAA 768, 770: '*A State is responsible in damages committed by revolutionists where it subsequently appoints the participants and leaders of the revolution to office, thereby tacitly approving their conduct*'; *Ruden*, in Moore, II (GPO 1898) 1653, 1655; *Cothesworth & Powell*, November 1875, in Moore, II (GPO 1898) 2050, 2082; *Cases of Amelia de Brissot, Ralph Rawdon, Joseph Stackpole and Narcisa de Hammer v Venezuela (the steamer* Apure *case)*, 1885, 29 RIAA 240; *Poggioli case (of a general nature)*, 1903, 10 RIAA 669, 673: '*the Italian Commissioner insists that there was an implied*

The attribution of responsibility to the State operated on the fictitious ground of a tacit or implied complicity of the State vis-à-vis the culprits of injuries to aliens that was inferred by distinct State conducts of (political) tolerance and approval, more or less stringently related to the facts of the dispute.[328] The conclusive rejection of such either open or subreptitious doctrines of State complicity is notably found in the case law of the US-Mexico General Claims Commission, notably in the *Janes* case:

> The international delinquency in this case is one of its own specific type, separate from the private delinquency of the culprit. The culprit is liable for having killed or murdered an American national; the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender. […] Even if the non-punishment were conceived as some kind of approval—which in the Commission's view is doubtful—still approving of a crime has never been deemed identical with being an accomplice to that crime; and even if nonpunishment of a murderer really amounted to complicity in the murder, still it is not permissible to treat this derivative and remote liability not as an attenuate form of responsibility, but as just as serious as if the Government had perpetrated the killing with its own hands.[329]

More authoritatively, the ICJ refused attribution based on 'complicity' in the *Hostages* case.[330] As is known, the ICJ considered as not attributable the acts of Iranian militants (students and other nationals) consisting in the attack on the US Embassy in Tehran of the 4th November 1979 and on the Consulates at Tabriz and Shiraz on the following day, their seizure and detention of their personnel as hostages:

> No suggestion has been made that the militants, when they executed their attack on the Embassy, had any form of official status as recognized "agents" or organs of the Iranian State. Their conduct in mounting the attack, overrunning the Embassy and seizing its inmates as hostages cannot, therefore, be regarded as imputable to that State on that basis. Their conduct might be considered as itself directly imputable to the Iranian State only if it were established that, in fact, on the occasion in question the militants acted *on behalf on the State*, having been charged by some competent

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responsibility on the part of the Government in these events, even if only a part of them were executed by its agents, because all were by them at least suggested or tolerated.'

[328] J L Brierly, 'The Theory of Implied State Complicity in International Claims' (1928) 9 British Year Book of International Law 42.

[329] *Laura M B Janes et al (USA) v United Mexican States*, 16 November 1925, 4 RIAA 82, 86-87. *Accord*, *Gertrude Parker Massey (USA) v United Mexican States*, 15 April 1927, 4 RIAA 155; *Owner of the Sarah B Putnam (United States) v Great Britain*, 6 November 1925, 6 RIAA 156-157. *See also* the earlier *Glenn*, 1868, in Moore, III (GPO 1898) 3138; *Lenz*, 25 March 1899, in Moore, VI (GPO 1906) 794; *Renton*, in Moore, VI (GPO 1906) 794.

[330] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Judgment, 24 May 1980, ICJ Reports 1980, 3.

> organ of the Iranian State to carry out a specific operation. The information before the Court does not, however, suffice to establish with the requisite certainty the existence at that time of *such a link* between the militants and any competent organ of the State. (*emphasis added*)[331]

Even various declarations of political approval and expressions of congratulations by the Ayatollah Khomeini were not interpreted as a demonstration of (actual) authorization from the State of Iran in relation to the attack to the US Embassy, held as a conduct of '*initially independent and unofficial character.*'[332]

Although States are relieved from direct imputation of conducts of private individuals based on theories of complicity or endorsement (level of secondary rules), they are nevertheless subject to attribution of acts and omissions of their organs found in breach of the obligation to comply with a general standard of *due diligence* (level of primary rules). After the disappearance of the legal doctrine of implied State complicity, this legal reasoning has comprehensively replaced the former approach in the adjudication of specular cases, equally resulting in a finding of State liability (from indirect or derivative responsibility based on a complicity argument to direct responsibility based on failure to comply with due diligence standards). For instance, episodes of judicial pardon, condonation and general amnesty would have been earlier considered as grounds for State complicity.[333] Afterwards, the same conducts have been interpreted as representing a failure to punish.[334] Another example is the

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[331] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Judgment, 24 May 1980, ICJ Reports 1980, 3, 29. *Accord*, *Alfred LW Short v The Islamic Republic of Iran*, Case No 11135, 14 July 1987, Award No 312-11135-3, 16 IRAN-US CTR 76, 84-86 (1987-III); *Jack Rankin v The Islamic Republic of Iran*, Case No 10913, 3 November 1987, Award No 326-10913-2, 17 IRAN-US CTR 135, 141 (1987-IV).
[332] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Judgment, 24 May 1980, ICJ Reports 1980, 3, 30.
[333] *Cothesworth & Powell*, November 1875, in Moore, II (GPO 1898) 2050, 2051.
[334] *Cornelia J Pringle, et al, (Santa Isabel Claims) (USA) v United Mexican States*, 26 April 1926, 4 RIAA 783; *Lettie Charlotte Denham and Frank Parlin Denham (United States) v Panama*, 22 May 1933, 6 RIAA 312-313; *F R West (USA) v United Mexican States*, 21 July 1927, 4 RIAA 270, 272.

appointment of a culprit as State official or dignitary, which has been earlier categorized as tacit complicity,[335] later as failure to protect.[336]

While the category of *patientia* (*ex ante* aware tolerance of mischiefs against foreigners) has been almost completely transferred into the realm of due diligence obligations (duty to prevent, chiefly), the category of *receptus* (*ex post* approval or ratification of acts of individuals) still retains standing in the domain of secondary rules of attribution.[337] Indeed, ARSIWA Article 11 provides for the acknowledgment and adoption by a State of *not otherwise attributable* conducts:

> *Article 11*
>
> *Conduct acknowledged and adopted by a State as its own*
>
> Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.[338]

The most remarkable precedent of application of the attribution rule of State acknowledgement and adoption of conduct *ex post facto* eminently is the *Hostages* case.[339] Notwithstanding non-attributability of the acts of the Iranian militants attacking and occupying the US embassy in Tehran, the ICJ nevertheless held that the endorsement by Iran – as gathered by the Ayatollah Khomeini's decree of 17 November 1979 and by a television interview of the minister of Foreign Affairs on 6 May 1980 – 'ratified' the militants' conduct, *transforming* (*ab initio*) their legal nature through the '*seal of official government*

[335] *Bovallins and Hedlund cases*, 1903, 10 RIAA 768, 770.
[336] *Francisco Mallén (United Mexican States) v USA*, 27 April 1927, 4 RIAA 173, 181.
[337] Frédéric Dopagne, 'La responsabilité de l'État du fait des particuliers: les causes d'imputation revisitées par les articles sur la responsabilité de l'État pour fait internationalement illicite' (2001) 34 Revue Belge du Droit International 492, 518: '*On ne peut cependant nier, nous semble-t-il, que le pas à franchir n'est pas énorme entre l'article 11 des articles et une certaine résurrection de la « complicité »*'.
[338] ARSIWA Commentaries 52.
[339] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Judgment, 24 May 1980, ICJ Reports 1980, 3. The Commentaries also mention the *Affaire relative à la concession des phares de l'Empire ottoman (Lighthouses Arbitration) (France v Greece)*, 24 July 1956, 12 RIAA 155.

approval'.[340] The ICJ deliberated that Iran's approval rendered the acts of the occupants as '*acts of that State*' and that the authors of the attack '*had now become agents of the Iranian State*'.[341] This language may be subject to legitimate criticism. It is hardly possible to admit a retroactive agency relationship between the State and the private individuals subsequent to government's approval. Pursuant to the rule of acknowledgement and adoption, the direction (the 'arrow') of the mechanism of "attribution" is exceptionally reversed: not from the conduct to the State (imputation of the act *to* the State), but rather from the State to the conduct (ratification *by* the State of the act). This rule appears to be rather stranger to the functioning of the canonical principle of imputability *ex* ARSIWA Article 4 (*de jure* or *de facto* agency), which attracts significant consequences in the applicable regime, chiefly the operation of the *ultra vires* rule. Rather in line with this argument, it has been questioned whether ARSIWA Article 11 provides for a rule of attribution *at all*, rather than entailing different issues of opposability to States of their unilateral acts and declarations.[342] Another issue touches upon the form and extent of the acknowledgement and adoption. The Commentaries underline that it must be clear, equivocal, and also specific.[343] From the last requirement, it may also be inferred that it should be express. In this respect, the Commentaries allow acknowledgement and adoption to take '*the form of words or conduct*.'[344] Therefore, an implied ratification or endorsement remains a possible option

[340] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Judgment, 24 May 1980, paras 73-74, ICJ Reports 1980, 3, 34-35.
[341] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Judgment, 24 May 1980, para 74, ICJ Reports 1980, 3, 35.
[342] Paolo Palchetti, 'Comportamento di organi di fatto e illecito internazionale nel progetto di articoli sulla responsabilità internazionale degli Stati' in Marina Spinedi, Alessandra Gianelli, Maria Luisa Alaimo (eds), La codificazione della responsabilità internazionale degli Stati alla prova dei fatti: problemi e spunti di riflessione (Giuffrè 2006) 3, 24.
[343] ARSIWA Commentaries 52, paras 6, 8.
[344] ARSIWA Commentaries 52, para 8.

provided by ARSIWA, which may appear as a reminescence of the old theories of State complicity.

In case of non-attributability of acts and omissions of private individuals, State responsibility can only be based upon some '*ultimate default*' by State organs with regard to the '*objective condition*s' embodied by the activities of private persons.[345] States are generally subject to due diligence obligations dictated by customary international law, as well as by treaty law.[346] This rules entail duties of care and surveillance incumbent on the State, not only in relation to acts of revolutionaries, mob violences or piracy, but also in relation to the conducts of every other private person, to the inclusion of corporate businesses, associations, trade unions, etc.[347] This universal principle has been consistently formulated by the Italy-Peru Mixed Claims Commission in relation to armed conflicts and civil strives:

> Un principe de droit international veut que l'Etat soit responsable des violations du droit des gens commises par ses agents ou ceux d'un des partis belligérants, dans une guerre civile, lorsqu'il n'a pas été fait toutes les diligences nécessaires pour sauvegarder les intérêts neutres représentés par les étrangers dans leurs personnes et leurs biens.[348]

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[345] Ian Brownlie, *System of the Law of Nations. State Responsibility. Part I* (Clarendon Press 1983) 159; Rüdiger Wolfrum, 'State Responsibility for Private Actors: an Old Problem of Renewed Relevance' in Maurizio Ragazzi (ed), *International Responsibility Today. Essays in Memory of Oscar Schachter* (Martinus Nijhoff Publishers 2005) 423, 424.

[346] *Alabama claims of the United States of America against Great Britain*, 14 September 1872, 29 RIAA 125, 127; *Sambiaggio Case (of a general nature)*, 1903, 10 RIAA 499, 502; *Affaire des biens britanniques au Maroc espagnol (Espagne contre Royaume-Uni) (Spanish Zone of Morocco)*, 1 May 1925, 2 RIAA 615, 645: '*il faut également reconnaître que l'État doit être considéré comme tenu à exercer une vigilance d'un ordre supérieur en vue de prévenir les délits commis, en violation de la discipline et de la loi militaires, par des personnes appartenant à l'armée. L'exigence de cette vigilance qualifiée n'est que le complément des pouvoirs du commandement et de la discipline de la hiérarchie militaire*.'; *Walter A Noyes (United States) v Panama*, 22 May 1933, 6 RIAA 308, 309; *Trail Smelter Case (United States, Canada)*, 16 April 1938 and 11 March 1941, 3 RIAA 1905.

[347] Francisco V García-Amador, 'State Responsibility: Some New Problems' (1958) 94 Recueil des Cours 365, 404; Pierre-Marie Dupuy, 'Due Diligence in the International Law of State Responsibility' in *Legal Aspects of Transfrontier Pollution* (Organisation for Economic Co-operation and Development 1977) 369-379; Riccardo Pisillo Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 German Yearbook of International Law 9, 22; Riccardo Pisillo Mazzeschi, *"Due diligence" e responsabilità internazionale degli Stati* (1989 Giuffrè) 193, 224; Jan Arno Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law' (2003-2004) 36 New York University Journal of International Law and Politics 265; Gordon A Christenson, 'Attributing Acts of Omission to the State' (1990-1991) 12 Michigan Journal of International Law 312, 323.

[348] *Queirolo*, 30 September 1901, 15 RIAA 407, 408; *Don Juan B Sanguinetti*, 30 September 1901, 15 RIAA 403-404; *Don Jeronimo Sessarego*, 30 September 1901, 15 RIAA 400-401; *Don Jacinto Gadino*, 30 September 1901, 15 RIAA 414, 415. *See also*, as to the Italy-Venezuela Commission, *Sambiaggio Case (of a general*

The breach of due diligence should not necessarily be at the causal origin of the injury suffered by an alien, but suffices to be connected to it at a previous, contemporary or subsequent phase.[349] Indeed, due diligence obligations enshrine the State duty to prevent injuries and to protect aliens,[350] as well as to apprehend and punish adequately the authors of delinquencies against foreigners.[351] Instead of covering artificial ways to link (municipally) wrongful 'private' acts to the State (such as theories of implied complicity or acquiescence), the focus of international law is whether the State has an independent obligation to prevent harm or to act affirmatively.[352] In this respect, the distinction between *direct* and *indirect* responsibility is definitely misleading, even though of moderate assistance to elucidate a legal phenomena, where the divide between primary and secondary rules fades. Indeed, the attribution mechanism is here necessarily intertwined with the applicability of a substantive rule of international law prescribing a standard of diligence. As a consequence, failure (by act or omission) to comply with such standard is per se attributable to State organs (ARSIWA Article 4) or also to State instrumentalities possibly entrusted with functions of surveillance, prevention and punishment of delinquencies (ARSIWA Article 5). As Hazel Fox has emphasised:

> while the terminology of "direct" and "indirect" responsibility may express the intensity of involvement of the State in the situation, at each stage of the situation it

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nature), 1903, 10 RIAA 499, 512: '*The ordinary rule is that a government, like an individual, is only to be held responsible for the acts of its agents or for acts the responsibility for which is expressly assumed by it. To apply another doctrine, save under certain exceptional circumstances incident to the peculiar position occupied by a government toward those subject to its power, would be unnatural and illogical.*'

[349] *Contra*, Institut de Droit International, 'Responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers' (Leo Strisower, Rapporteur), Résolution du 1 septembre 1927, Session de Lausanne, (1927) 33(III) Annuaire de l'Institut de Droit International 330-335, Article III.

[350] As to early case law, *see Cornelia J Pringle, et al, (Santa Isabel Claims) (USA) v United Mexican States*, 26 April 1926, 4 RIAA 783. As to the Iran-US Claims Tribunal, *see Lillian Byrdine Grimm v The Government of the Islamic Republic of Iran*, Case No 71, 18 February 1983, Award No 25-71-1, 2 IRAN-US CTR 78 (1983-I).

[351] *George Adams Kennedy (USA) v United Mexican States*, 6 May 1927, 4 RIAA 194, 199; *Walter A Noyes (United States) v Panama*, 22 May 1933, 6 RIAA 308, 309.

[352] Gordon A Christenson, 'The Doctrine of Attribution in State Responsibility' in Richard B Lillich (ed), *International Law of State Responsibility for Injuries to Aliens* (University Press of Virginia 1983) 321, 322.

> may be said the State has "directly" violated an international obligation. […] It follows that to classify attributable acts of organs as producing direct state responsibility and attributable acts of other individuals as producing indirect state responsibility is a distinction without meaning, producing no difference.[353]

The due diligence principle found a solemn formulation by the ICJ in the *Corfu Channel* case, where the Court established the responsibility of Albania on the ground of:

> certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.[354]

The *Corfu Channel* ruling – notably inspired by natural law tenets – imputes to States omissive conducts of their organs in a very similar fashion to the early doctrine of *patientia*, re-elaborated at the level of primary rules as failure to take *appropriate steps* to prevent injuries to aliens. This means that, notwithstanding non-imputability of conducts of private individuals to the State, the very same State is not '*free of any responsibility*' possibly arising in connection with the same conduct, as affirmed in *Hostages*.[355] In that case, the ICJ found the inaction of Iran as liable for breach of various substantive obligations deriving both from 'contractual' and 'general international law', namely due diligence duties and rules prescribed by the 1961 Vienna Convention on Diplomatic Relations (VCDR) and by the 1963 Vienna Convention on Consular Relations (VCCR).[356] Likewise, in the *Nicaragua* case, the ICJ found that the acts of the *contras* were not considered as attributable to the US for lack of effective control,[357] but affirmed that the activities of the US '*in relation to the* contras'[358]

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[353] Hazel Fox, 'The International Court of Justice's Treatment of Acts of the State and in Particular the Attribution of Acts of Individuals to the State' in Nisuke Ando, Edward McWhinney and Rüdiger Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda*, Volume 1 (Kluwer Law International 2002) 147, 152, 156.
[354] *Corfu Channel case*, Judgment, 9 April 1949, ICJ Reports 1949, 4, 22.
[355] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Judgment, 24 May 1980, para 61, ICJ Reports 1980, 3, 31.
[356] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Judgment, 24 May 1980, paras 62-68, ICJ Reports 1980, 3, 30-32.
[357] *See infra* para 5.3.4.1 of this Chapter.
[358] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, 27 June 1986, para 228, ICJ Reports 1986, 14, 118: '*recruiting, training, arming, equipping,*

constituted a breach of the customary international law principles of the non-use or threat of force, and non-intervention in the internal affairs of another State.[359] In *Armed Activities*, the Court exactly followed the same reasoning. It held that, even though the activities of the Congo Liberation Movement (MLC) and Congo Liberation Army (ALC) could not be imputed to Uganda, Uganda's conducts of training and military support violated '*certain obligations of international law*', substantiated as non-use of force, non-intervention and violation of the sovereignty and the territorial integrity of the Democratic Republic of the Congo (DRC).[360] The *Bosnian Genocide* case recently confirmed this legal scheme, emphasising the possibility for States to contract primary norms prohibiting incitement, conspiracy or complicity with non-state actors, for instance in relation to acts of genocide, terrorism or intervention in the internal affairs of other States, as well as obligations to prevent in the domain of multifaceted sectors such as financial markets, air and maritime transportation, and public security issues (*duty to control*).[361] It should be remarked once again that in all such cases attribution generally proceeds from the canonical rule of

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financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua.'

[359] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, 27 June 1986, ICJ Reports 1986, 14, 100, 147. Customary international law on non-use of force was also interpreted in light of General Assembly Resolution 2625 (XXV), 24 October 1970, 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations', A/8082.

[360] *Armed Activities in the Territory of the Congo (DRC v Uganda)*, Judgment, 19 December 2005, paras 161-164, ICJ Reports 2005, 168, 226-227.

[361] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, para 430, ICJ Reports 2007, 43, 221: '*In this area the notion of "due diligence", which calls for an assessment in concreto, is of critical importance.*' *See also* Summary of the Discussions in Various United Nations Organs and the Resulting Decisions: Working Paper Prepared by the Secretariat, 7 February 1964, document A/CN.4/165, Yearbook of the International Law Commission, 1964, Volume II, 125, 126, document A/CN.4/SER.A/1964/ADD.1; Proposals submitted to, and decisions of, various United Nations organs relating to the question of State responsibility: supplement prepared by the Secretariat to document A/CN.4/165, 28 February 1969, document A/CN.4/209, Yearbook of the International Law Commission, 1969, Volume II, 114, 117, document A/CN.4/SER. A/1969/Add.1: '*There was also agreement in principle that every State has the duty to refrain from involvement in civil strife and terrorist acts in another State. A number of the proposals submitted to the Committee would go further and require States not to tolerate, connive at, or acquiesce in, activities of a terrorist or subversive nature directed against another State.*' *Adde*, ICTY, Appeals Chamber, *Tadić*, IT-94-1-A, Separate Opinion of Judge Shahabuddeen, 15 July 1999, 150, 156, para 20: '*by deciding to use force through an entity, a state places itself under an obligation of due diligence to ensure that such use does not degenerate into such breaches, as it can.*'

attribution of conducts of State organs (*de jure* or *de facto*), not from the rule of imputability of acts of private individuals to the State.[362]

5.3 Instructions, or Directions or Control

5.3.1 Scope

The foregoing analysis may definitely assist the interpreter in the understanding of the structure and functioning of the rule of attributability to the State of conducts of individuals, currently codified by ARSIWA Article 8:

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

The rule is meant to cover instances of effective *private delegation* to undertake certain activities by a State to non-state actors, *i.e.* such persons or groups of persons not falling under the attribution mechanisms pertaining to the category of organs (*de jure* or *de facto*) *ex* ARSIWA Article 4 or 'State entities' *ex* ARSIWA Article 5.[363] As above mentioned,[364] the *positive* formulation of this rule represents a major advancement in comparison to Article 11 of the draft articles adopted on first reading, which propounded a mere *negative* formulation. ARSIWA Article 8 should also to be read in *historical* continuity with Article 8(a) of the draft

[362] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, para 380, ICJ Reports 2007, 43, 200.
[363] James Crawford, *State Responsibility. The General Part* (Cambridge University Press 2013) 141.
[364] *See supra* para 5.1 of this Chapter.

articles adopted on first reading, regulating the attribution of acts of *de facto* organs.[365] Indeed, the tests of (actual) instructions and (effective) control, which are currently employed in ARSIWA Article 8, were originally elaborated in relation to the former Article 8(a). However, it should be forcefully remarked that the rule of attribution of conducts of private individuals presently operates on the basis of an absolutely diverse mechanism in comparison to the imputability of acts of *de facto* agents pursuant to ARSIWA Article 4.2. This is testified by the radical elision of the phrase 'in fact acting on behalf of the State', which does not appear in the text of ARSIWA Article 8. Indeed, the attribution mechanism of ARSIWA Article 8 does not proceed from concept of "agency" as understood in public law (which is the case of ARSIWA Article 4 as to *de jure* or *de facto* organs), but rather from a private law concept of "agency".[366] This entails the absence of any exercise of elements of *official* (ARSIWA Article 4) or *governmental* (ARSIWA Article 5) authority whatsoever, but instead requires the existence of a *factual* link. It may even be questioned whether the conducts of non-state actors should be considered as 'acts of the State' proper, at least in Roberto Ago's acceptation. It may be submitted that only the *effects* of the acts and omissions of the individuals are attributed to the State, rather than the conducts themselves.

The point of departure of the attribution rule under ARSIWA Article 8 is the finding that State organs imparted instructions to or exercised direction or control over the activity of non-state actors.[367] The prongs of instructions and direction or control are reciprocally

[365] Paolo Palchetti, 'Comportamento di organi di fatto e illecito internazionale nel progetto di articoli sulla responsabilità internazionale degli Stati' in Marina Spinedi, Alessandra Gianelli and Maria Luisa Alaimo (eds), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti: problemi e spunti di riflessione* (Giuffrè 2006) 3, 7: '*In questo senso, la modifica introdotta in seconda lettura non sembra alterare i caratteri di fondo del criterio di attribuzione che era previsto all'art. 8, lett.* a).'

[366] *Black's Law Dictionary* (Thompson Reuters, 9° edn 2009): 'A fiduciary relationship created by express or implied contract or by law, in which one party (the *agent*) may act on behalf of another party (the *principal*) and bind that other party by words or actions.'

[367] ARSIWA Commentaries 40, para 2: '*But the rule* [ARSIWA Article 4] *is nonetheless a point of departure. It defines the core cases of attribution, and it is a starting point for other cases. For example, under article 8*

alternative. However, in both cases their object and target shall be a *specific* conduct to be undertaken by individuals: '*[t]he principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control*.'[368] The Commentaries offer some exemplification of individuals *ex* ARSIWA Article 8, by referring to private persons or groups recruited or instigated to act as 'auxiliaries' or 'volunteers' while remaining outside the official structure of the State.[369] Such examples may engender confusion. Indeed, we have submitted that the category of *auxiliaries* is generally included in the status of State organs.[370] The term is employed in conjunction with the example of 'volunteers'. Hence, the Commentaries might be held to use the two words in a synonymic fashion. Even in light of this interpretation, it should be underlined that *irregular* volunteers carrying out state functions are rather to be subsumed into the category of *de facto* organs. Accordingly, the kind of activities enshrined in ARSIWA Article 8 should be further investigated. The Commentaries states that '*it does not matter that the person or persons involved are private individuals nor whether their conduct involves "governmental activity"*.'[371] 'Private individuals' may include State agents acting *jure privatorum* outside of their office, which further suggests that the undertaking of 'authoritative' acts by non-state actors is not a requirement contemplated by ARSIWA Article 8. Rather, it is submitted that ARSIWA Article 8 does not regularly cover activities performed in the exercise of authority.

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conduct which is authorized by the State, so as to be attributable to it, must have been authorized by an organ of the State, either directly or indirectly'.

[368] ARSIWA Commentaries 47, paras 3, 7.

[369] ARSIWA Commentaries 47, para 2.

[370] *D Earnshaw and Others (Great Britain) v United States (Zafiro case)*, 30 November 1925, 6 RIAA 160. *See supra* para 1.3.2 of this Chapter.

[371] ARSIWA Commentaries 47, para 2.

5.3.2 State-Owned Companies

A (scholarly) rather unexplored vitality of ARSIWA Article 8 may dwell in the realm of activities *jure gestionis* performed by 'private' State-owned or State-controlled entities outside of cases of exercise of governmental authority. The practice of the IRAN-US Claims Tribunal provides for numerous cases of (possible) attribution to the State of the effects of the acts of private entities on the ground of the test of *governmental control* enshrined in Article VII of the Claims Settlement Declaration.[372] Various criteria for the finding of State control overlap with the tests included in the typologic method employed for the structural indentification of parastatals.[373] The decisive distinction between attributability under ARSIWA Articles 5 or 8 hinges on the exercise of elements of governmental authority (*prerogatives de la puissance publique)* by the entity in the particular instance at issue and formal empowerment by law of such an authority. This entails that – failing application of ARSIWA Article 5 – attribution may be triggered on the basis of control *ex* ARSIWA Article 8 in relation to the activities *jure gestionis* of 'State entities', to the notable inclusion of State-owned companies. Thus, the Iran-US Claims Tribunal repeatedly found the following factual findings as relevant indication of (effective) control: appointment by the government or public authorities of the managers of the company;[374] orders, directives, recommendations or

[372] *See supra* Chapter I, para 5.
[373] *See supra* para 4.3 of this Chapter.
[374] *RayGo Warner Equipment Company v Star Line Iran Company*, Case No 17, 15 December 1982, 1 IRAN-US CTR 411, 413 (1982); *Kimberley-Clark Corporation v Bank Markazi Iran, Novzohour Paper Industries, Government of the Islamic Republic of Iran*, Case No 57, Award No 46-57-2, 25 May 1983, 2 IRAN-US CTR 334, 338 (1983-I); *Cal-Maine Foods, Inc v The Government of the Islamic Republic of Iran and Sherkat Seamourgh Company, Inc*, Case No 340, 31 May 1984, Award No 133-340-3, 6 IRAN-US CTR 52, 58-59 (1984-II); *Rexnord, Inc v The Islamic Republic of Iran, Tchacosh Company and Iran Siporex Industrial and Manufacturing Works, Limited*, Case No 132, 10 January 1983, Award No 21-132-3, 2 IRAN-US CTR 6 (1983-I); *Sedco, Inc v National Iranian Oil Company and The Islamic Republic of Iran*, Case No 129, 24 October 1985, Award No ITL 55-29-3, 9 IRAN-US CTR 248, 277 (1985-III); *SeaCo, Inc v The Islamic Republic of Iran, The Iranian Meat Organization, Iran Express Lines, and Star Line Co*, 11 IRAN-US CTR 210, 215 (1986-II); *McLaughlin Enterprises, Ltd v The Governement of the Islamic Republic of Iran, Information System Iran*, Case

instructions by any governmental body;[375] and, a taking of expropriation of the company itself by the Government.[376]

In *Eastman Kodak*, the Tribunal laconically held that *'[t]he concept of control, as used in commercial and international law, is far from being as clear and unequivocal a legal concept as one would desire.*'[377] While State control over a company may also be indirect through another entity or parastatal,[378] majority ownership or shareholding is not per se a sufficient element for the purposes of attribution.[379] Accordingly, a finding of 'public control' entails a higher and more enhanced test in comparison to the control that a private controlling shareholder may exercise.

This appears to be a corollary of the principle of corporate separateness enshrined in domestic commercial law, which imposes markedly strict requirements for the application of the doctrine of '*piercing of the corporate veil*.'[380] The ICJ addressed this issue in the most famous case of the *Barcelona Traction*.[381] The decision stands as one of the chief and clearest

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No 289, 16 September 1986, Award No 253-289-1, 12 IRAN-US CTR 146, 149 (1986-III); *Emanuel Too v Greater Modesto Insurance Associates and The United States of America*, Case No 880, 29 December 1989, Award No 460-880-2, 23 IRAN-US CTR 378, 384 (1989-III); *Kaysons International Corporation v The Government of the Islamic Republic of Iran, The Ministry of Industries and Mines, The Alborz Investment Corporation, The Tolid Daru Company, The Payegozar, The Pakhs Alborz Company, and The KBC Company*, Case No 367, 28 June 1993, Award No 548-367-2, 29 IRAN-US CTR 222, 229 (1993).

[375] *Schering Corporation v The Islamic Republic of Iran*, Case No 38, 13 April 1984, Award No 122-38-3, 5 IRAN-US CTR 361, 370 (1984-I).

[376] *Sedco, Inc v National Iranian Oil Company and The Islamic Republic of Iran*, Case No 129, 24 October 1985, Award No ITL 55-29-3, 9 IRAN-US CTR 248, 277 (1985-III).

[377] *Eastman Kodak Company v Iran*, Case No 12384, 11 November 1987, Award No 329-227/12384-3, 17 IRAN-US CTR 153, 166 (1987-IV).

[378] *Economy Forms Corporation v Iran,* Case No 165, 14 June 1983, Award No 55-165-1, 3 IRAN-US CTR 42, 47 (1983-III); *Ultrasystems Incorporated v The Islamic Republic of Iran, Information Systems Iran*, Case No 84, 4 March 1983, Award No 27-84-3, 2 IRAN-US CTR 100, 105 (1983-I); *Phelps Dodge Corp and Overseas Private Investment Corp v The Islamic Republic of Iran*, Case No 99, 19 March 1986, Award No 217-99-2, 10 IRAN-US CTR 121, 166-167 (1986-I).

[379] *PepsiCo, Inc v Iran*, Case No 18, 11 October 1986, Award No 260-18-1, 13 IRAN-US CTR 3, 21 (1986-IV); *Bechtel, Inc v Iran*, Case No 181, 4 March 1987, Award No 294-181-1, 14 IRAN-US CTR 149, 157 (1987-I). For the same position in international investment arbitration, *see Tulip Real Estate and Development Netherlands BV v Republic of Turkey*, ICSID Case No ARB/11/28, Award, 10 March 2014, para 289.

[380] *See infra* Chapter IV, para 3.2.

[381] *Barcelona Traction Light and Power Company, Limited (Belgium v Spain)*, Second Phase, Judgment, 5 February 1970, ICJ Reports 1970, 3. *See* Rosalyn Higgins, 'Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd.' (1970-1971) 11 Virginia Journal of International Law 327; Richard B

instances of transposition of legal institutions of municipal law into the realm of customary international law.[382] This is evident from the relevant excerpts of the decision:

> 56. […] the Court must here refer to municipal law. Forms of incorporation and their legal personality have sometimes not been employed for the sole purposes they were originally intended to serve; sometimes the corporate entity has been unable to protect the rights of those who entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of "lifting the corporate veil" or "disregarding the legal entity" has been found justified and equitable in certain cirsumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.
> 57. Hence the lifting of the veil is more frequently employed from without, in the interest of those dealing with the corporate entity. However, it has also been operated from within, in the interest of - among others - the shareholders, but only in exceptional circumstances.
> 58. In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders. [383]

It might be thus admitted that customary international law does not considerably diverge, if not completely, from municipal commercial law on the legal issue of lifting the corporate veil. However, it is persuasively questioned whether this doctrine should be applied with the same strict intensity in the context of public vis-à-vis private corporate control.[384] Factors such as the higher solvency degree of the State, the more contained risk of the investment in a State-

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Lillich, 'The Rigidity of Barcelona' (1971) 65 American Journal of International Law 522; F A Mann, 'The Protection of Shareholders' Interests in the Light of the Barcelona Traction Case' (1973) 67 American Journal of International Law 259.

[382] Roberto Ago, Second Report on State Responsibility, by Mr Roberto Ago, Special Rapporteur, 'The origin of State responsibility', 20 April 1970, para 54, document A/CN.4/233, Yearbook of the International Law Commission, 1970, Volume II, 177, 195, document A/CN.4/SER.A/1970/Add.1: '*As writers have frequently pointed out, it is a mistake to attempt too direct a transposition into international law of ideas and concepts of municipal law which are very obviously linked with situations peculiar to municipal law.*'

[383] *Barcelona Traction Light and Power Company, Limited (Belgium v Spain)*, Second Phase, Judgment, 5 February 1970, paras 56-58, ICJ Reports 1970, 3, 38-39.

[384] David D Caron, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules of State Responsibility' in Richard B Lillich and Daniel B Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational Publishers, Inc 1998) 109, 173.

owned company, and undeniable political interferences of the State in the management of its companies may nurture the soil of sound policy arguments for reform.[385]

5.3.3 Instructions

The prong of instructions to individuals embodies a concept of specific authorization or charge by State authorities to commit a particular act (*actual instructions*, borrowing Judge Ago's language in his Separate Opinion in *Nicaragua*).[386] ARSIWA Article 8 does not require formality, being sufficient an oral communication 'in the field'.[387] Instructions may be also incorporated within an agreement between a State and a private contractor, as in the case of Private Military Companies (PMCs).[388] Indeed, the large majority of the activities undertaken by private contractors is likely to be attributed to the State pursuant to ARSIWA Article 8, in the absence of exercise of governmental authority under ARSIWA Article 5. Such conducts may further entail State responsibility, provided that they give rise to a breach of an international obligation.

The Commentaries allow the possibility of imputation of a conduct in contravention of State instructions or beyond the scope of the authorization, provided that the act in question maintains a certain affinity or relation with the mission entrusted to the individual.[389] In this

[385] For further elaboration of this reasoning, *see infra* Chapter IV, paras 3 and 5.
[386] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Separate Opinion of Judge Ago, 27 June 1986, para 19, ICJ Reports 1986, 181, 189; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, para 400, ICJ Reports 2007, 43, 208: '*It must however be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.*'
[387] James Crawford, *State Responsibility. The General Part* (Cambridge University Press 2013) 145.
[388] *See supra* para 4.4 of this Chapter.
[389] ARSIWA Commentaries 48, para 8. For a more restrictive opinion on this point, *see* Rüdiger Wolfrum, 'State Responsibility for Private Actors: an Old Problem of Renewed Relevance' in Maurizio Ragazzi (ed),

respect, an analogy with the *ultra vires* rule pursuant to ARSIWA Article 7 is not particularly tenable, since attribution under ARSIWA Article 8 does not pertain to notions of authority or office.[390] This may rather be considered as an application of a principle of appearance, as in the private law of agency.[391] In any event, the inapplicability of the test of State instructions does not prevent imputability based on direction or control, which will be discussed in the following paragraph.

5.3.4 Direction or Control

Even though the Commentaries maintain the possibility of a disjunctive application of the prongs of direction (the power to head or guide a given situation) and control (the power to govern a given set of activities), the practice of international law does not embark in such a distinction and definitely provides a single test that is illustrative of a unitary concept.[392] In the absence of a more detailed definition in ARSIWA, the effort to determine the degree, requirements and thresholds of the test of 'direction and control' (with a more evident focus on 'control') has been mainly undertaken by the international judiciary. As above mentioned,[393] the tests for attribution to the State of acts of private individuals have been elaborated in conjunction with the development of the doctrine of *de facto* organs. Such a Gordian knot of judge-made norms is in part justified in light of the former opinion that

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International Responsibility Today. Essays in Memory of Oscar Schachter (Martinus Nijhoff Publishers 2005) 423, 429.

[390] André JJ de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the *Tadić* Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia' (2001) 72 British Year Book of International Law 255, 281-282: '*some attention must be devoted to the absence of any relationship between Article 8 and Article 7*'. *But see* Antonio Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgement on Genocide in Bosnia' (2007) 18 European Journal of International Law 649, 654-655.

[391] *See infra* Chapter IV, para 3.3.1.

[392] ARSIWA Commentaries 48, para 7. *Adde*, James Crawford, *State Responsibility. The General Part* (Cambridge University Press 2013) 146.

[393] *See supra* paras 3 and 5.1 of this Chapter.

Article 8(a) adopted on first reading encompassed both *de facto* agents and 'private' individuals in the expression 'persons acting in fact on behalf of the State'. This overlap between distinct categories has longly created a considerable degree of normative uncertainty, in that the interpreter had to discharge the burdensome task to disentangle a mixture of non-homogenous elements corresponding to the different legal categories built by international Tribunals. This situation has persisted even after the adoption of ARSIWA on second reading until the *Bosnian Genocide* case, which has finally 'placed' the doctrine of *de facto* organs exclusively under the scope of ARSIWA Article 4 (more precisely, ARSIWA Article 4.2) and the rule of attribution of acts of private individuals under the applicability of ARSIWA Article 8. It is now provided an account of the historical evolution of this *jurisprudence* of international Tribunals. In light of the above clarifications, this review will inevitably address issues of *de facto* agency in conjunction with the test required for a finding of State control over private individuals.

5.3.4.1 *Nicaragua*

In *Nicaragua*, the ICJ was confronted with the issue of imputability to the US of the acts of the *contras*, a local force of civil strife against the Sandinista Government. The Court established (and the US admitted) extensive financial, logistic and intelligence support to the contras, but could not establish that the latter has been created by the US, nor that all their operations '*at every stage of the conflict reflected strategy and tactics wholly devised by the United States*', distinguishing them from the so called 'Unilaterally Controlled Latino Assets'

(UCLAs), whose acts were subject to attribution.[394] Hence, the Court identified its *thema decidendum* in the following way:

> What the Court has to determine at this point is whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras,* for legal purposes, with an organ of the United States Government, or as acting on behalf of that Govemment.[395]

This language seems to suggest the effort to apply two distinct prongs of attribution. The first (*dependence*) is based on the finding of a pervasive factual link between the State and certain formally independent persons or groups of persons in order to qualify the latter as *de facto* organs. The second (*control*) focuses on an equally factual relationship of "subjection" of the same persons vis-à-vis a government. The test of 'control' advanced in *Nicaragua* represents an innovation in respect to *Hostages*, where the ICJ required a test of authorization by the State '*to carry out specific operations*' (*actual instructions*).[396] This may also explain why the *Nicaragua* judgment did not cite *Hostages* as applicable precedent, which was remarked by Judge Ago in his Separate Opinion to the same case.[397] To this extent, *Nicaragua* implicitly introduces a seminal distinction between 'instructions' and 'direction and control', which will be embodied in the draft articles on second reading in order to codify the rule of attribution to a State of acts of 'private' individuals (ARSIWA Article 8). Nevertheless, in the follow-up of its reasoning, the ICJ seems to merge the criteria of dependence and control by emphasising 'the potential for control inherent in the degree of the *contras*' dependence on aid', as such

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[394] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, 27 June 1986, paras 106-108, ICJ Reports 1986, 14, 61. On UCLAs, *see* the Judgment at 45. Judge Ago, in his Separate Opinion, qualified UCLAs as '*persons or groups that, without strictly being agents or organs of that State, belong nevertheless to public entities empowered within its domestic legal order to exercise certain elements of the government authority*', at 188.

[395] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, 27 June 1986, para 109, ICJ Reports 1986, 14, 62.

[396] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Judgment, 24 May 1980, ICJ Reports 1980, 3, 29-30.

[397] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Separate Opinion of Judge Ago, 27 June 1986, paras 16, 18, ICJ Reports 1986, 188, 190.

entailing absence of actual or effective control (*contrôle effectif*).[398] This juxtaposition might suggest that the ICJ intended to apply a test of imputability of acts and omissions of *de facto* organs, not of private individuals, as corroborated by the Court's reliance on a test of absence of real autonomy of the *contras* vis-à-vis the governement.[399] Therefore, paragraph 115 of *Nicaragua*, which has been interpreted as disclosing a test for attribution of the acts of private individuals, ought to be read as providing a test for *de facto* agency:

> The Court has taken the view (paragraph 110 above) that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras***,** the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.[400]

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[398] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, 27 June 1986, paras 109-111, ICJ Reports 1986, 14, 62: '*However, whether the United States Government at any stage devised the strategy and directed the tactics of the contras depends on the extent to which the United States made use of the potential for control inherent in that dependence. The Court already indicated that it has insufficient evidence to reach a finding on this point. […] In the view of the Court it is established that the* contra *force has, at least at one period been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States. This finding is fundamental in the present case. Nevertheless, adequate direct proof that all or the great majority of contra activities during that period received this support has not been, and indeed probably could not be, advanced in every respect. It will suffice the Court to stress that a degree of control by the United States Government, as described above is inherent in the position in which the* contra *force finds itself in relation to that Government.*'

[399] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, 27 June 1986, paras 114-115, ICJ Reports 1986, 14, 64-65. *See* ICTY, Appeals Chamber, *Tadić*, IT-94-1-A, Judgement, 15 July 1999, 45, para 112: '*Admittedly, in paragraph 115 of the Nicaragua judgement, where "effective control" is mentioned, it is unclear whether the Court is propounding "effective control" as an alternative test to that of "dependence and control" set out earlier in paragraph 109, or is instead spelling out the requirements of the same test. The Appeals Chamber believes that the latter is the correct interpretation.*'

[400] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, 27 June 1986, para 115, ICJ Reports 1986, 14, 64-65.

Accordingly, *Nicaragua* establishes a requirement of "great dependency and control", which is tantamount to the test later resorted to by the Trial Chamber in *Tadić*,[401] and by Judge McDonald in her separate and dissenting opinion to the same decision.[402]

5.3.4.2 *Armed Activities*

In *Armed Activities*, the Court was required by the Democratic Republic of the Congo to declare the acts of the Congo Liberation Movement (MLC) as attributable to the State of Uganda. Similar to the findings in *Nicaragua*, the ICJ did not find credible evidence to establish that Uganda created the MLC, although activities of training and military support were acknowledged by the Respondent. The Court could not establish a relationship of control between Uganda and those paramilitaries. It basically left unaffected the issue of the degree of control, therefore affirming *Nicaragua*:

> Accordingly, no issue arises in the present case as to whether the requisite tests are met for sufficiency of control of paramilitaries (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 62-65, paras. 109-115).[403]

5.3.4.3 *Tadić*

The issue of control between States, on one side, and paramilitaries, on the other side, has been also adjudicated by the Trial Chamber and the Appeals Chamber of the International

[401] ICTY, Trial Chamber, *Tadić*, Case No IT-94-1-T, Opinion and Judgment, 7 May 1997, 207, para 588.
[402] ICTY, Trial Chamber, *Tadić*, Case No IT-94-1-T, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, 7 May 1997, 287.
[403] *Armed Activities in the Territory of the Congo (DRC v Uganda)*, Judgment, 19 December 2005, para 160, ICJ Reports 2005, 168, 226.

Criminal Tribunal for the Former Yougoslavia (ICTY) in the *Tadić* case.[404] More precisely, the Trial Chamber presented the issue as one of applicability of Article 4 of the Fourth Geneva Convention (Convention relative to the Protection of Civilian Persons in Time of War), as referred by Article 2 of the Tribunal's Statute, in relation to the qualification as 'protected persons' of the victims of Mr. Tadić's atrocities.[405] Therefore, as a preliminary and antecedent question to this legal issue, the Trial Chamber had to define whether the armed conflict between the Republic of Bosnia and Herzegovina, on one side, and Bosnian Serb forces (Republika Srpska and VRS), on the other side, was '*international*' in character. This finding could be possible only upon attribution of the acts and omissions of such entities to the Federal Republic of Yugoslavia (FRY), as Party to the conflict or Occupying Power. Hence, the Trial Chamber had to resort to principles of attribution under public international law ('*as a rule of customary international law, the acts of persons, groups or organizations may be imputed to a State where they act as* de facto *organs or agents of that State*').[406] The Chamber immediately clarified that (secondary rules of) State responsibility were concerned only with regard to the issue of imputability, as referred to via Article 2 of the ICTY Statute and the Fourth Geneva Convention, the remaining issues being determined only under

[404] ICTY, Trial Chamber, *Tadić*, Case No IT-94-1-T, Opinion and Judgment, 7 May 1997; ICTY, Appeals Chamber, *Tadić*, IT-94-1-A, Judgement, 15 July 1999, 124 ILR 61. *See* Marco Sassòli, 'La première décision de la chambre d'appel du Tribunal Pénal pour l'ex Yougoslavie: *Tadić* (Compétence)' (1996) 100 Révue Générale de Droit International Public 101.

[405] Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, 75 UNTS 287:

> *Article 4*
> *Definition of Protected Persons*
> Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

[406] ICTY, Trial Chamber, *Tadić*, Case No IT-94-1-T, Opinion and Judgment, 7 May 1997, 204, para 584.

international humanitarian law.[407] Thus, it is to be highlighted once more that the Tribunal intended to apply:

> general principles of international law relating to State responsibility for *de facto* organs or agents to the specific circumstance.[408]

The essence of the test for *de facto* agency was a finding of *great dependence and* (effective) *control*, such as the threshold established in *Nicaragua*.[409] In the absence of sufficient direct evidence as to the exercise of real command and control, but rather in a situation of coordination,[410] the Trial Chamber concluded that the Republika Sprska and the VRS were '*mere allies, albeit highly dependent allies'* of the FRY, denying attribution of the acts and omissions of the former to the latter.[411]

Presiding Judge McDonald dissented with the majority, held to improperly import a test of effective control – nevertheless (allegedly) ascertainable in the case before her – to determine whether victims of crimes against humanity can be considered as protected persons.[412] On the contrary, she read *Nicaragua* as establishing two different and separate tests: one for *de facto* agents (dependence); another one for attribution to the State of acts of individuals (control).[413] This interpretation induced to conclude that the requirement of effective control only affected the latter, while a test of dependence was sufficient as to the

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[407] Ibid: '*Were the Trial Chamber to make this imputation it would not be concerned further with questions of State responsibility for those acts.*'
[408] Id 205, 207, para 585, 587.
[409] Id 207, para 588.
[410] Id 212, 215, 216, paras 600, 604, 605.
[411] Id 216, para 606.
[412] ICTY, *Tadić*, Case No IT-94-1-T, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2, 7 May 1997, 292-294.
[413] This is indeed an ambiguity of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, 27 June 1986, para 109, ICJ Reports 1986, 14, 62. Analitically, the reading of Judge McDonald is correct, as we also tried to show above. Nevertheless, the ICJ really elaborated a combined criteria of dependence and control for *de facto* organs. Although McDonald's analysis is apposite in principle, in fact the ICJ did not render a criteria for attribution of 'private' individuals requiring effective control.

former.[414] Interestingly, Judge McDonald delivered the first judicial *dictum* (though as *obiter* in a dissenting opinion), on the degree of State control over the conducts of private individuals:

> State responsibility for the acts of individuals hinges on such [*i.e. effective*] control and it must therefore be established, but here that is not an issue. […] a close reading of *Nicaragua* leads me to conclude that the effective control standard supports a distinct and separate basis for the attribution of the conduct of non-agents to a State, and that it is not a necessary element for a finding of an agency relationship.[415]

Concerning the (*de facto*) agency test, the President emphasised the policies of international humanitarian law (*individual – as opposed to State – responsibility*), which she considered as undermined by the approach adopted by the majority.[416] Indeed, the dissent found the test of dependence only, not qualified as entailing an element of effective control, as sufficient criteria for the purposes of attribution.

The Prosecutor appealed the judgment of the Trial Chamber, which led to the appeal decision of 15 July 1999. The spirit of the judgment was markedly in line with the opinion of Judge McDonald, emphasising the policies of international humanitarian law vis-à-vis the international law of State responsibility:

> criteria may differ from the standards laid down in general international law, that is in the law of State responsibility, for evaluating acts of individuals not having the status of State officials, but which are performed on behalf of a certain State.[417]

The Appeals Chamber commenced its judicial reasoning from the Third Geneva Convention (Convention relative to the Treatment of Prisoners of War). Article 4A(2) of said Convention establishes a requirement of 'belonging to a Party to the conflict' in order to qualify the status

[414] ICTY, *Tadić*, Case No IT-94-1-T, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2, 7 May 1997, 296. *See* Id 288: '*the appropriate test of agency from Nicaragua is one of 'dependency and control' and a showing of effective control is not required*.'
[415] Id 298-299.
[416] Id 297.
[417] ICTY, Appeals Chamber, *Tadić*, IT-94-1-A, Judgement, 15 July 1999, 36, para 90.

of lawful combatants.[418] The ICTY interpreted this requirement to entail control, dependence and allegiance, but first and foremost control[419] or subjection to authority or control.[420] While asserting that such a criteria of control was firmly established in international humanitarian law, the ICTY held that the latter should be supplemented by general international rules providing the criteria to qualify individuals as acting as *de facto* State organs:[421]

> Consequently, it is necessary to examine the notion of control by a State over individuals, laid down in general international law, for the purpose of establishing whether those individuals may be regarded as acting as *de facto* State officials. This notion can be found in those general international rules on State responsibility which set out the legal criteria for attributing to a State acts performed by individuals not having the formal status of State officials.[422]

Contrary to the Prosecution's *pledoirie*, the Tribunal expressly held that the (preliminary) finding on *de facto* agency was governed by the same criteria under both public international law and international humanitarian law. Besides, while the Prosecution adopted the reading of *Nicaragua* proposed by Judge McDonald, the Appeals Chamber basically confirmed that in that case the ICJ rendered a test (or a set of tests) for *de facto* organs only.[423] It is upon this finding that the ICTY intervened to "overrule" the ICJ's determination on the degree of control required for *de facto* agency (effective control), perceived as unpersuasive and not consonant with very logic of the entire system of the international law of State responsibility,

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[418] Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, 75 UNTS 135:

> *Article 4*
> *Prisoners of War*
>
> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
> […]
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied […]

[419] ICTY, Appeals Chamber, *Tadić*, IT-94-1-A, Judgement, 15 July 1999, 38, paras 94-95.
[420] Id 39, para 97.
[421] Id 39, para 98.
[422] Id 40, para 98. The expression 'individuals not having the formal status of State officials' should be interpreted as referring to persons possibly being *de facto* agents, not to so called 'private' individuals *ex* ARSIWA Article 8. This remark is corroborated by the immediate reference to *Nicaragua* in the following paragraphs.
[423] Id 43, para 107: '*The Appeals Chamber considers that the Prosecution's submissions are based on a misreading of the judgement of the International Court of Justice and a misapprehension of the doctrine of State responsibility on which that judgement is grounded.*'

not only with the policies of international humanitarian law. Accordingly, the ICTY advanced an innovative survey of customary international law. On one hand, it held that between a State and unorganised groups of persons the link must be of effective control in a context of specific instructions concerning the performance of the acts at issue.[424] On the other hand, the case of '*organised and hierarchically structured group*', such as a paramilitary, should be distinguished, being sufficient for the purposes of attribution an *overall* control (*contrôle globale*).[425] Such a prong of overall control comprises more than the mere provision of financial assistance or military equipment or training, but does not necessarily include issuing of specific orders by the State, or its direction on each individual operation.[426] *Tadić*'s determination on attribution of acts of *de facto* organs based on dependence and (overall) control represents a marked departure from the (then) applicable customary international law ('*fragmentation through conflicting interpretations of general law*'), [427] which was consistently affirmed by the ICTY in subsequent cases (*Aleksovski*,[428] *Blaškić*,[429] *Mucić*,[430] *Naletilić and Martinović*,[431] *Kordić and Čerkez*,[432] *Delalić*).[433]

[424] Id 48, para 118.
[425] Id 49, para 120: '*One should distinguish the situation of individuals acting on behalf of a State without specific instructions, from that of individuals making up an organised and hierarchically structured group, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels. Plainly, an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group*.'
[426] Id 59, para 137.
[427] Martii Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, 13 April 2006, paras 49-52, document A/AC.4/L.682, 31-33.
[428] ICTY, Appeals Chamber, *Aleksovski*, Case No IT-95-14/I-A, Judgement, 24 March 2000.
[429] ICTY, Trial Chamber, *Blaskić*, Case No IT-95-14/T, Judgement, 3 March 2000.
[430] ICTY, Appeals Chamber, *Mucić et al "Čelebići Camp"*, Case No IT-96-21-A, Judgement, 20 February 2001.
[431] ICTY, Trial Chamber, *Naletilić and Martinović*, Case No IT-98-34-T, Judgement, 31 March 2003.
[432] ICTY, Appeals Chamber, *Kordić and Čerkez "Lašva Valley"*, Case No IT-95-14/2-A, Judgment, 17 December 2004.
[433] ICTY, Appeals Chamber, *Delalić*, Case No IT-96-21-A, Judgement, 20 February 2001.

7.3.4.4 *Bosnian Genocide*

The issue of the degree of control required for *de facto* agencies was again adjudicated by the ICJ in the case of *Bosnian Genocide*, which dealt with the same historical facts at the basis of the *Tadić* case.[434] This case has already been discussed with an emphasis on the 'loyalty' to *Nicaragua* manifested by the ICJ by establishing the requirements of strict control, on one side,[435] and complete and total dependence, on the other side, for a finding on *de facto* organs.[436] In this paragraph, the analysis will focus on the issue of attribution of acts of individuals on the basis of instructions or direction or control by the State pursuant to ARSIWA Article 8 ('*a completely separate issue*').[437] In this respect, the Court phrased its *thema decidendum* with the following language:

> What must be determined is whether FRY organs — incontestably having that status under the FRY's internal law — originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether, as a result, the conduct of organs of the Respondent, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations.[438]

The ICJ recalled *Nicaragua* by proposing a reasoning that is similar in structure (not in its spirit, though) to the interpretation proposed by Judge McDonald in her dissent in *Tadić*. Indeed, the ICJ held that *Nicaragua* established two distinc tests: one for *de facto* agents, *i.e.* complete dependence; another one for individuals, *i.e.* effective control.[439] It should be remarked that *Nicaragua* did not intend to dictate a rule of attribution of acts of private

[434] *See supra* para 3 of this Chapter.
[435] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, para 391, ICJ Reports 2007, 43, 204.
[436] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, paras 392, 394, ICJ Reports 2007, 43, 205, 206.
[437] Id 207, para 397.
[438] Ibid
[439] Id 208, para 400.

individuals (non-agents), as the one currently enshrined in ARSIWA Article 8, but to establish a threshold of control, *i.e.* effective control, to be applied within the test of "dependence and control" for the imputation of acts and omissions of *de facto* agents. Therefore, it must be underlined that in *Bosnian Genocide*, the ICJ – for the first time in its history – qualified as *effective* the degree of State control required for imputability of acts of 'private' individuals, the only earlier precedent outside the Wold Court's jurisdiction being the *obiter dictum* in the dissenting opinion of Judge McDonald in *Tadić*.[440] A conflict on this point of law with the ICTY Appeals Chambers has (or should have) never been at issue, since *Tadić* did not rule on persons *ex* ARSIWA Article 8 (as alleged by the ICJ).[441] This elucidation might turn out to be of assistance in mitigating the 'institutional' conflict (*turf war*) between the two judiciaries sitting in The Hague.[442]

5.3.4.5 Discussion: Thresholds of State 'Control' on Individuals and De Facto Organs

The application of the test of effective State control for the sake of attribution under ARSIWA Article 8 is persuasive in comparison to laxer criteria, in that imputation to the State of acts or omissions of private individuals is to be maintained as *exceptional*, not really as a general or

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[440] *See supra* para 5.3.4.3.

[441] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, paras 402, 404-406, ICJ Reports 2007, 43, 209, 212.

[442] Id 209, para 403: '*the Court observes that the ICTY was not called upon in the* Tadić *case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. […] The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it*.' *See* already *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, 27 June 1986, para 116, ICJ Reports 1986, 14, 65: '*What the Court has to investigate is not the complaints relating to alleged violations of humanitarian law by the* contras*, regarded by Nicaragua as imputable to the United States, but rather unlawful acts for which the United States may be responsible directly in connection with the activities of the* contras*. The lawfulness or otherwise of such acts of the United States is a question different from the violations of humanitarian law of which the* contras *may or may not have been guilty*.'

canonical rule. Hence, its operation can be triggered only upon restrictive prerequisites, such as effectiveness of control or actual character of instructions, in consistency with the entire architecture and mind of the international law of State responsibility.[443] In this respect, no particular judicial and doctrinal disagreement is recorded. Hence, *Bosnian Genocide* stands as unique persuasive authority as to the evaluation of customary international law on this specific issue. The effective control test would turn out to be sufficient even to pierce the corporate personality of State-owned entities or parastatals. As above discussed,[444] in that context imputability intersects a different problem, in that attribution to the State of the conducts *jure privatorum* of State-controlled companies ideally clashes with the traditional concept of corporate separateness and with the strict requirements for the application of the piercing the corporate veil doctrine, imported *tout cours* from domestic law(s) into customary international law.

This conclusion as to ARSIWA Article 8 remains without prejudice to the applicability of a different test for *de facto* organs under ARSIWA Article 4. In *Tadić*, the ICTY advanced a test of overall control between the State and 'organised' groups (paramilitaries), leaving unaffected the requirement of effective control between a government and 'unorganised' groups. Other specialized international courts also appear to favour laxer mechanisms of attribution to the State of the conducts of 'entities' that are – in a way or another – *separate* from its institutional system of command and control.[445] Notably, the ICTY, moved by the policy to condemn the perpetrators of international crimes, suggests to the international community and its judicial organs not to refuse or postpone the demand of a parallel finding of *both* international criminal responsibility of individuals *and* responsibility

[443] *See supra* para 5.1 of this Chapter.
[444] *See supra* para 5.3.2 of this Chapter.
[445] ECtHR, *Loizidou v Turkey*, Judgment, Merits, 18 December 1996, para 56, 108 ILR 443.

for internationally wrongful acts of such States the convicted individuals have been instruments thereof. Accordingly, Antonio Cassese, in his capacity of both international scholar and member of the Appeals Chamber sitting in *Tadić*, accused:

> states may not evade responsibility towards other states when they, instead of acting through their own officials, use groups of individuals to undertake actions that are intended to damage, or in the event do damage, other states; if states so behave, they must answer for the actions of those individuals, even if such individuals have gone beyond their mandate or agreed upon tasks – lest the worst abuses should go unchecked.[446]

The ICTY's posture that the finding of *de facto* agency should be undertaken upon application of the same criteria both in public international law (as a rule of attribution for the purposes of State responsibility for internationally wrongful acts) and international humanitarian law (as antecedent question to establish the status of protected persons or lawful combatants) is logically sound.[447] Accordingly, the ICJ and specialized international courts may touch upon the same issue and – far from any reciprocal hierarchy in the survey of customary international law – *should* coherently and consistently adjudicate it to the benefit of the international legal system. Hence, the answer to the problem is not resort to *lex specialis*, but rather to engage in a thorough study of customary international law.[448] Therefore, a fair analysis of '*what actually happens in the life of international society*' should be undertaken.[449] More accurately, it should be investigated whether the requirement of effective control has currently faded within the test for *de facto* agencies. As above underlined, the

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[446] Antonio Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgement on Genocide in Bosnia' (2007) 18 European Journal of International Law 649, 654.

[447] *Contra*, Theodor Meron, 'Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout' (1998) 92 American Journal of International Law 236, 237, 239: '*even a quick perusal of international law literature would establish that imputability is not a test commonly used in judging whether a foreign intervention leads to the internationalization of the conflict and the applicability of those rules of international humanitarian law that govern armed conflicts of an international character.*'; Katherine Del Mar 'The Requirement of 'Belonging' under International Humanitarian Law' (2010) 21 European Journal of International Law 105, 116-117.

[448] Antonio Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgement on Genocide in Bosnia' (2007) 18 European Journal of International Law 649, 687.

[449] Report of the International Law Commission on the Work of its Twenty-Fifth Session, 7 May-13 July 1973, para 11, document A/9010/REV.1, Yearbook of the International Law Commission, 1973, Volume II, 161, 190, document A/CN.4/SER. A/1973/Add. 1.

threshold of effective control has been explicitely demanded by the ICJ in *Nicaragua*, but has not been explicitely incorporated in *Bosnian Genocide* (‘*strict*’, it was written). Indeed, *Bosnian Genocide* expressly employed the effective control test in the radically different context of ARSIWA Article 8 as to the imputability of conducts of private individuals. The desuetude of the test of effective control by States on *de facto* organs propounded by *Nicaragua*[450] appears to be the most effective argument to foster the policies supported by the ICTY, but susceptible at the same time to preserve the orderly functioning of the rules of attribution (“rules of engagement” of the international responsibility) dictated by public international law for the security of international relations.

Tadić preferred not to embark in a ‘frontal’ *overruling* of the entire test of *de facto* agency, but rather operated a *distinguishing*, based on the difference between organised and non-organised groups for the sake of attribution. This elaborate distinction turns out to be markedly artificial, though minutely clever, and as such not really tenable as to the promotion of a reform of the customary international law on attribution of conducts of *de facto* organs. The ICTY’s reasoning may be seen as a “metonymic slippage” *contra legem* that moves the requirement of effectiveness from control between States and ‘organizations of persons’ to the structure of such organizations. The circumstance of a chain of command and control *inside* a given entity (as entrusted to a ‘head’ or ‘director’) cannot affect the different issue of control between State organs and that very entity. In so deciding, the ICTY could even be read to confirm the centrality of the test of ‘effective control’ in order to establish a *de facto* agency for all other cases of ‘non-organised’ groups. Instead, in present times, it seems more decisive to emphasise the desuetude of the prong of effective control for a finding of *de facto* organs.

[450] ‘Effective control’ was demanded in the *Zafiro* case as to the control between superior and subordinate *de jure* organs in the navy personnel. *See D Earnshaw and Others (Great Britain) v United States (Zafiro case)*, 30 November 1925, 6 RIAA 160.

This argument may be persuasively advocated based on the consistent indications proffered by specialized international Tribunals and the meaningful silence (and different *sedes materiae* of the test of effective control) of the ICJ in *Bosnian Genocide*.

6. Concluding Remarks

ARSIWA have ultimately provided a codification of customary international law as to the content and scope of the rules of attribution to the State of the conducts of State organs, State instrumentalities and individuals, as 'subjective' element for the establishment of State responsibility for internationally wrongful acts. As being already emerging from the early practice of Mixed Claims Commissions, the law of attribution has been systematically codified through the *travaux* of the International Law Commission, notably under the guide of Roberto Ago as Special rapporteur for the topic of State responsibility. The rules of attribution have been finally codified in ARSIWA and received increasingly enhanced scientific attention and systematic analysis by the ICJ, especially in the *Bosnian Genocide* case (conclusive delimitation of the scope of application of ARSIWA Article 4, as to *de facto* organs, and ARSIWA Article 8, as to 'private' individuals).[451] Indeed, a comprehensive examination of attribution issues turns out to be beneficial to understand the normative specificity and independence of each single test for imputation of acts and omissions to the sovereign. Moreover, systematic scientific understanding of the rules of attribution is massively relevant (and necessitated) to foster their correct application in the realm of so called 'self-contained'

[451] Alain Pellet, 'Remarques sur la jurisprudence récente de la C.I.J. dans le domaine de la responsabilité internationale' in Marcelo Kohen, Robert Kolb and Djacoba Liva Tehindrazanarivelo (eds), *Perspective of International Law in the 21st Century. Liber Amicorum Professor Christian Dominicé* (Martinus Nijhoff Publishers 2012) 321.

regimes, where an interaction with *lex specialis* issues may be in place, as it will be discussed in the following chapter.

In this brighter context of evaluation and elucidation of the customary international rules of attribution, critical issues still persist. The bulk of controversy has hinged on the centrality of the legal test of control in relation to attribution issues in various *sedes materiae*:

a) control within the State apparatus between superior and subordinate officials, for instance within the armed forces (ARSIWA Article 4.1);
b) State control for the purposes of a finding of *de facto* organ (ARSIWA Article 4.2);
c) State or governmental control for the purposes of a finding of the status of State instrumentality (ARSIWA Article 5);
d) State 'direction or control' on individuals (ARSIWA Article 8).

The key factor for the determination of the intensity of control between the State and a person or entity is the circumstance of the 'actor' having or not having separate juristic personality (especially of private law) vis-à-vis the State. This feature structurally distinguishes State organs ('*les organs de l'Etat, c'est l'Etat lui-même*') from 'State entities' and 'private' individuals.[452] The control of the State on its organs (*de jure* or *de facto*) should not be necessarily effective, which was sometimes established in early cases and scholarship. This is manifestly confirmed by the customary international rule of attribution of *ultra vires* conducts of State officials *ex* ARSIWA Article 7, a corollary of the cardinal principles of primacy of international law and of institutional unity and continuity of the State. The institutional link of the status of *organ* (even if established *ex post facto*) normatively supplements the absence of an official empowerment (authority or superior instructions) to undertake a particular conduct. This principle should receive full-fledged application also in the case of *de facto* organs,

[452] Pierre-Marie Dupuy, 'Les émanations engagent-elles la responsabilité des Etats? Etude de droit international des investissements' (2006) EUI Working Paper LAW No 2006/7, 5.

which, once the establishment of *de facto* agency has been fulfilled, are to be treated exactly as if they were *de jure* organs as to the relevant regime of attribution.

Lastly, one clarification is to be rendered. It seems from our examination of the international law of attribution that the concept of *agency* applies with two radically different meanings. There is one 'public law' acceptation of agency, which operates for State organs (*de jure* and *de facto*), intended as persons acting *on behalf of* the State. This concept is described by a legal mechanism of institutional 'identification' of the State with its organs, so that their conducts are considered to be executed by the State itself. The 'public law' notion of agency is also found in connection with the conducts of State instrumentalities, but only in so far as they exercise governmental authority formally delegated by the State in the given instance in question ('State entities' as *intermittent* organs of the State based on a functional link operating *hic et nunc* upon official empowerment of authority). Indeed, customary international law does not provide for a category of *de facto* State instrumentalities for the purposes of attribution. There is also a 'private law' concept of agency, which operates for private individuals, intended as *non-agents* (pursuant to the public law notion of agency), similar to a legal mechanism of 'representation'. It is hardly tenable to hold that the acts of the private individuals constitute 'acts of the State' proper. It rather seems that the *effects* of the conducts of private individuals are exceptionally bestowed to the person of the State for the purposes of its international responsibility, on the ground of restrictive prongs of instructions, or direction or control. This elucidation, consistent with the ICJ's posture in *Bosnian Genocide*, turns out to be relevant to understand and justify differences in the applicable

regimes of imputability between the conducts of ‘State actors’, on one side, and ‘non-state actors’, on the other side.[453]

[453] Wolfgang G Friedmann, ‘The Growth of State Control over the Individual, and its Effect upon the Rules of International State Responsibility’ (1938) 19 British Year Book of International Law 118, 119, 144.

CHAPTER III

ATTRIBUTION ISSUES IN INTERNATIONAL INVESTMENT LAW

1. An Introduction to International Investment Arbitration

This chapter aims to enlight and elucidate the resolution of problems of attribution of conducts to the State in the context of international investment arbitration (so called 'Investor-State Dispute Settlement' or ISDS).[454] International arbitration is an optional means of dispute

[454] *See specifically* James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 ICSID Review – Foreign Investment Law Journal 127; Zachary Douglas, 'Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 81; Yves Nouvel, 'Les entités paraétatiques dans la jurisprudence du CIRDI' in Charles Leben (ed), *Le contentieux arbitral transnational relatif à l'investissement. Nouveaux développements* (LGDJ 2006) 25; Pierre-Marie Dupuy, 'Les émanations engagent-elles la responsabilité des Etats? Etude de droit international des investissements' (2006) EUI Working Paper LAW No 2006/7; Jürgen Kurtz, 'The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration' (2010) 25 ICSID Review – Foreign Investment Law Journal 200; Kaj Hobér, 'State Responsibility and Attribution' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 550; Georgios Petrochilos, 'Attribution' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 287; Nick Gallus, 'State Enterprises as Organs of the State and BIT Claims' (2006) 7 Journal of World Investment & Trade 761; Thomas W Wälde and Patricia K Wouters, 'State Responsibilty and the Energy Charter Treaty: the Rules Regarding State Enterprises, Entities, and Subnational Authorities' (1997) 2 Hofstra Law and Policy Symposium 117; Michael Feit, 'Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity' (2010) 28 Berkeley Journal of International Law 142; Michael Feit, 'Attribution and the Umbrella Clause: is there a Way out of the Deadlock?' (2012) 21 Minnesota Journal of International Law 21; Srilal M Perera, 'State Responsibility: Ascertaining the Liability of States in Foreign Investment Disputes' (2005) 6 Journal of World Investment & Trade 499; Asser M Harb, 'The Wrongful Acts of Independent State Entities and Attribution to States in International Investment Disputes' (December 2006) Transnational Dispute Management 3(5); Clifford Larsen, 'ICSID Jurisdiction: the Relationship of Contracting States to Sub-states Entities' in Norbert Horn (ed), *Arbitrating Foreign Investment Disputes* (Kluwer Law International 2004) 353; Abby Cohen Smutny, 'State Responsibility and Attribution When is a State Responsible for the Acts of State Enterprises? *Emilio Agustín Maffezini v. The Kingdom of Spain*' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005) 17; Albert Badia, *Piercing the Veil of State Enterprises in International Arbitration* (Kluwer Law International 2014); Emmanuel Gaillard and Jennifer Younan (eds), *State Entities in International Arbitration* (Juris Publishing, Inc 2008); Luca Schicho, *State Entities in International Investment Law* (Nomos 2012); Luca Schicho, 'Attribution and State Entities: Diverging Approaches in Investment Arbitration' (2011) 12 Journal of World Investment & Trade 283; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2° edn 2012) 216-227; Christoph Schreuer, with Loretta Malintoppi, August

settlement, canonically based on the parties' will to arbitrate. Such a consent may be contained in international investment agreements stipulated between States (IIAs), investment contracts directly entered into by a State and an investor, or national investment statutes. By large majority, investment disputes are based on IIAs, notably Bilateral Investment Treaties (BITs), as well as multilateral investment treaties, such as the Energy Charter Treaty (ECT), [455] the North American Free Trade Agreement (NAFTA), [456] the ASEAN Comprehensive Investment Agreement (ACIA), [457] or the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR).[458] The most popular forum for ISDS is the International Centre for Settlement of Investment Disputes (ICSID) established by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 18 March 1965 (Washington Convention or ICSID Convention).[459] In addition, parties are at liberty to elect a different forum and opt for the application of different arbitration rules, such as *inter alia* those administered under the auspices of the Permanent Court of Arbitration (PCA), the United Nations Commission of International Trade Law (UNCITRAL), the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), or the Stockholm Chamber of Commerce (SCC). When the arbitration clause is embodied in IIAs, a Party's consent to arbitrate is not further necessitated,

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Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (Cambridge University Press, 2° edn 2009) 151, paras 235-237.

[455] Energy Charter Treaty (Annex I of the Final Act of the European Energy Charter Conference), signed on 17 December 1994, 34 ILM 373.

[456] North American Free Trade Agreement (NAFTA), adopted 17 December 1992, entered into force 1 January 1994, 32 ILM 612.

[457] ASEAN Comprehensive Investment Agreement, done at Cha-am, Thailand, on 26 February 2009, at http://www.asean.org/resources/publications/asean-publications/item/asean-comprehensive-investment-agreement.

[458] Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), signed on 5 August 2004, entered into force for all seven signatories on 1 January 2009, at https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta.

[459] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), opened for signature at Washington on 18 March 1965, entered into force on 14 October 1966, 575 UNTS 159.

being later sufficient the written consent of the investor of another Party contained in the request of arbitration filed before the elected forum (*arbitration without privity*).[460] Various images depicted by international investment law scholars convey the concept of the *asymmetric* nature of international investment arbitration having IIAs as basis of jurisdiction. This is the case of Zachary Douglas's idea of the hybrid foundations of investor-state arbitration, Anthea Roberts's story of the Australian platypus discovered by Europeans in the XVIII century, and Andrea Bjorklund's metaphor of the wedding between public international law and international commercial arbitration.[461] The peculiar features of ISDS have driven numerous scholars and observers to treat international investment arbitration as a realm apart from classic public international law disputes (a sort of *monstrum*).[462] This view emphasises structural features, notably procedural, of investment arbitration, by neglecting the marked degree of affinity, not to mention identity, with regard to the substantive law possibly applied by international investment Tribunals and inter-state international courts. This chapter will comprehensively address the dialectics between customary international law and international investment law with regard to the resolution of issues of imputability by investor-state Tribunals.

[460] Jan Paulsson, 'Arbitration Without Privity' (1995) 10 ICSID Review – Foreign Investment Law Journal 232, 233: '*By allowing direct recourse by private complainants with respect to such a wide range of issues, these treaties create a dramatic extension of arbitral jurisdiction in the international realm*'.

[461] Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 British Year Book of International Law 151; Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 American Journal of International Law 45; Andrea K Bjorklund, 'The Emerging Civilization of Investment Arbitration' (2009) 113 Penn State Law Review 1269, 1272.

[462] The latin word *monstrum, monstri* defines a situation of an extraordinary nature, somehow not understandable, that may create fear, panic or marvel, from which the civilised man tends to find a safe shelter, like the ten young upper class men and women averting the 1348 plague of Florence described in Giovanni Boccaccio's *Decameron*.

1.1 Customary International Law and "Self-contained" Regimes

The applicability of customary international rules, to the inclusion of the international law of State responsibility, is not limited to the realm of dispute settlement adjudicated by the World Court, but prospers in the entire variety of cases filed before other international judicial or quasi-judicial bodies. These disputes include *inter alia* cases of international trade law within the World Trade Organization (WTO) dispute settlement system, human rights litigation before the European Court of Human Rights (ECtHR), international humanitarian law cases before specialized and non-specialized international criminal courts, maritime disputes before the International Tribunal of the Law of the Sea (ITLOS), or international investment litigation before investor-state arbitral Tribunals (ISDS). This list already entails per se some threshold assumptions. First, the application of the law of State responsibility does not necessarily assume a State-to-State contentious dimension.[463] While at the level of lawmaking the inter-state dimension persists, the *beneficiary* of the rights created by international treaties may vary pursuant to the will of the Parties.[464] Indeed, what is relevant is the State as holder of international obligations vis-à-vis another State or, where applicable, a non-State actor in case of treaty for the benefit of third parties (*pacta in favorem tertii*).[465] This assumption

[463] ARSIWA Article 33.2: '*This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State*'. *Cf* ARSIWA Commentaries 94. *Contra*, *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14, Award, 8 December 2008, para 113: '*The ILC's Articles on State Responsibility is a detailed and official study on the subject but it contains no rules and regulations of State Responsibility vis-à-vis non-State actors.*'

[464] Mahnoush H Arsanjani and W Michael Reisman, 'Interpreting Treaties for the Benefit of Third Parties: The "Salvors' Doctrine" and the Use of Legislative History in Investment Treaties' (2010) 104 American Journal of International Law 597, 603.

[465] The beneficiary of an international investment treaty may even be a State-owned entity (SOE) in relation to its activity *jure gestionis*. *See Ceskoslovenska Obchodni Banka, AS (CSOB) v The Slovak Republic,* ICSID Case No ARB/97/4, Decision on Jurisdiction, 24 May 1999, para 16; *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award, 29 July 2008, paras 324-329; *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000, para 80. *Adde*, Aaron Broches, 'The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' (1972-II) 136 Recueil des Cours 331, 340, 355: '*a mixed*

remains unaffected by the application of either theory of *direct* or *derivative* rights in order to categorize the investor's right to access international arbitration.[466] Second, and more in general, it should be emphasised that so-called "self-contained" regimes (special subsystems of international law), to the inclusion of international investment law, are not impervious to the application of customary international law, irrespective of their regulatory *thickness*.[467]

Upon elaboration of the reports on State responsibility by William Riphagen,[468] Bruno Simma has doctrinally analysed the concept of self-contained regimes around three decades ago.[469] Notably, he has endorsed possible regime 'self-containment' (*i.e.*, resort to special

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

[466] Eric De Brabandere, *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications* (Cambridge University Press 2014) 62.

[467] *Ex multis*, James Bacchus, 'Not in Clinical Isolation' in Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO. The Development of the Rule of Law in the Multilateral Trading System* (Cambridge University Press 2015) 507, cleary referring to the Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline)*, WT/DS2/AB/R, 29 April 1996, 17; Robert Howse, 'From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trade Regime' (2002) 96 American Journal of International Law 94, 110; Giorgio Sacerdoti, 'The Application of BITs in Time of Economic Crisis: Limits to Their Coverage, Necessity and the Relevance of WTO Law' in Giorgio Sacerdoti *et al*, *General Interests of Host States in International Investment Law* (Cambridge University Press 2014) 3, 18-19; Maurizio Arcari, 'Le juge et la codification du droit de la responsabilité: quelques remarques concernant l'application judiciaire des articles de la CDI sur la responsabilité de l'État pour fait internationalement illicite' in Nerina Boschiero *et al* (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (TMC Asser Press 2013) 19, 25, 29: '*Tout en présentant des nuances et des implications différentes, les trois décisions considérées confirment l'inclination des juges internationaux vers une utilisation «systèmique» des articles de la CDI aux fins du traitement des problèmes qui se posent dans le contentieux de la responsabilité. Une telle approche contribuerait bien évidemment à renforcer la valeur de principe des règles codifiées dans le Projet.*'; James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 American Journal of International Law 874, 880: '*In my view, there cannot be, at the international level, any truly self-contained regime, hermetically sealed against bad weather*'.

[468] Willem Riphagen, Third Report on State Responsibility, by Mr. Willem Riphagen, Special Rapporteur, 'The content, forms and degrees of international responsibility (part 2 of the draft articles)', 12 March, 30 March and 5 May 1982, document A/CN.4/354 and Add.1 and 2, Yearbook of the International Law Commission, 1982, Volume II (Part One), 22, document A/CN.4/SER.A/1982/Add.l (Part 1).

[469] Bruno Simma, 'Self-contained Regimes' (1985) 16 Netherlands Yearbook of International Law 111, 117: '*the concept of a "self-contained regime" should not be used as a synonym of "subsystem", but be reserved to designate a certain category of subsystems, namely those embracing, in principle, a full (exhaustive and definite) set of secondary rules. A "self-contained regime" would then be a subsystem which is intended to exclude more or less totally the application of the general legal consequences of wrongful acts, in particular the application of the countermeasures normally at the disposal of an injured party. As has been stated above, the majority of subsystems do not live up to this definition which is, however, the only one in accord with the normal meaning of the words "self-contained".*' It is evident that in the present work the acceptation of "self-contained" is adopted with a wider connotation.

secondary rules) for the sake of '*effectiveness of the primary rules concerned and […] orderly procedures and collective decisions*'.[470] In a more recent contribution, he has examined in depth the *residual* operation of general secondary rules in connection with the existence and effectiveness of special secondary rules, established by *inter se* international treaties, notably addressing the topic of the recourse to countermeasures.[471] Accordingly, special international rules, seemingly more suited to the demands of enforcement of a given normative sector, replace in application the customary international law (*disposable* nature of customary international law). This is but an application of the general maxim of *lex specialis* for the resolution of antinomies (*lex specialis derogat legi generali*).[472] This principle is functional to the concept of sovereign equality of States in their international relations (*superiorem non recognoscens*) and to the horizontal and flexible paradigm of international law, notably lawmaking.[473] As a tendency, there is not a criteria of hierarchy or rigidity (*lex superior derogat legi inferiori*) in international norms, save for the exceptional recognition and operation of peremptory *jus cogens* norms, usually of a primary nature, as such overriding and non-disposable by the Parties.[474] However, in case of lacunae of a normative subsystem, a

[470] Bruno Simma, 'Self-contained Regimes' (1985) 16 Netherlands Yearbook of International Law 111, 135.
[471] Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 European Journal of International Law 483, 485: '*As international law has evolved into an elaborate, but fragmented, structure, in which multiple regimes govern the legal consequences of breach, the conceptual distinction between general and special laws remains important for maintaining systemic cohesion. In principle, the special secondary rules of the regime will prevail. Yet, to the extent that such rules are inexistent or ineffective, the general rules on state responsibility will remain applicable. Sociological regime differentiation does not preclude normative compatibility with general international law.*'; Bruno Simma and Dirk Pulkowski, '*Leges Speciales* and Self-contained Regimes' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 139.
[472] Joost Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003) 387 *et seq*.
[473] Jean Combacau, 'Le droit international: bric-à-brac ou système?' (1986) 31 Archives de Philosophie du Droit 85, 88; Hélène Ruiz Fabri, 'Genèse et disparition de l'État à l'époque contemporaine' (1992) 38 Annuaire Français de Droit International 153, 163; Christoph H Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?' (1993) 4 European Journal of International Law 447, 454.
[474] Alfred Verdross, '*Jus Dispositivum* and *Jus Cogens* in International Law' (1966) 60 American Journal of International Law 55: 'the question is whether all norms of international law have the character of *jus dispositivum* or if there exist some norms having the character of *jus cogens* too, from which no derogation is permitted by an agreement *inter partes*.' *Cf* Robert Kolb, 'La détermination du concept de "*jus cogens*"' (2014)

fallback to customary international law is rendered necessary to complete the gap outstanding in the self-contained regime.[475] To this extent, the applicability of general international law is restored, as a consequence of the 'failure' of the self-contained regime.[476] This framework is definitely compatible with – even though not imposed by – ARSIWA Article 55 (*Lex specialis*):

> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a state are governed by special rules of international law.[477]

While the ARSIWA Commentaries do not neatly address the question of the regime failure, the ILC has later espoused a 'generalist' approach, allowing for a fallback to general secondary rules. As Martii Koskenniemi has phrased it in relation to the *travaux* of ARSIWA:

> It was, in other words, accepted that the articles had residual nature, and that special regimes of responsibility could be adopted by States.[478]

With regard to the application of secondary rules of customary international law, as codified by ARSIWA, in the realm of international economic litigation, a certain *caveat* against generalist solutions is detected in legal scholarship. In relation to international investment arbitration, James Crawford has trenchantly submitted:

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118 Revue Générale de Droit International Public 5; Andrea Bianchi, 'Gazing at the Crystal Ball (again): State Immunity and *Jus Cogens* beyond *Germany v Italy*' (2013) 4 Journal of International Dispute Settlement 457; Hélène Ruiz Fabri, 'Enhancing the Rhetoric of *Jus Cogens*' (2012) 23 European Journal of International Law 1049. For a doctrinal position in favour of the so called "normative hierarchic theory", *see* Antonio Cassese, *International Law* (Oxford University Press, 2° edn 2005) 205-208.

[475] Martii Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, 13 April 2006, para 64, document A/AC.4/L.682, 38.

[476] Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 European Journal of International Law 483, 509. For a critique of the dominat 'regime failure doctrine', *see* Lorenzo Gradoni, Regime failure *nel diritto internazionale* (CEDAM 2009) 42-45.

[477] ARSIWA Commentaries 140, para 1: '*A treaty may expressly provide for its relationship with other rules. Often, however, it will not do so and the question will then arise whether the specific provision is to coexist with or exclude the general rule that would otherwise apply.*'

[478] Martii Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, 13 April 2006, para 142, document A/AC.4/L.682, 76.

> The ILC Articles are residual articles and an adjudicator must first look at the treaty under review and see what it says on the subject. If the treaty (such as a BIT) covers the field of the issue at stake, the ILC Articles have no role to play.[479]

In a similar vein, David Caron auspices the preservation of the effectiveness of *inter se* stipulations, possibly undermined by the arbitrators' reliance on general international law solutions:

> By too great and casual a deference to the *lex generalis* of the ILC draft articles, arbitrators may unconsciously undo the *lex specialis* of the parties.[480]

The relationship between general and special secondary rules deserves further study, notably in order to elucidate the scope of the margin of deviation of party autonomy from customary international law. The view that *lex specialis* ousts customary international law completely and to any extent is not eventually accurate. *Lex specialis* is contracted for the sake of enhanced legal certainty, stability of legal relationships and diminished defeasibility of bilateral or multilateral legal obligations, in order to dictate a norm that is closer (with an acceptation of subsidiarity) to the problem States intend to regulate ('*il paroît qu'on l'a voulu plus fortement*').[481] In light of the ever-increasing demand to "internationalize" various and multifaceted aspects of the human intercourses (from human rights violations to trade and investment matters), States have massively resorted to *inter se* international agreements to face and solve the issues, whose complexity had challenged the operation of classic (but somehow 'underdeveloped') customary international law.[482] Depending on the rule concerned, treaties may dictate norms that are either consistent or at variance with customary international law. In the former case *lex specialis* comes into play, while in the second case it

[479] James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 ICSID Review – Foreign Investment Law Journal 127, 131.
[480] David D Caron, 'The ILC Articles on State Responsibility: the Paradoxical Relationship Between Form and Authority' (2002) 96 American Journal of International Law 857, 872.
[481] Emer de Vattel, *Le droit des gens, ou principes de la loi naturelle, appliqués à la conduit et aux affaires des nations et des souverains* (Londres 1758) Livre II, Chapitre XVII, § 316.
[482] Wolfgang G Friedmann, 'Some Impacts of Social Organization on International Law' (1956) 50 American Journal of International Law 475, 476-477.

is rather *lex posterior* to operate. Within the former group, a treaty may reproduce the content or may also provide for a deviation from – but not really an objection to – customary international law, in terms of specification and quantitative development. Accordingly, treaty law may provide for and specify cases of application of international rules, which are not expressed, even though possibly implied, in the international custom. In other words, such stipulations may derogate from customary international law (*praeter legem*), but cannot undermine its core or undefeasible content (*contra legem*). As a consequence, *lex specialis* entails a confirmation of the content of customary international law. Instead, when treaty law objects a rule of international law, it has a function of *lex posterior* with an effect of abrogation *inter partes* (*lex posterior derogat legi priori*). When customary international law is challenged by repeated objections by States' practice (or contrary evaluations by international courts), there is a persuasive case in favour of its desuetude, alias disappearance.

In light of this distinction, it is appropriate to delve into the operation of *lex specialis* (defined as treaty law that reproduces or specifies customary international law) in order to elucidate its comprehensive relationship with customary international law. In the *Nicaragua* case, the ICJ held:

> even if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty law must deprive the customary norm of its applicability as *distinct (emphasis added)* from that of the treaty norm. The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the *North Sea Continental Shelf* cases. […] More generally, there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter "supervenes" the former, so that the customary international law has no further existence of its own.[483]

[483] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, 27 June 1986, para 177, ICJ Reports 1986, 14, 94-95, referring to *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)*, Judgment, 20 February 1969, para 63, ICJ Reports 1969, 3, 39.

By the same force of logic, it can be stated that customary international law retains its distinct applicability and axiologic function in coexistence with a possible *lex specialis* dictating *praeter legem* norms.[484] In this situation of 'regulatory competition' between *lex generalis* and *lex specialis*, the latter prevails on the former in so far as it can sufficiently govern given phenomena. Otherwise, the self-contained system might encounter a failure, thus leaving room to the applicability of the international custom (*fallback*).[485] The NAFTA investment case of *Archer Daniels v. Mexico* seems to support this general theoretical framework:

> The Tribunal finds that Section A of Chapter Eleven offers a form of *lex specialis* to *supplement* (*emphasis added*) the under-developed standards of customary international law relating to the treatment of aliens and property. In addition, Chapter Eleven confers upon the investor a right of action under Section B - through arbitration - that the dispute will be decided in accordance with the standards of Section A. […] Chapter Eleven of the NAFTA constitutes *lex specialis* in respect of its express content, but customary international law continues to govern all matters not covered by Chapter Eleven. In the context of Chapter Eleven, customary international law - as codified in the ILC Articles - therefore operates in a residual way.[486]

The ICSID system is also considered to be a self-contained regime, at least in the wider acceptation of the concept upheld by ARSIWA.[487] This connotation notably has a

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[484] Bruno Simma, 'Self-contained Regimes' (1985) 16 Netherlands Yearbook of International Law 111, 116: '*a treaty may create a subsystem of international law with its own, express or implied, "secondary" rules tailored to its "primary" rules. This does not necessarily mean that the existence of the subsystem* permanently *excludes the application of any* general *rules of customary international law relating to the legal consequences of wrongful acts.*'

[485] Martii Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, 13 April 2006, para 152(4), document A/AC.4/L.682, 82.

[486] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v The United Mexican States*, ICSID Case No ARB (AF)/04/5, Award, 21 November 2007, paras 116-119.

[487] Charles Leben, 'La responsabilité internationale de l'Etat sur le fondement des traités de promotion et de protection des investissements' (2004) 50 Annuaire Français de Droit International 683, 694; Zachary Douglas, 'Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 815, 820: 'ICSID is another such regime'. *See generally* Aaron Broches, 'The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' (1972-II) 136 Recueil des Cours 331; Giorgio Sacerdoti, 'La Convenzione di Washington del 1965 per la soluzione delle controversie tra Stati e nazionali di altri Stati in materia di investimenti' (1969) 5 Rivista di Diritto Internazionale Privato e Processuale 614; Giorgio Sacerdoti, 'La Convenzione di Washington del 1965: bilancio di un ventennio dell'ICSID' (1987) 23 Rivista di Diritto Internazionale Privato e Processuale 13; C F Amerasinghe, 'The Jurisdiction of the International Centre for the Settlement of Investment Disputes' (1979) 19 Indian Journal of International Law 166; Georges R Delaume, 'Enforcement of State Contract Awards: Jurisdictional Pitfalls and Remedies' (1993) 8 ICSID Review – Foreign Investment Law Journal 29; Georges R Delaume, 'ICSID Arbitration and the Courts'

procedural dimension, since the Convention does not dictate substantive standards of protection of foreign investment ('*procedure over substance*', as in Aaron Broches's formula). Indeed, as established by ICSID Convention Article 54(1), '*[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.*' This entails that ICSID awards do not necessitate domestic declaratory proceedings of *exequatur* in order to be enforced.[488] To this extent only, as far as *exequatur* is concerned, it may be concluded that the ICSID system is procedurally self-contained and autonomous from the domestic law machinery, rather than detached from general international law. As a confirmation, ICSID Convention Article 64 provides for the jurisdiction of the ICJ on disputes between Contracting States concerning the interpretation or application of the Convention.[489] In practice, the rule has not had application, but represents an indication of the non-isolation of the ICSID system from public international law, to the inclusion of procedural issues.[490] As far as the application of both primary and secondary

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(1983) 77 American Journal of International Law 784; Mario Amadio, *Le contentieux international de l'investissement privé et la Convention de la Banque Mondial du 18 mars 1965* (LGDJ 1967); Paul C Szasz, 'A Practical Guide to the Convention on Settlement of Investment Disputes' (1968) 1 Cornell Journal of International Law 1.

[488] On the contrary, non-ICSID awards (LCIA, ICC, UNCITRAL, SCC, etc.) do need *exequatur* by the domestic judge. The distinction is of threshold importance wiht regard to the application of the test of immunity from jurisdiction vis-à-vis immunity form execution. A recognition proceedings has an adjudicative nature and, accordingly, is subject to the rules of immunity from jurisdiction, where the applicable test hinges on the distinction between *acta jure imperii* and *acta jure gestionis*. Since investment disputes regularly involve the exercise by States of sovereign prerogatives, a national judge may refuse *exequatur* of a non-ICSID award on the ground of immunity from suit. *See* Federal Court of Justice of Germany, Case No III ZB 40/12, 30 January 2013, *Werner Schneider as liquidator of Walter Bau AG v The Kingdom of Thailand*, (2013) 38 Yearbook Commercial Arbitration 384.

[489] ICSID Convention, *supra* note 459:

> *Article 64*
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> Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.

[490] Zachary Douglas, 'Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 815, 816-817.

international rules is concerned, the proper law governing investment disputes is usually – as above mentioned – an IIA, whose provisions definitely embody *leges speciales*. In addition, ICSID Convention Article 42(1) envisages the residual application of '*the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*' To this extent, the absence or the insufficency of the determinations of the Parties (*regime failure*) allow for the residual application of customary international law, consistent with the pattern endorsed by the ILC.[491] Accordingly, the example of international investment law warrants the preponderant opinion as to the dialecticts between *lex generalis* and *lex specialis*.[492]

1.2 Attribution in International Investment Law

The rules of attribution embodied in ARSIWA are generally recognized and applied by ISDS Tribunals as a codification of customary international law.[493] However, IIAs – as *inter se*

[491] This was acknowldeged in the very first investment case based on a BIT in *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award, 27 June 1990, para 21: '*Furthermore, it should be noted that the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rule from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.*'

[492] Bruno Simma and Dirk Pulkowski, 'Two Worlds, but not Apart: International Investment Law and General International Law' in Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds), *International Investment Law* (CH Beck-Hart-Nomos 2015) 361.

[493] *Tulip Real Estate and Development Netherlands BV v Republic of Turkey*, ICSID Case No ARB/11/28, Award, 10 March 2014, para 281; *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v Democratic Republic of the Congo*, ICSID Case No ARB/10/4, Award, 7 February 2014, para 375; *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para 148; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 113, fn 19; *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, para 69; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 156; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 171; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, para 576; *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000, para 76. *Accord*, Christoph Schreuer, with Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID*

agreements – may in theory codify divergent tests of imputability of acts and omissions to sovereigns and consequently bind arbitrators to their application. This possibility is expressly recognised by the ARSIWA Commentaries, which unequivocally affirm:

> Thus, a particular treaty might impose obligations on a State but define the "State" for that purpose in a way which produces different consequences than would otherwise flow from the rules of attribution in chapter II.[494]

In the same vein, the ICJ has stated in *Bosnian Genocide* that '*[t]he rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed* lex specialis.'[495] Accordingly, a special provision should have as object peculiar tests of imputation deviating from the customary rules. The residual character of attribution rules established by the international custom is specifically envisaged by both international scholars[496] and arbitrators.[497] In practice, however, IIAs are largely silent on imputability issues and in the rare instances, where they dictate rules of attribution, a meaningful deviation from customary international law is not acknowledged.

One instance of investment treaties' specific treatment of issues of 'attributability' is

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Convention: A Commentary (Cambridge University Press, 2° edn 2009) 150, para 233. *See also* Martins Paparinskis, 'Investment Treaty Arbitration and the New Law of State Responsibility' (2013) 24 European Journal of International Law 617, 618, who recognizes '*the presumption of positivity*' of ARSIWA.

[494] ARSIWA Commentaries 140, para 3.

[495] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, para 408, ICJ Reports 2007, 43, 201.

[496] Luigi Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984) 189 Recueil des Cours 9, 117; Yves Nouvel, 'Les entités paraétatiques dans la jurisprudence du CIRDI' in Charles Leben (ed), *Le contentieux arbitral transnational relatif à l'investissement. Nouveaux développements* (LGDJ 2006) 25, 37 : '*Ce principe général d'attribution peut toutefois être modifié par les règles spéciales propres au droit des investissements*'.

[497] *United Parcel Service of America Inc (UPS) v Government of Canada*, UNCITRAL, Award on the Merits, 24 May 2007, para 55; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 130; *F-W Oil Interests, Inc v The Republic of Trinidad and Tobago*, ICSID Case No ARB/01/14, Award, 3 March 2006, para 206: '*That the substantive standards against which the Claimant puts forward its claims are those laid down in a specific treaty, not general international law, immediately opens up the possibility that particular standards of attributability may apply, as* lex specialis*, in substitute for or supplementation of the general rules of State responsibility – a possibility to which the ILC draws attention repeatedly in its draft Articles and the Commentaries (notably Article 55 & Commentary).*'

represented by NAFTA Articles 1502(3)(a) (*Monopolies and State Enterprises*)[498] and 1503(2)-(3) (*State Enterprises*).[499] These provisions have been thoroughly analysed by a NAFTA Tribunal in the case of *UPS v. Canada*, which recognised them as completely displacing the operation of criteria of attribution under ARSIWA:

> Several features of these provisions read as a whole lead the Tribunal to the conclusion that the general residual law reflected in article 4 of the ILC text does not apply in the current circumstances. The special rules of law stated in chapters 11 and 15, in terms of the principle reflected in article 55 of the ILC text, "govern" the situation and preclude the application of that law […] Accordingly, we conclude that actions of Canada Post are not in general actions of Canada which can be attributed

[498] NAFTA, *supra* note 456:

> *Article 1502: Monopolies and State Enterprises*
>
> […]
>
> 3. 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;
>
> (b) except to comply with any terms of its designation that are not inconsistent with subparagraph (c) or (d), acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale;
>
> (c) provides non-discriminatory treatment to investments of investors, to goods and to service providers of another Party in its purchase or sale of the monopoly good or service in the relevant market; and
>
> (d) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, its subsidiary or other enterprise with common ownership, in anticompetitive practices in a non-monopolized market in its territory that adversely affect an investment of an investor of another Party, including through the discriminatory provision of the monopoly good or service, crosssubsidization or predatory conduct.

[499] NAFTA, *supra* note 456:

> *Article 1503: State Enterprises*
>
> […]
>
> 2. Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapters Eleven (Investment) and Fourteen (Financial Services) wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges.
>
> 3. Each Party shall ensure that any state enterprise that it maintains or establishes accords non-discriminatory treatment in the sale of its goods or services to investments in the Party's territory of investors of another Party.

> to Canada as a "Party" within the meaning of articles 1102 to 1105 or for that matter in articles 1502(3)(a) and 1503(2). Chapter 15 provides for a *lex specialis* regime in relation to the attribution of acts of monopolies and state enterprises, to the content of the obligations and to the method of implementation. It follows that the customary international law rules reflected in article 4 of the ILC text do not apply in this case. […] We again recall however that the proposition in article 5 of the ILC text (as in other provisions) has "a residual character" and does not apply to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of a State's international responsibility are governed by special rules of international law - the *lex specialis* principle (paragraph 55 above). For the reasons which we have just given in relation to the argument based on article 4, and in particular the careful structuring and drafting of chapters 11 and 15 and which we need not repeat, we find that this argument also fails, as a general proposition.[500]

The motive for such a firm exclusion of any application of customary international law cannot be sorted out with immediate easiness. It may dwell in the parsimonious behaviour of certain arbitrators, appointed by virtue of a *specific* instrument of consent, as to the application of *general* international law.[501] In the NAFTA, the *lex specialis* and the international custom on attribution are not in a relationship of reciprocal inconsistency. With regard to ARSIWA Article 4, NAFTA does not affect the canonical rule of attribution to the State of the conducts of its organs. In addition, it codifies additional primary obligations of the Parties, incumbent to their organs, which shall warrant observance of the treaty by government and private monopolies (*duty to ensure*). With regard to ARSIWA Article 5, NAFTA Articles 1502(3)(a) and 1503(2) do not diverge from the customary norm, by listing particular instances of exercise of '*elements of the governmental authority*' by parastatals. As far as the operation of the attribution test for parastatal entities is concerned, NAFTA does not modify the customary rule of imputability, but merely specifies certain grounds for its application in a non-exhaustive way. With regard to ARSIWA Article 8, NAFTA Articles 1502(3) and 1503(2) do

[500] *United Parcel Service of America Inc (UPS) v Government of Canada*, UNCITRAL, Award on the Merits, 24 May 2007, paras 59, 62, 63. *See* James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 ICSID Review – Foreign Investment Law Journal 127, 131; Jürgen Kurtz, 'The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration' (2010) 25 ICSID Review – Foreign Investment Law Journal 200, 208-209.

[501] Robert Howse and Barry Appleton, 'Time and the Law of State Responsibility: Emerging Concepts of "Continuing Breach" and Related Issues in Contemporary International Jurisprudence', lecture held at the conference *International Law and Time*, Villa Barton, Geneva, 12-13 June 2015.

not render the conducts *jure gestionis* of private monopolies and State enterprises as automatically attributable to a Party, but instead creates a primary obligation of State organs to surveil on the consistency of their activities with the treaty. As a consequence, NAFTA does not actually derogate from the customary rules of attribution, but expressly specifies some grounds for their application. Accordingly, a NAFTA Tribunal will primarily apply the provisions codified by the treaty, but the concept of a rigid preclusion of *any* use of customary international rules of attribution does not seem to capture the correct picture of the relevant legal situation, as far as applicable laws are concerned.

Another instance of "treatification" of rules of imputability is found in ECT Articles 22 (*State and Privileged Enterprises*) and 23 (*Observance by Sub-National Authorities*).[502] ECT Article 22 does not technically codify rules of attributability, but introduces a

[502] ECT, *supra* note 455:

> *Article 22*
> *State and Privileged Enterprises*
> (1) Each Contracting Party shall ensure that any state enterprise which it maintains or establishes shall conduct its activities in relation to the sale or provision of goods and services in its Area in a manner consistent with the Contracting Party's obligations under Part III of this Treaty.
> (2) No Contracting Party shall encourage or require such a state enterprise to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under other provisions of this Treaty.
> (3) Each Contracting Party shall ensure that if it establishes or maintains an entity and entrusts the entity with regulatory, administrative or other governmental authority, such entity shall exercise that authority in a manner consistent with the Contracting Party's obligations under this Treaty.
> (4) No Contracting Party shall encourage or require any entity to which it grants exclusive or special privileges to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under this Treaty.
> (5) For the purposes of this Article, "entity" includes any enterprise, agency or other organization or individual.
>
> *Article 23*
> *Observance by Sub-National Authorities*
> (1) Each Contracting Party is fully responsible under this Treaty for the observance of all provisions of the Treaty, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its Area.
> (2) The dispute settlement provisions in Parts II, IV and V of this Treaty may be invoked in respect of measures affecting the observance of the Treaty by a Contracting Party which have been taken by regional or local governments or authorities within the Area of the Contracting Party.

substantive obligation (primary rule) to ensure that State enterprises established by a Party conduct their undertakings consistently with the treaty, either acting *jure imperii* or *jure gestionis*.[503] In the first instance, attribution as such is governed by the functional test of ARSIWA Article 5. In the second instance, attribution of conducts of State enterprises, assimilated to 'private' individuals, would not be in place unless instructions, direction or control by a Party is proved. ECT Article 23(1) reproduces the customary principle of the territorial unity of the State for the purposes of attribution and additionaly dictates the Parties' duty to surveil on the activities of sub-state levels of government, which may result in a breach of the treaty. In line with the above analysis of the relevant provisions of the NAFTA, ECT does not seem to embody a *lex specialis* as to attribution issues, but rather codifies substantive duties of performance and surveillance incumbent on the organs of the Parties.[504]

The foregoing review of IIAs confirms the empirical datum of the scarcity or nearly absence of *pacta inter se* with regard to attribution issues. Accordingly, in the overwhelming majority of investment disputes, issues of imputation are governed by customary international law *only*.[505] However, a scholarly question remains whether States *should* be at liberty to modify customary rules of imputability and to what extent, provided that they *may* legally do so. The ARSIWA Commentaries offer a couple of examples of *leges speciales* affecting issues of attributability outside the realm of international investment law. The first example is represented by Article 1.1 of the United Nations Convention against Torture and Other Cruel,

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[503] Thomas W Wälde and Patricia K Wouters, 'State Responsibilty and the Energy Charter Treaty: the Rules Regarding State Enterprises, Entities, and Subnational Authorities' (1997) 2 Hofstra Law and Policy Symposium 117, 131: '*The ECT extends the breadth of a state-party's liability by making the conduct of state enterprises and entities in the energy sector the responsibility of the contracting state.*'

[504] *See Nykomb Synergetics Technology Holding AB v The Republic of Latvia*, SCC, Arbitral Award, 16 December 2003, para 4.2.

[505] *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, para 69: '*As States are juridical persons, one always has to raise the question whether acts committed by natural persons who are allegedly in violation of international law are attributable to a State. The BIT does not provide any answer to this question. The rules of attribution can only be found in general international law which supplements the BIT in this respect.*'

Inhuman or Degrading Treatment or Punishment of 10 December 1984, which applies to torture committed '*by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*'[506] The ILC explains that '*[t]his is probably narrower than the bases for attribution of conduct to the State in Part One, chapter II.*' While Article 1.2 of the Convention against Torture preserve the operation of '*any international instrument or national legislation which does or may contain provisions of wider application*', it may be observed that the test of 'instigation' of a public official may be embedded within the prong of actual instructions by a State organ pursuant to ARSIWA Article 8. In addition, *patientia* and *receptus* by State agents entail a *wider* bases of imputability vis-à-vis the customary tests, as extensively demonstrated above.[507] The second example is embodied by "federal clauses" excluding constituent subdivisions of a State from the coverage of a treaty, as in Article 34(b) of the UNESCO Convention for the Protection of the World Cultural and Natural Heritage of 16 November 1972:[508]

Article 34

> The following provisions shall apply to those States Parties to this Convention which have a federal or non-unitary constitutional system:
> […]
> (b) with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of individual constituent States, countries, provinces or cantons that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States, countries, provinces or cantons of the said provisions, with its recommendation for their adoption.

[506] United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly Resolution 39/46 of 10 December 1984, entered into force on 26 June 1987, 1465 UNTS 85. *See* ARSIWA Commentaries 140, para 3, fn 820.
[507] *See supra* Chapter II, para 5.2.
[508] UNESCO Convention for the Protection of the World Cultural and Natural Heritage, Paris, adopted on 16 November 1972, entered into force on 17 December 1975, 1037 UNTS 151. *See* ARSIWA Commentaries 140, para 3, fn 820.

The problem of the insertion of federal clauses in IIAs has accrued interest in relation to the newly proposed Indian Model BIT.[509] Its 2015 draft provided a definition of "Government" as 'only (emphasis added) *the Central Government and State Governments in the case of India*' (Article 1.3(i)). This formulation was evidently meant to exclude attribution to India of the conducts of municipalities or territorial units beneath the State level, which entailed a significant departure from the principle of the unity of the State, as such a pillar of the international law of State responsibility. The subsequent 2016 draft adopted a markedly different legal technique to enforce the same policy. The exclusion of the measures of '*local governments*' is not anymore addressed through the definition of "Government", but is qualified as a carve-out from the substantive coverage of the BIT (Article 2.4(i)).[510] This amendment is seemingly illustrative of the will of India not to treat the exclusion of the conducts of municipalities as formally pertaining to attribution rules (*i.e.*, secondary rules), but rather limiting the regulatory scope of the investment treaty. In any event, it remains to be seen whether this specific Indian policy will be actually transposed in a binding agreement. To this extent, it is advisable for States not to pass *lex specialis* in a way to restrict (in form or substance) the customary scope of rules of attribution of acts and omissions, as it will be advocated in the conclusion of this paragraph.

Our scholarly question has received a certain attention also in the legal doctrine. In relation to parastatal entities *ex* ARSIWA Article 5, Yves Nouvel has stated that an investment treaty may exclude imputation of conduct of a parastatal entity by virtue of a sectoral exclusion contained in a carve-out provision (for instance with regard to the oil and

[509] Grant Hanessian and Kabir Duggal, 'The 2015 Indian Model BIT: Is This Change the World Wishes to See?' (2015) 30 ICSID Review – Foreign Investment Law Journal 729.
[510] Article 1.7 of the 2016 draft of the Indian Model BIT provides a non-exhaustive definition of 'local governments': '*"local government" includes: (i) An urban local body, municipal corporation or village level government; or (ii) an enterprise owned or controlled by an urban local body, a municipal corporation or a village level government.*'

mines sector).[511] Upon a closer inspection, this example pertains to the issue of jurisdiction *ratione materiae* of an international investment Tribunal, not to the merits question of attribution. With regard to the definiton of 'investment' contained in the applicable instrument of consent to arbitration, States are at liberty to restrict the scope of the jurisdiction of an international Tribunal,[512] while it is debated whether they can enlarge such a jurisdiction to cover mere commercial transactions falling outside the 'objective' definition of investment propounded by the *Salini v. Morocco* Tribunal, at least in the realm of ICSID arbitration.[513] It is submitted that for attribution issues an opposite dynamics holds true: Parties may extend the coverage of attribution rules, so as to 'capture' conducts that would *not otherwise* be imputable, but *should* not contract out cases of attributability provided by customary

[511] Yves Nouvel, 'Les entités paraétatiques dans la jurisprudence du CIRDI' in Charles Leben (ed), *Le contentieux arbitral transnational relatif à l'investissement. Nouveaux développements* (LGDJ 2006) 25, 38.

[512] Aron Broches, 'The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' (1972-II) 136 Recueil des Cours 331, 340, 351-352; C F Amerasinghe, 'Interpretation of Article 25(2)(b) of the ICSID Convention' in Richard B Lillich and Charles N Brower (eds), *International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity?* (Transnational Publishers, Inc 1993) 223, 231-232, 235; Georges R Delaume, 'ICSID Arbitration and the Courts' (1983) 77 American Journal of International Law 784, 794; M Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 3° edn 2010) 330; C F Amerasinghe, 'Jurisdiction *Ratione Personae* Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' (1974-1975) 47 British Year Book of International Law 227, 229-230.

[513] *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 31 July 2000, para 52; *Phoenix Action, Ltd v The Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009, para 96; *Malaysian Historical Salvors Sdn, Bhd v The Government of Malaysia*, ICSID Case No ARB/05/10, Award on Jurisdiction, 17 May 2007, paras 54-55; *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No ARB/03/11, Award on Jurisdiction, 6 August 2004, paras 49-50; *Société Générale de Surveillance SA (SGS) v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para 133, fn 153. Interestingly, the requirement of an '*inherent meaning*' of the term "investment" has been upheld by an UNCITRAL Tribunal, established under the Switzerland-Uzbekistan BIT (1993), *cf Romak SA (Switzerland) v The Republic of Uzbekistan*, UNCITRAL, PCA Case No AA280, Award, 26 November 2009, para 180, 207, quoting *Robert Azinian, Kenneth Davitian, & Ellen Baca v The United Mexican States*, ICSID Case No ARB(AF)/97/2, Award, 1 November 1999, para 90: '*labeling… is no substitute for analysis.*' *See* Anthony C Sinclair, 'ICSID's Nationality Requirements' (2008) 23 ICSID Review – Foreign Investment Law Journal 57, 63, who refers to '*the nationality requirements called for by the ICSID Convention and places these in the context of the criteria for protection found in investment treaties. These instruments form twin gateways through which investors must pass to bring a case to ICSID.*' Then, he takes position on the issue of the relationship between the ICSID Convention and the relevant instrument of consent to arbitration by affirming that '*[d]espite the unassailable position of consent as the "cornerstone" of ICSID jurisdiction, access to ICSID cannot be reduced simply to a matter of party autonomy.*' *Accord*, Christoph Schreuer, with Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (Cambridge University Press, 2° edn 2009) 83, para 6; C F Amerasinghe, *Jurisdiction of International Tribunals* (Kluwer Law International 2003) 658; Paul C Szasz, 'A Practical Guide to the Convention on Settlement of Investment Disputes' (1968) 1 Cornell Journal of International Law 1, 14.

international law. Accordingly, Yves Nouvel also affirms that States can definitely enlarge the operation of attribution mechanisms.[514] This may occur with particular regard to the imputability of conducts of non-state actors. Sparse treaty provisions establish the attribution to the State of activities of private individuals irrespective of *any* link with a government.[515] However, it may be questioned whether this is an issue of rules of attribution proper, rather than specific primary rules intended to create a regime of objective responsibility of the State. In addition, such provisions usually refer to times of crisis (revolutions, civil strives or mob violences), in a context of traditional evanescence of the divide between attribution rules and primary rules codifying a duty to prevent damages or to ensure compliance with given standards by any person involved in a certain activity, to the theoretical inclusion of parastatal entities.[516] James Crawford has recognised States' freedom to contract '*entirely new*' secondary rules of attribution, by referring to Article 139(2) of the United Nations Convention on the Law of the Sea (UNCLOS).[517] This rule provides for the responsibility of States for exploration and exploitation activities undertaken by private entities (State enterprises or

[514] Yves Nouvel, 'Les entités paraétatiques dans la jurisprudence du CIRDI' in Charles Leben (ed), *Le contentieux arbitral transnational relatif à l'investissement. Nouveaux développements* (LGDJ 2006) 25, 38, referring to the former French Model BIT, whose Article 2 established imputation to a contracting Party of the acts and omissions of any entity under its tutelage (*tutelle*).

[515] US-Zaire BIT (1984), Article IV(1) (*Compensation for Damages Due to War and Similar Events*):

> Nationals or companies of either Party whose investments in the territory of the other Party suffer: (a) damages due to war or other armed conflict between such other Party and a third country, or (b) damages due to revolution, state of national emergency, revolt, insurrection, riot or act of violence in the territory of such other Party, shall be accorded treatment no less favorable than that which such other Party accords to its own nationals or companies or to nationals or companies of any third country, whichever is the most favorable treatment, when making restitution, indemnification, compensation or any other settlement with respect to such damages.

See also Cornelia J Pringle, et al, (Santa Isabel Claims) (USA) v United Mexican States, 26 April 1926, 4 RIAA 783, 785, with regard to Article III(b) of the Convention of September 10, 1923, providing for the settlement and amicable adjustment of claims arising from losses or damages suffered by American citizens through revolutionary acts within the period from 20 November 1910 to 31 May 1920; *Kummerow, Otto Redler and Co, Fulda, Fischbach, and Friedericy Cases*, 1903, 10 RIAA 369, 370, with regard to Article III of the Germany–Venezuela protocol of 13 February 1903.

[516] *See infra* para 5.2 of this Chapter.

[517] James Crawford, *State Responsibility. The General Part* (Cambridge University Press 2013) 114.

natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals) they stand as sponsors of, provided that a Party has not taken '*all necessary and appropriate measures to secure effective compliance*'.[518] The argument that this provision specifies a due diligence rule, rather that a test of attribution, may be reiterated, but it is also relevant to underline that in any case the rule entails a wider, not narrower, scope of imputability in comparison to ARSIWA Article 8. Another theoretical example of extension of attributability mechanisms would be represented by express stipulations in IIAs that contractual breaches committed by State instrumentalities are imputable to their establishing State as being its own acts. This rule of attribution would be broader than the functional test of ARSIWA Article 5, in that it would establish imputability to the State of *acta jure gestionis* of parastatals, beyond the subjective limits of application of canonical umbrella clauses.[519]

It is submitted that IIAs can extend, but not restrict the scope of imputability rules dictated by customary international law. Attribution rules constitute a peculiar category of norms, in that they are preliminary in application to the other secondary rules (*trans-substantive* rules). By dispensing structural, technical, mechanical and logical elements in order to build the bridge between given persons and the corporate entity of the State, they "objectively" mark the boundary of the international arena of State responsibility and create its codes of organization and functioning. Derogation *ad minus* of rules of attribution of internationally wrongful acts would entail a surreptitious erosion and eventually circumvention of international primary rules.[520] There is indeed a logically undefeasible

[518] United Nations Convention on the Law of the Sea (UNCLOS), Articles 139(2) and 153(2)(b).
[519] *See infra* para 2.2 of this Chapter.
[520] In a milder vein and with regard to the entirety of secondary rules, *cf* Bruno Simma, 'Self-contained Regimes' (1985) 16 Netherlands Yearbook of International Law 111, 135: '*the exclusion or modification through a "self-contained regime" of "normal" secondary rules which leads to a "softening" of the legal consequences of wrongful acts should not be easily presumed.*'

noyeau dur of rules of attribution approximately coincident with the content of customary international law (a minimum *one-size-fits-all model*).[521] *Arguendo ad absurdum*, the consensual agreement of two or more States to deny attribution of conducts of police and army forces would inevitably, albeit voluntarily, render the Parties as irresponsible for the violation of the substantive rules dictated by the relevant treaty.[522] Such a treaty provision would embody an undesirable *clause d'irresponsabilité réciproque* equivalent to a renunciation to invoke the international responsibility of another Party, rather than a proper attribution rule.[523] This result would engender an effect of paralysis of the orderly life of the community of nations, in that it would be susceptible to circumvent and eventualy defeat the international regime of State responsibility *en bloc*. This analysis of the customary rules of attribution as clotting agents of the international system of State responsibility should suggest their consideration as fundamental questions of public order, which accordingly *should* not be derogated *ad minus* by Parties (inderogability by logics or techinique). On the contrary, there is neither legal rule nor policy preventing States from undertaking obligations in respect of conduct that would *not* otherwise be attributable (derogability *ad maius*). It has been amply

[521]Luigi Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984) 189 Recueil des Cours 9, 166: '*On doit d'ailleurs admettre sans la moindre réticence que le critère clé à suivre lorsqu'il s'agit de déterminer les bases normatives du raisonnement relatif à l'imputation peut être synthétisé ainsi: l'applicabilité des principes «communs» doit être sans autre présumée, tant que l'existence d'un principe dérogatoire (conventionnel ou coutumier) à préférer en l'espèce n'est pas positivement démontrée.*'; Yves Nouvel, 'Les entités paraétatiques dans la jurisprudence du CIRDI' in Charles Leben (ed), *Le contentieux arbitral transnational relatif à l'investissement. Nouveaux développements* (LGDJ 2006) 25, 41: '*il y a peu de mécanismes d'imputation propres au droit des investissements*.'

[522] Alfred Verdross, '*Jus Dispositivum* and *Jus Cogens* in International Law' (1966) 60 American Journal of International Law 55, 59: '*a state cannot waive the rights necessary for it to fulfill its international obligations*.'

[523] Institut de Droit International, 'Règlement sur la responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute, d'insurrection ou de guerre civile', Résolution du 10 septembre 1900, Session de Neuchâtel, in *Résolutions de l'Institut de droit international. 1873-1956* (Editions Juridiques et Sociologiques 1957) 141-142:

> *Vœux*
>
> L'Institut de Droit international exprime le vœu que les Etats évitent d'insérer dans les traités des clauses d'irresponsabilité réciproque. Il estime que ces clauses ont le tort de dispenser les Etats de l'accomplissement de leur devoir de protection sur leurs nationaux à l'étranger et de leur devoir de protection des étrangers sur leur territoire.

demonstrated that it would basically matter of substantive obligations of an ultimately primary nature mutually contracted by Parties.[524]

1.3 The Example of International Trade Law

In order to corroborate our conclusions with regard to the application of attribution rules by investment Tribunals, it seems appropriate to provide a brief excursus of the solutions rendered on the same issues within the WTO dispute settlement system, a canonical example of self-contained regime.[525] This analysis is suggested in light of the enhanced interdependence and even possible cross-fertilization between the regimes of international trade law and international investment law.[526]

The WTO covered agreements contains provisions that entail issues of attribution *lato sensu*. This is the case of GATT 1994 Articles III:8(a) (as to '*governmental agencies*') and Article XVII:1 (as to '*state trading enterprises*'), GATS Articles I:3(b)-(c) (as to '*governmental authority*') and XIII:1 (as to '*governmental agencies*'), SCM Agreement Article 1.1(a)(1) (as to the definition of '*public body*'), and Agreement on Agriculture Article

[524] Georgios Petrochilos, 'Attribution' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 287, 288.

[525] Graham Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (Cambridge University Press 2015) 31-43; Joanna Gomula, 'Responsibility and the World Trade Organization' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 791, 795-797; Santiago M Villalpando, 'Attribution of Conduct to the State: How the Rules of State Responsibility May be Applied within the WTO Dispute Settlement System' (2002) 5 Journal of International Economic Law 393.

[526] *Continental Casualty Company v The Argentine Republic*, ICSID Case No ARB/03/9, Award, 5 September 2008, paras 192-195, using Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Korea — Various Measures on Beef)*, WT/DS161/AB/R, WT/DS169/AB/R, 11 December 2000, para 161. *See* Giorgio Sacerdoti, 'The Application of BITs in Time of Economic Crisis: Limits to Their Coverage, Necessity and the Relevance of WTO Law' in Giorgio Sacerdoti *et al*, *General Interests of Host States in International Investment Law* (Cambridge University Press 2014) 3, 17; Tomer Broude, 'Investment and Trade: The 'Lottie and Lisa' of International Economic Law?' in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy. World Trade Forum* (Cambridge University Press 2013) 139: '*they are in fact identical twins, separated at a very young age following an unfortunate divorce, each of them subsequently been raised by one of their parents, and developing different characters*'.

9.1(a) (as to '*governments or their agencies*'). Regardless, WTO panels and the Appellate Body have determined problems of attribution of conducts to the State by interpreting the provisions dictated by the applicable covered agrement as identical or consistent with the rules established by customary international law ('*there is no major* lex specialis *on attribution in international trade law*').[527] This judicial attitude of the WTO adjudicators might be suggested by the obligation to provide '*security and predictability to the multilateral trading system*' *ex* DSU Article 3.2, which is an express networking device between general international law and special international trade law, so that the latter is not interpreted in '*clinical isolation*' from the former.[528] Accordingly, WTO panels and the Appellate Body reiterated the principle of irrelevance of the separation of powers in order to identify a 'measure' as attributable to a Member,[529] as well as of the internal allocation of competences between the central government and territorial entities,[530] and also the principle of

[527] Santiago M Villalpando, 'Attribution of Conduct to the State: How the Rules of State Responsibility May be Applied within the WTO Dispute Settlement System' (2002) 5 Journal of International Economic Law 393, 395.
[528] James Bacchus, 'Not in Clinical Isolation' in Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO. The Development of the Rule of Law in the Multilateral Trading System* (Cambridge University Press 2015) 507. *Cf* Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline)*, WT/DS2/AB/R, 29 April 1996, 17; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, WT/DS58/AB/R, 12 October 1998, paras 154-158.
[529] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline)*, WT/DS2/AB/R, 29 April 1996, 28-29; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, WT/DS58/AB/R, 12 October 1998, para 173; Appellate Body Report, *United States — Measures Relating to Zeroing and Sunset Reviews (Recourse to Article 21.5 of the DSU by Japan) (US – Zeroing (Japan))*, WT/DS322/AB/RW, 18 August 2009, para 182.
[530] Panel Report, *Australia — Measures Affecting Importation of Salmon (Recourse to Article 21.5 by Canada) (Australia – Salmon)*, WT/DS18/RW, 18 February 2000, para 7.12: '*we are of the view that the Tasmanian ban is to be regarded as a measure taken by Australia, in the sense that it is a measure for which Australia, under both general international law and relevant WTO provisions, is responsible.*'; Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil – Retreaded Tyres)*, WT/DS332/R, 12 June 2007, para 7.400: '*We consider that the measures of Rio Grande do Sul, a state of the Federative Republic of Brazil, are attributable to Brazil as a WTO Member and therefore should be considered as "measures" for the purposes of Article 3.3 of the DSU.*'; Panel Reports, *Canada — Certain Measures Affecting the Renewable Energy Generation Sector (Canada – Renewable Energy) and Measures Relating to the Feed-in Tariff Program (Canada — Feed-In Tariff Program)*, WT/DS412/R, WT/DS426/R, 19 December 2012, para 7.6, fn 37: '*It is not disputed that, under public international law, Canada is responsible for the actions of the Government of the Province of Ontario ("Government of Ontario").*'

responsibility of the State for acts of minor officials.[531] In general, WTO case law has found imputability of acts and omissions to the State, based on the conducts of the legislature,[532] of the executive branch,[533] and of the judiciary.[534] Besides, the meaning of 'public body' pursuant to the SCM Agreement Article 1.1(a)(1) has been defined by the Appellate Body as '*an entity that possesses, exercises or is vested with governmental authority*', in relevant consistency with the rule of ARSIWA Article 5.[535] Finally, both panels and the Appellate Body have rendered findings related to circumstances of instructions, direction or control between a Member and 'private parties'.[536] Notably, the Appellate Body provided further elucidation on the tests dictated by ARSIWA Article 8 through its analysis of the situations of

[531] Panel Report, *Korea — Measures Affecting Government Procurement (Korea – Procurement)*, WT/DS163/R, 1 May 2000, para 6.5.
[532] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline)*, WT/DS2/AB/R, 29 April 1996, 28.
[533] *United States — Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan (US — Corrosion-Resistant Steel Sunset Review)*, WT/DS244/AB/R, 15 December 2003, para 81: '*The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch.*'
[534] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, WT/DS58/AB/R, 12 October 1998, para 173: '*The United States, like all other Members of the WTO and of the general community of states, bears responsibility for acts of all its departments of government, including its judiciary.*'; Appellate Body Report, *United States — Measures Relating to Zeroing and Sunset Reviews (Recourse to Article 21.5 of the DSU by Japan) (US – Zeroing (Japan))*, WT/DS322/AB/RW, 18 August 2009, para 182: '*Thus, the United States cannot seek to avoid the obligation to comply with the DSB's recommendations and rulings within the reasonable period of time, by relying on the timing of liquidation being "controlled by the independent judiciary".*'; Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil – Retreaded Tyres)*, WT/DS332/R, 12 June 2007, para 7.305.
[535] Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (*US – Anti-Dumping and Countervailing Duties (China)*), WT/DS379/AB/R, 11 March 2011, para 317: '*A public body within the meaning of Article 1.1.(a)(1) of the* SCM Agreement *must be an entity that possesses, exercises or is vested with governmental authority. Yet, just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case.*' *Accord*, Appellate Body Report, *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (US – Carbon Steel (India))*, WT/DS436/AB/R, 8 December 2014, para 4.37. *See also* Panel Report, *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products (Canada – Dairy)*, WT/DS103/R, WT/DS113/R, 17 May 1999, para 7.77 (provincial marketing boards).
[536] Panel Report, *Japan — Measures Affecting Consumer Photographic Film and Paper (Japan – Film)*, WT/DS44/R, 31 March 1998, para 10.52.

'entrustment' and 'direction' by a government to a private body to carry out given functions, pursuant to the SCM Agreement Article 1.1(a)(1).[537]

It follows from the foregoing that no significant deviation from public international law is recorded in the WTO dispute settlement system with regard to issues of imputation. Rather, WTO case law has proffered more accuracy and specificity where demanded by the covered agreements, functional to a demand of enhanced adaptation to international trade matters and with a view to offer solutions '*adapted to the realities of international economic law'* ('*répondant à la diversité des besoins qui se manifestent dans le milieu social international*'), but eventually not antithetical to the core of the law of nations on attribution of acts and omissions to States.[538]

2. A Critique of the Application of Attribution Rules by International Investment Tribunals

From a comprehensive review of international investment cases, various problems emerge with regard to the application of attribution rules to the conducts or measures being the subject matter of an investment dispute. In this respect, it has been stated that arbitrators appear to be at a '*formative stage*' in so far as they are apparently in a training phase in order to master general categories of imputability under customary international law.[539] Although investment Tribunals have usually provided accurate and aptly reasoned analysis, in that they

[537] *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea (US — Countervailing Duty Investigation on DRAMs)*, WT/DS296/AB/R, 27 June 2005, para 116: '*In sum, we are of the view that, pursuant to paragraph (iv), "entrustment" occurs where a government gives responsibility to a private body, and "direction" refers to situations where the government exercises its authority over a private body. In both instances, the government uses a private body as proxy to effectuate one of the types of financial contributions listed in paragraphs (i) through (iii).*'

[538] The English quote is from *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 130. The French quote is from Luigi Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984) 189 Recueil des Cours 9, 166.

[539] Kaj Hobér, 'State Responsibility and Attribution' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 550, 582.

comprehensively articulate and indentify the spectrum of attribution rules,[540] certain confusion and even coarseness are detected in case law.[541] The major problems relate to the individual, independent and autonomous application of each single test of attributability under ARSIWA Article 4, 5 *or* 8. At times, Tribunals have practically resorted to a 'super-test' of attribution, based on the arbitrary combination of elements of different tests upon the rudimentary justification of the same operative conclusion, *i.e.* 'imputation' or 'non-imputation', as if ARSIWA dedicated to attribution the only provision of Article 2. In addition, the issue of the application of attribution rules in connection with an umbrella clause (*clause de couverture*) has created legal uncertainty, especially with regard to contract claims based on the activities of State instrumentalities. Finally, the qualification of attribution as a question of merits vis-à-vis jurisdiction has not been always clear-cut in the arbitrators' analysis, especially in non-bifurcated proceedings or in connection with the special

[540] *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para 148; *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, para 69; *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para 187; *Eureko BV v Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 August 2005, para 132; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 172; *Alpha Projektholding GmbH v Ukraine*, ICSID Case No ARB/07/16, Award, 8 November 2010, para 400; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 117.

[541] *EnCana Corporation v Republic of Ecuador*, LCIA Case No UN3481, UNCITRAL, Award, 3 February 2006, para 154: '*It does not matter for this purpose whether this result flows from the principle stated in Article 5 of the ILC's Articles on Responsibility of States for Intemationally Wrongful Acts or that stated in Article 8.* The result is the same.' (emphasis added); *Eureko BV v Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 August 2005, para 134: '*whatever may be the status of the State Treasury*'; *Waste Management, Inc v United Mexican States (Waste Management II)*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, para 75: '*For the purposes of the present Award, however, it will be assumed that one way or another the conduct of Banobras was attributable to Mexico for NAFTA purposes.*'; *Toto Costruzioni Generali SpA v The Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction, 11 September 2009, para 44: '*The* principal rule (*sic*) *of international law on attribution are presently reflected in Articles 4 and 5 of the International Law Commission's ("ILC") Draft Articles on Responsibility of States for Intenlationally Wrongful Acts, 2001 ("Draft Articles").*' (emphasis added); *United Parcel Service of America Inc (UPS) v Government of Canada*, UNCITRAL, Award on the Merits, 24 May 2007, para 76: '*It wilI be recalled that UPS also contends, as an alternative to the argument based on the rules of customary international law reflected in article 4 of the ILC text, that the proposition reflected in its article 5 apply to make Canada directly responsible for actions of Canada Post. That provision (set out in paragraph 48 above) is concerned with the conduct of* non-State entities. *[...] It is convenient at this point to return to article 5 of the ILC's State responsibility text and in particular to its commentary, quoted earlier (paragraph 48). That provision, it will be recalled, attributes to the State the conduct of* non-State organs *"empowered by the law of that State to exercise elements of the governmental authority" when it acts in that capacity*' (emphasis added).

mechanism of designation of constituent subdivisions or agencies pursuant to ICSID Convention Article 25(1)-(3).

On a more general perspective, a certain parsimony or even reluctancy of arbitrators is noted with regard to the application of principles and rules of customary international law.[542] This begets cursory analysis of the applicable rules of attribution, which nevertheless represents a threshold condition for State responsibility, also based on superficial treatment of the same issues contained in the submissions of the parties.[543] There is a clear impression, notably in non-ICSID disputes, that arbitrators tend to exclusively apply the relevant investment treaty, thus emphasising 'hard' self-containment of the investment regime and the private-like mechanism of justice, pursuant to which they are appointed.[544] This is not only the case for attribution issues, but for a variety of themes ranging from jurisdictional issues (for instance, nationality of corporate investors) to applicable laws in general.[545] Even the basic principle of the supremacy of international law vis-à-vis municipal law has not always been enforced in a full-fledged manner in investment litigation. In *EDF v. Romania*, it has been asserted that '*[a]s stated by ILC Article 4 (2), the State internal law determines whether an entity is a State organ*'.[546] As above mentioned, ARSIWA rather dictate an independent

[542] Pierre-Marie Dupuy, 'Les émanations engagent-elles la responsabilité des Etats? Etude de droit international des investissements' (2006) EUI Working Paper LAW No 2006/7, 9: '*Cet emprunt de plus en plus fréquent et délibéré aux règles de droit international public en particulier pour identifier l'«émanation » de l'Etat a de quoi frapper. Il manifeste à n'en pas douter non pas seulement une utilisation occasionnelle du droit international public mais, bel et bien, une reconnaissance de moins en moins réticente du fait que, dans un grand nombre de cas, le droit reconnu comme applicable est bien le droit international, y compris la coutume.*'

[543] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, Award, 24 July 2008, para 479: '*The parties agree as to the general principles governing State responsibility and the attribution of acts and omissions to the State, as they have been restated in the ILC Articles, and in particular Articles 2, 4, 5, 12 and 13.*'

[544] Chiefly, *United Parcel Service of America Inc (UPS) v Government of Canada*, UNCITRAL, Award on the Merits, 24 May 2007, paras 59-65.

[545] *Ex multis*, *Tokios Tokelės v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction, 29 April 2004, para 36.

[546] *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para 188. Similarly, in *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 199: '*The status of WAPDA as a party to the Contracts is a matter for the law of Pakistan, being both the law by which WAPDA was established and exists, and also the law governing the Contracts.*'

meaning of 'State organ' also encompassing *de facto* agencies.[547] While it is established that the status of organs, agencies or intrumentalities under domestic law remains a central element,[548] a finding of attribution pursuant to international law is decisively rooted by its own independent categories, as widely approved also in investment cases.[549]

The foregoing may display the circumstance that at least a part of the epistemic community of international investment law and arbitration regards ARSIWA as *external norms*, when possibly applied or used in the context of treaty-based arbitration.[550]As a consequence, arbitrators (as a possibility) might be oriented to proffer non-rigorous analysis and reasoning on attribution issues, in terms of legal science and methodology. The progress in clarity and scientificity in the resolution of issues of imputability (but also of State responsibility in general) in investment arbitration hinges on the arbitrators' conception of their dialecticts with customary international law. Only a more inclusive perspective and an

[547] *See supra* Chapter I, para 2; Chapter II, paras 1.2 and 3.

[548] For an example, *see Eureko BV v Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 August 2005, para 122, referring to Articles 33 and 34 of the Polish Civil Code within the analysis of the status of the State Treasury of the Republic of Poland.

[549] *F-W Oil Interests, Inc v The Republic of Trinidad and Tobago*, ICSID Case No ARB/01/14, Award, 3 March 2006, para 203: '*The internal law of the State will be the starting point, but not the end point*'; *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000, para 82: '*The Tribunal is also of the view that a domestic determination, be it legal, judicial or administrative, as to the juridical structure of an entity undertaking functions which may be classified as governmental, while it is to be given considerable weight, is not necessarily binding on an international arbitral tribunal. Whether an entity is to be regarded as an organ of the State and whether this might ultimately engage its responsibility, is a question of fact and law to be determined under the applicable principles of international law.*' The same dialectics between international and national law is contemplated with regard to the determination of the objective element of the internationally wrongful act. *See Continental Casualty Company v The Argentine Republic*, ICSID Case No ARB/03/9, Decision on Jurisdiction, 22 February 2006, para 88, quoting *Elettronica Sicula SpA (ELSI) (United States of America v Italy)*, Judgment, 20 July 1989, para 73, ICJ Reports 1989, 15: '*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 municipal law and what is unlawful in the municipal law may be fully innocent of violation of a treaty provision.*'

[550] Jürgen Kurtz, 'The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration' (2010) 25 ICSID Review – Foreign Investment Law Journal 200, 201: '*there is often remarkably little substantive analysis of the conditions under which those norms can and should penetrate the investment treaty under adjudication. […] Investment treaty arbitrators repeatedly fail to consider not only the formal justification for their use of an external norm but also the systemic and normative implications of a given choice.*'

enhanced account of the public international law dimension of investment disputes can trigger an evolution from the formative to the learned stage.

2.1 Independent Application of the Tests for Attribution

The rules of attribution under ARSIWA Articles 4, 5 and 8 deserve a differentiated and separate application. Each test of imputation corresponds to a different *link* with the State, namely institutional (organic), functional and factual. Moreover, the application of a given rule of imputation (either for State organs, State instrumentalities or private individuals) also entails different consequences, first and foremost the attributability of *ultra vires* acts *ex* ARSIWA Article 7, which operates for the former cases, but not for the latter. Accordingly, attribution rules are mutually exclusive – though possibly complementary – and should not be cumulatively merged by way of *holistic* interpretations by arbitrators.[551] However, this is what has usually occurred in the practice of international investment Tribunals. As noted by Rudolf Dolzer and Christoph Schreuer:

> In strict theory, the presence of any one of the possible criteria (status as state organ, governmental function, control) would suffice to establish attribution. In practice, tribunals have not followed the strict separation of those categories but have typically looked them in conjunction.[552]

This practice eminently consists in the combined application of the attribution tests dictated for State organs (ARSIWA Article 4) *and/or* State entities (ARSIWA Article 5), [553] and of the

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[551] *Contra*, *Eureko BV v Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 August 2005, para 132: '*The principles of attribution are cumulative so as to embrace not only the conduct of any State organ but the conduct of a person or entity which is not an organ of the State but which is empowered by the law of that State to exercise elements of governmental authority. It embraces as well the conduct of a person or group of persons if he or it is in fact acting on the instructions of, or under the direction or control of, that State.*'

[552] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2° edn 2012) 225.

[553] *Toto Costruzioni Generali SpA v The Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction, 11 September 2009, para 60: '*Based on the foregoing, the Tribunal's view is that the CEGP and thereafter the CDR are exercising in the context of the Contract the governmental authority of the Republic of*

criteria established for State entities (ARSIWA Article 5) *and/or* private individuals (ARSIWA Article 8).[554] In the first instance, Tribunals have mainly reasoned on the basis of the possible commonality of the exercise of governmental authority and functions. While a treaty claim is usually based on certain measures embodying *acta jure imperii*, conducts of a private nature (*acta jure gestionis*) can be attributed to a State by virtue of ARSIWA Article 4, which dispenses a rule of plenitude encompassing both governmental and commercial acts, but not under Article 5.[555] Moreover, while formal empowerment by law of *puissance publique* is required under ARSIWA Article 5, under Article 4 (canonical rule) there is normative room for the theory of *de facto* agents, even though investment Tribunals have not embarked thereon.[556] In the second instance, Tribunals generally emphasise the common element of a delegation pattern, namely public agency vis-à-vis private agency. However, attribution of conducts of private individuals usually concerns tasks of a private nature, while

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Lebanon, Therefore their acts are acts of the State of Lebanon, as also confirmed by Article 5 of the ILC Draft. *Lebanon may be internationally liable for the acts of the CEGP and thereafter the CDR.*' (emphasis added); *Iurii Bogdanov, Agurdino-Invest Ltd and Agurdino-Chimia JSC v Republic of Moldova*, SCC, Arbitral Award, 22 September 2005, 2.2.2: '*The Department of Privatization is, therefore, a central Governmental body of the Republic of Moldova, delegated by Governmental regulations to carry out state functions, and the effects of its conducts may be attributed to the State. It is generally recognised, in international law, that States are responsible for acts of their bodies or agencies that carry out State functions*'; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, para 592: '*The Tribunal therefore has no hesitation in concluding that MongolBank acted* de jure imperii*, if not in entering into the SCSA, at least when it exported GEM's gold for refining and deposited it or its value in an unallocated account in England "with the purposes of increasing the country's reserves." Those actions were* de jure imperii *and went beyond a mere contractual relationship. Therefore, even if MongolBank were not to be considered an organ of the State but merely an entity exercising elements of governmental authority, Claimants would be entitled to pursue their claim against Respondent in connection with the actions mentioned above.*'; *Alex Genin, Eastern Credit Limited, Inc and AS Baltoil v The Republic of Estonia*, ICSID Case No ARB/99/2, Award, 25 June 2001, para 327; *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000, paras 79-80; *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, para 83.

[554] *Limited Liability Company Amto v Ukraine*, SCC Case No 080/2005, Final Award, 26 March 2008, para 102: '*In these circumstances the Arbitral Tribunal considers that the conduct of Energoatom is attributable to the Ukraine, in accordance with established principles of international law, where it is shown that Energoatom was exercising* puissance publique *(governmental authority) or acted on the instructions of, or under the direction or control of, the State in carrying out the conduct.*'

[555] Georgios Petrochilos, 'Attribution' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 287, 289.

[556] *See Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 186.

it *invariably* matters of *acta jure imperii* in the case of State instrumentalities under ARSIWA Article 5. Moreover, as above adumbrated, the attribution of *ultra vires* conducts operates only with regard to the latter, never to the former, which is not a trivial difference.

This attitude to multi-qualified (but eventually unqualified) attribution is driven by the arbitrators' strategic behaviour to garnish their conclusions *ad colorandum*, either to corroborate the same operative result based on alternative grounds, or – more startingly – to counterbalance the insufficiency of mandatory requirements established by a single imputability rule.[557] It is instead submitted that Tribunals should address rules of attribution individually in order to preserve the functioning and legal consequences of each of them. This embodies the irrefutable premise for a polished *jurisprudence* and, as a consequence, for possible contribution of international investment arbitration to the evolution of customary international law.

2.2 Umbrella Clauses

Contract claims are not – as a rule – subject to the jurisdiction of an ISDS Tribunal,[558] save for the inaccurate posture that the rule *pacta sunt servanda* produces an automatic

[557] Luca Schicho, 'Attribution and State Entities: Diverging Approaches in Investment Arbitration' (2011) 12 Journal of World Investment & Trade 283-288: '*Finally, tribunals should not compensate a lack of evidence for one ground of attribution by relying on facts relevant for another ground of attribution that is also not sufficiently substantiated: a miss is a miss, no matter the distance, and two misses do not make a hit - should an entity seem both "almost empowered" to exercise governmental authority and "almost controlled", its conduct remains, nonetheless, non-attributable.*'

[558] *Société Générale de Surveillance SA (SGS) v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, paras 166-167; *Waste Management, Inc v United Mexican States (Waste Mangement II)*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, para 160; *Joy Mining Machinery Limited v The Arab Republic of Egypt*, ICSID Case No ARB/03/11, Award on Jurisdiction, 6 August 2004, para 72; *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, paras 210, 214, 216, 260; *Consortium RFCC v Kingdom of Morocco*, ICSID Case No ARB/00/6, Decision on Jurisdiction, 16 July 2001, para 68; *Consortium RFCC v Kingdom of Morocco*, ICSID Case No ARB/00/6, Award, 22 December 2003, para 38: '*Le Tribunal considère qu'il n'existe pas de principe d'assimilation nécessaire des violations contractuelles aux violations d'un traité bilatéral*

'internationalization' of any governments' ordinary private undertakings.[559] However, a treaty claim may certainly be substantiated on the ground of sovereign conducts affecting the performance of a contract stipulated between a State and foreign investors.[560] In this respect, it should also be demonstrated that the transaction concerned is part of an economic operation that may qualify as investment for jurisdictional purposes.[561] Regardless, States – as Parties to IIAs – are at liberty to contract treaty provisions obliging them to observe *any* obligation they have entered into with a foreign investor (*umbrella clause*, *clause of observance of obligations or undertakings*, *clause de couverture*, *clause de respect des engagement*, *clause*

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d'investissement.'; *Cable Television of Nevis v Federation of St Kitts and Nevis*, ICSID Case No ARB/95/2, Award, 13 January 1997, para 2.22; *Azurix Corp v The Argentine Republic*, ICSID Case No ARB/01/12, Award, 14 July 2006, para 315; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 135, 180; *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, paras 53, 85; *Robert Azinian, Kenneth Davitian, & Ellen Baca v The United Mexican States*, ICSID Case No ARB (AF)/97/2, Award, 1 November 1999, para 87; *Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador*, ICSID Case No ARB/04/19, Award, 18 August 2008, para 342; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 292: '*The starting premise is that only the State as a sovereign can be in violation of its international obligations.*'; *Toto Costruzioni Generali SpA v The Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction, 11 September 2009, para 103.

[559] As to the *querelle* of the application of the principle *pacta sunt servanda* to contractual matters, *cf* Giorgio Sacerdoti, *I contratti tra Stati e stranieri nel diritto internazionale* (Giuffrè 1972) 325-328, 358-359, quoting Hans Wehberg, 'Pacta Sunt Servanda' (1959) 53 American Journal of International Law 775, 786; Paul de Visscher, 'Les aspects juridiques fondamentaux de la question de Suez' (1958) 62 Revue Générale de Droit International Public 400, 436-437; Philip C Jessup, 'Responsibility of States for Injuries to Individuals' (1946) 46 Columbia Law Review 903, 913; Clyde Eagleton, *The Responsibility of States in International Law* (New York University Press 1928) 167-168. For a certain support in eary arbitral practice, *see Affaire relative à la concession des phares de l'Empire ottoman (Lighthouses Arbitration) (France v Greece)*, 24 July 1956, 12 RIAA 155, 198-199.

[560] *Eureko BV v Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 June 2005, para 241: '*There is an amplitude of authority for the proposition that when a State deprives an investor of the benefit of its contractual rights, directly or indirectly, it may be tantamount to a deprivation in violation of the type of provision contained in Article 5 of the Treaty. The deprivation of contractual rights may be expropriatory in substance and in effect.*', quoting *Metalclad Corporation v The United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, paras 74-101; *CME Czech Republic BV v The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, paras 154-164. *Adde*, *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (formerly *Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux v Argentine Republic*) (*Vivendi I*), ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2003, para 110: '*the passage appears to imply that conduct of Tucumán carried out in the purported exercise of its rights as a party to the Concession Contract could not,* a priori*, have breached the BIT. However, there is no basis for such an assumption: whether particular conduct involves a breach of a treaty is not determined by asking whether the conduct purportedly involves an exercise of contractual rights.*'

[561] *Eureko BV v Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 June 2005, para 144: '*The Tribunal has a measure of hesitation in finding that Eureko's corporate governance rights under the SPA, standing alone, qualify as an investment under the Treaty. On balance, however, it finds that those rights, critical as they were to the conclusion of the SPA and hence to the making of Eureko's very large investment, do so qualify.*'

parapluie).[562] Such clauses are generally drafted in a mandatory language as in ECT Article 10.1, where it is established that '*Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party*' (*real* umbrella clauses).[563] Likewise, less peremptory provisions may endorse different obligations, namely duties of a primary nature to foster an adequate legal environment for the performance of foreign investment: '*Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party*.'[564] Besides, it should be remarked that – notwithstanding application of an umbrella clause – the principle of supremacy of international law, on one hand, and the principle of privity of contract, on the other hand,

[562] Gérard Cahin, 'La clause de couverture (dite *umbrella clause*)' (2015) 119 Revue Générale de Droit International Public 103; Yves Nouvel, 'La compétence matérielle: contrat, traité et clauses parapluie' in Charles Leben (ed), *La procédure arbitrale relative aux investissements internationaux. Aspects récents* (LGDJ 2010) 13; James Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24 Arbitration International 351; Thomas W Wälde, 'The "Umbrella" Clause in Investment Arbitration: a Comment on Original Intentions and Recent Cases' (2005) 6 Journal of World Investment & Trade 183; Christoph H Schreuer, 'Travelling the BIT Route – Of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5 Journal of World Investment & Trade 231; Walid Ben Hamida, 'La clause relative au respect des engagements dans les traités d'investissement' in Charles Leben (ed), *Le contentieux arbitral transnational relatif à l'investissement. Nouveaux développements* (LGDJ 2006) 53; Yuval Shany, 'Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims' (2005) 99 American Journal of International Law 835; Stephan W Schill, 'Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties' (2009) 18 Minnesota Journal of International Law 1; Anthony C Sinclair, 'The Origins of the Umbrella Clause in the International Law of Investment Protection' (2004) 20 Arbitration International 411; Nick Gallus, 'An Umbrella Just for Two? BIT Obligations Observance Clauses and the Parties to a Contract' (2008) 24 Arbitration International 157; Stanimir A Alexandrov, 'Breaches of Contract and Breaches of Treaty' (2004) 5 Journal of World Investment & Trade 555; Michael Feit, 'Attribution and the Umbrella Clause: is there a Way out of the Deadlock?' (2012) 21 Minnesota Journal of International Law 21; Michael Feit, 'Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity' (2010) 28 Berkeley Journal of International Law 142; Katia Yannaca-Small, 'What about this "Umbrella Clause"?' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 479.

[563] ECT Article 10(1). *Adde*, UK-Argentina BIT (1990) Article 2(2); Lebanon-Italy BIT (1997) Article 9(2); Germany-Ghana BIT (1995) Article 9(2); US-Romania BIT (1992) Article II(2)(c); Philippines-Switzerland BIT (1997) Article X(2); Netherlands-Poland BIT (1992) Article 3.5; Netherlands-Venezuela BIT (1991) Article 3(4); UK-Peru BIT (1993) Article 3(1).

[564] Pakistan-Switzerland BIT (1995) Article 11. *Adde*, Italy-Jordan BIT (1996) Article 2(4).

impose the corollary that treaty and contract claims maintain their analytical distinction even if entailed by the very same conduct of the State.[565]

Whether the effect of an umbrella clause is a complete 'internationalization' of the contractual claim is controverted. Various Tribunals have tended to side in favour of the transformation of the claim from contractual to 'international'.[566] For instance, the *Noble Ventures v. Romania* Tribunal held:

> An umbrella clause is usually seen as transforming municipal law obligations into obligations directly cognizable in international law. […] In other words, two States may include in a bilateral investment treaty a provision to the effect that, in the interest of achieving the objects and goals of the treaty, the host State may incur international responsibility by reason of a breach of its contractual obligations towards the private investor of the other Party, the breach of contract being thus "internationalized", i.e. assimilated to a breach of the treaty. In such a case, an international tribunal will be bound to seek to give useful effect to the provision that the parties have adopted.[567]

Nevertheless, a complete assimilation of breaches of contractual arrangements, although linked to a foreign investment, to breaches of an international investment treaty is hardly tenable. There is always a 'double-step' to be taken into consideration. Only the proper law of

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[565] *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (formerly *Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux v Argentine Republic*) *(Vivendi I)*, ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2003, para 96: '*whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract.*'; *Consortium RFCC v Kingdom of Morocco*, ICSID Case No ARB/00/6, Award, 22 December 2003, para 48: '*Une telle violation peut certes résulter d'une violation du contrat, mais sans qu'une éventuelle violation du contrat ne constitue, ipso jure et en elle-même, une violation du Traité, comme le Tribunal l'a rappelé ci-dessus*'; *Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador*, ICSID Case No ARB/04/19, Award, 18 August 2008, para 342; *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 258: '*the fact that a breach may give rise to a contract claim does not mean that it cannot also – and separately – give rise to a treaty claim. Even if the two perfectly coincide, they remain analytically distinct, and necessarily require different enquiries.*'; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005, para 148. *See* Bernardo M Cremades, 'Litigating Annulment Proceedings. The *Vivendi* Matter: Contract and Treaty Claims' in Emmanuel Gaillard and Yas Banifatemi (eds), *Annulment of ICSID Awards* (Juris Publishing, Inc 2004) 87, 93.

[566] *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, paras 115-118, 127; *Eureko BV v Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 June 2005, para 250; *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, para 54; *Petrobart Limited v The Kyrgyz Republic,* SCC Case No 126/2003, Arbitral Award, 29 March 2005, paras 27-28; *Fedax NV v The Republic of Venezuela*, ICSID Case No ARB/96/3, Award, 9 March 1998, para 29.

[567] *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, paras 53-54.

contract should govern contractual obligations (to the inclusion of *ultra vires* issues), determined upon application of the choice-of-law rules of the relevant system of private international law. Accordingly, the law applicable to an investment contract may be a national law (for instance, the law of the host State) or other laws, to the inclusion of general principles of international law, identified through the conflict-of-laws or *voie directe* method. Once a breach of contract has been found pursuant to the proper law, then the umbrella clause may intervene to allow an investor to *transpose* such a contract claim and its legal consequences from the municipal law arena to the forum provided by international law, consistent with a justification of efficiency and concentration of contentious remedies (umbrella clauses as dispute resolution agreements). Indeed, the umbrella clause functions as a lift from municipal (private) law to international investment law, but does not change the inherent nature of a contract claim.[568] This explains how the international law of State responsibility, to the inclusion of attribution rules, does not apply to determine the subjective and objective element of contractual breaches.[569] As James Crawford has warned:

> there has also been some confusion particularly between the law of attribution and issues of contractual responsibility or liability. […] The rules of attribution have nothing to do with questions of contractual responsibility.[570]

This elucidation allows examining the issue of the coverage of umbrella clauses in relation to contractual breach of State instrumentalities or parastatal entities (so called '*it*

[568] *Toto Costruzioni Generali SpA v The Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction, 11 September 2009, para 202: '*Although Article 9.2 of the Treaty may be used as a mechanism for the enforcement of claims, it does not elevate pure contractual claims into treaty claims. The contractual claims remain based upon the contract; they are governed by the law of the contract and may be affected by the other provisions of the contract.*'; *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, para 95.

[569] Zachary Douglas, 'Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 815, 819, fn 14.

[570] James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 ICSID Review – Foreign Investment Law Journal 127, 134.

problem').[571] In other words, the question is whether a foreign investor may file before an ISDS Tribunal a contract claim based on its arrangements with a State entity. The preponderant majority of investment Tribunals answers in the negative, notably emphasising that separarate juristic personality of parastatal entities precludes their inclusion in the '*it*' of the umbrella clause.[572] While it is recognised that attribution rules under public international law do not intervene with regard to an umbrella clause,[573] at the same time nothing prevents

[571] Gérard Cahin, 'La clause de couverture (dite *umbrella clause*)' (2015) 119 Revue Générale de Droit International Public 103, 133-135; Kaj Hobér, 'State Responsibility and Attribution' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 550, 575-582; Michael Feit, 'Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity' (2010) 28 Berkeley Journal of International Law 142, 161.

[572] *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 31 July 2000, para 60: '*However, the Tribunal considers that its scope of application regarding the nature of disputes is limited as to the persons concerned. In the case where the State has organised a sector of activity through a distinct legal entity, be it a State entity, it does not necessarily follow that the State has accepted* a priori *that the jurisdiction offer contained in Article 8 should bind it with respect to contractual breaches committed by this entity.*'; *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 223: '*the Contracts were concluded by a separate and distinct entity*'; *Limited Liability Company Amto v Ukraine*, SCC Case No 080/2005, Final Award, 26 March 2008, para 110: '*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.*'; *William Nagel v The Czech Republic*, SCC Case No 049/2002, Final Award, 9 September 2003, paras 162-163: '*When engaged in commercial activities, the State enterprise could not and did not act as an agent or instrumentality of the Government, and the Government did not assume any of the obligations or liabilities of the State enterprise's activities. Under the State Enterprise Act, a State enterprise could not bind the Government and the Government was not bound by a State enterprise's contractual obligations.*'; *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, para 95; *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction, 9 November 2004, paras 100-101: '*Indeed, the contract at issue was entered into between the Claimants and the Jordan Valley Authority, which under the laws of Jordan governing the contract, has a legal personality distinct from that of the Jordanian State.*'; *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, paras 317-319: '*There is in principle no responsibility by the State for such breach in the instant case since the State, not being a party to the contract, has not directly assumed the contractual obligations the breach of which is invoked. […] Attribution does not change the extent and content of the obligations arising under the ASRO Contract and the SKY Contract, that remain contractual, nor does it make Romania party to such contracts.*'; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 113: '*From a contractual standpoint, these actions were those of NHA and not of the Government of Pakistan*'.

[573] For confusion on this notion, *see Société Générale de Surveillance SA (SGS) v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para 167; *Eureko BV v Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 June 2005, para 121. For a doctrinal position advocating for the application of attribution rules to contract claims, *see* Kaj Hobér, 'State Responsibility and Attribution' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 550, 582: '*if the 'it' problem were to be solved by applying only municipal law - and not the rules of attribution of international law - it would seem that this would allow states to do precisely what the rules of state responsibility were intended to prevent, namely, to avoid responsibility by delegating responsibilities, to allow states to 'contract out' of state*

the proper law of contract to dispense theories of extension of substantive liability to the State in connection with the undertakings of its parastatals (*imputation de la volonté* vis-à-vis *imputation du comportement*).[574] The factual findings for the application of such theories may definitely include elements of governmental (corporate) control and direction, or instructions specifically received from the State by a SOE, similarly to a finding demanded by the structural test under ARSIWA Article 5 or the factual test under ARSIWA Article 8.[575] In addition, the consideration of the economic unity of the contractual dealings stipulated in relation to a foreign investment either by a State or its parastatals may support the extension of the contractual obligations (*engagement substantiel*), corresponding to the extension of the subjective scope of the arbitration agreement (*engagement juridictionnel*), which is also found in early ICSID arbitration based on investment contracts.[576] The resulting 'attribution of liability' may be then elevated to the public international law dimension so as to allow investors to bring a contract claim in investment arbitration based on their transactions involving SOEs.

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responsibility.'; Michael Feit, 'Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity' (2010) 28 Berkeley Journal of International Law 142, 163.

[574] Yves Nouvel, 'Les entités paraétatiques dans la jurisprudence du CIRDI' in Charles Leben (ed), *Le contentieux arbitral transnational relatif à l'investissement. Nouveaux développements* (LGDJ 2006) 25, 50. *See SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para 117; *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 167.

[575] Pierre-Marie Dupuy, 'Les émanations engagent-elles la responsabilité des Etats? Etude de droit international des investissements' (2006) EUI Working Paper LAW No 2006/7, 7-8: '*l'unification sous l'égide du droit international des solutions retenues en matière de responsabilité encourue par l'Etat pour les faits illicites de ses émanations n'est encore que partielle. Dans bien des cas, on doit relever la persistance, pas toujours aisément justifiable au regard du droit international classique, de solutions particulières. Révèlent elles le maintient d'une réticence chez certains arbitres ou la démonstration d'une spécificité de la matière, liée notamment à la dualité des types de requêtes soumises à l'arbitrage.*'

[576] *Holiday Inns v Morocco*, ICSID Case No ARB/72/1, Decision on Jurisdiction, 1 July 1973, unpublished, in Pierre Lalive, 'The First 'World Bank' Arbitration (*Holiday Inns v. Morocco*) - Some Legal Problems' (1980) 51 British Year Book of International Law 123, 159; *Klöckner Industrie Anlagen GmbH v Republic of Cameroon*, ICSID Case No ARB/81/2, Award, 21 October 1983, 2 ICSID Reports 3, 69; *SPP (Middle East) Ltd v The Arab Republic of Egypt*, ICC Case No 3493, Award, 16 February 1983, para 41, 22 ILM 752; *SARL Benvenuti & Bonfant v People's Republic of the Congo*, ICSID Case No ARB/77/2, Award, 8 August 1980, para 4.40, 1 ICSID Reports 354.

In addition to the ordinary functioning of the proper law governing contractual arrangements, States may expressly stipulate umbrella clauses where they establish that the '*it'* also includes State instrumentalities (or also territorial sub-state entities). Upon closer inspection, this clause – nearly absent in State practice – would entail an effect of *ex post* '*ratification'* of conduct, which as such is extraneous to the mechanism of a proper attribution rule of customary international law, consistent with the posture traditionally applied to umbrella clauses.[577] Finally, as above mentioned, States may also create a duty for their organs to ensure or monitor performance of contracts concluded between their instrumentalities or monopolies and foreign investors, as in ECT Article 22, which operates at the level of primary obligations and does not affect issues of attribution.[578]

2.3 Merits v. Jurisdiction

Once the jurisdiction of an international Tribunal is established, attribution issues receive preliminary analysis in comparison to the other secondary rules and to the applicable primary rules. Thus, the attribution of conducts to a State for the purposes of its international responsibility is to be considered as a question of merits, not of jurisdiction, in that it represents the 'subjective' element of an internationally wrongful act.[579] In the realm of ISDS, attribution of acts and omissions to a State should be pleaded by the claimant investor and correspondingly demonstrated. Therefore, it is appropriate to provide a brief account of the

[577] *See supra* in this paragraph.
[578] *Nykomb Synergetics Technology Holding AB v The Republic of Latvia*, SCC, Arbitral Award, 16 December 2003, para 4.2.
[579] Christian Tomuschat, 'Attribution of International Responsibility: Direction and Control' in Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013) 7, 33.

evidentiary standards required in investment arbitration in the jurisdictional vis-à-vis merits phase.

Based on a general principle of international law, each party to the process has to prove the facts, on which its allegations are grounded (*onus probandi incumbit ei qui dicit, non ei qui negat*).[580] International courts and Tribunals have methodically distinguished the intensity of the burden of proof in the jurisdictional and merits phase.[581] In her Separate Opinion to the Preliminary Objection decision in the *Oil Platform* case, Judge Higgins addressed the various solutions rendered by the World Court in relation to the evidentiary burden at the jurisdictional stage.[582] In this historic review, she emphasised the interpretative contrast between the requirement of a sufficient *prima facie* case (a '*provisional conclusion*') for jurisdiction,[583] and the alternative view that a conclusive connection between the subject

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[580] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Jurisdiction and Admissibility, Judgment, 26 November 1984, para 101, ICJ Reports 1984, 392, 437: '*it is the litigant seeking to establish a fact who bears the burden of proving it*'; *Avena and Other Mexican Nationals (Mexico v United States of America)*, Judgment, 31 March 2004, para 55, ICJ Reports 2004, 12, 41. In the ISDS context, *see Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award, 1 June 2009, para 315: '*As to the burden of proof, the general rule, well established in international arbitrations, is that the Claimant bears the burden of proof with respect to the facts it alleges and the Respondent carries the burden of proof with respect to its defences.*'; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador*, UNCITRAL, PCA Case No 34877, Interim Award, 1 December 2008, para 138. *Adde*, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (reprinted Cambridge University Press 2006, first published Stevens & Sons, Ltd 1953) 326 *et seq.*

[581] The ICJ has not invariably adopted the qualification of jurisdictional issues as matters of fact, susceptible to be proven by the parties. *See Fisheries Jurisdiction (Spain v Canada),* Jurisdiction of the Court, Judgment, 4 December 1998, paras 37-38, ICJ Reports 1998, 432, 450-451: '*the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself. […] the establishment of the Court's jurisdiction […] is a "question of law to be resolved in the light of the relevant facts." […] That being so, there is no burden of proof to be discharged in the matter of jurisdiction*', quoting *Border and Transborder Armed Actions (Nicaragua v Honduras)*, Jurisdiction and Admissibility, Judgment, 20 December 1988, para 16, ICJ Reports 1988*,* 69, 76; and *The Factory at Chorzów*, Jurisdiction, Judgment No 8, 26 July 1927, PCIJ Reports 1927, Series A, No 9, 32.

[582] *Oil Platform (Islamic Republic of Iran v United States of America)*, Preliminary Objection, Judgment, Separate Opinion of Judge Higgins, 12 December 1996, paras 9-26, ICJ Reports 1996, 803, 847. *Adde*, *Oil Platform (Islamic Republic of Iran v United States of America)*, Judgment, Separate Opinion of Judge Higgins, 6 November 2003, para 33, ICJ Reports 2003, 161, 234: '*[t]he principal judicial organ of the United Nations should likewise make clear what standards of proof it requires to establish what sorts of facts.*'

[583] *Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8th, 1921*, Advisory Opinion, 7 February 1923, PCIJ Reports 1923, Series B, No 4, 26; *Ambatielos (Greece v United Kingdom)*, Merits: Obligation to Arbitrate, Judgment, 19 May 1953, ICJ Reports 1953, 10, 18: '*a sufficiently plausible character to warrant a conclusion that the claim is based on the Treaty*'; *Interhandel (Switzerland v United States of America)*, Preliminary Objections, Judgment, 21 March 1959, ICJ Reports 1959, 6, 24.

matter of the claim and the asserted basis for jurisdiction must be thoroughly assessed *in limine litis*.[584] She concluded that the decision whether an international court is vested of jurisdiction should be definitive and should be based on the *pro tempore* finding that the facts, as alleged by the claimant, if established, could result in a breach of the applicable international obligations.[585]

Investment Tribunals have comprehensively applied the evidentiary standard proposed by Judge Higgins. Accordingly, at the jurisdictional phase, arbitrators retain *prima facie* competence on the claim in case the facts or contentions presented by the investor, if proven, would possibly establish a case of violation of the relevant investment treaty.[586] At the same

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[584] *Mavrommatis Palestine Concessions (Greece v United Kingdom)*, Judgment No 2, 30 August 1924, PCIJ Reports 1924, Series A, No 2, 15-17, 24.

[585] *Oil Platform (Islamic Republic of Iran v United States of America)*, Preliminary Objection, Judgment, Separate Opinion of Judge Higgins, 12 December 1996, paras 31-32, 34, ICJ Reports 1996, 803.

[586] *Ambiente Ufficio SpA et al v Argentine Republic* (formerly *Giordano Alpi et al v Argentine Republic*), ICSID Case No ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, paras 535-540; *Abaclat et al v Argentine Republic* (formerly *Giovanna Beccara et al v The Argentine Republic*), ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para 303, 311, 314-315; *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, paras 84-91; *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para 2.5; *Phoenix Action, Ltd v The Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009, para 61; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 143: '*If jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage. However, if facts are alleged in order to establish a violation of the relevant BIT, they have to be accepted as such at the jurisdictional stage, until their existence is ascertained (or not) at the merits stage.*'; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005, paras 196-197; *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 237 *et seq*, 254; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005, paras 118-119, 128, 132; *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction, 9 November 2004, para 137 *et seq*, 151: '*The Tribunal is in full agreement with this jurisprudence. It reflects the balance to be struck between two opposing preoccupations: to ensure that courts and tribunals are not flooded with claims which have no chance of success and sometimes are even of an abusive nature; but to ensure equally that, in considering issues of jurisdiction, courts and tribunals do not go into the merits of cases without sufficient prior debate.*'; *Siemens AG v The Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004, para 180; *Société Générale de Surveillance SA (SGS) v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para 26, 157: '*Provided the facts as alleged by the Claimant and as appearing from the initial pleadings fairly raise questions of breach of one or more provisions of the BIT, the Tribunal has jurisdiction to determine the claim*.'; *Société Générale de Surveillance SA (SGS) v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para 145; *United Parcel Service of America Inc (UPS) v Government of Canada*, UNCITRAL, Award on Jurisdiction, 22 November 2002, para 36; *Wena Hotels Limited v Arab Republic of*

time, in case jurisdiction is necessarily dependent on the existence of given facts, Tribunals invariably require them to be finally proven in the jurisdictional phase upon fulfillment of a higher standard of evidence than the *prima facie* test.[587] Indeed, the distinction between facts establishing a breach of the applicable treaty and facts representing requirements for the Tribunal's competence is of threshold importance and reasonably supports a different standard of the burden of proof at the stage of jurisdiction:

> In sum, the Tribunal considers that as a general approach, it is correct that factual matters should provisionally be accepted at face value, since the proper time to prove or disprove such facts is during the merits phase. But when a particular circumstance constitutes a critical element for the establishment of the jurisdiction itself, such fact must be proven, and the Tribunal must take a decision thereon when ruling on its jurisdiction. In our case, this means that the Tribunal must ascertain that the prerequisites for its jurisdiction are fulfilled, and that the facts on which its jurisdiction can be based are proven.[588]

Factual issues pertaining to attribution should be completely demonstrated in the merits phase of an investment case.[589] Indeed, imputability might not be cristal-clear at a preliminary phase of the international process, in that issues of attribution may hinge on factual or substantive

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Egypt, ICSID Case No ARB/98/4, Decision on Jurisdiction, 29 June 1999, 41 ILM 881, 890-891; *Amco Asia Corporation, Pan American Development Limited and PT Amco Indonesia v Republic of Indonesia*, ICSID Case No ARB/81/1, Decision on Jurisdiction, 25 September 1983, para 38, 1 ICSID Reports 389; *Methanex Corporation v United States of America*, UNCITRAL, Partial Award, 7 August 2002, para 116 *et seq*, 121.

[587] *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, paras 2.8-2.11; *Phoenix Action, Ltd v The Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009, paras 61-64; *Inceysa Vallisoletana, SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award, 2 August 2006, para 155; *Industria Nacional de Alimentos, SA and Indalsa Perú, SA v The Republic of Peru* (formerly *Empresas Lucchetti, SA and Lucchetti Peru, SA v The Republic of Peru*), ICSID Case No ARB/03/4, Decision on Annulment, 5 September 2007, paras 118-119; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 143; *National Gas SAE v Arab Republic of Egypt*, ICSID Case No ARB/11/7, Award, 3 April 2014, para 118.

[588] *Phoenix Action, Ltd v The Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009, para 64.

[589] *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para 144: '*it is not for the Tribunal at the jurisdictional stage to examine whether the acts complained of give rise to the State's responsibility, except if it were manifest that the entity involved had no link whatsoever with the State. This is plainly not the case in the present dispute.*'; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Decision on Jurisdiction, 16 June 2006, para 89: '*When assessing the merits of the dispute, the Tribunal will rule on the issue of attribution under international law.*' *But see Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v The Argentine Republic*, ICSID Case No ARB/09/1, Decision on Jurisdiction, 21 December 2012, para 271: '*While Respondent asserts that substantial case law supports its position that the question of attribution is jurisdictional in nature, this case law also recognizes that not all questions of attribution are identical or involve an identical context.*'; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 140: '*The question whether the issue of attribution is, in a given case, one of jurisdiction or of merits is not, in the Tribunal's view, susceptible of a clear-cut answer.*'

elements to be ascertained in the course of the merits phase.[590] Accordingly, factual issues of imputability are subject to the *prima facie* ('*at first sight*') scrutiny applicable to merits claims at the stage of jurisdiction (*pro tem* conclusion that the facts alleged by the claimant, if established, can meet the factual requirements demanded by the rules of attribution).[591] When the proceedings of an international investment dispute are bifurcated, the distinction between the evidentiary standards applicable at the jurisdictional and merits phase is more palpable. However, this reasoning is generally rapid in the arbitral decisions on jurisdiction. This is understood in light of the claimants' strategy to invariably plead attribution to State organs of the measures at issue. Accordingly, mere contentions of governmental actions *ex* ARSIWA Article 4 would be sufficient to meet the *prima facie* test with regard to attribution, being it unnecessary to further investigate imputability under ARSIWA Articles 5 or 8.[592]

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[590] *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, paras 142-143: '*Not all issues, however, are so discrete or easily answered. Many—as is the case with attribution—entail more complex considerations, which could be characterized both as jurisdictional and relevant to the merits (and so to be considered only if the Tribunal has jurisdiction). Moreover, each of the alleged acts is closely connected to the question of whether Respondent has committed substantive violations of the BIT. […] The question of "attribution" does not, itself, dictate whether there has been a violation of international law. Rather, it is only a means to ascertain whether the State is involved. As such, the question of attribution looks more like a jurisdictional question. But in many instances, questions of attribution and questions of legality are closely intermingled, and it is difficult to deal with the question of attribution without a full enquiry into the merits.*'

[591] *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 266(a)-(b); *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para 145: '*In fact, at first sight at least, Petrobangla appears to be part of the State under Bangladeshi law.*'; *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000, para 89: '*the Tribunal concludes that the Claimant has made out a* prima facie *case that SODIGA is a State entity acting on behalf of the Kingdom of Spain.*'

[592] *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 31 July 2000, para 30: '*Since the claims of the Italian companies are being directed against the State and are founded on the violation of the Bilateral Treaty, it is not necessary, in order to determine whether the Tribunal has jurisdiction, to know whether ADM is a State entity*'; *Consortium RFCC v Kingdom of Morocco*, ICSID Case No ARB/00/6, Decision on Jurisdiction, 16 July 2001, para 34: '*Les demandes du Consortium étant dirigées contre l'Etat et fondées sur la violation de l'Accord bilatéral, il n'est pas nécessaire, pour la détermination de la compétence du Tribunal, de savoir si ADM est une émanation de l'Etat.*'; *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No ARB/05/19, Decision on Jurisdiction, 17 October 2006, para 91: '*The Arbitral Tribunal does not need to decide on the status of EGOTH in order to assess its jurisdiction in this case. It has already found that the Claimant has established the existence of a* prima facie *dispute directly arising out of an investment and involving EGYPT and that the dispute falls within the temporal scope of the Treaty. However, since the parties have thoroughly discussed this point, it considers* ex abundanti cautela *that it is its duty to solve this disputed issue in this Decision.*'; *Salini Costruttori SpA and Italstrade SpA*

States retains also the prerogative to widen the scope of the jurisdiction *ratione personae* of an ICSID Tribunal pursuant to ICSID Convention Article 25(1)-(3).[593] Such provisions allow States to unilaterally *designate* constituent subdivisions or agencies of a Contracting State, thus creating a *special* jurisdictional mechanism enabling such entities to be party to ICSID arbitration *eo nomine*.[594] The Convention does not expressly mention State

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v The Hashemite Kingdom of Jordan, ICSID Case No ARB/02/13, Decision on Jurisdiction, 9 November 2004, para 64; *Romak SA (Switzerland) v The Republic of Uzbekistan*, UNCITRAL, PCA Case No AA280, Award, 26 November 2009, para 161. In a different vein, *cf Aguas del Tunari, SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para 137: '*The Parties raise a number of issues which require more extensive findings based on additional evidence. At this jurisdictional phase of the proceedings, the Tribunal need not determine the questions of (1) attribution and State responsibility under the BIT, or (2) the precise relationship between the Republic of Bolivia and the Water Superintendency. These questions will be determined later, as needed, at the merits phase of the Tribunal's proceedings.*'

[593] Christoph Schreuer, with Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (Cambridge University Press, 2° edn 2009) 152, para 237: '*Therefore, designations of constituent subdivisions or agencies serve procedural convenience but do not affect questions of State responsibility. The State entity's party status is independent of the issue of the attribution of its actions to the State. In some instances the State entity may be the only potential respondent under the rules of State responsibility. In other cases, where attribution can be established, the State is an alternative or additional respondent despite the designation.*'; Yves Nouvel, 'Les entités paraétatiques dans la jurisprudence du CIRDI' in Charles Leben (ed), *Le contentieux arbitral transnational relatif à l'investissement. Nouveaux développements* (LGDJ 2006) 25, 28; Clifford Larsen, 'ICSID Jurisdiction: the Relationship of Contracting States to Sub-states Entities' in Norbert Horn (ed), *Arbitrating Foreign Investment Disputes* (Kluwer Law International 2004) 353, 358-359.

[594] *Repsol YPF Ecuador, SA and others v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No ARB/01/10, Award, 20 February 2004, para 120; *Repsol YPF Ecuador, SA et al v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No ARB/08/10, Procedural Order No 1, 17 June 2009; *Perenco Ecuador Ltd v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/08/6, Decision on Jurisdiction, 30 June 2011, paras 6-9; *Scimitar Exploration Limited v Bangladesh and Bangladesh Oil, Gas and Mineral Corporation*, ICSID Case No ARB/92/2, Award, 4 May 1994; *City Oriente Ltd v Republic of Ecuador and Petroecuador*, ICSID Case No ARB/06/21, Decision on Provisional Measures, 19 November 2007; *Burlington Resources Inc v Republic of Ecuador* (formerly *Burlington Resources Inc and others v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*), ICSID Case No ARB/08/5, Decision on Jurisdiction, 2 June 2010; *Manufacturers Hanover Trust v Arab Republic of Egypt General Authority for Investment and Free Zones*, ICSID No ARB/89/1, Order Taking Note of the Discontinuance, 24 June 1993; *Government of the Province of East Kalimantan v PT Kaltim Prima Coal and others*, ICSID Case No ARB/07/3, Award, 28 December 2009; *Noble Energy, Inc and Machalapower Cia Ltda v The Republic of Ecuador and Consejo Nacional de Electricidad (CONELEC)*, ICSID Case No ARB/05/12, Decision on Jurisdiction, 5 March 2008, para 63; *Cable Television of Nevis Ltd and Cable Television of Nevis Holdings, Ltd v The Federation of St Christopher (St Kitts) and Nevis*, ICSID Case No ARB/95/2, Award, 13 January 1997, para 2.28; *Tanzania Electric Supply Company Limited v Independent Power Tanzania Limited (IPTL)*, ICSID Case No ARB/98/8, Final Award, 12 July 2001, para 13.

intrumentalities or enterprises, but a functional reading may subsume them under the provision of ICSID Convention Article 25(1).[595]

In connection with this special mechanism, the status of designated entity pursuant to ICSID Convention Article 25(1) embodies a factual element that is determinative of the jurisdiction *ratione personae* of the Tribunal and, accordingly, should be proven upon fulfilment of a complete evidentiary standard.[596] To this extent, it would be required to the investor to file evidence with regard to the specific involvement of the entity in the dispute, its designation by the host State or the latter's approval or notification pursuant to ICSID Convention Article 25(3) in relation to the consent to arbitration formulated by the entity itself in the investment contract.[597]

3. State Organs

In line with the *Gestalt* of the international law of State responsibility, the municipal constitutional principle of the separation of the State powers is not of particular relevance as

[595] *Cable Television of Nevis Ltd and Cable Television of Nevis Holdings, Ltd v The Federation of St Christopher (St Kitts) and Nevis*, ICSID Case No ARB/95/2, Award, 13 January 1997, para 2.28: '*a government statutory corporation or a company incorporated under national/local legislation in which the Government has some interest or shareholding.*' *See* Christoph Schreuer, with Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (Cambridge University Press, 2° edn 2009) 153, para 243: '*The concept of "agency" should be read not in structural terms but functionally. This means that whether the "agency" is a corporation, whether and to what extent it is government-owned and whether it has separate legal personality are of secondary importance. What matters is that it performs public functions on behalf of the Contracting State or one of its constituent subdivisions.*'; C F Amerasinghe, 'Jurisdiction *Ratione Personae* Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' (1974-1975) 47 British Year Book of International Law 227, 233-234; C F Amerasinghe, 'The Jurisdiction of the International Centre for the Settlement of Investment Disputes' (1979) 19 Indian Journal of International Law 166, 185-186.

[596] *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v The Argentine Republic*, ICSID Case No ARB/09/1, Decision on Jurisdiction, 21 December 2012, para 272: '*Case law on this subject* does *support the conclusion that matters of state attribution should be adjudicated at the jurisdictional stage when they represent a fairly cut-and-dry issue that will determine whether there is jurisdiction.*'

[597] 'Designations by Contracting States Regarding Constituent Subdivisions or Agencies (Art. 25(1) and (3) of the Convention)', ICSID/8-C (May 2015).

to the application of attribution rules.[598] Accordingly, international investment Tribunals do not emphasise distinctions based on the position of a State organ into a given branch or level of government, but rather comprehensively analyse whether an exercise of authority by a sovereign power has occurred,[599] so as to possibly identify a measure of a Party, by way of act or omission,[600] to be subsumed under the relevant IIA.[601] In the context of the international protection of foreign direct investment (FDI), non-canonical forms of the phenomenology of authority (for instance an administrative *practice*) may adversely affect the value of the investment and, as a consequence, enlarge the traditional set of State conducts susceptible to

[598] Ian Brownlie, *System of the Law of Nations. State Responsibility. Part I* (Clarendon Press 1983) 133, 136, 142, 150.

[599] Argentina-Spain BIT (1991) Article V (*Nationalization and Expropriation*): '*Nationalization, expropriation or any other measure having similar characteristics or effects that might be adopted by the authorities of one Party (*autoridades de una Parte*) against invest ments made in its territory by investors of the other Party.*' *See Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000, para 74.

[600] *Eureko BV v Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 June 2005, para 185 *et seq*.

[601] *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award, 29 July 2008, para 338; *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, para 108: '*In so far as the international liability of Argentina under the Treaty is concerned, it also does not matter whether some actions were taken by the judiciary and others by an administrative agency, the executive or the legislative branch of the State. Article 4 of the Articles on State Responsibility adopted by the International Law Commission is abundantly clear on this point.*'; *Loewen Group, Inc and Raymond L Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, 5 January 2001, para 70: '*The modern view is that conduct of an organ of the State shall be considered as an act of the State under international law, whether the organ be legislative, executive or judicial, whatever position it holds in the organisation of the State.*'; *Eureko BV v Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 June 2005, para 127: '*In the perspective of international law, it is now a well settled rule that the conduct of any State organ is considered an act of that State and that an organ includes any person or entity which has that status in accordance with the internal law of that State.*'; *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, para 69: '*Art. 4 2001 ILC Draft lays down the well-established rule that the conduct of any State organ, being understood as including any person or entity which has that status in accordance with the internal law of the State, shall be considered an act of that State under international law.*'; *MCI Power Group LC and New Turbine, Inc v Republic of Ecuador*, ICSID Case No ARB/03/6, Award, 31 July 2007, para 225, fn 24; *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8,
Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, para 108: '*In so far as the international liability of Argentina under the Treaty is concerned, it also does not matter whether some actions were taken by the judiciary and others by an administrative agency, the executive or the legislative branch of the State. Article 4 of the Articles on State Responsibility adopted by the International Law Commission is abundantly clear on this point.*'

be scrutinized by an international jurisdiction according to ARSIWA Article 4.[602] This might be also the case with regard to press conferences, declarations or speeches, even of an informal nature, delivered by heads of State or local governments, or ministries of the host State, announcing the introduction of normative measures generally or specifically affecting a foreign investment, endorsing given conducts by citizens, or suggesting the termination of a concession contract by the government or one of its SOEs.[603]

3.1 Organs of the Central Government

Investment Tribunals have recognized as chiefly attributable to the State (*ex* ARSIWA Article 4) the conducts of the legislative,[604] executive,[605] and judicial powers,[606] as well as of '*any other functions*'.[607] The most 'populated' category is by largest majority represented by acts and omissions being ascribed to the executive branch, such as those of political authorities,[608]

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[602] *Ethyl Corp v The Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998, para 66: '*Clearly something other than a "law", even something in the nature of a "practice", which may not even amount to a legal stricture, may qualify.*'

[603] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, Award, 24 July 2008, para 497: '*On 13 May 2005, against the backdrop of forthcoming elections in Tanzania in which Minister Lowassa was running for the office of Prime Minister, the Tanzanian Government issued a press release in which Minister Lowassa announced the termination of the Lease Contract. This was followed by a similar declaration on television.*' *Contra*, *Tradex Hellas SA v Republic of Albania*, ICSID Case No ARB/94/2, Award, 29 April 1999, para 156: '*But the Berisha speech was neither a legislative or executive act nor did it change the situation found above in Section e) created by Decision 452.*'

[604] *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para 186; *EnCana Corporation v Republic of Ecuador*, LCIA Case No UN3481, UNCITRAL, Award, 3 February 2006, para 157(a); *William Nagel v The Czech Republic*, SCC Case No 049/2002, Final Award, 9 September 2003, para 109.

[605] *Ex multis*, *Eureko BV v Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 June 2005, para 129.

[606] *Ex multis*, *Loewen Group, Inc and Raymond L Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, 5 January 2001, para 70 *et seq*.

[607] *Alex Genin, Eastern Credit Limited, Inc and AS Baltoil v The Republic of Estonia*, ICSID Case No ARB/99/2, Award, 25 June 2001, para 327.

[608] *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 227 (Ministry of Commerce, Ministry of Finance and Ministry of Water and Power); *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 175 (Prime Minister of Egypt); *Eureko BV v Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 June 2005, para 129 (Minister of the State Treasury of Poland); *Gustav F W Hamester GmbH & Co KG v*

military and armed forces,[609] ordinary police officials or financial guards,[610] customs authorities,[611] tax agencies,[612] environmental agencies,[613] and administrative offices in general.[614] Various investment cases have addressed the conducts of domestic courts, as such clearly covered by the cloak of attributability.[615] While this rule also encompasses quasi-judicial organs,[616] Tribunals have not abstained to remark the irrelevance of the constitutional

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Republic of Ghana, ICSID Case No ARB/07/24, Award, 18 June 2010, para 293 (Ministry of Finance of Ghana); *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No ARB/05/19, Award, 3 July 2008, para 56; *Tradex Hellas SA v Republic of Albania*, ICSID Case No ARB/94/2, Award, 29 April 1999, para 142.

[609] *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 264 (failure to ensure access to the Kamra Military base); *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award, 27 June 1990, para 44; *Amco Asia Corporation, Pan American Development Limited and PT Amco Indonesia v Republic of Indonesia*, ICSID Case No ARB/81/1, Award, 20 November 1984, 1 ICSID Reports 413, 431, 438.

[610] *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 292: '*The police force is clearly a State organ and the acts performed during a police investigation are therefore attributable to the State.*'; *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award, 8 December 2000, para 109, 41 ILM 896; *Amco Asia Corporation, Pan American Development Limited and PT Amco Indonesia v Republic of Indonesia*, ICSID Case No ARB/81/1, Award, 20 November 1984, 1 ICSID Reports 413, 431, 438; *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para 186.

[611] *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 264 (failure to facilitate importation of equipment through the port of Karachi); *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 295 (suspension of any shipment by the investor).

[612] *EnCana Corporation v Republic of Ecuador*, LCIA Case No UN3481, UNCITRAL, Award, 3 February 2006, para 157(a) (Servicio de Rentas Internas or SRI).

[613] *Técnicas Medioambientales Tecmed, SA v The United Mexican States*, ICSID Case No ARB (AF)/00/2, Award, 29 May 2003, para 151 (Hazardous Materials, Waste and Activities Division of the National Ecology Institute of Mexico or INE).

[614] *Telenor Mobile Communications AS v The Republic of Hungary*, ICSID Case No ARB/04/15, Award, 13 September 2006, para 71.

[615] *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award, 1 June 2009, para 192; *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para 143; *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Award, 30 June 2009, para 190: '*It is self-evident and Bangladesh does not dispute that the courts are "part of the State",* i.e.*, an organ of the State in the meaning of Article 4 of the ILC Articles.*'; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 175: '*There is no doubt either that the Administrative Court of Ismaïlia qualifies as an organ of the State within the meaning of Article 4 of the ILC Articles, as acknowledged by the Respondent's expert.*'; *Toto Costruzioni Generali SpA v The Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction, 11 September 2009, para 152 *et seq*; *RosInvestCo UK Ltd v The Russian Federation*, SCC Case No V079/2005, Final Award, 12 September 2010, para 603; *Loewen Group, Inc and Raymond L Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, 5 January 2001, para 70; *Robert Azinian, Kenneth Davitian, & Ellen Baca v The United Mexican States*, ICSID Case No ARB (AF)/97/2, Award, 1 November 1999, paras 97-103.

[616] *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 175 (Second Panel of Experts; Committee for Settling the Complaints of Foreign Investors).

prerogative of independence of the judiciary, where applicable, for the sake of imputation of conducts to the State.[617] These cases usually consist of claims of 'denial of justice', both substantive and procedural, falling under the umbrella of the fair and equitable treatment (FET) standard of protection and as such entailing a gross or shocking departure of national judges from the international standards of due process and fair trail.[618] A finding of denial of justice inherently requires the exhaustion of local remedies as an element of the merits of the claim, not for its admissibility, as it is instead the case in relation to so called *Calvo clauses*, *rectius*, *soft Calvo clauses* (for instance, eighteen months litigation provisions) provided by the IIA in conformity with ICSID Convention Article 26.[619]

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[617] *Robert Azinian, Kenneth Davitian, & Ellen Baca v The United Mexican States*, ICSID Case No ARB (AF)/97/2, Award, 1 November 1999, para 98, quoting Eduardo Jiménez de Aréchaga, 'International Law in the Past Third of a Century' (1978-I) 159 Recueil des Cours 1, 278: '*the judgment given by a judicial authority emanates from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive.*'

[618] *Loewen Group, Inc and Raymond L Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, Award, 26 June 2003, paras 54, 87, 95, 119, 122, 132, 135, 224, 242, where the domestic proceedings have been variously addressed with the expressions '*miscarriage of justice*', '*manifest injustice*', judicial '*mystery*', '*disgrace'*, '*nefarious practice*' and '*lack of due process*' towards the foreign investor; *Robert Azinian, Kenneth Davitian, & Ellen Baca v The United Mexican States*, ICSID Case No ARB (AF)/97/2, Award, 1 November 1999, paras 102-103; *Waste Management, Inc v United Mexican States (Waste Management II)*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, para 130; *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002, para 127: '*In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.*'; *ADF Group Inc v United States of America*, ICSID Case No ARB (AF)/00/1, Award, 9 January 2003, para 190; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador*, UNCITRAL, PCA Case No 34877, Partial Award on the Merits, 30 March 2010, paras 389 *et seq*; *Toto Costruzioni Generali SpA v The Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction, 11 September 2009, para 156; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, paras 184 *et seq*.; *Waste Management, Inc v United Mexican States (Waste Management II)*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, para 98; *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (formerly *Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux v Argentine Republic*) (*Vivendi II*), ICSID Case No ARB/97/3, Award, 20 August 2007, para 7.4.11.

[619] Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press 2007) 245-246: '*States are held to an obligation to provide a fair and efficient system of justice, not to an undertaking that there will never be an instance of judicial misconduct. National responsibility for denial of justice occurs only when the system as a whole has been tested and the initial delict has remained uncorrected […] The very definition of denial of justice encompasses the notion of exhaustion of local remedies. There can be no denial of justice before exhaustion.*' *Adde*, *Loewen Group, Inc and Raymond L Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, 5 January 2001, para 71: '*Viewed in this light, the rule of judicial finality is no different from the local remedies rule. Its*

ISDS also provides innovative findings on organs of the State exercising '*any other functions*' outside the classic Montesquivian tripartition of powers, thus contributing to the evolution of customary international law on the issue. The open-ended formula of ARSIWA Article 4 notably comprises independent public law bodies and agencies chiefly entrusted with regulatory, monitoring and administrative functions in connection with services of general public interest. Upon analysis of the status of the central bank of Estonia, the *Alex Genin v. Estonia* Tribunal, established under the US-Estonia BIT (1994), concluded:

> The Bank of Estonia is an agency of a Contracting State. The Estonian central bank is a "state agency", as defined by the BIT, which stipulates in Article II 2(b) that "Each Party shall ensure that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under this Treaty 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…". The Republic of Estonia is therefore the appropriate Respondent to a complaint relating to the conduct of the Bank of Estonia.[620]

The circumstance of a public entity benefitting of separate juristic personality under domestic law does not preclude a finding of '*de iure*' organ.[621] However, it usually matters of separate

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purpose is to ensure that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.'

[620] *Alex Genin, Eastern Credit Limited, Inc and AS Baltoil v The Republic of Estonia*, ICSID Case No ARB/99/2, Award, 25 June 2001, para 327.

[621] *Eureko BV v Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 August 2005, para 120 (Polish State Treasury); *Toto Costruzioni Generali SpA v The Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction, 11 September 2009, para 46, 56: '*The circumstances in which the CEGP and/or the CDR would be considered separate entities pursuant to Lebanese law would be irrelevant in this context: a State cannot escape international responsibility by delegating its State functions to entities to which it gives separate. […] Moreover, the CDR acts as an agent of the State.*'; *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, paras 287-292 (National Television and Radio Council of Ukraine, '*a "*constitutional permanent collegiate agency*". Its activities "*shall be based upon the principles of legality, independence, impartiality, transparency...'); *Empresa Eléctrica del Ecuador, Inc (EMELEC) v Republic of Ecuador*, ICSID Case No ARB/05/9, Award, 2 June 2009, para 41 (National Electricity Council - Consejo Nacional de Electricidad or CONELEC); *MCI Power Group LC and New Turbine, Inc v Republic of Ecuador*, ICSID Case No ARB/03/6, Award, 31 July 2007, para 225: '*The Tribunal finds that INECEL, in light of its institutional structure and composition as well as its functions, should be considered, in accordance with international law, as an organ of the Ecuadorian State.*' (Instituto Ecuatoriano de Electrificación or INECEL); *Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador*, ICSID Case No ARB/04/19, Award, 18 August 2008, para 10 (Instituto Ecuatoriano de Electrificación or INECEL); *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, para 582: '*the fact that the Mongolian Parliament has created it as an institution independent of the Government does not per se make it lose its status as an organ of the State. In fact, it fulfills a major State function and the list of its responsibilities clearly demonstrates that it fulfills a role that*

legal personality of public law (for instance, *personnes morales de droit public* or *établissements publics administratifs*) established by national Constitution or statute.[622] The creation of separate legal entities of public law within the *internal* perimeter of the State, does not preclude a finding of a certain body to be on organ of the State (acting *on behalf of* it) pursuant to the *renvoi*, as above defined,[623] of international law to the internal law of that State.[624] Such agencies eminently exercise sovereign powers on an *institutional* basis.[625] Accordingly, the attribution of their acts and omissions is governed by ARSIWA Article 4, to the inclusion of commercial acts. On the contrary, separate juristic personality of private law generally orients the interpreter to a finding of the status of State instrumentality or parastatal

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only a State can fulfill: exclusive right to issue currency, formulation and implementation of monetary policy, acting as the Government's financial intermediary; supervising activities of other banks; holding and managing the State's reserves of foreign currencies' (MongolBank); *Nykomb Synergetics Technology Holding AB v The Republic of Latvia*, SCC, Arbitral Award, 16 December 2003, para 1.1, 4.2: '*The State Joint-Stock Company Latvenergo ("Latvenergo") was organized as a state enterprise under Latvian law in 1991, and was in 1993 transformed into a joint stock company under Latvian law. The Republic of Latvia (the "Republic") owns 100 per cent of the shares in Latvenergo. By an amendment of 3 August 2000 to the Latvian Energy Law the company is defined as "a national economy object of the State economy" that shall not be privatized. The company is actively involved in the production, purchase and distribution of electric power in Latvia.*'; *Alpha Projektholding GmbH v Ukraine*, ICSID Case No ARB/07/16, Award, 8 November 2010, para 401 (State Administration Authority or SAA); *CME Czech Republic BV v The Czech Republic*, UNCITRAL, Final Award, 14 March 2003, para 8 (Czech Media Council); *Aguaytia Energy LLC v Republic of Peru*, ICSID Case No ARB/06/13, Award, 11 December 2008, para 40 (Organismo Supervisor de la Inversión en Energía or OSINERGO); *William Nagel v The Czech Republic*, SCC Case No 049/2002, Final Award, 9 September 2003, para 144 (Czech National Property Fund). For a different approach, *see Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 119: '*Because of its separate legal status, the Tribunal discards the possibility of treating NHA as a State organ under Article 4 of the ILC Articles.*' *Contra*, Nick Gallus, 'State Enterprises as Organs of the State and BIT Claims' (2006) 7 Journal of World Investment & Trade 761, 777.

[622] *See Toto Costruzioni Generali SpA v The Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction, 11 September 2009, para 52 (Conseil Exécutif des Grands Projets or CEPG, and Council for Development and Reconstruction or CDR).

[623] *See supra* Chapter II, para 1.2.

[624] Pierre-Marie Dupuy, 'Les émanations engagent-elles la responsabilité des Etats? Etude de droit international des investissements' (2006) EUI Working Paper LAW No 2006/7, 6: '*Dans les cas limites où l'arbitre se poserait des questions sur l'appartenance de l'organe considéré à la structure administrative de l'Etat, c'est le droit international qui lui fait alors obligation de consulter le droit interne de cet Etat pour se prononcer sur le statut exact de l'organe en cause. Le renvoi au droit interne comporte cependant des limites strictes. Il ne vise que la détermination de la qualité de l'organe en cas de doutes.*'

[625] *Cf* Georgios Petrochilos, 'Attribution' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 287, 294.

entity *ex* ARSIWA Article 5, as discussed below.[626] A decisive element to this extent is represented by the business orientation and the profite motive pursued by the entity, as in the emblematic case of the Suez Canal Authority (SCA) in *Jan de Nul v. Egypt*.[627] The difference is not trivial, since the *acta jure gestionis* of a State organ would be attributable to the sovereign (plenary attribution), while those of a State instrumentality would not (functional test for attribution).[628]

3.2 Territorial Units

The international principle of the unity of the State is invariably recognised by investment arbitrators, so as to impute to the State the conducts of its constituent units or political subdivisions entailing a treaty claim: '*under public international law (*i.e. *as will apply to an alleged breach of treaty), a State may be held responsible for the acts of local public authorities or public institutions under its authority.*'[629] The principle is also formulated in

[626] *See Nykomb Synergetics Technology Holding AB v The Republic of Latvia*, SCC, Arbitral Award, 16 December 2003, para 4.2: '*Latvenergo cannot be considered to be, or to have been, an independent commercial enterprise, but clearly a constituent part of the Republic's organization of the electricity market and a vehicle to implement the Republic's decisions concerning the price setting for electric power.*'

[627] *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, paras 158-162; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, para 583: '*There is a huge difference to be found between public authorities established to operate and maintain a navigational canal or to construct and maintain highways and a central bank charged with the issuance of the currency and running the State's monetary policy.*'

[628] *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, para 82: '*With regard to the argument of the Respondent that a distinction has to be drawn between attribution of governmental and commercial conduct, the latter not being attributable, the following has to be said. The distinction plays an important role in the field of sovereign immunity when one comes to the question of whether a State can claim immunity before the courts of another State. However, in the context of responsibility, it is difficult to see why commercial acts, so called* acta iure gestionis*, should by definition not be attributable while governmental acts, so called* acta iure imperii*, should be attributable. The ILC-Draft does not maintain or support such a distinction.*'

[629] *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 262; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 182: '*An organ is part of the structure of the State itself, whether its central organisation (i.e. its legislative, executive or judicial structures), or decentralised organisation. (e.g. territorial*

NAFTA Article 105, providing for a Party's obligation to *ensure* the observance of the treaty by '*state and provincial governments*'.[630] Similar provisions are found in ECT Article 23(1),[631] as well as in BITs.[632] The French Model BIT of 2006 dictates the attributability of the conducts of territorial units on the basis of political control (*tutelle*), by establishing that '*the Contracting Parties are responsible for the actions or omission of their sub-sovereign entities, including though not exclusively their federal states, regions, local governments or any other entity over which the Contracting Party exercises the control, the representation or the responsibility of its international affairs, or its sovereignty consistent with its internal*

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entities such as federated States; provinces; municipalities; etc.).'; *Enron Corporation and Ponderosa Assets, LP v Argentine Republic* (also known as *Enron Creditors Recovery Corp and Ponderosa Assets, LP v The Argentine Republic*), ICSID Case No ARB/01/3, Decision on Jurisdiction, 14 January 2004, para 32: '*The Tribunal is mindful in this respect that under international law the State incurs international responsibility and liability for unlawful acts of its various agencies and subdivisions. The same holds true under Article XIII of the Bilateral Investment Treaty when providing that this "...Treaty shall apply to the political subdivisions of the Parties".*'; *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (formerly *Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux v Argentine Republic*) (*Vivendi I*), ICSID Case No ARB/97/3, Award, 21 November 2000, para 49: '*Under international law, and for purposes of jurisdiction of this Tribunal, it is well established that actions of a political subdivision of federal state, such as the Province of Tucumán in the federal state of the Argentine Republic, are attributable to the central government.*'; *ADF Group Inc v United States of America*, ICSID Case No ARB (AF)/00/1, Award, 9 January 2003, para 166: '*The view taken above by the Tribunal is in line with the established rule of customary international law that acts of all its governmental organs and entities and territorial units are attributable to the State and that that State as a subject of international law is, accordingly, responsible for the acts of all its organs and territorial units*'; *Grand River Enterprises Six Nations, Ltd, et al v United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, para 1: '*While the specific actions complained of are taken by various states of the United States, the United States acknowledges that it is internationally responsible under NAFTA for their actions.*'

[630] NAFTA, *supra* note 456:

> *Article 105: Extent of Obligations*
>
> The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.

[631] ECT, *supra* note 455:

> *Article 23*
> *Observance by Sub-National Authorities*
>
> (1) Each Contracting Party is fully responsible under this Treaty for the observance of all provisions of the Treaty, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its Area.

[632] *See* US-Argentina BIT (1991):

> *Article XIII*
>
> This Treaty shall apply to the political subdivisions of the Parties.

legislation.'[633] The 2016 draft of the new Indian Model BIT seems to deviate *in fact* from the principle of the unity of the State by excluding measures of local governments from the substantive scope of investment protection.[634] The entry into force of a similar provision would embody an undesirable departure from the principles of customary international law, invariably applied by Tribunals, which instead impose attributability of conduct of every political subdivision, such as federated states,[635] provinces,[636] or municipalities.[637]

The *Vivendi v. Argentina I* Annulment Committee remarked that attribution of conducts of political subdivisions is characterised by the very same legal mechanism pertaining to the imputation rules applicable to State organs, by criticising the unfortunate distinction between '*federal claims*' and '*Tucumán claims*' adopted in the award:

> The terminology employed by the Tribunal in this regard is not entirely happy. All international claims against a state are based on attribution, whether the conduct in question is that of a central or provincial government or other subdivision.[638]

[633] France Model BIT (2006) Article 1.7.
[634] *See supra* para 1.2 of this Chapter.
[635] *Waste Management, Inc v United Mexican States (Waste Management II)*, ICSID Case No ARB(AF)/00/3, Award 30 April 2004, paras 40, 75; *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002, para 67; *Mytilineos Holdings SA v The State Union of Serbia and Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, para 175; *Methanex Corporation v United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, para 1 (State of California's ban on the sale and use of the gasoline additive); *Grand River Enterprises Six Nations, Ltd, et al v United States of America*, NAFTA/UNCITRAL Arbitration, Decision on Objections to Jurisdiction, 20 July 2006, para 1, fn 1.
[636] *Enron Corporation and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3 (also known as *Enron Creditors Recovery Corp and Ponderosa Assets, LP v The Argentine Republic*), Decision on Jurisdiction, 14 January 2004, para 32; *Azurix Corp v The Argentine Republic*, ICSID Case No ARB/01/12, Award, 14 July 2006, para 52.
[637] *Waste Management, Inc v United Mexican States (Waste Management II)*, ICSID Case No ARB(AF)/00/3, Award 30 April 2004, paras 40, 75; *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Ad Hoc Tribunal, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184, 191, 208; *Metalclad Corporation v The United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, para 73; *Tokios Tokelės v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction, 29 April 2004, para 102, fn 113; *Generation Ukraine, Inc v Ukraine*, ICSID Case No ARB/00/9, Award, 16 September 2003, paras 8.12, 10.2; *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002, para 67, fn 12.
[638] *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (formerly *Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux v Argentine Republic*) *(Vivendi I)*, ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2003, para 16, fn 17.

The rule of the unity of the State has been aptly recognised by investment Tribunals as a counterbalance to the unlimited freedom of self-organization of sovereigns *as to internal matters*.[639]

In case the applicable IIA contains an umbrella clause, it should be recalled that foreign investors' contract claims against a political subdivisions are not imputable to their State, at least as far as public international law is concerned. As above mentioned,[640] a contractual relationship, even if transponsed by an umbrella clause on the international legal plane, is governed by its proper law *only*, to the inclusion of *ultra vires* issues. In principle, the State is not liable for the contractual obligations concluded by its territorial units, '*there being, in general, no conception of the unity of the State in domestic law*'.[641] However, nothing prevents the proper law of contract to provide a theory for the (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.[642]

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[639] *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (formerly *Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux v Argentine Republic*) (*Vivendi I*), ICSID Case No ARB/97/3, Award, 21 November 2000, para 49: '*It is equally clear that the internal constitutional structure of a country can not alter these obligations.*'; *Swembalt AB, Sweden v The Republic of Latvia*, UNCITRAL, Decision by the Court of Arbitration, 23 October 2000, para 37: '*In such a case, the subdivisions of the state and the way in which each state chooses to divide the work between such subdivisions is without relevance. If the state delegates certain work to lower levels of government, be they federal, regional or municipal, it must be an obligation of the state under international law to ensure that its obligations under international law, whether general or treaty law, are fulfilled by such subdivisions.*'; *Autopista Concesionada de Venezuela (Aucoven) v Bolivarian Republic of Venezuela*, ICSID Case No ARB/00/5, Award, 23 September 2003, para 127: '*The fact that "the Venezuelan Constitution ascribes separate legal identity to the federal, state and municipal governments, and that the actions of one may not be attributed to another "* (*sic*) […] *may be accurate, but is irrelevant for the present purposes*.'

[640] *See supra* para 2.2 of this Chapter.

[641] James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 ICSID Review – Foreign Investment Law Journal 127, 134. *See* Harvard Law School (Manley O Hudson, Director), 'Research in International Law (Nationality, Responsibility of States, Territorial Waters). Drafts of Conventions Prepared in Anticipation of the First Conference on the Codification of International Law, The Hague, 1930', 1 April 1929, Part II, 'Responsibility of States' (Edwin M Borchard, Rapporteur), Article 8(a), (1929) 23 Special Number American Journal of International Law Special Supplement 133: '*A State is not responsible if an injury to an alien results from the non-performance of a contractual obligation which its political subdivision owes to an alien, apart from responsibility because of a denial of justice.*' *Accord*, *La Guaira Electric Light and Power Company Case (US v Venezuela)*, 1903-1905, 9 RIAA 240, 243.

[642] *Azurix Corp v The Argentine Republic*, ICSID Case No ARB/01/12, Award, 14 July 2006, para 51 *et seq*.

3.3 *Ultra Vires* Conducts

Ultra vires conducts of State organs are plainly recognised as attributable by investment tribunals, which apply quasi-verbatim the rule of ARSIWA Article 7.[643] As a NAFTA Tribunal has reiterated in the case of *ADF v. USA*:

> An unauthorized or *ultra vires* act of a governmental entity of course remains, in international law, the act of the State of which the acting entity is part, if that entity acted in its official capacity.[644]

The act *ultra vires* should retain a sufficient homogeneity with the office entrusted to the agent concerned, or at least not appear as manifestly outside the actual or apparent authority of the organ.[645] As already underlined, the practice of investment Tribunals generally reproduces the customary interpretation of the *ultra vires* rule, with unprecedented applications with regard to the activities of State instrumentalities *ex* ARSIWA Article 5, which nevertheless confirm the content of the canonical rule.[646]

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[643] *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award, 1 June 2009, para 195; *ADF Group Inc v United States of America*, ICSID Case No ARB (AF)/00/1, Award, 9 January 2003, para 190; *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, para 81: '*Even if one were to regard some of the acts of SOF or APAPS as being* ultra vires*, the result would be the same. This is because of the generally recognized rule recorded in Art. 7 2001 ILC Draft according to which the conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions. Since, from the Claimant's perspective, SOF and APAPS always acted as if they were entities entitled by the Respondent to do so, their acts would still have to be attributed to the Respondent, even if an excess of competence had been shown.*'; *Ioannis Kardassopoulos v The Republic of Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction, 6 July 2007, para 190: '*The principle of attribution, in principle, applies to Georgia by virtue of its status as a sovereign State and is not contingent on the timing of its adherence to a treaty. It is also immaterial whether or not SakNavtobi and Transneft were authorized to grant the rights contemplated by the JVA and the Concession or whether or not they otherwise acted beyond their authority under Georgian law. Article 7 of the* Articles on State Responsibility *provides that even in cases where an entity empowered to exercise governmental authority acts ultra vires of it, the conduct in question is nevertheless attributable to the State.*'

[644] *ADF Group Inc v United States of America*, ICSID Case No ARB (AF)/00/1, Award, 9 January 2003, para 190.

[645] *Ioannis Kardassopoulos v The Republic of Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction, 6 July 2007, paras 190-192: '*the fact remains that these two agreements were "cloaked with the mantle of Governmental authority".*'

[646] *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, para 81; *Ioannis Kardassopoulos v The Republic of Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction, 6 July 2007, para 190.

Ultra vires issues related to contract claims are not regulated by customary international law, as reflected by ARSIWA Article 7, but by the law governing the substance of the domestic law obligations at issue, namely its proper law. Accordingly, the contractual obligation stipulated by a State official outside its competences might be declared as invalid pursuant to its applicable law.[647] For instance, the reference of the *Eureko* Tribunal to the '*clear authority*' of the Minister of the State Treasury of Poland to conclude a Share Purchase Agreement (SPA) for the placement of shares of a parastatal entity under a process of privatization should be interpreted to refer to domestic law, and not to the *ultra vires* rule of ARSIWA Article 7, which does not necessarily require actual authority.[648] This determination does not preclude a finding of a treaty breach (or a breach of customary international law) in connection with or even based on the very same facts on which a contractual claim is rooted. As above mentioned, the two questions always retain their analytical and axiological distinction: supremacy of international law, on one side, and privity of contract, on the other side.[649] Investment Tribunals have notably applied this legal scheme to the issue of representations or assurances rendered by the organs either of the State or of a State entity *ex* ARSIWA Article 5, even if *ultra vires*, in relation to the performance of a public contract or concession agreement with foreign investors. In such cases, the protection of investors' legitimate expectations may beget a treaty claim against the host State for breach of the standard of fair and equitable treatment (FET). On the same line of argument, a respondent State may be held to be *estopped* from reliance to the illegality of the investment pursuant to its domestic law (for the sake of an objection to jurisdiction *ratione materiae*),[650] on the

[647] *But see* the early case of *Trumbull*, in Moore, IV (GPO 1898) 3569-3571, where it was held that a diplomatic agent had '*authority'* to conclude a professional contract with an intermediary counsel and that the act could be attributed to the sending State, even if *ultra vires*.
[648] *Eureko BV v Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 August 2005, para 129.
[649] *See supra* para 2.2. of this Chapter.
[650] *Phoenix Action, Ltd v The Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009, para 114.

ground of its previous assurances on the exactly same point.[651] This principle of law was already clear to an ICSID Tribunal in the early case of *SPP v. Egypt*:

> Whether legal under Egyptian law or not, the acts in question were the acts of Egyptian authorities, including the highest executive authority of the Government. These acts, which are now alleged to have been in violation of the Egyptian municipal legal system, created expectations protected by established principles of international law. A determination that these acts are null and void under municipal law would not resolve the ultimate question of liability for damages suffered by the victim who relied on the acts. If the municipal law does not provide a remedy, the denial of any remedy whatsoever cannot be the final answer.[652]

Since the question of treaty breaches based on the violation of FET is governed by public international law, the *ultra vires* rule of ARSIWA Article 7 may intervene to this extent *only*, so as to render attributable to the State the conducts of representation and assurance performed by its agents or by the organs of its parastatals for the purposes of State responsibility for *internationally* wrongful acts.

4. Parastatals

4.1 Parastatals in the Context of Foreign Direct Investment

The practice of ISDS Tribunals displays the preponderant majority of cases of application of the customary rule of attribution codified by ARSIWA Article 5 having regard to international

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[651] *Kardassopoulos v The Republic of Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction, 6 July 2007, para 193; *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v The Republic of Estonia*, ICSID Case No ARB/04/6 (formerly *OKO Osuuspankkien Keskuspankki Oyj et al v Republic of Estonia*), Award, 19 November 2007, para 274: '*The Respondent also submitted that the [omissis] Letter was illegal, even patently illegal under Article 65 of the Respondent's Constitution. This submission is not accepted by the Tribunal. Under the applicable BITs, it is the obligation of the host State to deal with covered investments in accordance with the FET standard. If legitimate expectations are raised by the Respondent with a specific foreign investor that his investment will be treated fairly and equitably, such expectations must be honoured as a matter of international law. The fact that, according to the law of the host country, its officials or minister(s) may need certain internal approvals cannot later be held against that investor so as to defeat those expectations.*'

[652] *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Award on the Merits, 20 May 1992, para 83.

law disputes in general. It may provide for elucidation of customary international law and further enhance its development, directly affecting its content, rather than being constrained by a *lex specialis* argument, at least on attribution issues. Therefore, ISDS represents a major field for the study and clarification of imputability matters involving the nebula of economic operators revolving around the State (*émanations de l'État*).[653] Investment Tribunals have addressed the treatment of SOEs operating in strategically focal sectors, such as *inter alia* infrastructures,[654] energy and commodities,[655] water and irrigation management,[656] banking and insurance services,[657] telecommunications,[658] and tourism.[659] It may also matter of non-

[653] Yves Nouvel, 'Les entités paraétatiques dans la jurisprudence du CIRDI' in Charles Leben (ed), *Le contentieux arbitral transnational relatif à l'investissement. Nouveaux développements* (LGDJ 2006) 25. *Adde*, Roberto Ago, Third Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur, 'The internationally wrongful act of the State, source of international responsibility', 5 March, 7 April, 28 April and 18 May 1971, para 164, document A/CN.4/246 and Add.1-3, Yearbook of the International Law Commission, 1971, Volume II (Part One), 199, 254, document A/CN.4/SER.A/1971/Add.1 (Part 1).

[654] *Consortium RFCC v Kingdom of Morocco*, ICSID Case No ARB/00/6, Decision on Jurisdiction, 16 July 2001, para 34 *et seq* (Société Nationale des Autoroutes du Maroc or ADM); *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 31 July 2000, para 2 (Société Nationale des Autoroutes du Maroc or ADM); *Toto Costruzioni Generali SpA v The Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction, 11 September 2009, para 17 (Council for Development and Reconstruction or CDR); *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 119 (National Highway Authority or NHA); *United Parcel Service of America Inc (UPS) v Government of Canada*, UNCITRAL, Award on the Merits, 24 May 2007, para 10, 45 (Canada Post); *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para 185 *et seq* (CN Bucarest Aeroport Otopeni or AIBO, and Compania de Transportationuri Aeriene Romane Tarom SA or TAROM).

[655] *EnCana Corporation v Republic of Ecuador*, LCIA Case No UN3481, UNCITRAL, Award, 3 February 2006, para 154 *et seq* (Petroecuador); *Repsol YPF Ecuador, SA and others v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No ARB/08/10, Procedural Order No 1, 17 June 2009, para 3; *Wintershall AG, et al v Government of Qatar*, Partial Award on Liability, 5 February 1988, 28 ILM 795, 811-812 (Qatar General Petroleum Corporation or QGPC) in R Doak Bishop, James Crawford and W Michael Reisman, *Foreign Investment Disputes. Cases, Materials and Commentary* (Kluwer Law International, 2° edn 2014) 558-559; *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para 6 (Bangladesh Oil Gas and Mineral Corporation or Petrobangla); *Limited Liability Company Amto v Ukraine*, SCC Case No 080/2005, Final Award, 26 March 2008, para 101 (Energoatom); *F-W Oil Interests, Inc v The Republic of Trinidad and Tobago*, ICSID Case No ARB/01/14, Award, 3 March 2006, para 200 (Trinmar and Petrotrin).

[656] *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 13 (Pakistani Water and Power Development Authority or WAPDA); *Consortium Groupement LESI—DIPENTA v République algérienne démocratique et populaire,* ICSID Case No ARB/03/08, Award, 10 January 2005, para 3 (Agence nationale des barrages or ANB); *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction, 9 November 2004, para 80 *et seq* (Jordan Valley Authority or JVA).

[657] *Eureko BV v Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 August 2005, paras 36-38 (Powszechny laklad Ubezpieczen SA or PZU); *Waste Management, Inc v United Mexican States (Waste*

sectoral parastatal entities, for instance national or local development agencies or privatization agencies having corporate form and possibly participating to economic operations involving foreign investment in their country.[660] In the latter case the borderline with the category of public bodies having nevertheless the status of State organs tremendously fades, but as a tendency such entities are still subsumed into the category of '*persons […] empowered by the law of that State to exercise elements of the governmental authority*' *ex* ARSIWA Article 5.[661]

In general, the establishment by a State of instrumentalities acting in a specific economic sector is meant to signal to foreign investors a more attractive socio-political and economic environment for the establishment of their business, based on their alleged market orientation and their sectoral technical expertise.[662] Therefore, investors may have a selective preference to conclude investment agreements directly with private(-like) companies, instead of conducting negotiations with the organs of the host States. A typical structure for the investment is a Joint Venture Agreement (JVA), or more complex corporate engineering,

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Management II), ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, para 75 (Banco Nacional de Obras y Servicios Públicos or Banobras).

[658] *William Nagel v The Czech Republic*, SCC Case No 049/2002, Final Award, 9 September 2003, para 136 (České Radiokomunikace a.s. or ČRa).

[659] *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Ad Hoc Tribunal, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184, 191 (Ghana Tourist Development Company or GTDC); *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No ARB/05/19, Decision on Jurisdiction, 17 October 2006, para 91 *et seq* (Egyptian Organization for Tourism and Hotels or EGOTH).

[660] *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Ad Hoc Tribunal, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184, 187 (Ghana Investment Centre or GIC); *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000, para 71 *et seq* (Sociedad por el Desarrollo Industrial de Galicia or SODIGA); *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, para 79 (Authority for Privatization and Management of the State Ownership or APAPS, and State Ownership Fund or SOF).

[661] *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000, paras 79-80, 87; *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Award, 13 November 2000, para 48: '*But even if the structural test is applied, it is clear that financial companies such as SODIGA could not at the period relevant to the present dispute be held to fall entirely outside the overall scheme of public administration.*'; *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, para 83. Both Tribunals deliberatedly confuse the tests under ARSIWA Article 4 and Article 5.

[662] Wolfgang G Friedmann and Jean-Pierre Béguin, *Joint International Business Ventures in Developing Countries. Case Studies and Analysis of Recent Trends* (Columbia University Press 1971) 4-10.

between the investor(s) and a SOE establishing a mixed consortium of enterprises or Public-Private Partnership (PPP) for the performance of the economic operation.[663] Thus, the creation of economic parastatals corresponds to a strategic policy of capital importing countries to enhance attraction of FDI, at the same time interposing between them and foreign investors the corporate veil of a formally independent, separate and business oriented economic actor.[664]

Separate juristic personality of private law generally represents a threshold element for the identification of a 'State entity' *ex* ARSIWA Article 5. However, as above mentioned, decisive relevance is conferred on the profit motive and to the circumstance of the enterprise pursuing an economic method of management, for the purposes of a qualification of the entity as either forming a parcel of the State machinery or being a parastatal entity.[665] Accordingly, in sporadic cases, it may be found that a State enterprise not having separate personality of private law may be categorized as being a State instrumentality, therefore outside the mechanism of imputability enshrined in ARSIWA Article 4.[666] Conversely, it is less tenable to advocate for a qualification as State organ with regard to State instrumentalities with

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[663] *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para 46 *et seq*; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 22 *et seq*; *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Award, 13 November 2000, para 39. *See also Joint Venture Yashlar (Turkmenistan) and Bridas SAPIC (Argentina) v Government of Turkmenistan (or Turkmenistan or the State of Turkmenistan and/or the Ministry of Oil of Turkmenistan) (Turkmenistan)*, ICC Case No 9151/FMS/KGA, Interim Award, 8 June 1999, para 58.

[664] *First National City Bank v Banco Para el Comercio Exterior de Cuba (BANCEC)*, 462 US 611, 624-625 (1983): '*These distinctive features permit government instrumentalities to manage their operations on an enterprise basis while granting them a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies. These same features frequently prompt governments in developing countries to establish separate juridical entities as the vehicles through which to obtain the financial resources needed to make large-scale national investments.*'

[665] *See supra* para 3.1 of this Chapter.

[666] *Limited Liability Company Amto v Ukraine*, SCC Case No 080/2005, Final Award, 26 March 2008, para 101: '*Energoatom is a separate legal entity owned by the Respondent. It is not an ordinary private company, but a specific juridical person known as a state company.*'; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 160: '*Article 2 of Law No. 30/1975, embodying the Suez Canal Authority Statutes (Exh. C-9), states that "*Suez Canal Authority is a Public Authority*" and that SCA "*enjoys an independent juristic personality.*"*'

separate legal personality of private law.[667] *Ex hypothesi*, this scenario remains as contemplated at a theoretical level, which has been captured by the *F-W Oil Interests v. Trinidad and Tobago* Tribunal:

> where the operation of a State enterprise is at the core of an international dispute, it is theoretically possible that the enterprise's conduct (acts or omissions) may engage the responsibility of the State either as an organ of the State; or as a body exercising elements of the governmental authority of the State; or as a body which is in fact acting on the instructions of the State, or under its direction or control (ILC draft Articles 4-8). There is in other words a whole gamut of possibilities, whose application to particular situations depends upon an amalgam of questions of law and questions of fact which will vary from case to case according to the circumstances.[668]

The attempt at qualification of State enterprises as *organs* of the State triggers the possibility of the application of a theory of *de facto* agency in the realm of international investment arbitration.[669] This theory should be based on the requirements illustrated by the ICJ in the *Bosnian Genocide* case, namely complete dependence and strict control.[670] Provided that a prong of overall control may be sufficient to meet the test for attribution, such a threshold remains markedly high. Thus, the application of the doctrine of *de facto* organs has rarely been resorted to in international investment litigation, but can seemingly provide an additional arrow to the quiver of investors aiming to establish attribution to the State of *acta jure gestionis*.[671] Indeed, claimant investors and their counsels invariably attempt to propose to Tribunals the qualification of a 'person' as State organ *ex* ARSIWA Article 4, rather than as a State instrumentality pursuant to Article 5, in order to benefit from the plenary attribution

[667] *Contra*, Nick Gallus, 'State Enterprises as Organs of the State and BIT Claims' (2006) 7 Journal of World Investment & Trade 761, 777-779.
[668] *F-W Oil Interests, Inc v The Republic of Trinidad and Tobago*, ICSID Case No ARB/01/14, Award, 3 March 2006, para 203.
[669] *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000, paras 79-80, 89.
[670] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, para 391, ICJ Reports 2007, 43, 201.
[671] *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 186.

established by the canonical rule.[672] Regardless, Tribunals have usually rejected the categorization of economic parastatal entities as agents of the State, chiefly in connection with their market or business orientation.[673]

4.2 Test for Attribution: A Functional Test Applied on the Basis of a Structural Finding

The major problems in the application of the attribution rule of ARSIWA Article 5 in international economic litigation hinge upon the possible complexity of the forms of the State intervention into the economic system.[674] In addition, given the preponderance of the option for the corporate form, peculiar issues arise in international investment arbitration with regard to the combination of principles of public international law and municipal corporate law. This scenario is skilfully depicted by the *Maffezzini v. Spain* Tribunal:

> the Tribunal may look to the applicable rules of international law in deciding whether a particular entity is a state body. These standards have evolved and been applied in the context of the law of State responsibility. Here, the test that has been developed looks to various factors, such as ownership, control, the nature, purposes and objectives of the entity whose actions are under scrutiny, and to the character of the actions taken. The relevance of these standards is clearer when there is a direct State operation and control, such as by a section or division of a Ministry, but less so when the State chooses to act through a private sector mechanism, such as a corporation (*sociedad anonima*) or some other corporate structure.[675]

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[672] *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 155.

[673] *Ex multis*, *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 162.

[674] *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 31 July 2000, para 35: '*the Tribunal notes that the fact that a State may act through the medium of a company having its own legal personality is no longer unusual if one considers the extraordinary expansion of public authority activity. In order to perform its obligations, and at the same time take into account the sometimes diverging interests that the private economy protects, the State uses a varied spectrum of modes of organisation, among which are in particular semi-public companies, similar to ADM, a company mostly held by the State which, considering the size of its participation (over 80%), directs and manages it. All these factors resolutely imprint a public nature on the said company.*' In French, 'semi-public companies' is translated as '*sociétés d'économie mixte*'. *See Consortium RFCC v Kingdom of Morocco*, ICSID Case No ARB/00/6, Decision on Jurisdiction, 16 July 2001, para 39.

[675] *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000, paras 76-78. *See* Abby Cohen Smutny, 'State Responsibility and Attribution When is a State Responsible for the Acts of State Enterprises? *Emilio Agustín Maffezini v. The Kingdom of Spain*' in Todd

Notwithstanding such enhanced problems, it may be held that the mechanism of attribution to the State of the conducts of economic parastatal entities, although possibly being characterised by certain peculiarities, does not meaningfully depart from the framework of customary international law, which provides for a sequence of a preliminary structural analysis, followed by the application of a functional test, provided that the State instrumentality in question is formally empowered by law to exercise elements of the governmental authority of its establishing State. Indeed, this normative operation consists of the two main steps of *identification* of the parastatal entity as being such (*structural* test) and *attribution* of the specific act or omission based on the exercise of sovereign authority (*functional* test).[676]

4.2.1 Structural Test: Inductive Methodology

The application of the structural test for the identification of a State instrumentality is eminently grounded on factual findings. An "official" or canonical formula of the complex compound named '*parastatal entity*' does not exist. While certain characteristic elements are definitely recurring, no particular one is necessary or decisive for a conclusion of a certain 'person' to fall under the scope of ARSIWA Article 5. Hence, the methodology resorted to by the interpreter is inevitably inductive, while possibly oriented or informed by a 'typologic' model or image of what a parastatal is or may be. All the indexes or symptoms of the status of a 'State entitiy' *ex* ARSIWA Article 5, which have been listed in the preceding chapter, are

Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005) 17.

[676] Pierre-Marie Dupuy, 'Les émanations engagent-elles la responsabilité des Etats? Etude de droit international des investissements' (2006) EUI Working Paper LAW No 2006/7, 11-12.

applicable in the context of international economic litigation.[677] Nevertheless, it seems appropriate to provide another enumeration of symptoms of the status of (economic) parastatal, more suited to the peculiarities of international investment cases. While the factual elements illustrated with regard to general international law chiefly reflected the practice of the IRAN-US Claims Tribunal, this present list is based on a comprehensive review of the relevant decisions of investment Tribunals. For the sake of completeness, one clarification seems to be required. An affirmative conclusion as to the fulfilment of the structural test is not as such determinative of *attribution* under ARSIWA Article 5. However, numerous elements involved in the structural test may be relevant for the application of the *factual* prong for attribution of conducts of 'private' individuals *ex* ARSIWA Article 8, based on 'instructions, or direction or control.' Accordingly, while a finding of a legal entity as being a State-controlled company does not automatically end in attribution based on ARSIWA Article 5, it may nevertheless represent an applicable basis for attribution under Article 8.

It is hereby provided a non-exhaustive list of 'symptomatic' elements, which in investment arbitration have *usually* showed that the 'compound' they are part of is a 'parastatal entity', so as to meet the structural test required under ARSIWA Article 5:

a) establishment by statutory act or decree[678] (to the inclusion of privatization laws);[679]

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[677] *See supra* Chapter II, para 4.3.

[678] *Waste Management, Inc v United Mexican States (Waste Management II)*, ICSID Case No ARB(AF)/00/3, Award 30 April 2004, para 75; *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 200; *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para 6; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005, para 10; *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, para 71; *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para 204; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, paras 45, 160; *United Parcel Service of America Inc (UPS) v Government of Canada*, UNCITRAL, Award on the Merits, 24 May 2007, para 9; *Toto Costruzioni Generali SpA v The Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction, 11 September 2009, paras 51, 54; *William Nagel v The Czech Republic*, SCC Case No 049/2002, Final Award, 9 September 2003, paras 144, 162; *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction, 9 November 2004, para 81; *United Parcel Service of America Inc*

b) mission to provide a public service or to pursue a public purpose;[680]

c) entitlement to acquire, hold and dispose of property;[681]

d) capacity to sue and be sued;[682]

e) autonomous budget;[683]

f) funds deposited in a special account or accounts at the central bank of the establishing State;[684]

g) subsidization by the government;[685]

h) exercise of a delegated monopoly (to the inclusion of the power to set prices);[686]

(UPS) v Government of Canada, UNCITRAL, Award on the Merits, 24 May 2007, para 9; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 22; *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000, para 83.

[679] *Eureko BV v Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 June 2005, para 38; *Nykomb Synergetics Technology Holding AB v The Republic of Latvia*, SCC, Arbitral Award, 16 December 2003, para 1.1.

[680] *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 31 July 2000, para 32; *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction, 9 November 2004, para 81; *Waste Management, Inc v United Mexican States (Waste Management II)*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, para 75; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 45; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 184, 189; *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No ARB/05/19, Decision on Jurisdiction, 17 October 2006, para 92; *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000, para 86; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005, para 10.

[681] *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 119; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 149(iv); *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction, 9 November 2004, para 81; *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 205; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 185.

[682] *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 200; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 184; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005, para 10.

[683] *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 161; *Toto Costruzioni Generali SpA v The Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction, 11 September 2009, para 51, 55.

[684] *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction, 9 November 2004, para 82.

[685] *United Parcel Service of America Inc (UPS) v Government of Canada*, UNCITRAL, Award on the Merits, 24 May 2007, para 45.

i) board of directors appointed (and as a possibility revoked) by the government or political power;[687]

j) ministers sitting as president or member of the board of directors;[688]

k) applicability to their employees of the labour regime governing public servants;[689]

l) registration on the Treasury's accounts of the charges collected and revenues received by the parastatal;[690]

m) auditing of accounts and balance sheets by the General Auditor of the State;[691]

n) palpable governmental (also through a *Conseil d'Ét*at) oversight, mandatory approval of resolutions and operations, and mandates;[692]

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[686] *United Parcel Service of America Inc (UPS) v Government of Canada*, UNCITRAL, Award on the Merits, 24 May 2007, para 9.

[687] *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, para 76; *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 201; *William Nagel v The Czech Republic*, SCC Case No 049/2002, Final Award, 9 September 2003, para 164; *Wintershall AG, et al v Government of Qatar*, Partial Award on Liability, 5 February 1988, 28 ILM 795, 811-812.

[688] *Consortium RFCC v Kingdom of Morocco*, ICSID Case No ARB/00/6, Decision on Jurisdiction, 16 July 2001, para 19, 36; *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No ARB/05/19, Decision on Jurisdiction, 17 October 2006, para 92; *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction, 9 November 2004, para 83; *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 31 July 2000, para 32.

[689] *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 203; *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction, 9 November 2004, para 82.

[690] *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No ARB/05/19, Decision on Jurisdiction, 17 October 2006, para 92.

[691] *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 207.

[692] *Nykomb Synergetics Technology Holding AB v The Republic of Latvia*, SCC, Arbitral Award, 16 December 2003, para 4.2; *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No ARB/05/19, Decision on Jurisdiction, 17 October 2006, para 92; *EnCana Corporation v Republic of Ecuador*, LCIA Case No UN3481, UNCITRAL, Award, 3 February 2006, para 154; *Toto Costruzioni Generali SpA v The Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction, 11 September 2009, para 51; *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 204, 209; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 118; *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, para 77; *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para 205; *William Nagel v The Czech Republic*, SCC Case No 049/2002, Final Award, 9 September 2003, para 164 (decisions on winding up the State enterprise; decisions on merger with another State enterprise); *Waste Management, Inc v United Mexican States (Waste Management II)*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, para 75; *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case

o) jurisdiction of administrative courts on their activities;[693]

p) applicability of the administrative regulation on public contracts (including concessions and procurements);[694]

q) general and broad empowerment to issue regulations to implement a parastatal's mandate;[695]

r) empowerment to impose coercive measures, such as charges, fines and penalties.[696]

The element of the mission of a SOE to provide a public service or to pursue a public purpose has been in certain instances confused with the functional test of the exercise of governmental authority, so that a finding of the 'public aim' of the entity has been considered as sufficient to establish attribution of conducts. This has evidently occurred in the *Salini v. Morocco* case where the Tribunal held:

> it is clear that ADM's main object is to accomplish tasks that are under State control (building, managing and operating of assets falling under the province of the public utilities responding to the structural needs of the Kingdom of Morocco with regard to infrastructure and efficient communication networks).[697]

No ARB/00/4, Decision on Jurisdiction, 31 July 2000, para 32; *EnCana Corporation v Republic of Ecuador*, LCIA Case No UN3481, UNCITRAL, Award, 3 February 2006, para 154.

[693] *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 146(vi).

[694] *United Parcel Service of America Inc (UPS) v Government of Canada*, UNCITRAL, Award on the Merits, 24 May 2007, para 51; *Consortium RFCC v Kingdom of Morocco*, ICSID Case No ARB/00/6, Decision on Jurisdiction, 16 July 2001, para 38; *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 31 July 2000, para 34; *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Award, 13 November 2000, para 49.

[695] *United Parcel Service of America Inc (UPS) v Government of Canada*, UNCITRAL, Award on the Merits, 24 May 2007, para 9; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 190: '*"(t)he Board of Directors may*, by legislative instrument*, make such regulations as it may see fit for the purpose of giving effect to the provisions of this Law."*'; *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 208.

[696] *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 166; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 190; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 121.

[697] *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 31 July 2000, para 33. *Accord*, *Consortium RFCC v Kingdom of Morocco*, ICSID Case No ARB/00/6, Decision on Jurisdiction, 16 July 2001, para 37: '*Il est ainsi clair que le but social d'ADM poursuit la réalisation de tâches de nature étatique (construction, gestion et exploitation de biens relevant du service public répondant aux besoins structurels du Royaume du Maroc en matière d'infrastructures et de réseaux de communications efficaces).*'.

However, ascertaining the public dimension of the corporate objective (*object social*) of a State enterprise does not conclusively solve the issue of attribution, since it just remains as an element falling under the structural analysis under ARSIWA Article 5, which additionally requires the application of the functional test. As observed by the *Jan de Nul v. Egypt* Tribunal, '*the fact that the subject matter of the Contract related to the core functions of the SCA, i.e., the maintenance and improvement of the Suez Canal, is irrelevant. […] What matters is not the "service public" element, but the use of "prérogatives de puissance publique" or governmental authority.*'[698] Accordingly, the public purpose or nation-wide strategic role of the concerned State entity (for instance, '*to contribute to the development of national economy*',[699] '*the general nature of the activity in question*',[700] '*an essential role in the economic, social and cultural life*' of a State,[701] '*an instrument of State action*',[702] '*to promote and finance activities carried out by the Federal, State, and Municipal Governments of the Country*',[703] '*an institution of public interest*')[704] are not as such determinative of the result of attribution of its acts and omissions to its establishing State, which entails a normative operation that cannot neglect the actual exercise of sovereign authority.[705]

[698] *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, paras 169-170.
[699] *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No ARB/05/19, Decision on Jurisdiction, 17 October 2006, para 92.
[700] *F-W Oil Interests, Inc v The Republic of Trinidad and Tobago*, ICSID Case No ARB/01/14, Award, 3 March 2006, para 204.
[701] *United Parcel Service of America Inc (UPS) v Government of Canada*, UNCITRAL, Award on the Merits, 24 May 2007, para 57.
[702] *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000, para 86.
[703] *Waste Management, Inc v United Mexican States (Waste Management II)*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, para 75.
[704] *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, para 76 (this references is kept in so far as the Tribunal confuses the tests of attribution under ARSIWA Article 4 and 5).
[705] *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 202: '*It is not enough for an act of a public entity to have been performed in the general fulfilment of some general interest, mission or purpose to qualify as an attributable act.*'

4.2.2 Functional Test: *Acta Jure Imperii* and *Acta Jure Gestionis*

The structural test '*in itself clearly does not resolve the issue of attribution*'.[706] Indeed, a Tribunal should subsequently resort to the functional test of the actual exercise of elements of the governmental authority pursuant to ARSIWA Article 5. It is submitted again that such functional test should coincide with the nature test dictated by the law of State immunity from adjudication grounded on the dichotomy between *acta jure imperii* and *acta jure gestionis*.[707] This posture is not stranger to the practice of investment Tribunals, as expressed in the case of *Maffezini v. Spain*:

> the Tribunal must again rely on the functional test, that is, it must establish whether specific acts or omissions are essentially commercial rather than governmental in nature or, conversely, whether their nature is essentially governmental rather than commercial. Commercial acts cannot be attributed to the Spanish State, while governmental acts should be so attributed.[708]

The quibbling argument that the requirement of the *exercise of elements of the governmental authority ex* ARSIWA Article 5 provides for a larger category than the requirement of the *exercise of sovereign authority of the State ex* UNCSI Article 2.1(b)(iii) is not persuasive, nor far-reaching. It has been already argued that an effective judicial protection requires a complementary interaction between the international and the national jurisdictions so that lacunae in terms of aliens' access to legal redress are adequately prevented.[709]

Before addressing our analysis of the functional test under ARSIWA Article 5, it is apposite to underline that the very same test – based on *acta jure imperii* vis-à-vis *acta jure*

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[706] *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 193.
[707] *See supra* Chapter I, para 6, and Chapter II, para 4.2.
[708] *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Award, 13 November 2000, para 52, 57. *Adde*, *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 201(i): '*Under Article 5 of the ILC Articles, if the acts of Cocobod which are the subject of complaint were performed in the exercise of governmental power, they will be attributed to the State. If they were performed in the fulfilment of commercial relations, they will not be attributable on that basis to the State.*'
[709] *See supra* Chapter II, para 4.2.

gestionis (*i.e.*, the same applicable for the sake of State immunity from adjudication) – is used for jurisdictional purposes to establish whether a SOE may retain *jus standi* as a 'national of another Contracting State', *i.e.* in the position of claimant investor, pursuant to ICSID Convention Article 25(1). Accordingly, standing is granted in so far as the subject matter of the dispute involves the activity *jure privatorum* of the SOE.[710] Otherwise, the involvement of the discharge of essentially governmental functions by the State entity would transform an investor-state dispute into inter-state litigation, which is not contemplated by the jurisdiction of the Centre.

With regard to the definition of 'governmental authority', a general starting point is the acknowledgement of the absence of conclusive guidance in ARSIWA Article 5 and in the Commentaries:[711]

> In short, the notion is intended to be a flexible one, not amenable to general definition in advance; and the elements that would go in its definition in particular cases would be a mixture of fact, law and practice.[712]

Sparse treaty practice expressly illustrates instances of the exercise of '*any regulatory, administrative or other governmental authority […] such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges*', which is found in NAFTA Article 1502(3)(a). However, a scientific definition is not (nor it has necessarily to be) dispensed by IIAs. Therefore, it is appropriate in the first place to proceed from a casuistic review of arbitral resolutions on the distinction between *acta jure*

[710] *Ceskoslovenska Obchodni Banka, AS (CSOB) v The Slovak Republic,* ICSID Case No ARB/97/4, Decision on Jurisdiction, 24 May 1999, para 16; *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award, 29 July 2008, paras 324-329; *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000, para 80.

[711] Kaj Hobér, 'State Responsibility and Attribution' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 550, 556, 560.

[712] *F-W Oil Interests, Inc v The Republic of Trinidad and Tobago*, ICSID Case No ARB/01/14, Award, 3 March 2006, para 203.

imperii and *acta jure gestionis*, and, in the second place, to embark on a doctrinal attempt at definition.

International investment Tribunals have found the following activities, either of a general or specific application, to embody an exercise of governmental authority (*puissance publique*): the issue of decrees or regulations of a normative nature,[713] imposition and collection of charges,[714] the infliction of sanctions or penalties,[715] ejection of unauthorised persons,[716] the grant of subsidies,[717] marketing and export regulations,[718] land inspections,[719] site expropriations,[720] official certification of products,[721] and handling and moving of financial accounts without the consent of the account holder.[722] On the other hand, arbitrators have categorized as commercial, as such not attributable to States, the following acts of parastatal entities: default on settlement of contractual debts owed to a service provider,[723]

[713] *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 208; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 149; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 121; *United Parcel Service of America Inc (UPS) v Government of Canada*, UNCITRAL, Award on the Merits, 24 May 2007, para 9; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 190.

[714] *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 149; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 121.

[715] *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 190.

[716] *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 121.

[717] *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000, para 86.

[718] *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 189.

[719] *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 121.

[720] *Toto Costruzioni Generali SpA v The Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction, 11 September 2009, para 102.

[721] *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 189.

[722] *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Award, 13 November 2000, para 78.

[723] *Limited Liability Company Amto v Ukraine*, SCC Case No 080/2005, Final Award, 26 March 2008, para 107.

undertaking of business with an assumption of reasonable commercial risk,[724] exercise of shareholders' rights,[725] advising and providing information to businesses, accounting services and technical assistance,[726] the organization of auctions of commercial spaces,[727] and the refusal to grant an extension of time in the context of a tender process.[728] The resolutions rendered by national courts with regard to the grant of State immunity from adjudication may adequately supplement this review, in light of the application of the very same distinction between *acta jure imperii* and *acta jure gestionis*.[729]

From the foregoing analysis, it is possible to detect the thresholds for a definition of governmental vis-à-vis commercial acts. Arbitrators (and national judges) apply a 'private contractor' test recognising as 'sovereign' such activities in which a private party may not engage, or, conversely, as 'commercial' such activities that a private party may perform.[730]

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[724] *William Nagel v The Czech Republic*, SCC Case No 049/2002, Final Award, 9 September 2003, para 163.
[725] *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para 194.
[726] *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Award, 13 November 2000, paras 61-62; *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000, para 85.
[727] *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para 196: '*They were not acts performed in the exercise of delegated governmental authority, but rather were acts aiming at the better exploitation by AIBO of commercial spaces, which were part of its private property, and the conduct of its own duty-free business, subject only to its corporate bodies' determinations.*'
[728] *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, paras 169-170.
[729] *See* Carlo de Stefano, *Jurisdictional Immunity of Foreign States and Commercial Transactions*, Master Thesis (Università Commerciale Luigi Bocconi 2011) 157-163.
[730] *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 169-170: '*In its dealing with the Claimants during the tender process, the SCA* acted like any contractor *trying to achieve the best price for the services it was seeking. It did not act as a State entity. The same applies to the SCA's conduct in the course of the performance of the Contract. […]* Any private contract partner could have acted in a similar manner.' (emphasis added); *United Parcel Service of America Inc (UPS) v Government of Canada*, UNCITRAL, Award on the Merits, 24 May 2007, para 74: '*That contrast with commercial activities emphasizes the particular character of the limiting phrase. The monopoly or enterprise is exercising a "*governmental *authority" delegated to it by the State Party. To be contrasted with the exercise of that authority is the use by a monopoly or State enterprise of those rights and powers which it* shares (emphasis added) *with other businesses competing in the relevant market and undertaking commercial activities.*'; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 202: '*In considering the application of Article 5 of the ILC Articles, the Tribunal has carefully assessed whether, in its dealings with Hamester in relation to the JVA, Cocobod* acted like any contractor/shareholder*, or rather as a State entity enforcing regulatory powers.* (emphasis added). *Adde*, *ex multis*, Court of Appeal of The Hague, 28 November 1968, *NV Cabolent v National Iranian Oil Company (NIOC)*, 47 ILR 138; Cour d'Appel de Rouen, 13 November 1984, *Société européenne d'études et d'entreprises (SEEE) v Yugoslavia*, (1985) 112 Journal du Droit International (Clunet) 473, (1986) 90 Revue Générale de Droit International Public 707; High Court of

The profite motive of the act executed by the parastatal retains a central role in this analysis.[731] The power or prerogative exercised by the State instrumentality in relation to a given foreign investment should not go *beyond* and as such actually override the ordinary schemes of private law.[732] As Yves Nouvel has remarked with regard to the *Maffezini v. Spain* award, '*une telle irrégularité ne pouvait se réaliser sans les pouvoirs exorbitants du droit commun dont était investie l'entité paraétatique.*'[733] The *fil rouge* between UNCSI Article 2.2 and ARSIWA Article 5 strenghtens the centrality of a *comprehensive* nature test in order to *functionally* categorize State entities' (and States') acts.[734] This criteria should be undefeasibly applied upon reference to a *context-based* analysis taking into consideration all the elements and circumstances surrounding a given act or transaction, so that the resulting threshold be possibly *laxer* in comparison to the canonical 'private contractor' test of the law of sovereign immunity.[735] Hints of a validation of this development of international law seem to emerge from the arbitral practice:

> Handling the accounts of EAMSA as a participating company, managing its payments and finances and generally intervening on its behalf before the Spanish authorities without being paid for these services, are all elements that responded to

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West Pakistan, 2 November 1970, *Secretary of State of the United States of America v Gammon-Layton*, 64 ILR 587.

[731] *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para 197.

[732] *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 260, 266(b): '*In fact, the State or its emanation, may have behaved as an ordinary contracting party having a difference of approach, in fact or in law, with the investor. In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt.*'; *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Award, 13 November 2000, para 62; *Siemens AG v The Argentine Republic*, ICSID Case No ARB/02/8, Award, 19 January 2007, para 248; *Consortium RFCC v Kingdom of Morocco*, ICSID Case No ARB/00/6, Award, 22 December 2003, para 65.

[733] Yves Nouvel, 'Les entités paraétatiques dans la jurisprudence du CIRDI' in Charles Leben (ed), *Le contentieux arbitral transnational relatif à l'investissement. Nouveaux développements* (LGDJ 2006) 25, 38.

[734] *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 197.

[735] UNCSI Article 10. *See* Lord Wilbeforce in *I Congreso del Partido* [1983] 1 AC 244, 278: '*The conclusion which emerges is that in considering, under the "restrictive" theory whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity.*'

> SODIGA's public nature and responsibility. Moreover, the manner in which the private banks conducted themselves in this case with regard to the loan, can be explained in large measure *only because* of their recognition that SODIGA's orders and instructions were entitled to be honored because of the public functions it performed in Galicia. (*emphasis added*)[736]

The *Maffezini v. Spain* case demonstrates that in order to qualify an act of a parastatal entity as attributable to the State (or – if the reader prefers – immune from adjudication before the domestic judiciary) it is not necessary to demonstrate that it was exercised strictly out of governmental authority, being sufficient that it was '*growing out*' of the *public functions* of the State instrumentality.[737] The Tribunal seems to suggest that by virtue of a *qualified* redolence of governmental authority (*allure étatique*) an activity may be attributed to the State, in light of the casuistic finding that a parastatal entity could have not performed it without availing itself of its status of *émanation de l'État*.[738] Accordingly, the inception of a philosophy of *competitive neutrality* within the context-based application of the nature test for the purposes of functional qualification of the activities of SOEs may possibly enlarge the stitches of attribution under ARSIWA Article 5. This analysis should generally contemplate the various competitive advantages benefitting parastatals pursuant to domestic law, such as *inter alia* regulatory immunity from antitrust regulation, exemption from bankruptcy legislation, and asymmetric information.[739] This normative result is hereby being advocated as

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[736] *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Award, 13 November 2000, para 78.

[737] *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Award, 13 November 2000, para 49, 79: '*It was not until the adoption of Law 6/ 1997 of April 14, 1997 that state commercial corporations were clearly forbidden to "perform functions that imply the exercise of public authority."*' This explains that SODIGA was even prohibited by the law to exercise governmental functions.

[738] Georgios Petrochilos, 'Attribution' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 287, 322: '*It is irrelevant whether the act so taken is generically of a kind that in some circumstances a private person could take: the question is, rather, whether the act was in fact taken on a legal basis available specifically to the entity concerned, as a complement of its governmental functions.*'

[739] Antonio Capobianco and Hans Christiansen, 'Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options', OECD Corporate Governance Working Papers, No 1 (OECD Publishing 2011) 5-7; Sébastien Miroudot and Alexandros Ragoussis, 'Actors in the International Investment Scenario: Objectives, Performance and Advantages of Affiliates of State-Owned Enterprises and Sovereign Wealth Funds' in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy: World Trade*

consistent with a full-fledged communitarian policy to level the playing field in domestic markets receiving FDI, not to say with the effective enforcement of the aggregate consequences of the host States' policy to attract foreign investors by signalling the creation of economic instrumentalities.

Provided that, on one side, this broader threshold would enhance the accountability of States before international Tribunals, on the other side it would conversely enlarge the scope of sovereign immunity from adjudication in connection with the conducts of State instrumentalities. This is the necessary corollary ('*per la contradizion che nol consente*')[740] of the application of the same test in association with issues of attribution of internationally wrongful acts and of immunity from jurisdiction of parastatal entities. What is definitely relevant is the consistent, coordinated and consonant application of the same criteria by both the international arbitrator and the national judge, so as to avoid *deni de justice*, meant as ultimate absence of legal redress. Accordingly, the application of a nature test interpreted in light of the principle of competitive neutrality of SOEs is susceptible to shift adjudication from the national to the international arena, bestowing renovated centrality to the international arbitrator in the resolution of disputes involving State-controlled corporations. Seconding a voluntaristic posture, express reference in IIAs to the principle of competititve neutrality of SOEs may represent a symptom of the will of States to endorse this progressive development of customary international law.

Forum (Cambridge University Press 2013) 51, 61; Anne van Aaken, 'Blurring Boundaries between Sovereign Acts and Commercial Activities: A Functional View on Regulatory Immunity and Immunity from Execution' in Anne Peters, Evelyne Lagrange, Stefan Oeter and Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Brill 2015) 131, 173.

[740] Dante Alighieri, *Divina Commedia*, *If*, XXVII, 120.

4.3 Empowerment by Law

Parastatal entities are generally empowered by statutory law to exercise '*elements of governmental authority*' such as regulatory, coercive and fiscal powers.[741] As above mentioned, a contractual arrangement may be sufficient to meet the formal requirement of ARSIWA Article 5, to the inclusion of the charter or the articles of association of a State enterprise.[742] The delegation of governmental authority by the State should be express, as such providing for a specific enumeration of powers. One illustrative example is represented by the Pakistani National Highway Authority Act of 1991, analysed by the *Bayindir v. Pakistan* Tribunal:

> It is not disputed that NHA is generally empowered to exercise elements of governmental authority. Section 10 of the NHA Act vests broad authority in NHA to take "such measures and exercise such powers it considers necessary or expedient for carrying out the purposes of this Act," including to "levy, collect or cause to be collected tolls on National Highways, strategic roads and such other roads as may be entrusted to it and bridges thereon." Other relevant provisions of the NHA Act are section 12 on "Powers to eject unauthorized occupants" and section 29 on the NHA's "Power to enter" upon lands and premises to make inspections.[743]

In the case of *Helnan v. Egypt*, the Tribunal decided that *'[e]ven if EGOTH has not been officially empowered by law to exercise elements of the govemmental authority, its actions within the privatisation process are attributable to the Egyptian State.*'[744] This conclusion seems to suggest attribution under a different mechanism than ARSIWA Article 5, evidently

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[741] *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 166 (Egyptian Law No 30/1975); *United Parcel Service of America Inc (UPS) v Government of Canada*, UNCITRAL, Award on the Merits, 24 May 2007, para 9 (Canada Post Corporation Act 1981); *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 208 (Pakistan Water and Power Development Authority Act of 1958); *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, para 190 (Ghana Cocoa Board Law of May 3, 1984, amended in 1991); *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 121 (Pakistani National Highway Authority Act of 1991).

[742] *See supra* Chapter II, para 4.4.

[743] *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 121.

[744] *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No ARB/05/19, Decision on Jurisdiction, 17 October 2006, para 93.

attribution to the State of conducts of 'private' individuals based on instructions, or direction or control pursuant to ARSIWA Article 8.

4.4 Collusive Interference of State Organs in the Commercial Operations of State Enterprises

The previous chapter has already addressed the issue of the collusive interference of the State, through its organs, into the businesses of its parastatal entities, as illustrated by the Iran-US Claims Tribunal in *Int'l Technical Products v. Iran*.[745] This problem has been resolved in a markedly similar fashion in ISDS cases:

> if organs of Government choose to intervene in the operations of its para-statal entities (or if the State, for whatever reason, interferes in what would otherwise be purely commercial operations), an international tribunal ought to be ready to infer that by doing so they have engaged the international responsibility of the State for effects that, in substance, amounts to breaches of the standards expressly accepted by the State by treaty. The Tribunal considers that this conclusion is moreover in harmony with a series of arbitral decisions establishing that interference by the State with the operation of a private contract is capable of constituting a breach of treaty.[746]

As above mentioned, such conducts are subject to attribution pursuant to the canonical rule of ARSIWA Article 4 *only*, without resort to Article 5. State practice may 'enforce' in a more predictable way State responsibility for such actions by establishing primary obligations of the State to ensure or surveil on the observance of investment treaties by its State instrumentalities, also in connection with their contractual undertakings, as provided by NAFTA Articles 1502(3) and 1503(2), and by ECT Article 22. In cases of interferences of State officials in the conduct of business of State enterprises, the arbitral award rendered against the State may be possibly enforced against the assets of the SOE, in light of its

[745] *International Technical Products Corporation and ITP Export Corporation, its wholly-owned subsidiary, v The Government of the Islamic Republic of Iran and its agencies, The Islamic Republic Iranian Air Force and the Ministry of National Defense, acting for the Civil Aviation Organization*, Case No 302, 24 October 1985, Award No 196-302-3, 9 IRAN-US CTR 206, 239 (1985-II). *See supra* Chapter II, para 4.2.
[746] *F-W Oil Interests, Inc v The Republic of Trinidad and Tobago*, ICSID Case No ARB/01/14, Award, 3 March 2006, para 206.

collusive involvement in the dispute. Indeed, a sufficient link or relationship pertaining to the dispute should be established between the State and a given SOE for the purposes of execution proceedings, since the latter does not usually stands as formal party in the arbitral process.[747]

5. Individuals

5.1 General Rule of Non-Attribution of Conducts of 'Private' Individuals

In line with the liberal political philosophy of the international law of State responsibility,[748] investor-state Tribunals have invariably applied the universal rule of irresponsibility of the State for the acts and omissions of private individuals, unless instructed, or directed or controlled by organs of the State itself.[749] Thus, in the first treaty-based investment arbitration the *AAPL v. Sri Lanka* Tribunal deliberated:

> It is a generally accepted rule of International Law, clearly stated in international arbitral awards and in the writings of the doctrinal authorities, that […] [a] State on whose territory an insurrection occurs is not responsible for loss or damage sustained by foreign investors unless it can be shown that the Government of that state failed to provide the standard of protection required, either by treaty, or under general customary law, as the case may be;[750]

The traditional rule clearly denies attributability to the State of the conducts of private individuals, while recognising imputation to the State of the acts and omissions of State

[747] *See infra* Chapter IV, para 4.5.3.
[748] *See supra* Chapter II, para 5.1.
[749] *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award, 27 June 1990, para 72; *Tradex Hellas SA v Republic of Albania*, ICSID Case No ARB/94/2, Award, 29 April 1999, para 165; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 124.
[750] *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award, 27 June 1990, para 72(i) *et seq*, quoting *Affaire des biens britanniques au Maroc espagnol (Espagne contre Royaume-Uni) (Spanish Zone of Morocco)*, 1 May 1925, 2 RIAA 615; *Sambiaggio Case (of a general nature)*, 1903, 10 RIAA 499; *Kummerow, Otto Redler and Co, Fulda, Fischbach, and Friedericy Cases*, 1903, 10 RIAA 369; *The Home Insurance Co (USA) v United Mexican States*, 31 March 1926, 4 RIAA 48.

organs (or, theoretically, also State entities) in relation to the substantive standards of protection owed to foreign investors.

5.2 Fair and Equitable Treatment and Full Protection and Security

In the context of international investment law the primary obligation of due diligence incumbent on the State and its organs is usually strengthened through codification of higher standards of fair and equitable treatment or full protection and security, as such possibly overlapping, the latter establishing affirmative duties of State organs to control and surveil, prevent, or repress.[751] Both standards posit a model of responsibility based on negligence (fault theory), but States may nevertheless provide for rules of strict or objective liability for damages incurred by foreign investors, traditionally in times of social, political and civil

[751] *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 262 *et seq*, 269: '*The notion of continuous protection and security is to be distinguished here from the fair and equitable standard since they are placed in two different provisions of the BIT, even if the two guarantees can overlap. As put forward by the Claimants, this concept relates to the exercise of due diligence by the State.*'; *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007, para 354 *et seq*; *Eureko BV v Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 August 2005, para 237: '*However, in any event, there is no clear evidence before the Tribunal that the RoP was the author or instigator of the actions in question. If such actions were to be repeated and sustained, it may be that the responsibility of the Government of Poland would be incurred by a failure to prevent them*.'; *Nykomb Synergetics Technology Holding AB v The Republic of Latvia*, SCC, Arbitral Award, 16 December 2003, para 4.2-4.3; *American Manufacturing & Trading, Inc (AMT) v Republic of Zaire*, ICSID Case No ARB/93/1, Award, 21 February 1997, paras 6.05-6.11; *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, para 166; *Toto Costruzioni Generali SpA v The Republic of Lebanon*, ICSID Case No ARB/07/12, Award, 7 June 2012, paras 226-230; *Tradex Hellas SA v Republic of Albania*, ICSID Case No ARB/94/2, Award, 29 April 1999, para 146: '*Tradex has also not shown that it contacted the authorities after these alleged invasions so that a failure to act by the authorities could be considered under the aspect of attributability to the State.*'; *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award, 27 June 1990, para 49: '*Consequently, both the oldest reported arbitral precedent and the latest I.C.J. ruling confirms that the language imposing on the host State an obligation to provide "protection and security" or "full protection and security required by international law" (the other expression included in the same Article V) could not be construed according to the natural and ordinary sense of the words as creating a "strict liability".*' On the distinction between fair and equitable treatment and full protection and security, *see* Christoph H Schreuer, 'Full Protection and Security' (2010) Journal of International Dispute Settlement 1, 14: '*As a matter of substance, the content of the two standards is distinguishable. The FET standard consists mainly of an obligation on the host State's part to desist from behaviour that is unfair and inequitable. By contrast, by assuming the obligation of full protection and security the host State promises to provide a factual and legal framework that grants security and to take the measures necessary to protect the investment against adverse action by private persons as well as State organs.*'

turmoils (international conflicts, revolutionary upheavals, civil wars), irrespective of their 'involvement' by way of act or omission in the relevant events.[752] As decided in the case of *American Manufacturing & Trading v. Zaire*:

> Such is the case without the Tribunal enquiring as to the identity of the author of the acts of violence committed on the Zairian territory. It is of little or no consequence whether it be a member of the Zairian armed forces or any burglar whatsoever.[753]

The stipulation of such 'absolute warranty' clauses – not only irrespective of State *fault*, but even of State *conduct* – is very limited in investment treaties and practice.[754] Moreover, as above mentioned,[755] it should be emphasised that such stipulations do not establish rules of attribution proper, but operate at the level of the creation of primary obligations establishing for the benefit of foreign investors a more favourable treatment than that established by the customary standard of due diligence, with a pragmatic consequence to *suggest* State action in order to prevent the occurence of damages or losses to aliens, which would have been

[752] US-Zaire BIT (1984), Article IV(1) (*Compensation for Damages Due to War and Similar Events*): '*Nationals or companies of either Party whose investments in the territory of the other Party suffer: (a) damages due to war or other armed conflict between such other Party and a third country, or (b) damages due to revolution, state of national emergency, revolt, insurrection, riot or act of violence in the territory of such other Party, shall be accorded treatment no less favorable than that which such other Party accords to its own nationals or companies or to nationals or companies of any third country, whichever is the most favorable treatment, when making restitution, indemnification, compensation or any other settlement with respect to such damages.*'. *Adde*, *Cornelia J Pringle, et al, (Santa Isabel Claims) (USA) v United Mexican States*, 26 April 1926, 4 RIAA 783, 785, with regard to Article III(b) of the Convention of September 10, 1923, providing for the settlement and amicable adjustment of claims arising from losses or damages suffered by American citizens through revolutionary acts within the period from 20 November 1910 to 31 May 1920; *Kummerow, Otto Redler and Co, Fulda, Fischbach, and Friedericy Cases*, 1903, 10 RIAA 369, 370, with regard to Article III of the Germany–Venezuela protocol of 13 February 1903.

[753] *American Manufacturing & Trading, Inc (AMT) v Republic of Zaire*, ICSID Case No ARB/93/1, Award, 21 February 1997, para 6.13.

[754] Yves Nouvel, 'Les entités paraétatiques dans la jurisprudence du CIRDI' in Charles Leben (ed), *Le contentieux arbitral transnational relatif à l'investissement. Nouveaux développements* (LGDJ 2006) 25, 41: '*Il est vrai que la responsabilité du plein droit ainsi mise en place tend à constituer un véritable mécanisme de garantie. Or, tel n'est pas l'objet des conventions bilatérales d'investissement. C'est pourquoi ces stipulations forment une pratique conventionnelle extrêmement marginale.*'

[755] *See supra* para 1.2 of this Chapter.

otherwise outside the ordinary coverage of State responsibility for internationally wrongful acts:[756]

> Even if not (i.e., even if the applicable secondary rules of State responsibility remain unaffected), the fact that the treaty is a BIT opens up a further possibility at the level of primary obligation, specifically that the broad scope mutually agreed by the Contracting Parties for encouraging as well as protecting the investments of one in the territory of the other may have the effect of requiring (sc. as a matter of treaty obligation) the Government to adopt patterns of conduct in respect of its State organs and para-statal entities different from those that would ordinarily be required under general international law or treaty law.[757]

The old theory of implied State complicity is not applied, not to say considered, by arbitrators, which usually dismiss it in so far as a sporadic allegation of 'conspiracy' is raised by investors.[758] Even a general declaration of the political powers calling for or encouraging given actions by civilians does not result in the attribution of such actions to the State. This case has been analysed by the *Tradex v. Albania* Tribunal, which accordingly observed:

> Subsidiarily, even if the villagers felt encouraged to such occupations by Decision 452 and the Berisha speech, that would not be a sufficient basis to attribute such occupations to the State of Albania, and no other evidence has been provided as a basis for such an attributability.[759]

5.3 State-Owned Companies

As already mentioned, the conducts *jure gestionis* of a SOE, for instance a State enterprise, may fall under the scope of attribution of ARSIWA Article 8, which confers renovated vitality to this rule. This possibility is contemplated in so far as the requirements dictated by

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[756] Luca Schicho, 'Attribution and State Entities: Diverging Approaches in Investment Arbitration' (2011) 12 Journal of World Investment & Trade 283, 293.
[757] *F-W Oil Interests, Inc v The Republic of Trinidad and Tobago*, ICSID Case No ARB/01/14, Award, 3 March 2006, para 206.
[758] *Waste Management, Inc v United Mexican States (Waste Management II)*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, paras 137-138: '*a deliberate conspiracy – that is to say, a conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement–*'; *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Award, 30 June 2009, para 148: '*the Tribunal is not satisfied that the Bangladeshi courts acted in collusion or conspired with Petrobangla.*'; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 258.
[759] *Tradex Hellas SA v Republic of Albania*, ICSID Case No ARB/94/2, Award, 29 April 1999, para 165.

ARSIWA Article 5 are not cumulatively met, which occurs in the absence of formal delegation of powers or exercise of elements of the governmental authority in the actual case. Accordingly, symptomatic elements displaying the status of a parastatal entity (pursuant to the structural test) may nonetheless function as basis for attribution, in so far as they embody an evidence of instructions, or direction or control by State organs.[760] This conclusion may be seemingly reached upon the findings of a palpable governmental oversight, previous approval of resolutions and operations, and mandates from the State to the SOE, and upon consideration of corporate governance provisions envisaging the governmental appointment of its managers, consistently with the decisions rendered by the Iran-US Claims Tribunal on the same legal issue.[761] The *F-W Oil Interests v. Trinidad and Tobago* Tribunal has noted this logical sequence in the resolution of attribution issues relating to the activities of SOEs:

> Moreover – and the point is of some importance – it is not the case that the same answer would necessarily emerge on every occasion; in some of its activities a State enterprise might fall on one side of the line, in others on the other. Considerations of a very similar kind would apply to the case lying on the outer edge of the spectrum of possibilities described above, that in which the State enterprise was not exercising "governmental authority" as such, but has to be regarded as acting in fact on State instructions, or under State direction, or under State control.[762]

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[760] *See supra* para 4.2.1 of this Chapter.

[761] *RayGo Warner Equipment Company v Star Line Iran Company*, Case No 17, 15 December 1982, 1 IRAN-US CTR 411, 413 (1982); *Kimberley-Clark Corporation v Bank Markazi Iran, Novzohour Paper Industries, Government of the Islamic Republic of Iran*, Case No 57, Award No 46-57-2, 25 May 1983, 2 IRAN-US CTR 334, 338 (1983-I); *Cal-Maine Foods, Inc v The Government of the Islamic Republic of Iran and Sherkat Seamourgh Company, Inc*, Case No 340, 31 May 1984, Award No 133-340-3, 6 IRAN-US CTR 52, 58-59 (1984-II); *Rexnord, Inc v The Islamic Republic of Iran, Tchacosh Company and Iran Siporex Industrial and Manufacturing Works, Limited*, Case No 132, 10 January 1983, Award No 21-132-3, 2 IRAN-US CTR 6 (1983-I); *Sedco, Inc v National Iranian Oil Company and The Islamic Republic of Iran*, Case No 129, 24 October 1985, Award No ITL 55-29-3, 9 IRAN-US CTR 248, 277 (1985-III); *SeaCo, Inc v The Islamic Republic of Iran, The Iranian Meat Organization, Iran Express Lines, and Star Line Co*, 11 IRAN-US CTR 210, 215 (1986-II); *McLaughlin Enterprises, Ltd v The Governement of the Islamic Republic of Iran, Information System Iran*, Case No 289, 16 September 1986, Award No 253-289-1, 12 IRAN-US CTR 146, 149 (1986-III); *Emanuel Too v Greater Modesto Insurance Associates and The United States of America*, Case No 880, 29 December 1989, Award No 460-880-2, 23 IRAN-US CTR 378, 384 (1989-III); *Kaysons International Corporation v The Government of the Islamic Republic of Iran, The Ministry of Industries and Mines, The Alborz Investment Corporation, The Tolid Daru Company, The Payegozar, The Pakhs Alborz Company, and The KBC Company*, Case No 367, 28 June 1993, Award No 548-367-2, 29 IRAN-US CTR 222, 229 (1993); *Schering Corporation v The Islamic Republic of Iran*, Case No 38, 13 April 1984, Award No 122-38-3, 5 IRAN-US CTR 361, 370 (1984-I).

[762] *F-W Oil Interests, Inc v The Republic of Trinidad and Tobago*, ICSID Case No ARB/01/14, Award, 3 March 2006, para 203.

In general, this further elicits an absence of any requirement of official or governmental authority for the purposes of attribution *ex* ARSIWA Article 8, being 'sufficient' the demonstration of a factual link of instructions, or direction or control, between State organs and non-state actors.[763]

5.4 Test for Attribution

Investment Tribunals confirm that attribution under ARSIWA Article 8 is to be regarded as an exceptional mechanism, based on the two alternative prongs of instructions or authorization, on one hand, and direction or control, on the other hand.[764] With particular regard to the attribution of conducts of SOEs, notably private or privatized State enterprises organized in corporate form, the analysis of the arbitrators is inevitably influenced by municipal law tenets of corporate law, which usually provides for the regulation of the phenomena of direction and coordination within groups of companies. In *EDF v. Romania*, the Tribunal acknowledged evidence that the Roumanian Ministry of Transportation issued instructions and directions to two SOEs in relation to their conduct in the exercise of their rights as shareholders of a PPP

[763] *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 129: '*The Tribunal also notes that attribution under Article 8 is without prejudice to the characterization of the conduct under consideration as either sovereign or commercial in nature. For the sake of attribution under this rule, it does not matter that the acts are commercial, jure gestionis, or contractual. […] In other words, a finding of attribution does not necessarily entail that the acts under review qualify as sovereign acts*'; *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, para 82: '*in principle, a certain factual link between the State and the actor is required in order to attribute to the State acts of that actor.*'; *Limited Liability Company Amto v Ukraine*, SCC Case No 080/2005, Final Award, 26 March 2008, para 31: '*It follows from Article 8 of the ILC Articles that* any *act, which is in fact carried out on the instructions of, or under the direction or control of the State, is attributable to it.*'

[764] *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para 200; *Tradex Hellas SA v Republic of Albania*, ICSID Case No ARB/94/2, Award, 29 April 1999, paras 169-170; *EnCana Corporation v Republic of Ecuador*, LCIA Case No UN3481, UNCITRAL, Award, 3 February 2006, para 154; *Waste Management, Inc v United Mexican States (Waste Management II)*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, para 75; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award, 27 August 2008, para 297; *Limited Liability Company Amto v Ukraine*, SCC Case No 080/2005, Final Award, 26 March 2008, para 102; *Fireman's Fund Insurance Company v The United Mexican States*, ICSID Case No ARB(AF)/02/1, Award, 17 July 2006, paras 148-155.

with the foreign investor and with regard to other commercial activities.[765] The attribution of conduct to Romania was mainly justified upon the finding of an articulated system of mandates by the governement ultimately expressing compelling directives, which was demonstrated by the adoption by the general assembly of the shareholders of the SOE of a resolution conforming verbatim thereto.[766] Similarly, the *Bayindir v. Pakistan* Tribunal declared the termination of contract by a parastatal as attributable to Pakistan by virtue of the '*express clearance*' from the government.[767] It is questioned whether a conclusion of attribution requires the demonstration by the claimant of a specific purpose of the State to be fulfilled through its mandates to the SOE. This was indeed the solution adopted by the *EDF v. Romania* Tribunal:

> Further, the evidence before the Tribunal indicates that the Romanian State was using its ownership interest in or control of corporations (AIBO and TAROM) specifically "in order to achieve a particular result" within the meaning of the ILC Commentary above. The particular result in this case was bringing to an end, or not extending, the contractual arrangements with EDF and ASRO and instituting a system of auctions.[768]

The Tribunal explicitely referred to the excerpt of the ARSIWA Commentaries stating that '*where there was evidence […] that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has to be attributed to the State.*'[769] This '*particular result*' should be found to be contrary or at least as going beyond the *subjective* economic interest of the SOE, since a Tribunal is refrained by a business judgment rule to assess '*what is objectively in the best interests of a*

[765] *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para 201.
[766] *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, paras 207-208.
[767] *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 125.
[768] *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, paras 201. *Accord*, *Tulip Real Estate and Development Netherlands BV v Republic of Turkey*, ICSID Case No ARB/11/28, Award, 10 March 2014, para 306.
[769] ARSIWA Commentaries 48, para 6, quoting *Foremost Tehran, Inc v Iran*, Cases Nos 37 and 231, 10 April 1986, Award No 220-37/231-1, 10 IRAN-US CTR 228 (1986-I); *American Bell International, Inc v The Islamic Republic of Iran, The Ministry of Defense of the Islamic Republic of Iran, The Ministry of Post, Telegraph and Telephone of the Islamic Republic of Iran, and The Telecommunications Company of Iran*, Case No 48, 19 September 1986, Award No 255-48-3, 12 IRAN-US CTR 170 (1986-III).

company for purposes of State attribution.'[770] The 'particular result' theory applied by the *EDF v. Romania* Tribunal (as seemingly referring to the requirements for the application of the group of companies doctrine)[771] may certainly be sufficient to establish attribution, but its markedly high threshold is not necessarily required under ARSIWA Article 8 (it is parenthetically noted that the *EDF v. Romania* Tribunal implicitly considered the specific purpose underlying the orders of the State as being coincident with the content of the mandated conduct, which as such did not deviate from the interests of the company itself).[772] Moreover, a finding of serious interference by the State into the business of a SOE may even provide for a basis of imputation under ARSIWA Article 4 based on the conducts of State organs. Instead, adequate evidence of an important and indeed predominant (hence, globally decisive) influence of the sovereign (directly or indirectly) would complete the test of effective control established for attribution of conducts (*jure gestionis*) of private individuals.[773] While a finding of 'control' for the purposes of attribution should in principle elicit a tighter link than an ordinary majority ownership held by a private shareholder,[774] the rule of 'important indeed predominant (*importante voire prédominante*) influence' may represent a major advancement towards the erosion of the unreasonably restrictive criteria for

[770] *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, paras 210.
[771] *See infra* Chapter IV, para 3.2.3.
[772] *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para 201. Indeed, a coincidence between the interests of the State and of the SOE in relation to the performance of a given conduct does not prevent attribution under ARSIWA Article 8: an act may be clearly executed by the SOE in its own interest *and* at the same time upon implementation of orders of the State.
[773] *Consortium Groupement LESI—DIPENTA v République algérienne démocratique et populaire,* ICSID Case No ARB/03/08, Award, 10 January 2005, para 19 (ii): '*La jurisprudence admet toutefois que la responsabilité de l'Etat peut être engagée dans des contrats pourtant passés par des entreprises de droit public distinctes de lui lorsque son influence n'en reste pas moins importante voire prédominante.*'; *LESI SpA and ASTALDI SpA v République Algérienne Démocratique et Populaire*, ICSID Case No ARB/05/3, Decision, 12 July 2006, para 78(ii). *See* Pierre-Marie Dupuy, 'Les émanations engagent-elles la responsabilité des Etats? Etude de droit international des investissements' (2006) EUI Working Paper LAW No 2006/7, 6-7: '*c'était en réalité l'Etat qui « tirait les ficelles »*'.
[774] *Tulip Real Estate and Development Netherlands BV v Republic of Turkey*, ICSID Case No ARB/11/28, Award, 10 March 2014, para 289.

lifting the corporate veil of companies dispensed by the ICJ in the *Barcelona Traction* case.[775] Finally, and precisely about the thresholds of State 'control', it seems that Tribunals confuse the test of effective control demanded by ARSIWA Article 8 with the prong of overall control required for a finding of *de facto* agency under Article 4.2:

> Finally, the Tribunal is aware that the levels of control required for a finding of attribution under Article 8 in other factual contexts, such as foreign armed intervention or international criminal responsibility, may be different. It believes, however, that the approach developed in such areas of international law is not always adapted to the realities of international economic law and that they should not prevent a finding of attribution if the specific facts of an investment dispute so warrant.[776]

Although this pararagraph remains markedly cryptic, it apparently refers to the *querelle Nicaragua – Tadić – Bosnian Genocide* on the issue of the prong of control – effective or overall – for the sake of attribution of conducts of *de facto* organs, which instead prospers outside the scope of application of the rule of imputability of acts and omissions of 'private' individuals.[777] While it is found that investment litigation may envisage issues of business law (such as corporate governance principles, or aspects of direction and coordination within groups of companies) susceptible to orient the analysis of the test for attribution, the fundamental mechanism of ARSIWA Article 8 remains ontologically unaffected by that.

6. Concluding remarks

This chapter has attempted to ascertain that IIAs do not normally provide for attribution rules at all, or, in any case, for significant deviations from customary international law, as codified

[775] *Barcelona Traction Light and Power Company, Limited (Belgium v Spain)*, Second Phase, Judgment, 5 February 1970, paras 56-58, ICJ Reports 1970, 3, 38-39.
[776] *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 130.
[777] *See also Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 173, fn 17; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, paras 179, fn 168, 198-199.

by ARSIWA Articles 4, 5 and 8 ('*il y a peu de mécanismes d'imputation propres au droit des investissements*').[778] Accordingly, international investment law and arbitration stands as one of the most prolific fields for the analysis of the contemporary functioning of the ordinary mechanisms of imputability with the view to contribute to its understanding and gradual progressive development. However, this chapter has also detected relevant critical problems in the resolutions of investment Tribunals, which demand to be sublimated in order to enhance a prospective evolutionary process from Erinyes to Eumenides, or from the formative to the learned stage.[779] Problems seem to be originated by (certain) arbitrators' habit to treat customary international law in general and ARSIWA in particular as a set of norms that are external to their self-contained 'private' institutional mandate, which accordingly have to be handled with parsimony and caution.[780] The resulting cursory treatment of the general theory tenets underlying the function and nature of the international rules of attribution of conducts to States has notably engendered their illiterate application through holistic and cumulative combination of different tests of imputability,[781] which should invariably remain as distinct and independent, though possibly complementary, and their confusion with aspects of contractual liability, governed as such by the proper law of contract.[782]

Provided that problems are solved, various shoots of contribution and innovation from international investment law to customary international law are already acknowledgeable.

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[778] Yves Nouvel, 'Les entités paraétatiques dans la jurisprudence du CIRDI' in Charles Leben (ed), *Le contentieux arbitral transnational relatif à l'investissement. Nouveaux développements* (LGDJ 2006) 25, 41.
[779] Kaj Hobér, 'State Responsibility and Attribution' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 550, 582.
[780] Jürgen Kurtz, 'The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration' (2010) 25 ICSID Review – Foreign Investment Law Journal 200, 201; Pierre-Marie Dupuy, 'Les émanations engagent-elles la responsabilité des Etats? Etude de droit international des investissements' (2006) EUI Working Paper LAW No 2006/7, 11: '*Toutefois, en l'absence de précisions conventionnelles de cet ordre, les arbitres sont en quelque sorte laissés à eux-mêmes pour appliquer le droit international général. Ils le font alors, parfois, selon des raisonnements et des méthodes aboutissant à des solutions partiellement hétérodoxes.*'
[781] Luca Schicho, 'Attribution and State Entities: Diverging Approaches in Investment Arbitration' (2011) 12 Journal of World Investment & Trade 283-288.
[782] James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 ICSID Review – Foreign Investment Law Journal 127, 134.

With regard to ARSIWA Article 4, Tribunals have rendered important analysis of attribution of acts and omissions of State organs exercising 'any other functions', such as central banks and independent administrative bodies like competition authorities and market regulators. Tribunals have generally established *de jure* agency (in the public law meaning), notwithstanding their separate juristic personality. To this extent, their legal personality should have a public law connotation. Otherwise, independent juristic personality of private law would usually trigger attraction into the orbit of the imputability mechanism designed for parastatatal entities under ARSIWA Article 5. Arbitrators have not ultimately embarked – but for isolated *obiter dicta* – in the application of a doctrine of *de facto* organs *ex* ARSIWA Article 4.2. Even though investment Tribunals are regularly confronted with different factual scenarios than those involving the activities of paramilitary groups, whose requirement of qualification has created the aforementioned doctrine, they are definitely not prevented to apply it in the context of their jurisdiction, by taking into consideration the different policies and nuances of international economic litigation. More speculatively, this doctrine may even intervene to qualify a SOE, formally benefitting of separate legal personality of private law, as a *de facto* agent of the State, in connection with a finding of serious lack of independence, institutional and financial insuffiency, and overwhelming mandates by the State, so that the SOE appears as an arm of the governmental functions, rather than a business actor.[783] With regard to ARSIWA Article 5, investment arbitration practice represents the bulk of international litigation involving attribution of the conducts of State instrumentalities. In particular, a noticeable progressive trend towards a wider scope of imputability may be in place, hinging on the qualification of given acts of parastatal entities as 'governmental' based

[783] Georgios Petrochilos, 'Attribution' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 287, 296-299; Nick Gallus, 'State Enterprises as Organs of the State and BIT Claims' (2006) 7 Journal of World Investment & Trade 761, 778.

on the inception of a principle of competitive neutrality or equality into the context-based nature test resorted to by the interpreter in order to distinguish *acta jure imperii* and *acta jure gestionis*. This development is recognised as desirable under a policy viewpoint, but under a legal perspective should be accompanied by the application of the same test by national judges as to their decision to grant or deny State immunity from jurisdiction, which depends on the very same distinction. With regard to ARSIWA Article 8, notwithstanding sparse confusion with the prongs of control required for a finding of *de facto* agency, Tribunals have rendered insightful solutions for the imputation to States of the conducts *jure privatorum* undertaken by their SOEs, which inevitably entails the consideration of issues of domestic corporate law. In this respect, the complex dynamics associated with governmental shareholdings in State enterprises may suggest an overriding approach to the restrictive conditions for the piercing of the corporate personality established by *Barcelona Traction*.

Soil has been ploughed, trees have been planted, and the orchard will soon appear.

CHAPTER IV

"ATTRIBUTION" ISSUES IN INTERNATIONAL BUSINESS DISPUTES BETWEEN STATES OR STATE-OWNED ENTITIES AND ALIENS

1. Premise: State Contracts with Aliens in International Law

This treatise has hitherto investigated issues of attribution of conducts to States in the context of State-to-State disputes and international investment disputes as subjective requirement for the purposes of State responsibility for internationally wrongful acts. Instead, this chapter investigates the solutions rendered by arbitrators and municipal judges with regard to the treatment of the State and of State instrumentalities as parties to a 'State contract' stipulated with aliens ('*contrat d'État*').[784] Accordingly, 'attribution' (or 'imputation') is here intended

[784] Giorgio Sacerdoti, *I contratti tra Stati e stranieri nel diritto internazionale* (Giuffrè 1972); Prosper Weil, 'Problèmes relatifs aux contrats passés entre un État et un particulier' (1969) 128 Recueil des Cours 95; Philippe Leboulanger, *Les contrats entre états et entreprises étrangères* (Economica 1985); Jean-Flavien Lalive, 'Contracts Between a State or a State Agency and a Foreign Company' (1964) 13 International & Comparative Law Quarterly 987; Patrick Juillard, 'Contrats d'État et investissement' in Hervé Cassan (ed), *Contrats internationaux et pays en développement* (Economica 1989) 159; Frédéric Eisemann, 'La situation actuelle de l'arbitrage commercial international entre Etats ou entités étatiques et personnes physiques ou morales de droit privé' (1975) Revue de l'Arbitrage 279; Charles Carabiber, 'L'arbitrage international entre gouvernements et particuliers' (1950-I) 76 Recueil des Cours 221; Geneviève Guyomar, 'L'arbitrage concernant les rapports entre États et particuliers' (1959) 5 Annuaire Français de Droit International 333; J Gillis Wetter and Stephen M Schwebel, 'Some Little Known Cases on Concessions' (1964) 40 British Year Book of International Law 183; Theodor Meron, 'Repudiation of Ultra Vires State Contracts and the International Responsibility of States' (1967) 6 International & Comparative Law Quarterly 273; Martin Domke, 'Arbitration of State-trading Relations' (1959) 24 Law & Contemporary Problems 317; F A Mann, 'The Law Governing State Contracts' (1944) 21 British Yearbook of International Law 11; F A Mann, 'State Contracts and International Arbitration' (1967) 42 British Year Book of International Law 1; F A Mann, 'The Theoretical Approach Towards the Law Governing Contracts Between States and Private Persons' (1975) 11 Revue Belge de Droit International 562; Georges Vedel, 'Le problème de l'arbitrage entre gouvernements ou personnes de droit public et personnes de droit privé' (1961) Revue de l'Arbitrage 116; Eduardo Jiménez de Aréchaga, 'L'arbitrage entre les Etats et les sociétés privées étrangères' in *Mélanges en l'honneur de Gilbert Gidel* (Sirey 1961) 367; Robert Y Jennings, 'State Contracts in International Law' (1961) 37 British Yearbook of International Law 156; C F Amerasinghe, 'State Breaches of Contracts with Aliens and International Law' (1964) 58 American Journal of International Law 881; Pierre Lalive, *Réflections sur l'Etat et ses contrats internationaux* (Institut Universitaire de Hautes Etudes Internationales 1976); Werner Goldschmidt, 'Transactions Between States and Public Firms and Foreign Private Firms (A Methodological Study)' (1972) 136 Recueil des Cours 203; Hüsein Pazarci, 'La responsabilité

in a-technical acceptation in relation to various issues, such as the extension of contractual obligations and of the subjective scope of an arbitration agreement from a parastatal entity to the State, or the possibility to enforce an award rendered against the State on the assets of a SOE. In 2014, in line with the average trend of the last years, 10.7% of the ICC cases involved arbitration of a private party with a State or parastatal entity, which confirms the persisting importance of a focus on public-private international business disputes ('*a subject of great practical as well as theoretical importance*').[785]

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internationale des Etats à l'occasion des contrats conclus entre Etats et personnes privées étrangères' (1975) 79 Revue Générale de Droit International Public 354; Georges A van Hecke, 'Les accords entre un Etat et une personne privée étrangère' (1977-I) Annuaire de l'Institut de Droit International 192; Wilhelm Wengler, 'Nouveaux aspects de la problématique des contrats entre Etats et personnes privées' (1978-1979) 14 Revue Belge de Droit International 415; Georges R Delaume, 'State Contracts and Transnational Arbitration' (1981) 75 American Journal of International Law 784; Arghyrios A Fatouros, 'International Law and the Internationalized Contract' (1980) 74 American Journal of International Law 134; Christopher Greenwood, 'State Contracts in International Law–The Libyan Oil Arbitrations' (1982) 53 British Year Book of International Law 27; Jean-Flavien Lalive, 'Contrats entre Etats ou entreprises étatiques et personnes privées. Développements récents' (1983) 181 Recueil des Cours 9; Karl-Heinz Böckstiegel, *Arbitration and State Enterprises. A Survey on the National and International State of Law and Practice* (Kluwer Law and Taxation Publishers 1984); Bernardo M Cremades, 'States and Public Enterprises as International Commercial Partners, in International Chamber of Commerce' in *60 Years of ICC Arbitration: A Look to the Future* (ICC Publications 1984) 177; Bernard Audit, 'Transnational Arbitration and State Contracts: Findings and Prospects' in *L'arbitrage transnational et les contrats d'État* (The Hague Academy of International Law 1987); Jean-Pierre Regli, *Contrats d'État et arbitrage entre États et personnes privées* (Librairie de l'Université Georg & Cie 1983); Philippe Kahn, 'Souveraineté de l'Etat et règlement du litige. Régime juridique du contrat d'Etat' (1985) Revue de l'Arbitrage 641; Bruno Oppetit, 'Les Etats et l'arbitrage international: esquisse de systematisation' (1985) Revue de l'Arbitrage 493; Claude Reymond, 'Souveraineté de l'Etat et participation à l'arbitrage' (1985) Revue de l'Arbitrage 517; Joe Verhoeven, 'Arbitrage entre Etats et entreprises étrangères: des règles spécifiques?' (1985) Revue de l'Arbitrage 609; Derek William Bowett, 'State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach' (1988) 59 British Year Book of International Law 49; Leo J Bouchez, 'The Prospects for International Arbitration: Disputes Between States and Private Enterprises' (1991) 8 Journal of International Arbitration 81, 82; Leila Lankarani El-Zein, *Les contrats d'Etat à l'épreuve du droit international* (Bruylant 2001); Charles Leben, 'Retour sur la notion de contrat d'Etat et sur le droit applicable à celui-ci' in *Mélanges offerts à Hubert Thierry. L'évolution du droit international* (Éditions A Pedone 1998) 247; Charles Leben, 'L'évolution de la notion de contrat d'Etat – Les Etats dans le contentieux économique international, I. Le contentieux arbitral' (2003) Revue de l'Arbitrage 629; Charles Leben, 'La théorie du contrat d'Etat et l'évolution du droit international des investissements' (2003) 302 Recueil des Cours 197.

[785] 'Statistics – ICC Arbitration in 2014', at http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/. The majority of commercial awards is not published and, as a consequence, available. This work has significantly benefitted from the contribution of Eduardo Silva Romero, 'Are States Liable for the Conducts of Their Instrumentalities? ICC Case Law' in Emmanuel Gaillard and Jennifer Younan (eds), *State Entities in International Arbitration* (Juris Publishing, Inc 2008) 31. When reference is made to an award as 'unpublished', the reader should be re-directed to Silva Romero's work. The italics is from Institute of International Law, 'Arbitration Between States, State Enterprises or State Entities, and Foreign Enterprises' (Eduardo Jiménez de Aréchaga and Arthur von Mehren, Rapporteurs), Resolution of 5-13 September 1989, Session of Santiago de Compostela, Preamble, (1990) 5 ICSID Review – Foreign Investment Law Journal 139.

State contracts are agreements stipulated between a foreign business and a State ('State contracts *stricto sensu*')[786] or a parastatal entity ('State contracts *lato sensu*'),[787] seconding Pierre Mayer's classification.[788] They may have a private, or public or administrative nature, and are usually stipulated for a long-term duration, thus broadly encompassing agreements of research and exploitation of natural resources (*contrats pétroliers et miniers*), infrastructure agreements (*marchés de travaux publics*), industrial cooperation contracts (turnkey, technology transfer, engineering and service agreements), administrative concessions, public loans, and investment contracts in general.[789] Giorgio Sacerdoti has emphasised that from the point of view of foreign businesses the chief purpose of concluding State contracts is to limit or even to completely exclude the impact of the host State's public and private municipal law on their commercial relationships.[790] To this extent, State contracts are not meant to be 'international' or 'internationalised' only upon reference to the subjective involvement of parties of different nationalities, but first and foremost by virtue of structural elements of the contract, such as the parties' choice of the applicable laws (a national law different from local law, non-state rules or general principles of international law),[791] the stipulation of stabilisation or intangibility clauses (*clauses de stabilisation*,

[786] *Ex multis*, *Ministry of Defence and Support for Armed Forces of [State X] v German Corporation*, ICC Case No 7304, Partial Award, 31 March 1994, unpublished, para 25: '*contracts concluded by the Ministry of Defence are, without any hesitation, qualified as a "State contract."*'
[787] *Ex multis*, *Capital India Power Mauritius I and Energy Enterprises (Mauritius) Co v Maharashtra Power Development Corp Ltd, Maharashtra State Electricity Board and the State of Maharashtra*, ICC Case No 12913/MS, Final Award, 27 April 2005, 20(5) Int'l Arb Rep C-1 (2005).
[788] Pierre Mayer, 'La neutralisation du pouvoir normatif de l'Etat en matière de contrats d'Etat' (1986) 113 Journal du Droit International (Clunet) 5.
[789] *See* the taxonomy of Philippe Leboulanger, *Les contrats entre états et entreprises étrangères* (Economica 1985) 13 *et seq*. *Adde*, Aldo Frignani, 'L'intervento pubblico nei contratti internazionali' (1990) 26 Rivista di Diritto Internazionale Privato e Processuale 557, 569.
[790] Giorgio Sacerdoti, *I contratti tra Stati e stranieri nel diritto internazionale* (Giuffrè 1972) 18.
[791] Philippe Fouchard, 'L'État face aux usages du commerce international', *Travaux du Comité français de droit international privé* (CNRS 1977) 71.

clauses d'intangibilité),[792] and notably the option for a dispute resolution mechanism through binding 'international' arbitration.[793] All such factors engender an effect of externalization, depoliticization, and disengagement from the host State's substantive and procedural legal order. On one hand, a State contract cannot be assimilated to an international agreement,[794] although former doctrinal definitions of 'quasi-international agreements' or 'economic development agreements' yealded in favour of a comprehensive systematization into the domain of public international law.[795] On the other hand, State contracts may not be completely equated to a business-to-business agreement. A dimension of latent inequality (*inegalité latente*) always persists in transactions between sovereigns and private parties, from the negotiation to the physiologic performance of the contract, until its possible pathologic phase.[796] This is well understood in light of the two-faced role of the State as regulator and merchant: it appears as business partner on a dimension of contractual parity, but nevertheless may exercise its sovereign prerogatives to affect that very same commercial transaction with a

[792] Prosper Weil, 'Les clauses de stabilisation ou d'intangibilité dans les accords de développement économique' in *Mélanges offerts à Charles Rousseau. La communauté internationale* (Éditions A Pedone 1974) 301; Pierre Mayer, 'La neutralisation du pouvoir normatif de l'Etat en matière de contrats d'Etat' (1986) 113 Journal du Droit International (Clunet) 5; Philippe Leboulanger, *Les contrats entre états et entreprises étrangères* (Economica 1985) 91-99, 99-101; Samuel K B Asante, 'Stability of Contractual Relations in the Transnational Investment Process' (1979) 28 International & Comparative Law Quarterly 401; Nicolas David, 'Les clauses de stabilité dans les contrats pétroliers. Questions d'un praticien' (1986) 113 Journal du Droit International (Clunet) 79; Aldo Frignani, 'L'intervento pubblico nei contratti internazionali' (1990) 26 Rivista di Diritto Internazionale Privato e Processuale 557, 772; Jean-Michel Jacquet, 'L'Etat, opérateur du commerce international' (1989) 116 Journal du Droit International (Clunet) 621, 649.

[793] *Ex multis*, Giorgio Sacerdoti, *I contratti tra Stati e stranieri nel diritto internazionale* (Giuffrè 1972) 8, 18-19; Jean-Flavien Lalive, 'Contracts Between a State or a State Agency and a Foreign Company' (1964) 13 International & Comparative Law Quarterly 987; Leo J Bouchez, 'The Prospects for International Arbitration: Disputes Between States and Private Enterprises' (1991) 8 Journal of International Arbitration 81, 82.

[794] ICC Case No 3327 of 1981, Award, (1982) 109 Journal du Droit International (Clunet) 971.

[795] Alfred Verdross, 'Quasi-International Agreements and International Economic Transactions' (1964) 18 The Yearbook of World Affairs 230; Arnold D McNair, 'The General Principles of Law Recognized by Civilized Nations' (1957) 33 British Year Book of International Law 1, 3; James N Hyde, 'Economic Development Agreements' (1962) 105 Recueil des Cours 271; Ignaz Seidl-Hohenveldern, 'The Theory of Quasi-International and Partly International Agreements' (1975) 11 Revue Belge de Droit International 567; Wilhelm Wengler, 'Les accords entre Etats et entreprises étrangéres sont-ils des traités du droit international?' (1972) 76 Revue Générale de Droit International Public 313, 316.

[796] Pierre Lalive, '"Raison d'État" et Arbitrage International' in Robert Briner, L Yves Fortier, Claus-Peter Berger and Jens Bredow (eds), 'Law of International Business and Dispute Settlement in the 21st Century. Liber Amicorum Karl-Heinz Böckstiegel' (Carl Heymanns Verlag KG 2001) 469.

foreing investor based on *raison d'État*. The asymmetric nature of the parties riverberates itself in the contentious dimension, since a State and a SOE may invariably invoke a defence of immunity from adjudication before a foreign court (which is notably applicable to the phase of recognition of the arbitral award) or from execution of the abitral award on their properties, which does not correspond to a canonical setting of 'equality of arms'.

1.1 Proper Law of State Contracts

The determination of the law applicable to the substance of contracts stipulated between States or SOEs and foreign private businesses has been and still remains a matter of controversial systematization.[797] The traditional theory considered State contracts as subject to the domestic law of the contracting State. The Permanent Court of International Justice held this posture, later confirmed by the International Court Justice, in the case of the *Serbian Loans*:

> Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country. The question as to which this law is forms the subject of that branch of law which is at the present day usually described as private international law or the doctrine of the conflict of laws. The rules thereof may be common to several States and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between States. But apart from this, it has to be considered that these rules form part of municipal law.[798]

[797] For an illustration, *see* Francisco V García Amador, International Responsibility: Fourth Report by F V García Amador, Special Rapporteur, 'Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens – Measures Affecting Acquired Rights', 26 February 1959, para 93 *et seq*, document A/CN.4/119, Yearbook of the International Law Commission, 1959, Volume II, 1, 24 *et seq*, document A/CN.4/SER.A/1959/Add.l.

[798] *Serbian Loans (France v Serbia)*, Judgment No 14, 12 July 1929, PCIJ Reports 1929, Series A, Nos 20/21, 5, 41. *Adde*, *Anglo-Iranian Oil Co (United Kingdom v Iran)*, Preliminary Objections, Judgment, 22 July 1952, ICJ Reports 1952, 93, 111-112: '*The Court cannot accept the view that the contract signed between the Iranian Government and the Anglo-Persian Oil Company has a double character. It is nothing more than a concessionary contract between a government and a foreign corporation. The United Kingdom Government is not a party to the contract; there is no privity of contract between the Government of Iran and the Government of the United Kingdom. Under the contract the Iranian Government cannot claim from the United Kingdom Government any rights which it may claim from the Company, nor can it be called upon to perform towards the United Kingdom Government any obligations which it is bound to perform towards the Company*.'; *Case of*

The traditional theory undoubtedly corresponded to an historical phase of limited mobility of foreign direct investment (FDI): '*Au surplus, l'arrêt de 1929 de la C.P.J.I. est intervenu à une époque où la délocalisation et l'internationalisation des contrats entre un Etat souverain et une entreprise étrangère n'avaient pas encore trouvé droit de cité dans le droit international des contrats*'.[799]

Another theory considers instead State contracts as being regulated by a part of public international law proper. This is the position expressed by the sole arbitrator René-Jean Dupuy in the case of *Texaco v. Libya*:

> For the time being, it will suffice to note that the evolution which has occurred in the old case law of the Permanent Court of International Justice is due to the fact that, while the old case law viewed the contract as something which could not come under international law because it could not be regarded as a treaty between States, under the new concept treaties are not the only type of agreements governed by such law. And it should be added that, although they are not to be confused with treaties, contracts between States and private persons can, under certain conditions, come within the ambit of a particular and new branch of international law: the international law of contracts.[800]

The theory has found support especially in relation to State contracts where 'public international law' or 'international law' were expressly stipulated by the parties as proper laws to govern their contractual dealings.[801]

Certain Norwegian Loans, Judgment, 6 July 1957, ICJ Reports 1957, 9, 24: '*France has limited her acceptance of the compulsory jurisdiction of the Court by excluding beforehand disputes "relating to matters which are essentially within the national jurisdiction as understood by the Govemment of the French Republic"*'.

[799] ICC Case No 5030 of 1992, Award, (1993) 120 Journal du Droit International (Clunet) 1004, 1008. *Adde*, Leo J Bouchez, 'The Prospects for International Arbitration: Disputes Between States and Private Enterprises' (1991) 8 Journal of International Arbitration 81, 100: '*However, the question arises as to whether the aforesaid view still holds good in present-day practice.*'

[800] *Texaco Overseas Petroleum Company / California Asiatic Oil Company v The Government of the Libyan Arab Republic*, Award on the Merits, 19 January 1977, para 32, 17 ILM 3, 13, (1977) 104 Journal du Droit International (Clunet) 350.

[801] *Arabian American Oil Company (ARAMCO) v Saudi Arabia*, Award, 23 August 1958, 27 ILR 117; *BP Exploration Company (Libya) v The Government of the Libyan Arab Republic*, Award on the Merits, 10 October 1973, 53 ILR 297, (1980) 5 Yearbook Commercial Arbitration 143, (1980) Revue de l'Arbitrage 117; *Libyan American Oil Company (LIAMCO) v The Government of the Libyan Arab Republic*, Ad Hoc Award, 12 April 1977, 20 ILM 1, (1981) 6 Yearbook Commercial Arbitration 89, (1980) Revue de l'Arbitrage 132; *Government of the State of Kuwait v The American Independent Oil Company (AMINOIL)*, Award, 24 March 1982, 21 ILM 976, (1984) 9 Yearbook Commercial Arbitration 71, (1982) 109 Journal du Droit International (Clunet) 869.

The 'third' theory recognises the applicability of an '*ordre juridique de base*' (*Grundlegung*), stemming from public international law, as *lex validitatis* of the State contract, which confers to the agreement between the sovereign party and the foreign contractor its binding force and foundation (*pacta sunt servanda*).[802] The *Grundlegung* imposes to States and parastatal entities a public international law obligation to respect and enforce their contractual engagements and arbitration agreements vis-à-vis foreign businesses.[803] Accordingly, the public party cannot invoke its own domestic law in order to deny its aptitude to express consent to arbitrate or capacity to submit to arbitration.[804] In addition, the same cannot avail itself of local courts to frustrate the arbitration agreement, thus

[802] Prosper Weil, 'Problèmes relatifs aux contrats passés entre un État et un particulier' (1969) 128 Recueil des Cours 95, 126, 189 *et seq*; Prosper Weil, 'Les clauses de stabilisation ou d'intangibilité dans les accords de développement économique' in *Mélanges offerts à Charles Rousseau. La communauté internationale* (Éditions A Pedone 1974) 301, 315, 317; Prosper Weil, 'Droit international et contrats d'Etat' in *Mélanges offerts à Paul Reuter. Le droit international: unité et diversité* (Éditions A Pedone 1981) 549.

[803] Karl-Heinz Böckstiegel, 'Arbitration on Disputes between States and Private Enterprises in the International Chamber of Commerce' (1965) 59 American Journal of International Law 579, 585-586.

[804] Cour de Cassation, 1e Chambre civile, Judgment, 2 May 1966, *Tresor Public v Galakis*, (1966) 93 Journal du Droit International (Clunet) 648, (1967) 56 Revue Critique de Droit International Privé 533, note Berthold Goldman. As to arbitral decisions, *see* ICC Case No 1526 of 1968, Award, (1974) 101 Journal du Droit International (Clunet) 915; *Solel Boneh International Ltd and Water Resources Development International v Republic of Uganda and National Housing and Construction Corporation of Uganda*, ICC Case No 2321 of 1974, Award, (1975) 102 Journal du Droit International (Clunet) 938, 939-940, (1976) 1 Yearbook Commercial Arbitration 133: '*Je dois admettre que j'ai quelque peine à suivre le fil du raisonnement selon lequel un Etat, uniquement en raison de sa situation et de ses qualitéś suprêmes, serait incapable de donner une promesse qui l'engage. Le principe « Pacta sunt servanda » est de façon générale reconnu en Droit International et il est difficile de voir une raison quelconque pour laquelle il ne s'appliquerait pas ici. Un Etat souverain doit être suffisamment souverain pour faire une promesse qui l'engage aussi bien en Droit International qu'en droit interne.*'; ICC Case No 5103 of 1988, Award, (1988) 115 Journal du Droit International (Clunet) 1206, 1209; *Italian company v African state-owned entity*, ICC Case No 1939 of 1971, (1975) 102 Journal du Droit International (Clunet) 919: '*L'ordre public international s'opposerait avec force à ce qu'un organe étatique, traitant avec des personnes étrangères au pays puisse passer ouvertement, le sachant et le voulant, une clause d'arbitrage qui met en confiance le cocontractant et puisse ensuite, que ce soit dans la procédure arbitrale ou dans la procédure d'exécution, se prévaloir de la nullité de sa propre parole.*' ('*International public policy would strongly reject the idea that a State organ, having contracted with foreign persons, could openly and intentionally agree to an arbitration clause which attracts the confidence of the contracting party and could later, whether during the arbitral proceedings or at the stage of enforcement, invoke the nullity of its own word.*'); *Framatome v Iranian Agency of Atomic Energy*, ICC Case No 3896 of 1982, Award, (1984) 113 Journal du Droit International (Clunet) 58; ICC Case No 4381 of 1986, Award, (1986) 113 Journal du Droit International (Clunet) 1102; ICC Case No 10157 of 2000, Final Award, (2004) 15 ICC International Court of Arbitration Bulletin 113; *Supplier (European Company) v Republic of X*, ICC Case No 6474, Partial Award on Jurisdiction and Admissibility, 22 April 1992, para 101, (2000) 25 Yearbook Commercial Arbitration 278, *also in* (2004) 15(2) ICC International Court of Arbitration Bulletin 102. As to courts' decisions, *see* Cassazione civile, 9 maggio 1996, No 811, *Société Arabe des Engrais Phosphates et Azotes e Société Industrielle d'Acide Phosphorique et d'Engrais (SIAPE) v Gemanco Srl*, (1997) 22 Yearbook Commercial Arbitration 737, 741.

circumventing its obligations.[805] The prohibition to States and SOEs to twart their arbitration agreements is not (only) the effect of the application of general principles of international law (*venire contra factum proprium*), but of a proper rule of public international law (also applied as international protection against denial of justice under customary international law, or fair and equitable treatment codified in IIAs).[806] The *Grundlegung* eminently differs from the proper law applicable to the substance of the contractual (or administrative) obligations embodied in the relevant contract or concession, for instance the law governing the execution of the agreement.[807] The applicable law to the merits (*fond*) is indeed determined at a subsequent stage ('second step') upon reference to the governing rules of private international

[805] *Himpurna California Energy Limited (Bermuda) v PT (Persero) Perusahaan Listruik Negara (Republic of Indonesia)*, Ad Hoc Arbitration, Final Award, 4 May 1999, para 21 (2000) 15 Yearbook Commercial Arbitration 13: '*It is one thing for a party to seek to avail itself of such remedies it believes to be at its disposal once an award has been rendered. It is quite another for instrumentalities of a party [under international law] to be used to prevent the implementation of a pending procedure to which it has agreed.*'; *Salini Costruttori SpA v Ethiopia and Addis Ababa Water and Sewerage Authority*, ICC Case No 10623/AER/ACS, Award Regarding the Suspension of the Proceedings and Jurisdiction, 7 December 2001, para 166, (2003) 21 ASA Bulletin 82, 90, 92: '*In effect, there is no difference between a state unilaterally repudiating an international arbitration agreement or changing its internal law in an attempt to free itself from such an agreement, on the one hand, and a state going before its own courts to have the arbitral proceedings suspended or terminated (whether on the basis of alleged nullity of the arbitration agreement, alleged bias on the part of the arbitral tribunal, or some other ground), on the other hand. Both amount to the state reneging on its own agreement to submit disputes to international arbitration*'; *Italian Contractor v State Entity (Bandaglesh)*, ICC Case No 7934/CK of 1993, Award on Jurisdiction, unpublished, quoted in High Court of Dhaka, Judgment, 5 April 2000, *Not indicated v Not indicated*, (2000) 18 ASA Bulletin 821 (*see Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, paras 18 *et seq*); *European Company v West African State*, ICC Case No 12048 of 2003, First Partial Award, para 129, (2012) 23(2) ICC International Court of Arbitration Bulletin 61: '*a majority of the Arbitral Tribunal considers that the Claimant did not give the Respondent license to invoke the provisions of that [statute] arbitrarily for the purpose of subverting the parties' arbitration agreement. Indeed, as a State entity, the Respondent arguably has a special duty not to abuse its position by improperly using the judicial apparatus of the State to avoid arbitrating claims that it freely agreed to arbitrate as part of the bargain that it struck when entering into the Contract.*'

[806] ICC Case No 2521 of 1975, Interim Award, (1976) 103 Journal du Droit International (Clunet) 997. *See* Stephen M Schwebel, *International Arbitration. Three Salient Problems* (Cambridge University Press 1987) 61, 65.

[807] Leila Lankarani El-Zein, *Les contrats d'Etat à l'epreuve du droit international* (Bruylant 2001) 12-13: '*La théorie de M. Weil repose sur une distinction qui lui semble fondamentale entre « l'ordre juridique de base » d'un contrat d'Etat à rattachement multiples, et le « le droit applicable » à celui-ci; le droit applicable se concrétisant, soit, dans la choice of law, s'il en existe, soit, à défaut, par la recherche de la* proper law*, de la* lex contractus*. La juridicité de l'autonomie de la volonté, autrement dit la force obligatoire ou le fondement obligatoire du contrat, son pacta, relève de l'ordre juridique de base, appelé également la «* Grundlegung *». […] « C'est à un second stade seulement – c'est-à-dire une fois réglé le problème de l'ordre juridique servant de fondement au contrat – qu'interviendra la détermination des règles de fond appelées, sur renvoi de l'ordre juridique de base, à gouverner matériellement le contrat ».*'

law, either through a conflict-of-laws method (*methode conflictuelle*) or *voie directe*.[808] To this specific extent, it may be said – as a tendency – that '*normally the applicable law in arbitration with state enterprises can and will be found in applying the same criteria as are used for contracts and disputes between private enterprises in international commercial arbitration*.'[809] Accordingly, the proper law of the State contract may be determined by party autonomy (*lex voluntatis*, *loi d'autonomie*) or by reference to the applicable rules of conflict.[810] The choice-of-law analysis may result in the applicability of domestic law(s),[811] as well as a-national rules codifiying transnational business usages (*lex mercatoria*),[812] or a combination thereof.[813] The *depeçage* between municipal law and general principles of international law inevitably depends on the type and nature of the agreement, having regard to

[808] *See* David Suratgar, 'Considerations Affecting Choice of Law Clauses in Contracts Between Governments and Foreign Nationals' (1962) 2 Indian Journal of International Law 273.
[809] Karl-Heinz Böckstiegel, *Arbitration and State Enterprises. A Survey on the National and International State of Law and Practice* (Kluwer Law and Taxation Publishers 1984) 23. *See* Berthold Goldman, 'Les conflits de lois dans l'arbitrage international de droit privé' (1963) 109 Recueil des Cours 347; Yves Derains, 'L'ordre public et le droit applicable au fond du litige dans l'arbitrage international' (1986) Revue de l'Arbitrage 375; Pierre Mayer, 'Mandatory Rules of Law in International Arbitration' (1986) 2 Arbitration International 274.
[810] Giorgio Sacerdoti, *I contratti tra Stati e stranieri nel diritto internazionale* (Giuffrè 1972) 192.
[811] *See French Corporation v Ministry of Defense of State X*, ICC Case No 8646, Award, 22 June 1998, para 10.1.3.3, (2004) 15(2) ICC International Court of Arbitration Bulletin 109.
[812] *Petroleum Development (Trucial Cost) Ltd v Cheikh d'Abu Dhabi*, Award, 18 July 1949, (1952) 1 International & Comparative Law Quarterly 247; ICC Case No 3380 of 1980, Award, (1981) 108 Journal du Droit International (Clunet) 927; ICC Case No 3742 of 1983, Award, (1984) 111 Journal du Droit International (Clunet) 910; ICC Case No 5030 of 1992, Award, (1993) 120 Journal du Droit International (Clunet) 1004, 1008. *Cf* Berthold Goldman, 'Frontières du droit et « lex mercatoria »' in *Le droit subjectif en question,* Archives de Philosophie du Droit No 9 (Sirey 1964) 177; Berthold Goldman, 'La *lex mercatoria* dans les contrats et l'arbitrage internationaux: réalités et perspectives' (1979) 106 Journal du Droit International (Clunet) 475; Berthold Goldman, 'Nouvelles réflexions sur la *lex mercatoria*' in *Études de droit international en l'honneur de Pierre Lalive* (Helbing & Lichtenhahn 1993) 241; Philippe Fouchard, 'L'État face aux usages du commerce international', *Travaux du Comité français de droit international privé* (1977) 71; Philippe Kahn, 'Droit international économique, droit du developpement, lex mercatoria: concept unique ou pluralisme des ordres juridiques?' in *Le droit international des relations economique internationales. Études offertes à Berthold Goldman* (Litec 1982) 97; Philippe Kahn, 'Les principes généraux du droit devant les arbitres du commerce international' (1989) 116 Journal du Droit International (Clunet) 327; Prosper Weil, 'Principes généraux du droit et contrats d'Etat' in *Le droit international des relations economique internationales. Études offertes à Berthold Goldman* (Litec 1982) 387; Wilhelm Wengler, 'Les principes généraux du droit en tant que loi du contrat' (1982) 71 Revue Critique de Droit International Privé 467.
[813] *Arabian American Oil Company (ARAMCO) v Saudi Arabia*, Award, 23 August 1958, 27 ILR 117; ICC Case No 3380 of 1980, Award, (1981) 108 Journal du Droit International (Clunet) 927.

the continuum (*éventail*, according to Charles Leben) of the variety of State contracts.[814] Regardless, even if the contract contains an express choice-of-law in favour of a given national law, such as the law of the State or SOE being a party to the dispute, an arbitral Tribunal is invariably allowed to resort to general principles.[815] This practice has been eventually accepted by the most frequently applied international rules of arbitration, *in primis* by the ICC Arbitration Rules ('*The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages*').[816]

Even though criticised from a strict conflict-of-laws viewpoint,[817] Prosper Weil's theory of State contracts – as being governed by an *ordre juridique de base* as *lex validitatis*, and nevertheless subject to one or more national laws or a-national rules as to its ordinary

[814] Charles Leben, 'L'évolution de la notion de contrat d'Etat – Les Etats dans le contentieux économique international, I. Le contentieux arbitral' (2003) Revue de l'Arbitrage 629, 634.

[815] *Société des Grands Travaux de Marseille v East Pakistan Industrial Corporation*, ICC Case No 1803 of 1972, Award, in Yves Derains and Sigvard Jarvin (eds), *Collection of ICC Arbitral Awards 1974–1985* (Kluwer Law and Taxation Publishers 1990) 40; ICC Case No 5103 of 1988, Award, (1988) 115 Journal du Droit International (Clunet) 1206, 1208; ICC Case No 3380 of 1980, Award, (1981) 108 Journal du Droit International (Clunet) 927; ICC Case No 6754 of 1993, Award, (1995) 122 Journal du Droit International (Clunet) 1009, 1010-1011; ICC Case No 3093/3100 of 1979, Award, in Yves Derains and Sigvard Jarvin (eds), *Collection of ICC Arbitral Awards 1974–1985* (Kluwer Law and Taxation Publishers 1990) 365; *European Company v Municipality of X (African Country)*, ICC Case No 7245 of 1995, Final Award, unpublished; *European State Company v Middle-East State Company*, ICC Case No 7373, Final Award, 3 February 1997, para 349, (2004) 15 ICC International Court of Arbitration Bulletin 72; *Italian Contractor v African State Entity*, ICC Case No 9202 of 1998, Partial Award, (2008) 19(2) ICC International Court of Arbitration Bulletin 76, para 35; *British Company v Czech State Entity*, ICC Case No 9753 of 1999, Final Award, (2001) 12 ICC International Court of Arbitration Bulletin 82, para 6; *Advertising Agency (West European Country) v State Entity (West Asian Country)*, ICC Case No 12099 of 2003, Final Award, (2007) 18(1) ICC International Court of Arbitration Bulletin 111; *UK Joint Venture v African State-Owned Entity*, ICC Case No 13258 of 2005, Partial Award, (2012) 23(2) ICC International Court of Arbitration Bulletin 83; *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Ad Hoc Tribunal, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184, (1994) 19 Yearbook Commercial Arbitration 11. *Contra*, *French Corporation v Ministry of Defense of State X*, ICC Case No 8646, Award, 22 June 1998, para 10.1.3.3, (2004) 15(2) ICC International Court of Arbitration Bulletin 109: '*Having considered the presentations of the Parties, the Arbitral Tribunal concludes that the Contract must be deemed an administrative contract, and that the principles of [State X] administrative law must control. While administrative law concepts have not yet been fully developed in [State X] jurisprudence, the administrative jurisdiction of [State X] courts has been established, and the principles of administrative law are recognized. Egyptian and French jurisprudence, and legal commentary ... serve as a reliable guide in this as in other areas of [State X] law. The Contract in the instant case is with a public entity, unquestionably involves a public service function, and contains some burdensome, and unilateral provisions in favour of the State.*'

[816] ICC Arbitration Rules (2012) Article 21.2 (*Applicable Rules of Law*).

[817] Pierre Mayer, 'Le mythe de l' « ordre juridique de base » (ou *Grundlegung*)' in *Le droit des relations économiques internationales. Etudes offertes à Berthold Goldman* (Litec 1982) 199.

substance – appears to be confirmed by more recent international investment case law allowing for 'cross-over' treaty claims on the basis of the wrongful conduct of the host State for frustration of an international commercial arbitration agreement or award.[818] As remarked by an ICC Tribunal in the Case No 12048:

> Indeed, the majority of this Arbitral Tribunal considers that there is today ample authority in international arbitral jurisprudence for the proposition that the existence of a contract involving a State or State party, as in the present case, is "suffic[ient] to bring the resultant relationship [with the foreign counter party] within the sphere of protection of International law". International tribunals sitting in arbitrations involving States as parties have over the last quarter of a century, thus, applied international law to the determination of disputes before them, notwithstanding the concurrent applicability of the law of a particular State to the underlying agreement. To borrow language from a recent international arbitral award on this issue, the dispute before this Arbitral Tribunal cannot, by its very nature, be "insulated from the imperatives of international law".[819]

Nevertheless, the *renvoi* from the *Grundlegung* to the applicable law retains a decisive role, especially in light of the obligation of the Tribunal to render an award enforceable at law,[820] which should point to a complete normative regime in order to exhaustively and effectively govern the physiology and the possible pathology of the State contract.[821]

1.2 Proper Law of the Arbitration Agreement in State Contracts

By virtue of the principle of severability (*separabilité*) of the arbitration clause, the proper law of the arbitration agreement is not per se identical to the proper law of its matrix contract (*lex contractus*, *lex causae*), or to the law governing the arbitral proceedings (*lex arbitri*, *curial*

[818] *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Award, 30 June 2009, paras 120 *et seq*. *See* Luca G Radicati di Brozolo, 'I rimedi contro le interferenze statali con l'arbitrato internazionale' (2015) Rivista dell'Arbitrato 1, 6.

[819] *European Company v West African State*, ICC Case No 12048 of 2003, First Partial Award, (2012) 23(2) ICC International Court of Arbitration Bulletin 61, para 131.

[820] ICC Arbitration Rules (2012) Article 41.1 (*General Rule*): '*In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.*'

[821] Giorgio Sacerdoti, *I contratti tra Stati e stranieri nel diritto internazionale* (Giuffrè 1972) 196: '*il rinvio deve di necessità indirizzarsi ad un ordinamento completo e positivo, dalle cui norme cogenti e dispositive il contratto possa essere effettivamente retto e disciplinato.*'; Riccardo Luzzatto, 'International Commercial Arbitration and the Municipal Law of States' (1977-IV) 157 Recueil des Cours 87, 90.

law, *law of the reference*).[822] The principle is widely recognised with regard to contracts stipulated between States or 'State entities' and foreign enterprises.[823] Provided that the law applicable to the arbitration clause may differ from both the *lex causae* and *lex arbitri*, it matters of establishing *which* law exactly governs its substantive validity. In general, with regard to business-to-business transactions, the two main candidates appear to be the law of the country of the seat of arbitration or *lex (loci) arbitri*, and the *lex contractus*.[824] The parties to a State contract do not often indicate the place of arbitration, nor the law applicable to the merits, which is otherwise usually designated as being the law of the contracting State.[825] In previous decades, this was notably explained by the election of ICSID arbitration in investment contracts directly entered into by a business with the host State, since in ICSID arbitration the choice of the geographic seat does not entail relevant legal effects.[826] The 1989

[822] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, Article 16(1); ICC Arbitration Rules (2012) Article 6(9); UNCITRAL Arbitration Rules (2010) Article 21(2); LCIA Arbitration Rules (2014) Article 23(2); AAA-ICDR International Arbitration Rules (2014) Article 19(2). *Cf* Carlo de Stefano, 'La legge applicabile alla clausola arbitrale: considerazioni intorno al novello approccio conflittuale delle corti inglesi', nota a *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Company Ltd* [2013] EWHC 4071 (Comm) (2015) Rivista dell'Arbitrato 105, 110.

[823] Institute of International Law, 'Arbitration Between States, State Enterprises or State Entities, and Foreign Enterprises' (Eduardo Jiménez de Aréchaga and Arthur von Mehren, Rapporteurs), Resolution of 5-13 September 1989, Session of Santiago de Compostela, Article 3(a), (1990) 5 ICSID Review – Foreign Investment Law Journal 139, 140: '*The arbitration agreement is separable from the legal relationship to which it refers.*' With regard to the resolution, *see* Arthur T von Mehren, 'Arbitration between States and Foreign Enterprises: The Significance of the Institute of International Law's Santiago de Compostela Resolution' (1990) 5 ICSID Review – Foreign Investment Law Journal 54; Ibrahim F I Shihata, 'The Institute of International Law's Resolution on Arbitration between States and Foreign Enterprises—A Comment' (1990) 5 ICSID Review – Foreign Investment Law Journal 65. As to arbitral practice, *see* ICC Case No 4381 of 1986, Award, (1986) 113 Journal du Droit International (Clunet) 1102, 1104; ICC Case No 1526 of 1968, Award, (1974) 101 Journal du Droit International (Clunet) 915; *Supplier (European Company) v Republic of X*, ICC Case No 6474, Partial Award on Jurisdiction and Admissibility, 22 April 1992, para 116, (2000) 25 Yearbook Commercial Arbitration 278.

[824] *Ex multis*, Marc Blessing, 'The Law Applicable to the Arbitration Clause' in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards. 40 Years of Application of the New York Convention*, ICCA Congress Series No 9 (Paris, 1998) (Kluwer Law International 1999) 168. The solution of the *lex (loci) arbitri* is eminently dictated by the New York Convention on the Recognition and Enforcement of Arbitral Awards, 10 June 1958, entered into force on 7 June 1959, 330 UNTS 3, Article V(1)(a). On the contrary, the solution of the *lex causae* is vigourously supported by UK case law, *see*, *ex multis*, *Sulamérica Cia Nacional de Seguros SA et al v Enesa Engenharia SA et al* [2012] EWCA Civ 638.

[825] Giorgio Sacerdoti, *I contratti tra Stati e stranieri nel diritto internazionale* (Giuffrè 1972) 78.

[826] Carlo de Stefano, 'Arbitration Agreement as Waivers to Sovereign Immunity' (2014) 30 Arbitration International 59, 69-70.

resolution of the Institute of International Law on arbitration between States or State entities and foreign enterprises envisages a series of alternative laws and rules to govern the validity of the arbitration clause: '*the law chosen by the parties, the law indicated by the system of private international law stipulated by the parties, general principles of public or private international law, general principles of international arbitration, or the law that would be applied by the courts of the territory in which the tribunal has its seat*'.[827] The guiding criterion for a Tribunal is expressly required to be the validation principle (*favor validitatis*), which invariably imposes the determination of a law, under which the clause is held to be in existence, valid and effective ('*ubiquity rule*').[828] It can be concluded that the determination of the proper law of the arbitration clause in State contracts follows *sui generis* policies aimed to the effectiveness of the jurisdiction of the arbitral Tribunal as neutral forum, as such not to any extent comparable with the dispute settlement between private parties.

2. "Attribution" Issues in International Business Litigation

While the previous chapters have analysed issues of attribution to the State of internationally wrongful acts before an international jurisdiction, this chapter aims to explore the legal solutions rendered by international commercial Tribunals and domestic courts to problems of qualification of the relationships between the State, on one side, and its organs and

[827] Institute of International Law, 'Arbitration Between States, State Enterprises or State Entities, and Foreign Enterprises' (Eduardo Jiménez de Aréchaga and Arthur von Mehren, Rapporteurs), Resolution of 5-13 September 1989, Session of Santiago de Compostela, Article 4, (1990) 5 ICSID Review – Foreign Investment Law Journal 139, 141: '*Where the validity of the agreement to arbitrate is challenged, the tribunal shall resolve the issue by applying one or more of the following: the law chosen by the parties, the law indicated by the system of private international law stipulated by the parties, general principles of public or private international law, general principles of international arbitration, or the law that would be applied by the courts of the territory in which the tribunal has its seat. In making this selection, the tribunal shall be guided in every case by the principle* in favorem validitatis.'

[828] In relation to business-to-business arbitration, the validation principle is adopted by Switzerland, Spain and Algeria. *Cf* Swiss Law on Private International Law Article 178(2).

instrumentalities, on the other side, in the context of international business litigation. Accordingly, such issues do not technically involve matters of attribution of conduct to the State for the purposes of international responsibility, but rather of attribution or extension of obligations of domestic law to the State, or of 'imputation' of an arbitral award in the post-judgment phase. In this respect, the distinction between attribution of conduct (*imputation du comportement*) and attribution of a manifestation of will (*imputation de la volonté*) is of threshold importance.[829] The two normative operations are not equivalent, in that the same act may create obligations (of international or municipal law), but at the same time may not entail attribution of conduct to the State. As emphasised by the ILC in its 1973 Report on State Responsibility to the General Assembly:

> Attaching to the State a manifestation of will which is valid, for example, in order to establish its participation in a treaty is, however, in no way identifiable with the operation which consists of attributing to the State particular conduct for the purpose of imputing to it an internationally wrongful act entailing international responsibility. It would be wrong to adopt the same criteria in these two cases and to propose an identical solution based on a general and common definition of "act of the State". In the context of the responsibility of States for internationally wrongful acts, the "act of the State" has its own specific character and must be defined according to particular criteria.[830]

Thus, the ILC warns from '*confusion between the consideration of certain conduct as an internationally wrongful act and the attribution to the State of a manifestation of will capable of constituting a valid international legal act or establishing participation in such an act.*'[831] However, although imputation of will and imputation of conduct of States are not governed by the same rules, it will be investigated whether the main logical tenets behind the mechanism of attribution of conducts under public international law find a correpondence in

[829] *Cf* Giuseppe Biscottini, 'Volontà ed attività dello Stato nell'ordinamento internazionale' (1942) 21 Rivista di Diritto Internazionale 3.
[830] Report of the International Law Commission on the Work of its Twenty-Fifth Session, 7 May-13 July 1973, para 5, document A/9010/REV.1, Yearbook of the International Law Commission, 1973, Volume II, 161, 189, document A/CN.4/SER. A/1973/Add. 1.
[831] Report of the International Law Commission on the Work of its Twenty-Fifth Session, 7 May-13 July 1973, para 3, document A/9010/REV.1, Yearbook of the International Law Commission, 1973, Volume II, 161, 194, document A/CN.4/SER. A/1973/Add. 1.

the tests for attribution of a manifestation of will, as such creator of legal obligations, in the context of international business transactions.

The contractual activities of State organs ordinarily engage the responsibility of the State ('*les organs de l'Etat, c'est l'Etat lui-même*'[832]).[833] As Eduardo Silva Romero has noted, '*one should make no distinction between the State and its organs for the purposes of determining the State's liability. Thus, the question "Are States Liable for the Conduct of Their Organs?" would be a tautology*'.[834] Indeed, an ICC Tribunal in Case No. 9762 has affirmed:

> What is important in our case is that the contracts with Ax and Ay were not signed by an entity separate from the State of Z, but by a Ministry, i.e., by an organ of the State, whose acts are undoubtedly performed on behalf and in the interest of the State. […] In a few words and as is obvious for any Ministry, particularly in a country where the power is highly centralized in the hand, under the directions, and under the control of the President, first respondent was and is in charge of carrying out the agrarian policy of the government of Z. It represents the State, within its competence, and the State is bound by its acts.[835]

In addition, it can hardly by denied that – with regard to State organs – imputation of consent and imputation of acts and omissions are basically governed by the same mechanism, which is

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[832] Pierre-Marie Dupuy, 'Les émanations engagent-elles la responsabilité des Etats? Etude de droit international des investissements' (2006) EUI Working Paper LAW No 2006/7, 5.

[833] *SPP (Middle East) Ltd v The Arab Republic of Egypt*, ICC Case No 3493, Award, 16 February 1983, 22 ILM 752; *State X Owned Enterprise v Government of State B*, ICC Case No 7701, Final Award, 15 November 1994, at 18, (1997) 8 ICC International Court of Arbitration Bulletin 66: '*when a Ministry signs a contract, the "State [is] acting through its executive branch, the Government"*'; ICC Case No 7245, *European Company v Municipality of X (African Country)*, Interim Award, 28 January 1994, unpublished, at 24; *Company B v Département de commercialisation d'une matière première de la Présidence de l'Etat*, ICC Case No 6775, Final Award, 28 January 1998, unpublished, at 25; *European Company v State X, Ministry of Industry of State X, Ministry of Defence of State X and State X Establishment*, ICC Case No 7472, Interim Award, 16 January 1995, unpublished, at 10, 11-12; *Ministry of Defence and Support for Armed Forces of [State X] v German Corporation*, ICC Case No 7304, Partial Award, 31 March 1994, unpublished, para 25; *Contractor A (Luxembourg) v Ministry of Agriculture and Water Management of Z (Republic of Z), State Fund for Development of Agriculture of Z (Republic of Z) et al*, ICC Case No 9762, Final Award, 22 December 2001, paras 40-41, (2004) 29 Yearbook Commercial Arbitration 25, 40; *French Corporation v Ministry of Defense of State X*, ICC Case No 8646, Award, 22 June 1998, (2004) 15(2) ICC International Court of Arbitration Bulletin 109; *Supplier (European Company) v Republic of X*, ICC Case No 6474, Partial Award on Jurisdiction and Admissibility, 22 April 1992, (2000) 25 Yearbook Commercial Arbitration 278.

[834] Eduardo Silva Romero, 'Are States Liable for the Conducts of Their Instrumentalities? ICC Case Law' in Emmanuel Gaillard and Jennifer Younan (eds), *State Entities in International Arbitration* (Juris Publishing, Inc 2008) 31, 33.

[835] *Contractor A (Luxembourg) v Ministry of Agriculture and Water Management of Z (Republic of Z), State Fund for Development of Agriculture of Z (Republic of Z) et al*, ICC Case No 9762, Final Award, 22 December 2001, paras 51-52, (2004) 29 Yearbook Commercial Arbitration 25, 39.

confirmed by the plenary character of attribution of conducts of State organs under customary international law, which includes *acta jure gestionis* of State officials.[836] Accordingly, arbitral Tribunals have have not refrained from reference to the canonical rule of imputability *ex* ARSIWA Article 4, as in the case of *Salini Costruttori S.p.A. v. Ethiopia and Addis Ababa Water and Sewerage Authority*, where an ICC Tribunal has expressly invoked ARSIWA to justify its conclusion on the issue of attribution.[837] Besides, a given act of a State official may engender State responsibility under public international law and at the same time State liability under the proper law of contract based on the same mechanism of "imputability".[838]

The treatment of State organs appears to be more complex in connection with public bodies benefitting of separate legal personality. In general, Tribunals have denied the qualification of a given entity formally separated form the State machinery as being a State organ on the main ground of the former's distinct juristic personality.[839] However, as above mentioned,[840] separate legal personality, notably of public law, does not as such prevent a categorization as *de jure* organ of the State, which has occured with regard to central banks

[836] This was already clear in relation to a contract claim in the early case of *Trumbull*, in Moore, IV (GPO 1898) 3569-3571. In this case, the Tribunal held that a diplomatic agent had '*authority'* to conclude a professional contract with an intermediary counsel and that the act could be attributed to the sending State, even if *ultra vires*.
[837] *Salini Costruttori SpA v Ethiopia and Addis Ababa Water and Sewerage Authority*, ICC Case No 10623/AER/ACS, Award Regarding the Suspension of the Proceedings and Jurisdiction, 7 December 2001, paras 169, 173, 174, (2003) 21 ASA Bulletin 82, 96-97: '*This conclusion is supported by reference to public international law, which treats the organs of a state as the state itself for the purposes of determining state responsibility, irrespective of whether or not those organs are independent or separate for the purposes of a state's internal law. […] For the same reason, the Respondent, as a state entity, must be considered part and parcel of the state itself for the purposes of addressing the present question. […] The principle that equates the organs of a state with the state itself reinforces our conclusion that we should proceed with our own duties to determine whether or not we have jurisdiction in this case.' Adde*, *American Corporation v W (State-Owned Company), X (State-Owned Company), Y (State-Owned Company) and Z (State-Owned Company)*, ICC Case No 7640, Award, 9 September 1999, unpublished, para 60 (emphasizing the principle of the unity of the State).
[838] *European Company v State X, Ministry of Industry of State X, Ministry of Defence of State X and State X Establishment*, ICC Case No 7472, Partial Award, 6 February 1996, unpublished, at 28-29.
[839] *European Company v State X, Ministry of Industry of State X, Ministry of Defence of State X and State X Establishment*, ICC Case No 7472, Interim Award, 16 January 1995, unpublished, at 11: '*the existence of the legal personality of defendants 2 to 4 prevents them from being considered as organs of the State*'.
[840] *See supra* Chapter III, para 3.1.

and independent administrative authorities.[841] It remains still unclear in case law whether such 'independent' public bodies are treated as agents of the State within the meaning of either public or private agency. The consequence is not trivial, in that, based on this qualification, the act at issue will result in being either of the State or of the public body. This distinction retains particular relevance in the stage of enforcement of the arbitral award.[842]

The treatment of State instrumentalities or parastatal entities (*émanations de l'État*) attracts critical issues related to their separate juristic personality and to the configuration in fact of a triangular relationship involving a private contractor, a SOE and its establishing State (in the simplest scenario). The threshold issue to be solved is then the question whether the State's main or subsidiary contractual liability can been triggered by a manifestation of will of the SOE, based on a link of a strictly *legal* – rather than institutional, functional or factual – nature (*rattachement juridique, pas matériel*).[843] One more time, though maintaining the analytic distinction between *imputation du comportement* and *imputation de la volonté*, it should be remarked that nothing prevents the logics behind the two normative operations to overlap. Indeed, the structural, technical, mechanical and logical (*i.e.*, "objective") elements at the basis of the rules of attribution are apt to compel non-inconsistent, not to mention resembling, results on both fronts.

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[841] ICC Case No 6725, Award, 14 February 1991, unpublished, at 7-8: '*the contract concluded by the Governor of the Central Bank could, in principle, be done in the name of the Presidency, the latter being, according to that State's constitution, an official organ of the Republic.*'

[842] *See infra* para 4.5 of this Chapter.

[843] Yves Nouvel, 'Les entités paraétatiques dans la jurisprudence du CIRDI' in Charles Leben (ed), *Le contentieux arbitral transnational relatif à l'investissement. Nouveaux développements* (LGDJ 2006) 25, 51: '*Comment expliquer, pour finir, que le comportement et la volonté de l'entité ne soient pas attribuable à l'État selon les mêmes modalités. En effet, l'attribution à l'État de la volonté émise par son émanation bute sur la personnalité alors que l'attribution de son comportement surmonte cet obstacle. Dans le deux cas, l'imputation est une operation normative. Mais, concernant le comportement, elle prend appui sur une question de fait dont l'enjeu est l'exécution d'une obligation. Elle vise à établir un rapport matériel entre l'État et l'entité: l'accomplissement d'actes de puissance publique. En revanche, l'imputation de la volonté prend appui sur une question de droit dont l'enjeu est la création d'une obligation. On cherche à mettre en évidence un lien juridique entre les deux entités: un rapport de représentation. C'est pourquoi, dans un cas, la personnalité forme un indice factuel et dans l'autre, un élément de droit déterminant.*'

It appears that arbitral Tribunals and domestic courts have followed different techniques to resolve the issue of the treatment of State instrumentalities (*émanations de l'État*). On one hand, they have emphasised the absence of real independence and autonomy of the entity so as to comprehensively disregard their formal corporate separateness (*inclusive* technique).[844] This approach somehow entails a similar rationale to the test applied within the theory of *de facto* agency ('complete dependence and overall control' under ARSIWA Article 4.2) aiming to consider the instrumentality as a parcel of the governmental machinery. An ICC Tribunal in the Case No 6465 has markedly conformed to this vein:

> [The State entity] by its purpose and through its operations almost totally served as a vehicle to meet the needs and requirements of the X Government, in particular its military forces. [The State entity] was almost completely controlled by and dependent on the X Government's decisions, and the Government exercised its powers to such a degree that [the State entity] must be seen as an instrumentality of, *or agent for*, the X Government. (*emphasis added*)[845]

To a closer inspection, this theory of the *émanations de l'État* operates to completely elide the legal personality of a State instrumentality, thus transforming a triangular setting into a bilateral relationship. The underlying purpose is to impute or extend to a State the obligations formally stipulated by a SOE, to the inclusion of the undertaking to arbitrate, to attribute to a State the conducts *jure gestionis* of its SOEs, and to prevent a SOE to invoke a *force majeure* defence for non-performance of a contractual obligation.[846] Moreover, the theory has been

[844] This traditional theory of the *émanations de l'État* has been applied by French courts with respect to the Libyan nationalizations. *See* Tribunal de Grande Instance de Paris (référé), 5 March 1979, *Procureur de la République v LIAMCO*, (1979) 106 Journal du Droit International (Clunet) 861, note Bruno Oppetit. *Cf* Paul Lagarde, 'Une notion ambivalente: l'« émanation » de l'Etat nationalisant' in *Droits et libertés à la fin du XXe siècle – Etudes offertes à Claude-Albert Colliard* (Éditions A Pedone 1984) 539; Eduardo Silva Romero, 'Are States Liable for the Conducts of Their Instrumentalities? ICC Case Law' in Emmanuel Gaillard and Jennifer Younan (eds), *State Entities in International Arbitration* (Juris Publishing, Inc 2008) 31, 35; Daniel Cohen, 'Sur l'émanation d'État' in Louis d'Avout, Dominique Bureau and Horatia Muir Watt (eds), *Mélanges en l'honneur du Professeur Bernard Audit. Les relations privées internationales* (LGDJ 2014) 233.

[845] *Defense Industry of State X v European Company*, ICC Case No 6465, Interim Award, 15 August 1991, unpublished, at 29.

[846] Karl-Heinz Böckstiegel, *Arbitration and State Enterprises. A Survey on the National and International State of Law and Practice* (Kluwer Law and Taxation Publishers 1984) 37-39; Ignaz Seidl-Hohenveldern, *Corporations in and under International Law* (Cambridge University Press 1987) 55; Georges R Delaume, 'Excuse for Non-Performance and Force Majeure in Economic Development Agreements' (1971) 10 Columbia

historically resorted to in order to allow expropriated investors to offset their credits vis-à-vis the nationalising State by means of attachment of the assets of its SOEs.[847]

On the other hand, adjudicators have emphasised recognition of the separate juristic personality of a State entity (*exclusive* technique), which can be exceptionally pierced on the basis of a finding of considerable involvement or interference, actual instructions or effective control of the State in relation to a transaction involving a private party and a parastatal.[848] This theory resembles the prong for attribution under ARSIWA Article 8 that may encompass the activities of State instrumentalities, such as State-owned companies, so as to 'lift' their corporate veil.[849] While the inclusive technique adopts an organic or structural criteria in order to disregard corporate separateness *in toto*, the exclusive technique instead tends to ignore it *hic et nunc* (instantaneously) upon exceptional circumstances to be ascertained on a casuistic basis. Elements of both approaches are contemplated by the doctrine of the alter ego, which is largely adopted by judges and arbitrators to address the treatment of parastatal entities. However, a clear tendency of adjudicators is detected to maintain the centrality of corporate personality and to isolate the operativity of a possible piercing of the corporate veil, which more closely corresponds to the exclusive technique. Indeed, the activities *jure gestionis* of SOEs – including the undersigning of an arbitration agreement – are not automatically attributed to the State.[850] Moreover, SOEs can ordinarily avail themselves of a

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Journal of Transnational Law 242; Philippe Kahn, 'Force majeure et contrats internationaux de longue durée' (1975) 102 Journal du Droit International (Clunet) 467.

[847] Ahmed S El-Kosheri, 'Les nationalisations dans les pays du tiers monde devant le juge occidental' (1967) 56 Revue Critique de Droit International Privé 249. In addition to the French decisions on *LIAMCO*, see the US leading case *First National City Bank v Banco Para el Comercio Exterior de Cuba (BANCEC)*, 462 US 611.

[848] *Ex multis*, *SPP (Middle East) Ltd v The Arab Republic of Egypt*, ICC Case No 3493, Award, 16 February 1983, 22 ILM 752.

[849] *See supra* Chapter II, para 5.3.2, and Chapter III, para 5.3.

[850] *Ex multis*, Cour de Cassation, 1e Chambre civile, 1 October 1985, *Sonatrach v Migeon*, 26 ILM 998.

justification of *force majeure*, save for a finding of connivance ('*complicity*') between a sovereign and its parastatal entities in relation to the dispute at issue.[851]

The classic attitude of adjudicators is not to emphasise the circumstance of *public* ownership or control of a company.[852] Indeed, a certain tendency is noted to treat the relationship between a State and its SOEs as equivalent to the corporate control between two purely private businesses. This may explain the circumstance that arbitrators and judges have rarely resorted to ARSIWA to address issues of "attribution" in international business litigation involving State instrumentalities. Instead, they usually proceed from a canonical analysis grounded on the *statut personnel* of the parastatal entity (or, where applicable, *lex societatis*) in a traditional private international law fashion.[853] A strict distinction between public international law and private international law reasoning with regard to issues of "attribution", as analysed in isolation from the nature of the State or SOEs' underlying responsibility, would result in being unreasonable, in that it would treat rather equivalent cases in a markedly different way, which begets considerable inefficiency. For this reason, it will be investigated whether the *practices* of adjudicators applying public international law (*i.e.*, international judges and arbitrators) or domestic law and private international law (*i.e.*, commercial arbitrators and national judges) may be reconciled, irrespective of the *structure* of their dispute settlement system. It will be demonstrated that the distinction – rightly criticized by the realist school of international law – should not entail highly meaningful systematic differences in the 'treatment' of the 'State', namely of its organs, instrumentalities and

[851] As to domestic courts' case law, *see Czarnikow Ltd v Centrala Handlu Zagranicznego Rolimpex* [1979] AC 351. As to arbitral cases, *see Jordan Investments Ltd v Soujuzneftexport*, Award, 3 July 1958, (1959) 53 American Journal of International Law 804.

[852] *But see Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, para 35: '*The tribunal, or Dr Shah and Lord Mustill, added that "particular caution must be observed where the party sought to be joined as defendant is a state or state body".*'

[853] Eduardo Silva Romero, 'Are States Liable for the Conducts of Their Instrumentalities? ICC Case Law' in Emmanuel Gaillard and Jennifer Younan (eds), *State Entities in International Arbitration* (Juris Publishing, Inc 2008) 31, 37.

'private' agents.[854] Accordingly, the role of attribution rules under customary international law, as codified by ARSIWA, should be emphasised in order to foster a tailored regime, as such different (or not necessarily equal) to the the set of solutions already developed in business-to-business litigation (chiefly with regard to the alter ego doctrine). In line with the consideration that a complete privatisation of the *statut personnel* of the State or its SOEs is not ultimately conceivable, it is submitted that the functioning of the piercing of the corporate veil should not be the same in relation to public vis-à-vis private corporate ownership or control.[855] In particular, the element of 'fraud and injustice' should be and in practice seems to be attenuated in the application of the theory of alter ego in public sector analysis. This entails an evolution from an emphasis on the requirement of thwarting interference on the subsidiary's management or damages suffered by minority shareholders (as far as the group of companies doctrine is applicable) to more critical focus on the structural assimilation of the SOE with the State, without prejudice to a factual finding of actual interference. Therefore, with regard to corporate relations between States and SOEs, alter ego should not be intended as *Doppelgänger*, but instead as having the aspect of a friendly (not conflicting) *double*. The *fil rouge* between ARSIWA Article 8 and private international law doctrines ending up with piercing the corporate veil of SOEs is visibly available.

[854] Charles Leben, 'Hans Kelsen and the Advancement of International Law' (1998) 9 European Journal of International Law 287, 299.

[855] Jane Chalmers, 'State Responsibility for Acts of Parastatals Organized in Corporate Form' (1990) 84 American Society of International Law Procedings 60, 63: '*What I am suggesting is that the presumption against piercing the corporate veil in the public sector need not be the same as in private sector analysis. The corporate veil concept may not need the diligent protection in the public sphere that it needs in the private sector […] wholesale importation of the limited liability/corporate veil metaphor is not appropriate.*'

3. Extension to the State of the Obligations Contracted between State-Owned Entities and Private Parties

3.1 Equitable and Legal Doctrines

One of the most unsettled aspects of the treatment of SOEs in international business litigation pertains to the possibility to impute their contractual obligations to a non-signatory State. The problem has a two-fold dimension on the substantive (*engagement substantiel*) and jurisdictional (*engagement juridictionnel*) level. It may be affirmed that the two dimensions are parallel, in that the extension of liability to the State ordinarily attracts its summons before an arbitral Tribunal or municipal court.[856] In practice, the jurisdictional issue intervenes at a prior time than the merits question of the attribution of the applicable substantive obligations, and the resolution of the former is usually determinative of the latter.[857] On a general perspective, the extension of liability or passive standing is not automatic, but is determined upon application of various doctrines of domestic private law and private international law, meant to extend the subjective scope of a contractual undertaking.[858] As above adumbrated,[859] arbitrators and judges view the triangular relationship 'State – SOE – private contractor' as equivalent to the triangular relationship 'parent company – subsidiary company – private

[856] Philippe Leboulanger, 'Groupes d'Etat(s) et arbitrage' (1989) Revue de l'Arbitrage 415, 418 : '*une bonne administration de la justice justifie que l'Etat soit appelé dans la procédure. La procédure commande le fond: une fois l'Etat attrait, il peut alors être déclaré responsable de la rupture du contrat.*'

[857] As to arbitration cases, *see SPP (Middle East) Ltd v The Arab Republic of Egypt*, ICC Case No 3493, Award, 16 February 1983, 22 ILM 752. As to domestic courts' case law, *see First Investment Corporation of the Marshall Islands v Fujian Mawei Shipbuilding, Limited, Fujian Shipbuilding Industry Group Corporation, People's Republic of China*, Case No 12-30377 (5th Cir 2012) at 21: '*For the* same *reasons it concluded that the Fujian Entities were not alter egos of the PRC, the district court concluded that the PRC could not be bound to the agreement*' (emphasis added).

[858] *See Karaha Bodas Company, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") and Ministry of Finance of the Republic of Indonesia*, 313 F.3d 70, 76-77 (5th Cir 2002); *First Investment Corporation of the Marshall Islands v Fujian Mawei Shipbuilding, Limited, Fujian Shipbuilding Industry Group Corporation, People's Republic of China*, Case No 12-30377 (5th Cir 2012) at 17; *Hester Int'l Corp v Federal Republic of Nigeria*, 879 F.2d 170, 181 (5th Cir 1989).

[859] *See supra* para 2 of this Chapter.

party', thus not distinguishing public from private ownership in the context of complex multiple party actions.[860] As upheld in *Bridas SAPIC I*, '*arbitration agreements apply to nonsignatories only in rare circumstances.*'[861] To this extent, the US Court of Appeals of the Fifth Circuit indentified six theories for binding a non-signatory, to the inclusion of a State:

> Six theories for binding a nonsignatory to an arbitration agreement have been recognized: (a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing/alter ego; (e) estoppel; and (f) third-party beneficiary.[862]

The House of Lords has been more circumspect in its enumeration of such theories, by affirming that '*a non-signatory may be bound by an arbitration agreement, by virtue of any one of a number of legal theories such as representation, assignment, succession, alter ego or the theory of group of companies.*'[863] These lists provide for a combination of legal and equitable doctrines, whose boundaries are not clearly defined, especially with regard to disputes involving parastatal entities. It may generally affirmed that the ultimate result of the application of such theories is to overcome the corporate personality of SOEs in order to consider the parent State as subsidiarily answerable, or to construe a direct responsibility of the State as connected with the activities of its SOEs. Based on this distinction, it is possible to trace a *summa divisio* between corporate law doctrines and private law doctrines, both

[860] Berthold Goldman (Rapporteur), 'La protection des actionnaires minoritaires des sociétés filiales' in *Le droit international privé des groupes de sociétés* (Georg 1973) 7; Bernard Hanotiau, *Complex Arbitrations. Multiparty, Multicontract, Multi-issue and Class Actions* (Kluwer Law International 2005); Bernard Hanotiau, 'Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law' in Albert Jan van den Berg (gen ed), *International Arbitration 2006: Back to Basics?* (Kluwer Law International 2007) 341; Bernard Hanotiau, 'Multiple Parties and Multiple Contracts in International Arbitration' in Permanent Court of Arbitration, *Multiple Party Actions in International Arbitration* (Oxford University Press 2009) 35; William W Park, 'Non-signatories and International Arbitration: An Arbitrator's Dilemma' in Permanent Court of Arbitration, *Multiple Party Actions in International Arbitration* (Oxford University Press 2009) 3; Stavros L Brekoulakis, 'Third Parties in International Commercial Arbitration' (Oxford University Press 2010).

[861] *Bridas SAPIC, Bridas Energy International, Ltd, Intercontinental Oil & Gas Ventures, Ltd, Bridas Corporation v Government of Turkmenistan, State Concern Turkmenneft*, 345 F.3d 347, 357 (5th Cir 2003), quoting *Westmoreland v Sadoux,* 299 F.3d 462, 465 (5th Cir 2002).

[862] *Bridas SAPIC, Bridas Energy International, Ltd, Intercontinental Oil & Gas Ventures, Ltd, Bridas Corporation v Government of Turkmenistan, State Concern Turkmenneft*, 345 F.3d 347, 356 (5th Cir 2003), quoting *Thomson-CSF, SA v American Arbitration Ass'n*, 64 F.3d 773, 776 (2nd Cir 1995); *DuPont de Nemours & Co v Rhone Poulenc Fiber and Resin Intermediates*, 269 F.3d 189, 195-197 (3rd Cir 2001); *Javitch v First Union Securities, Inc*, 315 F.3d 619, 629 (6th Cir 2003).

[863] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, para 34.

designed to settle the issue of the private liability of the State with regard to the transactions concluded by its instrumentalities. In addition, nothing prevents a sovereign to be held liable for its own conducts, nevertheless connected with the activities of its SOEs. This is notably the case of a State passing new legislation that produces an excuse of *force majeure*, even though in a non-discriminatory manner towards the foreign contractor. This situation may clearly correspond to a direct claim for tortious interference in contract by the private party against the State, without formal involvement of the SOE in the proceedings.[864] Tribunals have also found an additional cause of action based on negligence of the State for *culpa in vigilando* in relation to the performance of its SOEs' contracts.[865]

3.2 Corporate Law Doctrines

3.2.1 Piercing the Corporate Veil

The point of departure for the resolution of the problem of the extension to a State of the contractual arrangements of its SOEs invariably is the acknowledgement of the latter's juridical separation from the former ('*presumption of independent status*').[866] This respresents a threshold tenet of business law, which chiefly entrusts to corporate personality and corporate veil a dual function of insulation of the owners' assets from business debts ('limited

[864] *Company X v State Company of State B*, ICC Case No 6490, Award, 23 April 1993, unpublished, para 8.6, at 54.
[865] *X Gas Company v Société nationale des produits pétroliers [State X]*, ICC Case No 6375, Award, 8 February 1992, unpublished, at 43–50; *French Corporation v Ministry of Defense of State X*, ICC Case No 8646, Award, 22 June 1998, para 10.1.4.3.f, partially published in (2004) 15(2) ICC International Court of Arbitration Bulletin 109. *Cf* Eduardo Silva Romero, 'Are States Liable for the Conducts of Their Instrumentalities? ICC Case Law' in Emmanuel Gaillard and Jennifer Younan (eds), *State Entities in International Arbitration* (Juris Publishing, Inc 2008) 31.
[866] *Bridas SAPIC, Bridas Energy International, Ltd, Intercontinental Oil & Gas Ventures, Ltd, Bridas Corporation v Government of Turkmenistan, State Concern Turkmenneft*, 345 F.3d 347, 356 (5th Cir 2003); *Hester International Corp v Federal Republic of Nigeria,* 879 F.2d 170, 176 (5th Cir 1989); *Arriba Limited v Petroleos Mexicanos*, 962 F.2d 528, 536 (5th Cir 1992).

liability rule') and of immunisation of the firm from the claims of the creditors of its shareholders ('entity shielding rule').[867] In relation to parastatal entities, statutory law may expressly provide for the classic limited liability rule. For instance, an investment Tribunal formed under the aegis of the SCC, while called to adjudicate certain investor's contract claims, acknowledged with regard to the Czech Republic's Act No. 111/1990 (State Enterprise Act):

> Pursuant to the provisions of Sections 2(1), 5(1) and 5(2) of the State Enterprise Act, only a State enterprise is responsible for its own actions; no other entity, including the Government (or the State itself), is directly or indirectly liable for the acts or omissions of the State enterprise.[868]

Not only the limited liability rule, but also the entity shielding rule is emphasised by adjudicators, as in the well-known case of the *First National City Bank v. Banco Para el Comercio Exterior de Cuba (BANCEC)*, where the US Supreme Court affirmed:

> Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee.[869]

As a corollary, under both municipal and international law, piercing the corporate veil (*Durchgriff*) constitutes an equitable remedy, wich proceeds from a remarkable justification of 'fairness' in order to foster material justice and common sense, so that reality triumphs over (legal) formalities.[870] However, its functioning may be triggered under exceptional circumstances of absence of corporate institutions ('*The alter ego doctrine, like all variations*

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[867] Henry Hansmann, Reiner Kraakman and Richard Squire, 'Law and Rise of the Firm' (2005-2006) 119 Harvard Law Review 1335.
[868] *William Nagel v The Czech Republic*, SCC Case No 049/2002, Final Award, 9 September 2003, para 165.
[869] *First National City Bank v Banco Para el Comercio Exterior de Cuba (BANCEC)*, 462 US 611, 626 (1983), quoting Richard A Posner, 'The Rights of Creditors of Affiliated Corporations' (1976) 43 University of Chicago Law Review 499, 516-517 (1976).
[870] As to domestic law, *see* the traditional UK case law in *Salomon v A Salomon & Co Ltd* [1897] AC 22; *Re Darby ex p Brougham* [1911] 1 KB 95; *Amalgamated Investment & Property Co Ltd (In Liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84. As to international law cases, *see Barcelona Traction Light and Power Company, Limited (Belgium v Spain)*, Second Phase, Judgment, 5 February 1970, paras 56-58, ICJ Reports 1970, 3, 38-39.

of piercing the corporate veil doctrine, is reserved for exceptional cases.'),[871] which may render a subsidiary company as resembling a mere façade, puppet, sham or clone of its parent (*société fictive*).[872] Upon consideration of the assumption that piercing the veil of a company for a specific action does not mean denying its personality for all and each aspect of its commercial life, it is here provided an account of the corporate law doctrines applicable *inter alia* to SOEs in order to disregard their corporate separateness from the State.[873]

3.1.2 Alter Ego

Arbitrators frequently resort to the alter ego doctrine in order to impute to a State the obligations contracted by its SOEs.[874] It basically consists in a finding that the State has exercised such a pervasive and intrusive control, that the acts of the SOE result as being

[871] *Bridas SAPIC, Bridas Energy International, Ltd, Intercontinental Oil And Gas Ventures, Ltd, and Bridas Corp v Government of Turkmenistan, Concern Bal-Kannebitgazsenagat and State Concern Turkmenneft*, 447 F.3d 411, 416 (5th Cir 2006). *Adde*, *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC*, 17 July 2012, Privy Council Appeal No 6/2011 [2012] UKPC 27 (Judicial Committee of the Privy Council), para 29.

[872] Maurice Wormser, 'Piercing the Corporate Veil of Corporate Entity' (1912) 12 Columbia Law Review 496; EJ Cohn and C Simitis, 'Lifting the Veil in the Company Laws of the European Continent' (1963) 12 International & Comparative Law Quarterly 189; Juan M Dobson, '"Lifting the Veil" in Four Countries: the Law of Argentina, England, France and the United States' (1986) 35 International & Comparative Law Quarterly 839; Karl Hofstetter, 'Parent Responsibility for Subsidiary Corporations: Evaluating European Trends' (1990) 39 International & Comparative Law Quarterly 576; Jonathan R Macey and Joshua Mitts, 'Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil' (2014) Yale Law & Economics Research Paper No 488 (forthcoming on Cornell Law Review).

[873] Albert Badia, *Piercing the Veil of State Enterprises in International Arbitration* (Kluwer Law International 2014) 57.

[874] *See State X Corporation v European Company*, ICC Case No 6789, Partial Award, 16 August 1999, unpublished, para 42; *Ministry of Defence of [State A] v XX [State Corporation] and State B*, ICC Case No 7071, Award, 23 July 1993, unpublished, paras 82, 83, 90-94; *American Corporation v W (State-Owned Company), X (State-Owned Company), Y (State-Owned Company) and Z (State-Owned Company)*, ICC Case No 7640, Award, 9 September 1999, unpublished, para 60; *European Company v State X, Ministry of Industry of State X, Ministry of Defence of State X and State X Establishment*, ICC Case No 7472, Interim Award, 16 January 1995, unpublished, at 17-18; *Joint Venture Yashlar (Turkmenistan) and Bridas SAPIC (Argentina) v Government of Turkmenistan (or Turkmenistan or the State of Turkmenistan and/or the Ministry of Oil of Turkmenistan) (Turkmenistan)*, ICC Case No 9151/FMS/KGA, Interim Award, 8 June 1999; *Capital India Power Mauritius I and Energy Enterprises (Mauritius) Co v Maharashtra Power Development Corp Ltd, Maharashtra State Electricity Board and the State of Maharashtra*, ICC Case No 12913/MS, Final Award, 27 April 2005, 20(5) Int'l Arb Rep C-1 (2005), at 17-18.

dictated at its behest on the account of a fraudulent purpose.[875] However, a certain degree of confusion persists whether the actual interference of the State should be demonstrated in relation to the specific claim brought by a private party or instead a finding of overall dependence or control is sufficient. The highly fact-based features of the doctrine of alter ego would suggest a preference for the first interpretation.[876] While arbitral Tribunals have displayed a markedly liberal vein to organically 'merge' State enterprises with their parent State, domestic courts have sometimes corrected this approach in the phase of recognition or enforcement of the award, by requiring more circumstantial alter ego determinations.[877]

The initial step in the analysis of adjudicators is the identification of a given entity to be a parastatal, on the basis of a '*faisceau d'indices*',[878] with a not markedly different methodology from the analysis under the structural test required by ARSIWA Article 5 for the finding of the *status* of State instrumentality.[879] In *Bridas SAPIC I*, the US Court of Appeals

[875] *Bridas SAPIC, Bridas Energy International, Ltd, Intercontinental Oil & Gas Ventures, Ltd, Bridas Corporation v Government of Turkmenistan, State Concern Turkmenneft*, 345 F.3d 347, 358-359 (5th Cir 2003): '*Under the alter ego doctrine, a corporation may be bound by an agreement entered into by its subsidiary regardless of the agreement's structure or the subsidiary's attempts to bind itself alone to its terms, "when their conduct demonstrates a virtual abandonment of separateness." […] The corporate veil may be pierced to hold an alter ego liable for the commitments of its instrumentality only if (1) the owner exercised complete control over the corporation with respect to the transaction at issue and (2) such control was used to commit a fraud or wrong that injured the party seeking to pierce the veil.*'

[876] *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC*, 17 July 2012, Privy Council Appeal No 6/2011 [2012] UKPC 27 (Judicial Committee of the Privy Council), para 77: '*In international law as in domestic law, lifting the corporate veil must be a tailored remedy, fitted to the circumstances giving rise it.*'; *Bridas SAPIC, Bridas Energy International, Ltd, Intercontinental Oil & Gas Ventures, Ltd, Bridas Corporation v Government of Turkmenistan, State Concern Turkmenneft*, 345 F.3d 347, 359 (5th Cir 2003): '*Alter ego determinations are highly fact-based, and require considering the totality of the circumstances in which the instrumentality functions. […] No single factor is determinative. This should be apparent from the extensive list of circumstances that courts have developed to guide alter ego determinations.*'

[877] *Ex multis*, *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

[878] William W Park, 'Non-signatories and International Arbitration: An Arbitrator's Dilemma' in Permanent Court of Arbitration, *Multiple Party Actions in International Arbitration* (Oxford University Press 2009) 3, 10; Daniel Cohen, 'Sur l'émanation d'État' in Louis d'Avout, Dominique Bureau and Horatia Muir Watt (eds), *Mélanges en l'honneur du Professeur Bernard Audit. Les relations privées internationales* (LGDJ 2014) 233, 240.

[879] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, para 39: '*the alter ego doctrine is based on the finding of a structural relationship*.'

of the Fifth Circuit listed a vast variety of symptoms, which may capture this category.[880] Any single factor is not per se decisive, but the subsumption of a given entity on the type 'SOE' should unequivocally result from a comprehensively inductive analysis of the circumstances characterising its corporate life. To this extent, Tribunals have particularly emphasised the following elements: the appointment and removal of the members of the company board by the government, ministers or State officials sitting in the board of directors (a situation that is considered equivalent to the phenomena of *interlocking directorates* in corporate law), the setting of corporate policies by the State, the commingling or intermingling of funds (*confusion de patrimoines*) between the State Treasury (or a central bank) and the SOE, governmental control in the form of preventive approval and mandates to the SOE, and a general absence of 'corporate formalities' (for instance, absence of any financial statement or balance sheet), notwithstanding separate legal personality.[881] In *Bridas SAPIC II*, the US

[880] *Bridas SAPIC, Bridas Energy International, Ltd, Intercontinental Oil & Gas Ventures, Ltd, Bridas Corporation v Government of Turkmenistan, State Concern Turkmenneft*, 345 F.3d 347, 360, fn 11 (5th Cir 2003),: '*Once it has been determined that the corporate form was used to effect fraud or another wrong upon a third-party, alter ego determinations revolve around issues of control and use. […] On remand, the court should explore the totality of the environment in which Turkmenneft operated, including those factors normally explored in the context of parent-subsidiary alter ego claims, such as whether: (1) the parent and subsidiary have common stock ownership; (2) the parent and subsidiary have common directors or officers; (3) the parent and subsidiary have common business departments; (4) the parent and subsidiary file consolidated financial statements; (5) the parent finances the subsidiary; (6) the parent caused the incorporation of the subsidiary; (7) the subsidiary operated with grossly inadequate capital; (8) the parent pays salaries and other expenses of subsidiary; (9) the subsidiary receives no business except that given by the parent; (10) the parent uses the subsidiary's property as its own; (11) the daily operations of the two corporations are not kept separate; (12) the subsidiary does not observe corporate formalities […] Additional factors include: (1) whether the directors of the "subsidiary" act in the primary and independent interest of the "parent,"; (2) whether others pay or guarantee debts of the dominated corporation; and (3) whether the alleged dominator deals with the dominated corporation at arms length. […] While the preceding considerations are adaptable to a certain degree to the context of a sovereign government and its instrumentality, the district court should also consider the factors that we take into account when determining if a state agency is the "alter ego" of a state for 11th amendment sovereign immunity purposes: (1) whether state statutes and case law view the entity as an arm of the state; (2) the source of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property.*'

[881] As to arbitral case law, *see Capital India Power Mauritius I and Energy Enterprises (Mauritius) Co v Maharashtra Power Development Corp Ltd, Maharashtra State Electricity Board and the State of Maharashtra*, ICC Case No 12913/MS, Final Award, 27 April 2005, 20(5) Int'l Arb Rep C-1 (2005), at 17-18. As to domestic courts' case law, *see Bridas SAPIC, Bridas Energy International, Ltd, Intercontinental Oil And Gas Ventures, Ltd, and Bridas Corp v Government of Turkmenistan, Concern Bal-Kannebitgazsenagat and State Concern*

Court of Appeals of the Fifth Circuit notably emphasised the element of undercapitalization of the State instrumentality by the State for the purposes of piercing the corporate veil. In that case, Turkmenneft, a SOE created by the governemnt of Turkmenistan to form a joint venture with an Argentinian investor for the sake of exploitation of oil and gas resources, was initially capitalized with the equivalent of 17,000 US dollars, while its revenues were entirely collected by the Turkmen State Oil and Gas Development Fund. The government of Turkmenistan later restructured and undercapitalized the SOE, and enacted statutory law that expressly rendered the assets of the State Fund as immune from seizure. In particular, the court found the prong of fraud and injustice, as such required by the canonical doctrine of alter ego (as applicable in any business-to-business litigation), to be inherently demonstrated by virtue of the undercapitalization executed by the State ('*[i]ntentionally bleeding a subsidiary to thwart creditors is a classic ground for piercing the corporate veil*').[882] As a result, the test of fraud or injustice turns out to be attenuated and divested of its independent role, as being treated within the analysis of the structural test for the purposes of an alter ego determination.[883]

Turkmenneft, 447 F.3d 411, 418-420 (5th Cir 2006): '*The court observed that the Government caused the incorporation of Turkmenneft and that there was some identity between high-ranking Government and Turkmenneft officials. Further, Government officials attended the JVA's board meetings […] The court noted the absence of any financial statement or balance sheet for Turkmenneft, whether under U.S. or local law. Turkmenneft's revenues were diverted to a State Oil and Gas Fund that also collected revenues from other state-owned entities. Although the Government contends that the joint venture, not the Government, paid the joint venture's salaries and expenses, Turkmenneft's costs of arbitration have been paid entirely from the State Fund. The court accordingly found that Turkmenneft was not financially independent from the Government and that the Government used the lack of financial separateness "to commit a fraud or another wrong on plaintiffs".*'; *S & Davis International, Inc v Republic of Yemen*, 218 F.3d 1292, 1299-1300 (11th Cir 2000): '*ministry failed to submit evidence that corporation was independent entity, including papers of incorporation, status of employees as public or private servants, or separation of assets*'; *First National City Bank v Banco Para el Comercio Exterior de Cuba (BANCEC)*, 462 US 611, 624-625 (1983).

[882] *Bridas SAPIC, Bridas Energy International, Ltd, Intercontinental Oil And Gas Ventures, Ltd, and Bridas Corp v Government of Turkmenistan, Concern Bal-Kannebitgazsenagat and State Concern Turkmenneft*, 447 F.3d 411, 418-420 (5th Cir 2006).

[883] *See also S & Davis International, Inc v Republic of Yemen*, 218 F.3d 1292, 1299-1300 (11th Cir 2000). *Cf* Timothy Tyler, Lee Kocarsky and Rebecca Stewart, 'Beyond Consent: Applying Alter Ego and Arbitration Doctrines to Bind Sovereign Parents' in Permanent Court of Arbitration, *Multiple Party Actions in International Arbitration* (Oxford University Press 2009) 149, paras 4.72-4.73.

Once the *identification* of a given SOE as being an alter ego of the State has occurred, the subsequent (and inescapable step) is the proper attribution of liability from to SOE to the State. However, certain arbitral Tribunals only require successful completion of the structural test in order to pierce the corporate veil, thus practically qualifying a SOE as being an organ of the State (in this respect, the 'structural' test may be also denominated as 'organic' test). In line with this posture, the arbitral Tribunal in the case of *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* has established:

> The Trust, in spite of its distinct legal personality in theory, appears thus in fact and in conduct to have been considered – and to have acted – as a part and a division of the Defendant to which it is fully assimilated, a temporary instrument that has been created by a political decision of the Defendant for specific activities which the Defendant wanted to perform, and which was cancelled also by a political decision of the Defendant. Therefore, the Trust appears as having been no more than the alter ego of the Defendant which appears, in substance, as the real party in interest, and therefore as the proper party to the Agreement and to the Arbitration with the Claimant.[884]

This position, which echoes the decisions adopted in the seventies and in the eighties by French and US courts in relation to the Libyan and Cuban nationalizations, does not properly

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[884] *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan*, ICC Case No 9987, Award, (2010) 2(4) International Journal of Arab Arbitration 370, 389, para 12-1, as reported by the House of Lords in *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, para 37: '*In this light, the tribunal examined in turn the position prior to, at signature of, and during performance of the Agreement, and during the period after the Trust lapsed. At each point, it focused on the Government's conduct. It considered that it was "clearly established" that the Trust was organically and operationally under the Government's strict control, that its financial and administrative independence was largely theoretical, and that everything concerning the Agreement was at all times "performed by the [Government] concurrently with the Trust" and that "the Trust functions .... reverted back logically to" the Government, after the Trust ceased to exist "clearly established" that the Trust was organically and operationally under the Government's strict control, that its financial and administrative independence was largely theoretical.*' *See also Capital India Power Mauritius I and Energy Enterprises (Mauritius) Co v Maharashtra Power Development Corp Ltd, Maharashtra State Electricity Board and the State of Maharashtra*, ICC Case No 12913/MS, Final Award, 27 April 2005, 20(5) Int'l Arb Rep C-1 (2005), at 17-19: '*It is unmistakably clear from the evidence that all of the behaviour of MPDCL complained of here was done at the behest of SOM and MSEB, as their agent-in-place in DPC, for the purpose of effectuating theri policy objectives, and that MPDCL could not have and did not have any indepndence of objective or action, MPDCL* was *SOM and MSEB operating in the DPC corporate structure, and those entitites can properly be held to account, through recourse to the exclusive arbitral procedure set out in its terms, for the breaches of the Shareholders Agreement MPDCL formally committed as their alter-ego. […] It would be anomalous to hold that MPDCL could insulate itself and its Affiliates form liability for breach of the Shareholders Agreement by committing yet another breach of that agreement. Such a result would render all its undertakings under the agremeent illusory by depriving its counterparties of their contractually exclusive remedy.*'

convey application of an alter ego doctrine, but rather resembles a theory of *de facto* State organs.[885] As a confirmation, this theory suffices to be based on determinations of status, and not on factual findings of interference by the State. On the contrary, the alter ego doctrine should require an additional finding to the ascertainment of the structural relationship between the State and its SOE. This factual test should be aimed at demonstrating the actual involvement of the State in the form of instructions or orders to the parastatal entity in relation to the specific claim at issue ('*alter ego examines the actual conduct of the parent vis-a-vis its subsidiary*').[886] A canonical example is the order of a ministry to a State enterprise to terminate a *contrat d'État*.[887] On the contrary, a general involvement of the government in the negotiation of a contract or concession between a SOE and a private investor is not per se (*i.e.*, in its own isolation) sufficient to justify the piercing of the corporate veil. To this specific extent, it may be possible for the investor to resort to an estoppel theory establishing its bona fide reliance on the intention of the State to be bound by the contract, to the inclusion of the arbitration agreement.[888] It is clearly remarked that the theory of estoppel results in the creation of a direct contractual relationship between the investor and the State, thus remaining as such markedly distinct from the equitable remedy provided by the alter ego doctrine.

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[885] Tribunal de Grande Instance de Paris (référé), 5 March 1979, *Procureur de la République v LIAMCO*, (1979) 106 Journal du Droit International (Clunet) 861, note Bruno Oppetit; *First National City Bank v Banco Para el Comercio Exterior de Cuba (BANCEC)*, 462 US 611 (1983).

[886] *Bridas SAPIC, Bridas Energy International, Ltd, Intercontinental Oil And Gas Ventures, Ltd, and Bridas Corp v Government of Turkmenistan, Concern Bal-Kannebitgazsenagat and State Concern Turkmenneft*, 447 F.3d 411, 416 (5th Cir 2006).

[887] *S & Davis International, Inc v Republic of Yemen*, 218 F.3d 1292, 1299 (11th Cir 2000): '*ministry ordered corporation to breach contract.*'

[888] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, para 36.

3.2.3 Group of Companies

Another equitable doctrine often adopted by arbitrators in the context of State corporate ownership is the theory of group of companies. This theory has been originally conceived in relation to private ownership, and revolves on the concept of indivisible economic unity (*une realité économique unique*), as such possibly overriding the distinct legal personalities of the companies linked by a chain of control, which nevertheless comprises a single enterprise entity.[889] The theory has been extensively interpreted as being also applicable to the relationship between States and State enterprises:

> the mandatory force of the arbitration clause (or arbitration agreement) cannot be dissociated from that of the substantive contractual commitments. This may be the case of companies belonging to the same 'group of companies', whenever there is a sufficient evidence of the global liability of the 'group'. This may be the case of an individual partner being bound by an arbitration clause signed by a general partnership. This may also be the case of States when engaging in transactions of an economic nature through one of their administrative bodies, or even through a separate legal entity provided, in this last case, that the State has full control over it and is bound by the acts of it.[890]

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[889] *Dow Chemical v Isover Saint-Gobain*, ICC Case No 4131, Interim Award, 23 September 1982, (1983) 110 Journal du Droit International (Clunet) 899, 904: '*Considering that irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality (*une realité économique unique*) of which the arbitral tribunal should take account when it rules on its own jurisdiction […] Considering, in particular, that the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise.*'; ICC Case No 6519 of 1991, Award, (1991) 118 Journal du Droit International (Clunet) 1065; ICC Case No 10758 of 2000, Award, (2001) 128 Journal du Droit International (Clunet) 1171. *See* Otto Sandrock, 'Arbitration Agreement and Groups of Companies' (1993) 27 International Lawyer 941; Ibrahim Fadlallah, 'Clauses d'arbitrage et groupes de societés', *Travaux du Comité français de droit international privé* (CNRS 1987) 105; Marc Henry, 'La théorie du groupe de sociétés appliquée aux arbitrages impliquant un État' (2006) Revue de Droit des Affaires Internationales 297.

[890] *Contractor A (Luxembourg) v Ministry of Agriculture and Water Management of Z (Republic of Z), State Fund for Development of Agriculture of Z (Republic of Z) et al*, ICC Case No 9762, Final Award, 22 December 2001, paras 49-50, (2004) 29 Yearbook Commercial Arbitration 25, 39. Analogously, the concept of *unité du groupe* has been applied to a Tunisian *group d'État* comprising four State enterprises involved in the production of phosphates in ICC Case No 5103 of 1988, Award, (1988) 115 Journal du Droit International (Clunet) 1206, 1212: '*Le Tribunal arbitral estime qu'en l'espèce les conditions de la reconnaissance de l'unité du groupe sont remplies, les sociétés composant celui-ci ayant toutes participé, dans une confusion aussi réelle qu'apparente, à une relation contractuelle internationale complexe dans laquelle l'intérêt du groupe l'emportait sur celui de chacune d'elles. La sécurité des relations commerciales internationales exige qu'il soit tenu compte de cette réalité économique et que toutes les sociétés du groupe soient tenues ensemble et solidairement des dettes dont elles ont directement ou indirectement profité à cette occasion.*'

The group of companies doctrine requires an effective all-embracing control from the parent to the subsidiary company, in addition to the establishment of a conflict of interests between the two entities, as such resulting in a wrong or prejudice to the detriment of the latter. This last requirement is demanded in order that a court or Tribunal ultimately condemn the parent company to compensate the minority shareholders of the subsidiary. However, as far as the specific and circumscribed aspect of the attribution or extension of liability is concerned, the test of effective control is theoretically sufficient. This entails that a qualified corporate control from a government to a SOE may plainly constitutes the basis of "attribution" as *subjective* element of responsibility. Beyond imputability, a private claimant, for instance a minority shareholder of the State enterprise, should further demonstrate its actual loss or damage for the sake of ultimate conviction of the State as 'parent' (*objective* element of responsibility). In any case, although the relationship between a State and its SOEs clearly comprises corporate entities, a complete and uncritical transposition of the group of companies doctrine from the province of business-to-business relations to the context of the intervention of the State into the market does not seem to be warranted.[891]

3.3 Private Law Doctrines

Private law doctrines have a strictly legal connotation, thus not triggering questions of equity.[892] Indeed, such theories individually rely on the consent of the State to be bound by a given undertaking contracted through a State enterprise, on the legal transfer of rights and

[891] *See infra* para 5 of this Chapter.

[892] *Bridas SAPIC, Bridas Energy International, Ltd, Intercontinental Oil & Gas Ventures, Ltd, Bridas Corporation v Government of Turkmenistan, State Concern Turkmenneft*, 345 F.3d 347, 359 (5th Cir 2003): '*The laws of agency, in contrast, are not equitable in nature, but contractual, and do not necessarily bend in favor of justice.*' Instead, '*Courts are thus comparatively free from the moorings of the parties' agreements when considering whether an alter ego finding is warranted.*'

obligations from the SOE to the State on the account of the consideration of the ultimate beneficiary of the transaction, or to a legal phenomenon of succession of the State in the position of a SOE, especially after the latter's dissolution. Accordingly, this section will analyse the private law doctrines of agency, succession, third party beneficiary and group of contracts, as possibly applicable to the relationship between States and parastatal entities. It should be preliminary explained that a State's position of express guarantor of the obligations of its SOEs does not invariably attract its passive standing in arbitration proceedings. While some Tribunals have rather applied a theory of incorporation by reference to extend an arbitration clause to a State on the ground of its guaranty,[893] domestic courts have displayed a more restrictive attitude ('*[t]ypically a guarantor cannot be compelled to arbitrate on the basis of an arbitration clause in a contract to which it is not a party'*).[894]

3.3.1 Agency

As defined by the US Court of Appeals of the Fifth District, 'agency' is – in its private law acceptation – '*a fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act*.'[895] Agency, if combined with representation, produces the imputation to the principal of the *effects* (not of the *act* itself) of the transaction undertaken by the agent.

[893] *Two European Companies v African State*, ICC Case No 6262, Partial Award, 24 June 1992, unpublished, para 92; *Consortium of Two Foreign Companies and a National Company v Public Corporation of State X*, ICC Case No 8357, Final Award, 14 June 1997, unpublished, para 1.3.
[894] *Bridas SAPIC, Bridas Energy International, Ltd, Intercontinental Oil & Gas Ventures, Ltd, Bridas Corporation v Government of Turkmenistan, State Concern Turkmenneft*, 345 F.3d 347, 357 (5th Cir 2003).
[895] *Bridas SAPIC, Bridas Energy International, Ltd, Intercontinental Oil & Gas Ventures, Ltd, Bridas Corporation v Government of Turkmenistan, State Concern Turkmenneft*, 345 F.3d 347, 357 (5th Cir 2003). *Adde*, *J H Rayner (Mincing Lane) Limited v Department of Trade and Industry* [1989] Ch 72, CA, 188-189; [1990] 2 AC 418, 515; *Ebbw Vale Urban District Council v South Wales Traffic Area Licensing Authority* [1951] 2 KB 366, 370.

This corresponds to the established distinction between *imputation de la volonté* and *imputation du comportement*, which theoretically characterises attribution under domestic law (private law and private international law), on one hand, and public international law, on the other hand. To this extent, agency under private law rather entails a bilateral structure between the private party and the State party (comprehensively considered), than a triangular relationship where the SOE is separately bound vis-à-vis the foreign investor. Indeed, the will of the State contemplates the creation of its direct obligation with the private party *ab initio*, even though contracted through the medium of a State instrumentality, notwithstanding separate and independent legal personality under its domestic law.[896] To this extent, the authority of the parastatal entity to enact a particular transaction should turn out to be either actual or apparent, the latter entailing the principal's conduct to cause a third party to reasonably and bona fide believe that the agent is empowered to act on behalf of the principal and that the agent is acting within the scope of that authority.[897] Importantly, the apparent authority may not be conclusively demonstrated upon reliance on a structural test of pervasive control of the State on the parastatal (as under the equitable doctrine of the alter ego), but a factual test should be met to demonstrate the actual consent (even by estoppel) of the State to be bound by the contract and arbitral clause stipulated by the SOE.[898]

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[896] *European Company v State X, Ministry of Industry of State X, Ministry of Defence of State X and State X Establishment*, ICC Case No 7472, Interim Award, 16 January 1995, unpublished, at 19; *State X Helicopter Industries v American Company No 1 and American Company No 2*, ICC Case No 6406, Interim Award, 29 July 1991, unpublished, at 7-8; Arbitration Chamber of Paris Case No 9392, Final Award, 16 January 1998, para 3, (dual responsibility of the SOE 'as both a public company and as an agent of the governmental authorities'); ICC Case No 8035 of 1995, Award, (1997) 124 Journal du Droit International (Clunet) 1040, note Dominique Hascher; *Antoine Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Ad Hoc Tribunal, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184, 204-204, (1994) 19 Yearbook Commercial Arbitration 11, 16, paras 12-14; *Wintershall AG, et al v Government of Qatar*, Partial Award on Liability, 5 February 1988, 28 ILM 795, 811-812: '*As a matter of Qatari Law it is clear that QGPC operates as an arm or agent of the Government in respect of the concession areas held by it*'.

[897] Michael Feit, 'Attribution and the Umbrella Clause: is there a Way out of the Deadlock?' (2012) 21 Minnesota Journal of International Law 21, 38.

[898] *Bridas SAPIC, Bridas Energy International, Ltd, Intercontinental Oil & Gas Ventures, Ltd, Bridas Corporation v Government of Turkmenistan, State Concern Turkmenneft*, 345 F.3d 347, 358 (5th Cir 2003).

3.3.2 Succession

When confronted with the dissolution of a debtor State entity upon political decision of its (parent) State, arbitrators have usually applied the theory of succession in order to 'replace' the former with the latter.[899] As being a private law doctrine, succession does not technically involve piercing the corporate veil, but only operates to revert to the State the outstanding and pending obligations of its (not anymore existing) SOE. Since the dissolution of the SOE may in fact correspond to the sovereign's purpose to fraudulently escape the settlement of the debts owed to private parties, the theory of succession has been sometimes discussed in connection with the equitable doctrine of the alter ego. This has also happened in the well-known case of the *BANCEC* with regard to the dissolution by the Cuban State of the Banco para el Comercio Exterior, a Cuban official autonomous credit institution for foreign trade with full juridical capacity of its own:

> Having dissolved Bancec and transferred its assets to entities *[Banco National and Ministry of Foreign Trade]* that may be held liable on Citibank's counterclaim, Cuba cannot escape liability for acts in violation of international law simply by retransferring the assets to separate juridical entities. To hold otherwise would

[899] *Société des Grands Travaux de Marseille v East Pakistan Industrial Corporation*, ICC Case No 1803 of 1972, Award, in Yves Derains and Sigvard Jarvin (eds), *Collection of ICC Arbitral Awards 1974–1985* (Kluwer Law and Taxation Publishers 1990) 40: '*The Bangladesh Government must be deemed to have been an original party to the arbitration clause of the Principal Agreement which is at issue in these proceedings; and further, the said Government became, as from the entry into force of Order No. 140, a necessary party to these proceedings. Accordingly, it is a right that leave should be given to the Claimant to join the Bangladesh Government as a Defendant.*'; *National Company (State X) v European Company*, ICC Case No 7237, Partial Award, 1 June 1993, unpublished, at 8-9; ICC Case No 7245, *European Company v Municipality of X (African Country)*, Interim Award, 28 January 1994, unpublished, at 43: '*since [the State] succeeded to the rights and obligations of the 'Comité Populaire' of Municipality [X], which it replaces as a party to the present arbitration automatically and without the need for any modification of the terms of reference, which bind the State based on the sole fact of the aforementioned succession.*'; *Contractor A (Luxembourg) v Ministry of Agriculture and Water Management of Z (Republic of Z), State Fund for Development of Agriculture of Z (Republic of Z) et al*, ICC Case No 9762, Final Award, 22 December 2001, paras 40-41, (2004) 29 Yearbook Commercial Arbitration 25, 26.

> permit governments to avoid the requirements of international law simply by creating juridical entities whenever the need arises.[900]

3.3.3 Third Party Beneficiary and Beneficial Ownership

Another private law theory that may be resorted in international business litigation involving States and State entities is the third party beneficiary.[901] This doctrine allows binding the State to the obligations stipulated between a SOE and a private party, provided that the transaction unequivocally displays the intent to benefit the (parent) government.[902] An UNCITRAL arbitral Tribunal seemingly applied the third party beneficiary doctrine to extend to the government of Ghana the arbitration clause stipulated by the Ghana Investment Centre (GIC), which provided *expressis verbis* for arbitration between the private contractor and the government:

> the Agreement with GIC, an agency of the Government of Ghana, clearly binds the Government; indeed, the Agreement speaks explicitely of disputes between the investor 'and the Government', and the expropriation clause expressly prohibits expropriation 'by the Government'. Thus the relevant clauses both engage the Government of Ghana, and contemplate claims against it.[903]

The government should also declare to be willing to benefit from a certain stipulation, which was inferred by the Tribunal in light of the appearence of the State in the proceedings through

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[900] *First National City Bank v Banco Para el Comercio Exterior de Cuba (BANCEC)*, 462 US 611, 633 (1983). *See also Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, paras 52, 62.

[901] *See* Otto Sandrock, 'Arbitration Agreement and Groups of Companies' (1993) 27 International Lawyer 941, 951.

[902] *Bridas SAPIC, Bridas Energy International, Ltd, Intercontinental Oil & Gas Ventures, Ltd, Bridas Corporation v Government of Turkmenistan, State Concern Turkmenneft*, 345 F.3d 347, 362 (5th Cir 2003): '*Under third party beneficiary theory, a court must look to the intentions of the parties at the time the contract was executed.*'

[903] *Antoine Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Ad Hoc Tribunal, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184, 204-204, (1994) 19 Yearbook Commercial Arbitration 11, 17.

its Solicitor General.[904] The theory of third party beneficiary should not be confused with the doctrine that allows private plaintiffs to sue *in rem* a government as beneficial owner of properties operated by its SOEs, which was at the basis of the landmark UK judgment in the case of *I Congreso del Partido*.[905]

3.3.4 Group of Contracts

The concept of economic unity applicable in the theory of group of companies should be distinguished from the concept of legal or contractual unity (alias economic unity of a series of agreements), which intervenes in relation to the theory of group of contracts. This theory has been resorted to by arbitrators, when faced with a series of contracts that nevertheless pertain to a same project or business operation. This may be the case of a framework agreement between the State and the investor, later followed by an implementation or execution agreement between a SOE and the same contractor. In case the arbitration clause is contained only in the second contract, the extension of the dispute resolution agreement to the State may be relied upon the implied intention of the State that a unique proceeding governs the litigation arising from the same economic operation. The leading arbitration is in this respect the ICC case of the *Plateau des Pyramides*, where the arbitral Tribunal found that the juxtaposition of the signature of the Egyptian Ministry of Tourism after the sentence '*approved, agreed and ratified*' within the Supplemental Agreement signed by the Egyptian General Organization of Tourism and Hotels (EGOTH) displayed an *ensemble contractuel*

[904] *Antoine Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Ad Hoc Tribunal, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184, 204-204, (1994) 19 Yearbook Commercial Arbitration 11, 16.
[905] *I Congreso del Partido* [1983] 1 AC 244.

unifié, which justified the possibility to summon the government in the same arbitration.[906] The arbitral award has been later set aside by the Court of Appeal of Paris on the ground that the intervention of Egypt had taken place only in its governmental capacity partaining to its administrative supervision (*tutelle administrative*), rather than in its commercial capacity.[907] In any case, the theory of group of contracts, as any other private law doctrine, cannot disregard the ascertainment of the will, at least implied or by way of estoppel, of the non-signatory State to be bound by the obligations stipulated by the SOE.[908] While it has been investigated the possibility to impute to the State the arbitration clause contracted by the SOE, the reverse operation is also allowed (even though more reluctantly by arbitrators) under the same theory of group of contracts, so as to extend to the SOE the agreements signed by the State. Likewise, the justification is still the contractual unity of various transactions embodying the legal devices for the implementation of a same business project.[909]

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[906] *Southern Pacific Property (Middle East) Ltd v The Arab Republic of Egypt*, ICC Case No 3493, Award, 16 February 1983, 22 ILM 752. *Cf* Philippe Leboulanger, 'Etat, politique et arbitrage. L'affaire du Plateau des Pyramides' (1986) Revue de l'Arbitrage 3. *See also* in early ICSID arbitration based on investment contracts (*arbitration with privity*), the cases of *Holiday Inns v Morocco*, ICSID Case No ARB/72/1, Decision on Jurisdiction, 1 July 1973, unpublished, in Pierre Lalive, 'The First 'World Bank' Arbitration (*Holiday Inns v. Morocco*) - Some Legal Problems' (1980) 51 British Year Book of International Law 123, 159; *Klöckner Industrie Anlagen GmbH v Republic of Cameroon*, ICSID Case No ARB/81/2, Award, 21 October 1983, 2 ICSID Reports 3, 69. However, *see contra* ICC Case No 8035 of 1995, Final Award, (1997) 124 Journal du Droit International (Clunet) 1040, note Dominique Hascher.

[907] Cour d'Appel de Paris, 12 July 1984, *The Arab Republic of Egypt v Southern Pacific Property (Middle East) Ltd (SPP)*, (1985) Journal du Droit International (Clunet) 130, note Berthold Goldman; *accord*, Cour de Cassation, 6 February 1987, *Southern Pacific Property (Middle East) Ltd (SPP) v The Arab Republic of Egypt*, (1987) Journal du Droit International (Clunet) 638, note Berthold Goldman.

[908] On the concept of estoppel, *see also Amco Asia Corporation et al v The Republic of Indonesia*, Decision on Jurisdiction, 25 September 1983, paras 42-49, 1 ICSID Reports 389, 407,

[909] ICC Case No 7105 of 1993, Award, (2000) 127 Journal du Droit International (Clunet) 1062, 1064. *Contra*, *Swiss Oil Co v Petrogab et Etat Gabonais*, ICC Arbitration, Award, 3 April 1977, (1989) Revue de l'Arbitrage 309, note Charles Jarosson.

4. Immunity of Foreign States and State Instrumentalities

4.1 Immunity from Jurisdiction and from Execution

When a State or a SOE are involved in international business litigation before a municipal court, the issue of their immunity should be necessarily considered by the judge as a preliminary matter *in limine litis*.[910] State immunity from jurisdiction (adjudication) depends on the *nature* of the activity of the State at the basis of the subject matter of the dispute, which requires a qualification of an act as being either *jure imperii* or *jure gestionis* (*ratione materiae* concept of State immunity).[911] This rule represents the outcome of a gradual evolution of customary international law.[912] Traditionally, State immunity has been universally considered as being absolute or unqualified, which meant that it was not subject to exceptions or limitations (*ratione personae* concept of State immunity).[913] Subsequently, the trend towards the theory of restrictive or qualified immunity, initially advocated in isolation

[910] *See supra* Chapter I, para 6.
[911] UNCSI Article 2.2 and 7.
[912] Hazel Fox and Philippa Webb, *The Law of State Immunity* (Oxford University Press, 3° edn revised and updated 2013) 25 *et seq*.
[913] As to the US case law, *cf The Schooner Exchange v McFaddon et al*, 11 US 116 (1812), 7 Cranch 116; *Berizzi Brothers Company v Steamship Pesaro*, 271 US 562 (1926); *ex parte Republic of Peru (Ucayali)*, 318 US 578 (1943); *Republic of Mexico et al v Hoffman*, 324 US 30 (1945). As to the UK, *cf The Parlement Belge* [1880] 5 PD 197 (CA), All ER 104; *Mighell v Sultan of Johore*, [1893] 1 QB 149 (CA); *The Porto Alexandre* [1920] P 30, (1918–1919) All ER 615; *Compañía Naviera Vascongada v Steamship Cristina et al* [1938] AC 485 (HL); *Kahan v Pakistan Federation* [1951] 2 KB 1003 (CA). As to the French case law, *cf* Cour de Cassation (FR), Chambre civile, 22 January 1849, *Gouvernement espagnol v Lambège et Pujol (Casaux)*, Sirey 1849-I-81, Dalloz Périodique, 1849-I-5; Cour d'Appel de Paris, 6e Chambre, 30 April 1912, *Gamen Humbert v État russe,* Dalloz Périodique, 1913-II-200. As to Germany, *cf* Preußische Gerichtshof für Kompetenzkonflikte*,* 25 June 1910, *Hellfeld v den Fiskus des Russischen Reiches*, (1910) 20 Zeitschrift für Internationales Recht 416, 437, (1911) 5 American Journal of International Law 75 (*see* Albert de La Pradelle, *La saisie des fonds russes à Berlin* (1910) 6 *Revue (critique) de droit international privé* 75); Zivil Reichsgericht, 10 December 1921, *The Ice King*, 1 Annual Digest of Public International Law Cases (1919–1922) 150. The People's Republic of China, although being a signatory to UNCSI, formally adheres to the absolute doctrine of State immunity, *cf* Hong Kong Court of Final Appeals, 8 June 2011, *Democratic Republic of Congo v FG Hemisphere Associates LLC* [2011] 4 HKC 151.

by Italian and Belgian courts,[914] prevailed over the former doctrine.[915] Moreover, after a long process of codification under the aegis of the ILC, the principle of the restrictive immunity has been eventually adopted at the international level in the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004 (UNCSI), which is not yet entered into force.[916] UNCSI declares that immunity is to be held as a general rule of customary international law.[917] Such a general principle is subject to a series of specific exceptions concerning a variety of enumerated State activities, mainly based on the concept of commerciality (UNCSI Article 10) and identified having regard to the nature of the act executed by the State ('*list method*'). Provided that an exception applies, the foreign State's conduct is regarded as non-immune and, therefore, subject to municipal jurisdiction. This

[914] As to Italy, *cf* Corte di Cassazione di Torino, 18 November 1882, *Morellet v Governo danese* (1883) 35 Giurisprudenza Italiana 125; Corte di Cassazione di Napoli, 16 March 1886, *Typaldos console di Grecia v Manicomio di Aversa* (1886) 38(I) Giurisprudenza Italiana 228; Corte di Cassazione di Firenze, 25 July 1886, *Guttieres v Elmilik*, (1886) 9 Foro Italiano 913; Corte d'Appello di Lucca, 14 March 1887, *Hamspohn v Bey di Tunisi*, (1887) 12 Foro Italiano 474; Corte di Cassazione, Sezioni Unite e I Sezione, 13 March 1926, *Governo rumeno v Trutta*, (1926) 78 Giurisprudenza Italiana 774, (1926) 5 Rivista di Diritto Internazionale 252, note Enrico Tullio Liebman; Corte di Cassazione, Sezioni Unite, 21 September 1948, No 1631, *Governo della Repubblica di Bolivia v Consorzio italiano esportazioni aeronautiche*, (1950) 102 Giurisprudenza Italiana 183, note Rodolfo De Nova. As to Belgium, *see* Cour de Gand, 14 March 1879, *Rau, van de Abeele et Cie v Duruty*, Pacrisie Belge, 1879-II-175, (1881) 8 Journal du Droit International (Clunet) 82, 83; Cour de Cassation (BE), 1e Chambre, 11 June 1903, *Société anonyme Compagnie des chemins de fer Liégeois-Limbourgeois v État néerlandais (Ministère du Waterstaat)*, (1904) 31 Journal du Droit International (Clunet) 417.

[915] The "political" watershed between the unqualified and the qualified theory of State immunity is represented by the celebrated 'Tate letter' of 19 May 1952 sent by the Acting Legal Adviser of the US Department of State to the Acting Attorney-General. *Cf* 'Changing Policy Concerning the Granting of Sovereign Immunity to Foreign Governments' (1952) 26 US Department of State Bulletin 984–985. For an account of the case law on the restrictive immunity, *cf* German Federal Constitutional Court, 30 April 1963, *Claim against the Empire of Iran case*, 45 ILR 57; German Federal Constitutional Court, 13 December 1977, *Philippines Embassy Bank Account case*, 65 ILR 146; Cour de Cassation, 1e Chambre civile, 25 February 1969, *Administration des Chemins de Fer du Gouvernment Iranien v Societé Levant Express Transport*, (1970) 74 Revue Générale de Droit International Public 98, note Pierre Bourel; Cour de Cassation, 1e Chambre civile, 17 January 1973, *État espagnol v Société anonyme de l'hôtel Georges V*, (1973) 90 Journal du Droit International (Clunet) 725; *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529; *Philippine Admiral v Wallem Shipping (Hong Kong) Ltd et al* [1977] AC 373; *I Congreso del Partido* [1983] 1 AC 244 (HL); *Republic of Argentina and Banco Central de la Republica Argentina v Weltover, Inc*, 504 US 607 (1992); *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31, at 147. More recently, Japan has expressly recognized and adopted the restrictive theory of sovereign immunity, *cf* Japanese Supreme Court, 12 April 2002, *Yokota Base case*, (2003) 46 Japanese Annual of International Law 161; Japanese Supreme Court, 21 July 2006, *Pakistan Loans Contracts* case, (2008) 51 Japanese Year Book of International Law 485.

[916] *See supra* Chapter I, para 6.

[917] *Ex multis*, Sompong Sucharitkul, 'Immunities of Foreign States Before National Authorities' (1976) 149 Recueil des Cours 93, 95.

model has been already adopted in the seventies by national statutes in several common law jurisdictions, notably the US and the UK.[918] In this respect, it is important to remark that State immunity is established to be generally dictated by international law, but municipal law through statute or courts' decisions eventually determines its concrete scope of application.

UNCSI also regulates State immunity from execution and provisional measures (Articles 18-21). This immunity is granted to a sovereign defendant on the ground of the specific destination of a given State property to a governmental purpose, unless consent to measures of constraint is otherwise rendered.[919] Accordingly, it appears as appropriate to consider the positive existence of two regimes of State immunity, as such markedly distinct and governed by different tests, which is confirmed by UNCSI Article 20: '*[w]here consent to the measures of constraint is required under articels 18 and 19, consent to the exercise of jurisdiction under Article 7 shall not imply consent to the taking of measures of constraint.*'[920] This clearly conflicts with a principle of effective judicial redress of private parties, whose rights may eventually turn out not to be vindicated on the ground of sovereign immunity from execution at the ultimate stage of litigation. [921]

A comprehensive analysis of the rules of State immunity is required by a demand of overall completeness and exhaustiveness of this treatise on attribution issues in international law and arbitration. With regard to immunity from adjudication, attribution of conduct logically represents an antecedent determination to a domestic courts' decision whether to

[918] US Foreign Sovereign Immunities Act 1976 (FSIA), 28 USC §§ 1602-1611; UK State Immunity Act 1978 (SIA), *The Public General Acts* (1978), London, HM Stationery Office, Part I, Chapter 33, 715.
[919] *See especially* UNCSI Article 19(c).
[920] James Crawford, 'Execution of Judgments and Foreign Sovereign Immunity' (1981) 75 American Journal of International Law 820, 860; Luca G Radicati di Brozolo, *La giurisdizione esecutiva e cautelare nei confronti degli Stati stranieri* (Giuffrè 1992) 110; August Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures' (2006) 17 European Journal of International Law 803, 817.
[921] *See* Cour de Cassation, Chambre civile, 22 January 1849, *Gouvernement espagnol v Lambège et Pujol* (*Gouvernement espagnol v Casaux*), Sirey 1849-1-81, 92: '*l'exécution a toujours suivi la juridiction*'; Tribunal de Bruxelles, 30 April 1951, *Socobelge et État belge v État hellénique, Banque de Grèce et Banque de Bruxelles*, (1952) 74 Journal du Droit International (Clunet) 244; Swiss Federal Tribunal, 20 August 1998, *Banque Bruxelles Lambert SA et al v Paraguay*, ATF 124-III-382, 389.

grant or deny to a sovereign an exemption from suit. Besides, it has already been submitted that the test for attribution to the State of the conducts of parastatal entities *ex* ARSIWA Article 5 is equivalent to the test of State immunity from jurisdiction, hinging on a convergent definition of exercise of governmental authority (*puissance publique*) on the ground of a context-based nature test informed by a principle of competitive neutrality.[922] With regard to immunity from execution, it notably matters to investigate how the principle of the unity of the State is applied at the stage of attachment or seizure of the assets owned by the State. It will be acknowledged that UNCSI provides for a marked policy for non-enforceability of pecuniary awards against '*specific categories of property*', chiefly diplomatic, military and central bank's assets, by codifying a presumption (*juris tantum*) of their use for 'governmental' purposes (UNCSI Article 21). These brief observations are already apt to elucidate the centrality (for the sake of this study) of the law of State immunity, which – by virtue of its two-fold nature (international, on one side, and municipal, on the other side) – represents the pivotal engine of consistency in the legal treatment of the State and its galaxy of parastatals in public international and international business disputes (consistent treatment of the State '*selon le droit international*').[923]

4.2 State Immunity and International Arbitration

An arbitral Tribunal does not represent an organ of a State power (*pouvoir étatique*).[924] Accordingly, the defence of sovereign immunity may not be raised in the course of an arbitral

[922] *See supra* Chapter II, para 4.2, and Chapter III, para 4.2.2.
[923] The words in italics are borrowed from Mathias Forteau, 'L'État selon le droit international: une figure à géométrie variable?' (2007) 111 Revue Générale de Droit International Public 737.
[924] *Solel Boneh International Ltd and Water Resources Development International v Republic of Uganda and National Housing and Construction Corporation of Uganda*, ICC Case No 2321 of 1974, Award, (1975) 102 Journal du Droit International (Clunet) 938, 939-940, (1976) 1 Yearbook Commercial Arbitration 133: '*As*

process, as a corollary of the principle *par in parem non habet judicium*.[925] Regardless, arbitrators have not refrained themselves from qualifying the State conduct at issue as being either commercial or governmental.[926] This qualification, even though not determinative of the issue of the jurisdiction of an arbitral Tribunal, may be explained in light of the threshold relevance of the distinction in the subsequent stage of recognition of the arbitral award, where a reviewing court has to apply the test of immunity from adjudication, focussed on the nature of the State act in question. Indeed, arbitrators have the obligation to render an award '*enforceable at law*', which generally envisages the entire post-award phase.[927] As a consequence, arbitrators are juridically bound to *consider* issues of State immunity in their reasoning, technically not for the sake of integrity of their jurisdiction, but for the sake of enforceability of their award.

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arbitrator I am myself no representative or organ of any State'; *European Company v West African State*, ICC Case No 12048 of 2003, First Partial Award, (2012) 23(2) ICC International Court of Arbitration Bulletin 61, para 44: '*this Arbitral Tribunal has not been constituted by a sovereign authority, but has been appointed by the ICC Court in accordance with the ICC Rules and, thus, derives its authority from those Rules.*'; ICC Case No 8035 of 1995, Award, (1997) 124 Journal du Droit International (Clunet) 1040, note Dominique Hascher: '*Le tribunal considère que l'argument tiré par l'Etat [le défendeur 1] de son immunité n'est pas pertinent dans un système consensuel de règlement des différends tel que l'arbitrage, fondé sur l'acceptation préalable par les parties de toute décision résultant du procès arbitral.*'

[925] *Salini Costruttori SpA v Ethiopia and Addis Ababa Water and Sewerage Authority*, ICC Case No 10623/AER/ACS, Award Regarding the Suspension of the Proceedings and Jurisdiction, 7 December 2001, para 128, (2003) 21 ASA Bulletin 82, 86: '*Le point de savoir si l'objet du présent litige relève du* jus gestionis *ou du* jus imperii *a aussi été discuté par les unes et les autres des parties. Il résulte de ce que j'ai dit ci-dessus que cette distinction est dépourvue de pertinence à partir du moment où les parties se sont mises d'accord sur l'arbitrage.*'

[926] *Contractor A (Luxembourg) v Ministry of Agriculture and Water Management of Z (Republic of Z), State Fund for Development of Agriculture of Z (Republic of Z) et al*, ICC Case No 9762, Final Award, 22 December 2001, (2004) 29 Yearbook Commercial Arbitration 25, 40: '*No need to say that as far as the 'state immunity' is concerned, if we would retain the theory of restricted immunity based on the distinction between acts of a State as a trader (acts jure gestionis) and acts of a State in its sovereign capacity (acts jure imperii), there should be no doubt that the contracts in question are to be classified in the first category. In any case, the acceptance of our jurisdiction by the Ministry, as representative of the State, does also imply the waiver of immunity from jurisdiction.*'

[927] ICC Arbitration Rules (2012) Article 41; LCIA Arbitration Rules (2014) Article 32(2). *See Salini Costruttori SpA v Ethiopia and Addis Ababa Water and Sewerage Authority*, ICC Case No 10623/AER/ACS, Award Regarding the Suspension of the Proceedings and Jurisdiction, 7 December 2001, (2003) 21 ASA Bulletin 82, 86: '*The Tribunal would be slow to render an award that is likely to be set aside at the seat, taking into account the principle according to which the Tribunal must make every effort to render an enforceable award.*'

The arbitration exception to State immunity is regulated by UNCSI Article 17, which establishes a waiver of sovereign immunity, provided that the dispute is related to a '*commercial transaction*'.[928] The waiver only operates in so far as a domestic court is exercising its 'ancillary' jurisdiction in aid of arbitration, either in the phase of annulment or recognition of the arbitral award, whereas the stipulation of an arbitral agreement by a sovereign does not per se entail any renunciation to its immunity from execution of the award. The requirement of the connection of the arbitration with a commercial transaction (*jure gestionis*) does not engender significant problems in international commercial arbitration, but has created critical problems with regard to non-ICSID international investment awards. Indeed, while ICSID awards may be set aside by an international ad hoc committee established under ICSID Convention Article 52 and do not require *exequatur* by a municipal court for the purposes of execution, non-ICSID awards – for instance rendered under the aegis of UNCITRAL, ICC, LCIA, AAA or SCC – do require a domestic proceeding of recognition in order to be granted the *exequatur*. Since international investment arbitration invariably involves State measures in the exercise of governmental authority (*puissance publique*) or *acta jure imperii*, a municipal judge unavoidably administers a wide margin of discretion whether to deny recognition of an investment award on the ground of sovereign immunity from jurisdiction, which has occurred in the case of *Walter Bau v. Thailand* before the German Federal Supreme Court.[929] Seemingly, this situation is not solved by the vagueness of the understanding with respect to Article 17, contained in the Annex to UNCSI, which establishes that '*[t]he expression commercial transaction includes investment matters*'.[930]

[928] UNCSI Article 17.
[929] Federal Court of Justice of Germany, Case No III ZB 40/12, 30 January 2013, *Werner Schneider as liquidator of Walter Bau AG v The Kingdom of Thailand*, (2013) 38 Yearbook Commercial Arbitration 384.
[930] Hazel Fox, 'The Merits and Defects of the 2004 UN Convention on State Immunity: Gerhard Hafner's Contribution to its Adoption by the United Nations' in Isabelle Buffard, James Crawford, Alain Pellet and Stephan Wittich (eds), *International Law Between Universalism and Fragmentation. Festschrift in Honour of*

Undoubtedly, the case of *Walter Bau* embodies a strong recoil to the liberal trend inaugurated by the French Court of Cassation with the case of *Creighton Ltd v. Government of Qatar*, where consent to ICC arbitration has been construed as an *implied* waiver to immunity from execution in light of the obligation to carry out the award without delay, which was imposed by the ICC Rules.[931] This liberal vein has been later (and rightly) expanded by US courts, which declared the same undertaking to incorporate an *express* renunciation to immunity from measures of constraint.[932] This principle seems to be generally applicable in institutional arbitration.[933] After *Walter Bau v. Thailand*, the current '*state-of-the-art*' on the relationship between (investment) arbitration and sovereign immunity begets substantial uncertainty and unpredictability and faces investors with the Hamletic dilemma 'to ICSID or not to ICSID'. Indeed, on one hand, non-ICSID awards have benefitted from a more favourable treatment at the stage of execution in comparison to ICSID awards (which suffer from the '*Achille's heel*' of ICSID Convention Article 55), but, on the other hand, may be denied *exequatur* in the antecedent phase of recognition by virtue of a defense of sovereign immunity from adjudication, which is instead *in toto* excluded with regard to ICSID awards. The solution of this thorny conundrum would be to overcome the regressive formulation of UNCSI Article 17, so as to entrust an independent role to the consent of the State party to an arbitration agreement to waive its immunity, at least from adjudication, thus avoiding to dilute the

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Gerard Hafner (Brill 2008) 413, 418, who invokes an effective interpretation of this Understanding so as to intepret any investment matter as meeting the definition of 'commercial transaction'.

[931] Cour de Cassation, 1e Chambre civile, 6 July 2000, *Creighton Ltd v Gouvernement du Qatar*, (2000) 117 Journal du Droit International (Clunet) 1054, note Isabelle Pingel-Lenuzza, (2001) Revue de l'Arbitrage 114, 116, note Philippe Leboulanger, (2000) 25 Yearbook Commercial Arbitration 458; Cour d'Appel de Paris, 12 December 2001, *Creighton Ltd v Gouvernement du Qatar*, (2003) Revue de l'Arbitrage 417, note Philippe Leboulanger: '*l'acceptation du caractère obligatoire de la sentence qui résulte de celle de la convention d'arbitrage opérant, au vu du principe de bonne foi et sauf clause contraire, une renonciation à l'immunité d'exécution*'.

[932] *Walker International Holdings Ltd v Republic of Congo (ROC)*, 395 F.3d 229, 234 (2004).

[933] ICC Arbitration Rules (2012) Article 34(6); UNCITRAL Arbitration Rules (2010) Article 34(2); LCIA Arbitration Rules (2014) Article 26(8); AAA Arbitration Rules (2009) Article 27(1).

arbitration exception through recourse to the requirement of commerciality of the subject matter of the underlying dispute.[934]

4.3 Immunity of State Organs

4.3.1 Organs of the Central Government

UNCSI Article 2.1(b) elucidates the meaning of 'State' for the purposes of the Convention. With regard to organs of the State this proviso comprises: '*(i) the State and its various organs of government; […] (iv) representatives of the State acting in that capacity*'.[935] Immunity is ultimately accorded only to such acts of the State entailing an exercise of governmental authority, while a municipal judge can ordinarily adjudicate State commercial acts. However, as far as attribution of conduct (*imputation du comportement*) is strictly concerned, the criteria established for the purposes of immunity do not significanty differ from the rule of attribution of acts and omissions of State organs pursuant to ARSIWA Article 4. This is also understood in light of the consideration that attribution of a given conduct to a State invariably is a preliminary determination to the judicial resolution whether that very same conduct is either immune or subject to jurisdiction. As above mentioned, both immune and non-immune conducts of State organs are 'acts of the State' – as such imputable – under international law.[936] However, an exemption from suit may intervene in the context of proceedings before a domestic court, which is compelled by the law of State immunity (a combination of international and domestic law) not to grant it with exclusive regard to *acta jure gestionis*.

[934] Carlo de Stefano, 'Arbitration Agreement as Waivers to Sovereign Immunity' (2014) 30 Arbitration International 59, 72.
[935] UNCSI Article 2.1(b)(i)(ii) and (iii).
[936] *See supra* Chapter I, para 6.1.

Thus, it appears that both the law of State immunity and the international rules of attribution concur as to the possibility to *bridge* the conducts of State organs to a sovereign. What ultimately differs is not the attributability of an act to the State, but the applicability of an exception to the immunity associated with that act, which depends on its nature (*rationae materiae* concept of immunity).

Immunity may comprehensively cover the conducts of all powers exercising a State function, such as the legislative, executive, judiciary or other authority of a regulatory or administrative nature. Accordingly, the meaning of 'State' encompasses all various organs of government, however designated, such as monarchs or heads of State, heads of government, ministries, departments and offices (to the inclusion of subordinate officials), as well as diplomatic missions and consular posts.[937] The application of the regime of sovereign immunity is not affected by the adoption of a particular form of State or government, so that it operates without distinction with regard to kingdoms, empires, republics, federations, confederations of States, etc.[938] In addition, the circumstance of a given administrative authority as having separate legal personality under domestic law does not preclude its qualification as *de jure* State organ, as such possibly benefitting from the exemption from suit or seizure before foreign courts.[939]

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[937] Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries, in Report of the International Law Commission on the Work of its Forty-Third Session, 29 April – 19 July 1991, document A/46/10, Yearbook of the International Law Commission, 1991, Volume II (Part Two), 13, 14, 15-16, document A/CN.4/SER.A/1991/Add.1 (Part 2).

[938] Austrian Supreme Court, 10 May 1950, *Dralle v Republic of Czechoslovakia*, Case No 41, 17 ILR 155; *Kingdom of Norway v Federal Sugar Refining Co*, 286 F. 188 (1923); *Kahan v Pakistan Federation* [1951] 2 KB 1003 (CA). *See* André Weiss, 'Compétence ou incompétence des tribunaux a l'égard des Etats étrangers' (1923) 1 Recueil des Cours 521, 526; Sompong Sucharitkul, 'Immunities of Foreign States Before National Authorities' (1976) 149 Recueil des Cours 93, 99.

[939] *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC*, 17 July 2012, Privy Council Appeal No 6/2011 [2012] UKPC 27 (Judicial Committee of the Privy Council), para 16: '*But an organ of the state* may *under certain circumstances have legal personality*.'; *R (on the application of Alamieyeseigha) v Crown Prosecution Service* [2005] EWCH 2704; *Mackenzie-Kennedy v Air Council* [1927] LR 2 KB 517.

4.3.2 Organs of Territorial Units of the State

The Convention also establishes that immunity is granted to '*constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity*.'[940] This provision expressly establishes a dual requirement of entitlement and actual performance of sovereign authority in order that organs of the sub-state level of government benefit of immunity. Similar to the logic of the international rules of attribution, the threshold rationale is that the internal delegation of sovereignty between the central and the peripheric level of government is as tendency irrelevant from the perspective of imputation. Accordingly, courts have traditionally granted immunity to acts in the exercise of governmental authority undertaken by federated states,[941] municipalities,[942] and other territorial entities, to the inclusion of overseas territories.[943]

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[940] UNCSI Article 2.1(b)(ii). *See also* Report of the Working Group on Jurisdictional Immunities of States and Their Property, Annex to Report of the International Law Commission on the Work of its Fifty-First Session, 3 May - 23 July 1999, document A/54/10, Yearbook of the International Law Commission, 1999, Volume II (Part Two), 149, 155, document A/CN.4/SER.A/1999/Add.1 (Part 2). *Adde*, Gerhard Hafner and Ulrike Köhler, 'The United Nations Convention on Jurisdictional Immunities of States and Their Property' (2004) 35 Netherlands Yearbook of International Law 3, 14; Gerhard Hafner and Leonore Lange, 'La Convention des Nations Unies sur les immunités juridictionnelles des Etats et de leurs biens' (2004) 50 Annuaire Français de Droit International 45, 54-55; Isabelle Pingel-Lenuzza, 'Observations sur la convention du 17 janvier 2005 sur les immunités juridictionnelles des Etats et de leurs biens' (2005) 122 Journal du Droit International (Clunet) 1045, 1047.

[941] Cour d'Appel de Bruxelles, 22 November 1907, *Feldman v Etat de Bahia*, Pasicrisie Belge, 1908-II-55, (1932) 26 Supplement to the American Journal of International Law 484; Cour d'Appel de Colmar, 1928, *Etat de Céara v Dorr et al*, Dalloz Périodique, 1933-I-196; *Sullivan v State of Sao Paulo*, 36 F.Supp. 503 (1941), 10 Annual Digest of Public International Law Cases (1941-1942), Case No 50, 178; Tribunale di Firenze, 1906, *Somigli v Stato di San Paolo nel Brasile*, (1907) 2 Rivista di Diritto Internazionale 379-380; Cour d'Appel de Bruxelles, 1891, *De Bock v Etat indépendant du Congo*, Pasicrisie Belge, 1891-II-419, 420. *Contra*, Tribunal de grand instance de Paris, 15 January 1969, *Neger v Land de Hesse*, (1970) 59 Revue Critique de Droit International Privé 99-101.

[942] Cour de Cassation, Chambre des requêtes, 1 July 1895, *Ville de Genève v Consorts de Civry,* Sirey 1896-I-225, (1894) 21 Journal du Droit International Privé (Clunet) 1032. *See* Jean-Paulin Niboyet, 'Immunité de juridiction et incompétence d'attribution' (1950) 39 Revue Critique de Droit International Privé 139, 147; Charles Rousseau, 'Compétence des tribunaux internes à l'égard des Etats étrangers', (1939) 46 Revue Générale de Droit International Public 427; Louis Cavaré, 'L'immunité de juridiction des États étrangers' (1954) 25 Revue Générale de Droit International Public 202; CJ Hamson, 'Immunity of Foreign States: The Practice of the French Courts' (1950) 27 British Year Book of International Law 321.

[943] *Van Heyningen v Netherlands Indies Government* [1948] QWN 22, 15 Annual Digest of International Law Cases, Case No 43, 138 (per Judge Philipps of the Supreme Court of Queensland): '*an action cannot be brought in our courts against a part of a foreign sovereign State. Where a foreign sovereign State sets up as an organ of*

4.4 Immunity of State Instrumentalities

Not only State organs may be immune from jurisdiction or execution, but also State instrumentalities, notwithstanding their separate legal personality of private law.[944] Indeed, UNCSI also includes in the meaning of 'State' for the purposes of immunity '*agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State*.'[945] Accordingly, SOEs may benefit of State immunity in so far as they have been empowered by the State to perform *acta jure imperii* and actually executed sovereign activities in the case in question (*inclusive* technique). As above submitted, the test for immunity and for imputability of conducts of parastatal entities is convergent in its functioning and operative result: all the acts of State instrumentalities that are attributable to the State pursuant to ARSIWA Article 5 in a public international dispute are conversely immune from the jurisdiction of a domestic court, unless a renunciation of sovereign immunity is applicable.[946]

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its Government a governmental control of part of its territory which it creates into a legal entity, it seems to me that that legal entity cannot be sued here, because that would mean that the authority and territory of a foreign sovereign would be subjected in the ultimate result to the jurisdiction and execution of this court.'

[944] Sompong Sucharitkul, *State Immunities and Trading Activities in International Law* (Stevens & Sons 1959) 104, 112-113; Christoph H Schreuer, *State Immunity: Some Recent Developments* (Cambridge University Press 1988) 92 *et seq*; Jean-Flavien Lalive, 'Contracts Between a State or a State Agency and a Foreign Company' (1964) 13 International & Comparative Law Quarterly 987; Paul Lagarde, 'Une notion ambivalente: l'« émanation » de l'Etat nationalisant' in *Droits et libertés à la fin du XXe siècle – Etudes offertes à Claude-Albert Colliard* (Éditions A Pedone 1984) 539; Fouad AM Riad, 'L'entreprise publique ou semi-publique en droit international privé' (1963) 108 Recueil des Cours 561; Karl-Heinz Böckstiegel, *Arbitration and State Enterprises. A Survey on the National and International State of Law and Practice* (Kluwer Law and Taxation Publishers 1984) 14, 34; KW Wedderburn, 'Sovereign Immunity of Foreign Public Corporations' (1957) 6 International & Comparative Law Quarterly 290; PJ Kincaid, 'Sovereign Immunity of Foreign State-Owned Corporations' (1976) 10 Journal of World Trade Law 110.

[945] UNCSI Article 2(b)(iii).

[946] *See supra* Chapter I, para 6.2.

The terms 'agency' and 'instrumentality' are used in UNCSI Article 2.1(b)(iii) as being interchangeably equivalent.[947] In addition, the drafters of the Convention have inserted the reference to '*other entities*' in order to cover 'private' persons exceptionally endowed with governmental authority, such as commercial banks entrusted by the State to grant import and export licenses.[948] In any case, such situations are clearly covered by the scope of '*persons […] empowered by the law of that State to exercise elements of the governmental authority*' pursuant to ARSIWA Article 5, which governs the same number of cases of UNCSI Article 2(1)(b)(iii). A punctual taxonomy of the various 'State entities', as distinct from State organs, may appear as being artificially superfluous, in light of the *ratione materiae* operativity of the regime of sovereign immunity under the restrictive theory. Indeed, what is relevant is not the status of a given State official, SOE or private person, but its performance of governmental activity. This may explain certain *dicta* of UK courts, which conveyed a non-disguised intolerance towards articulated terminologies:

> whether a particular ministry or department or instrument, call it what you will, is to be a corporate body or an unincorporated body seems to me to be purely a matter of governmental machinery.[949]

Nevertheless, the inclusion of State agencies into the definition of 'State entities' covered with sovereign immunity does not appear to be eventually apposite. Indeed, an 'agency' should be usually subsumed into the category of State organs, in light of its regulatory and

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[947] *Krajina v Tass Agency* [1949] 2 All ER 274 (CA); *Compañía Mercantil Argentina v United States Shipping Board* [1924] All ER 186 (CA); *Baccus SRL* v *Servicio National del Trigo* [1957] 1 QB 438 (CA).

[948] Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries, in Report of the International Law Commission on the Work of its Forty-Third Session, 29 April – 19 July 1991, document A/46/10, Yearbook of the International Law Commission, 1991, Volume II (Part Two), 13, 17, document A/CN.4/SER.A/1991/Add.1 (Part 2). *Adde*, Catherine Kessedjan and Christoph H Schreuer, 'Le projet d'articles de la Commission du Droit International sur les immunités des Etats' (1992) 96 Revue Générale de Droit International Public 299, 321.

[949] *Baccus SRL v Servicio National del Trigo* [1957] 1 QB 438 (CA) (per Lord Jenkins). *See also* Lord Wilbeforce in *I Congreso del Partido* [1983] 1 AC 244: '*State-controlled enterprises, with legal personality, ability to trade and to enter into contracts of private law, though wholly subject to the control of their state, are a well-known feature of the modern commercial scene. The distinction between them, and their governing state, may appear artificial.*' *Adde*, Christoph H Schreuer, *State Immunity: Some Recent Developments* (Cambridge University Press 1988) 92.

administrative functions. As just remarked, the distinction is not dispositive of the issue of sovereign immunity, but nonetheless determines attribution under ARSIWA Article 4, rather than under Article 5. It may be submitted that the drafters of the Convention inserted State agencies in UNCSI Article 2.1(b)(iii) to mean that they are entitled to immunity notwithstanding their separate legal personality (of public law) under domestic law. This is notably the case of central banks, which ordinarily benefit of distinct juristic personality and exercise a marked degree of political autonomy and administrative independence.[950] Another inconsistency in the Convention is noted, in that 'State enterprises' are regulated through an *exclusive* technique, which implies that their activities are presumptively non-immune from jurisdiction. Indeed, UNCSI Article 10.3 establishes that the activity *jure gestionis* of State enterprises does not trigger issues of State immunity.[951] While this rule does not affect the tenets of the restrictive theory of sovereign immunity (*ratione materiae* concept), the adoption of a different legislative technique – and the corresponding reversal of the burden of proof – does not seem to be justified by a tenable ontological distinction between State

[950] *AIG Capital Partners v Kazakhstan* [2005] EWHC 2239 (Comm), [2006] 1 All ER (Comm) 1, para 38; *Banca Carige SpA Cassa di Risparmio di Genova e Imperia v Banco Nacional de Cuba* [2001] 3 All ER 923; *Central Bank of Yemen v Cardinal Financial Investment Corp (No 1)* [2001] Lloyd Rep Bank 1 (CA); *Crescent Oil and Shipping Services Ltd v Banco Nacional de Angola* [1999] All ER 577; *Camdex International Ltd v Bank of Zambia (No 2)* [1997] 1 All ER 728; *De Sanchez v Banco Central de Nicaragua*, 770 F.2d 1385 (1985); *Texas Trading and Milling Corp v Federal Republic of Nigeria and The Central Bank of Nigeria*, 647 F.2d 300 (1981); *Verlinden BV v Central Bank of Nigeria*, 488 F.Supp. 1284 (S.D.N.Y. 1980); *Hispano Americana Mercantil SA v Central Bank of Nigeria* [1979] 2 Lloyd's Rep 277; *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529; *National American Co v Federal Republic of Nigeria*, 420 F.Supp. 954 (S.D.N.Y. 1976); Landgericht Frankfurt, 2 December 1975, *Nada Trust v Central Bank of Nigeria*, (1976) 29 NJW 1044, 65 ILR 131; Cour de Cassation, 1^{e} Chambre civile, 11 February 1969, *Englander v Banque d'Etat Tchécoslovaque*, (1969) 96 Journal de Droit International (Clunet) 923; *Dollfus Mieg et Cie SA v Bank of England* [1952] 1 All ER 572.

[951] UNCSI Article 10.3:

> Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of:
>
> (a) suing or being sued; and
>
> (b) acquiring, owning or possessing and disposing of property, including property which that State has authorized it to operate or manage,
>
> is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected.

instrumentalities and enterprises. However, in light of the persistence of the adoption of the doctrine of absolute immunity in certain jurisdictions, the drafters of UNCSI may have opted for this solution in order to ultimately bar recourse to immunity in relation to the commercial activities of state trading agencies.[952]

When the unqualified concept of immunity (*ratione personae*) was dominant, courts substantially resorted to the exclusive technique, since no other remedy to displace State immunity was outstanding than establishing the separateness of a SOE from the State.[953] This approach may be defined as 'structuralist' or 'definitional', since it aims to treat a SOE as a distinct entity from the government in order to exclude any intervention of the regime of sovereign exemption from jurisdiction.[954] Elements of this adjudicative technique persist within the 'structural' test for the *identification* of a parastatal entity.[955] Following the evolution of the rule of State immunity from absolute to restrictive, status-based determinations faded in favour of subject matter considerations about the nature – either *jure imperii* or *jure gestionis* – of the conduct at issue.[956] Thus, the shift in the operation of State

[952] For an example of the persistence of the doctrine of unqualified immunity, *see* Hong Kong Court of Final Appeals, 8 June 2011, *Democratic Republic of Congo v FG Hemisphere Associates LLC* [2011] 4 HKC 151.
[953] *See* German Federal Constitutional Court, *National Iranian Oil Company Revenues from Oil Sales case*, 65 ILR 215, 229.
[954] *United States v Deutches Kalisyndicat Gesellschaft*, 31 F.2d 199 (1929); *Ulen v Bank Gospodarstwa Krajowego*, 261 App Div 1, 24 NY S.2d 201(1940).
[955] *First National City Bank v Banco Para el Comercio Exterior de Cuba (BANCEC)*, 462 US 611, 624-625 (1983): '*The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances. The instrumentality is run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirements with which government agencies must comply. These distinctive features permit government instrumentalities to manage their operations on an enterprise basis while granting them a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies.*'; Cour de Cassation, 1e Chambre civile, 6 February 2007, *Société nationale des pétroles du Congo (SNPC) v Walker International Holdings Ltd*, (2007) Revue de l'Arbitrage 483, note Laurence Franc-Menget; Tribunal de Grande Instance de Paris (référé), 5 March 1979, *Procureur de la République v LIAMCO*, (1979) 106 Journal du Droit International (Clunet) 861, note Bruno Oppetit.
[956] Burkhardt Hess, 'The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property' (1993) 4 European Journal of International Law 269, 280.

immunity from a structuralist (*ratione personae*) to a functionalist (*rationae materiae*) approach is correspondingly applied with regard to the treatment of SOEs.[957]

4.5 Immunity of State or State-Owned Entities' Properties

While States and SOEs generally comply with arbitral awards and court decisions,[958] sovereign immunity from measures of constraint (*par in parem non habet imperium*) may continue to represent a '*stumbling block in the smooth enforcement of judgments and awards involving foreign states*'.[959] As above mentioned, UNCSI adopts a purpose-based test of immunity from execution or attachment.[960] Indeed, a property of the State can be subject to execution only in so far as it is '*specifically in use or intended for use by the State for other*

[957] *Kuwait Airways Corp (KAC) v Iraq Airways Co (IAC) (No 2)* [2001] 1 WLR 429, [1995] 3 All ER 694, 719 (HL); *In the matter of SEDCO, Inc*, 543 F.Supp. 561 (S.D. Tex 1982); *Arango v Guzman Travel Advisors Corporation*, 621 F.2d 1371 (1980); *Carey v National Oil Corporation*, 592 F.2d 673, 676 (1979); *Yessenin-Volpin v Novosti Press Agency*, 443 F.Supp. 849 (S.D.N.Y. 1978); *Mellenger v New Brunswick Development Corporation* [1971] 2 All ER 593 (CA), [1971] 1 WLR 604; Cour de Cassation, 1e Chambre civile, 25 February 1969, *Administration des Chemins de Fer du Gouvernment Iranien v Societé Levant Express Transport*, (1970) 74 Revue Générale de Droit International Public 98, note Pierre Bourel; Corte di Cassazione, 5 December 1966, *Consorzio Agrario della Tripolitania v Federazione Italiana Consorzi Agrari e Cassa di Risparmio della Libia*, (1967) 3 Rivista di Diritto Internazionale Privato e Processuale 602, 65 ILR 265; Cour d'Appel de Bruxelles, 4 December 1963, *Société Anonyme "Dhlellemes et Masurel" v Banque Centrale de la République de Turquie*, 45 ILR 85; Court of Appeal of The Hague, 28 November 1968, *NV Cabolent v National Iranian Oil Company (NIOC)*, 47 ILR 138; Swiss Federal Tribunal, 22 June 1966, *Italian Republic, Italian Ministry of Transport and Italian State Railways v Beta Holding SA*, 65 ILR 394; Swiss Federal Tribunal, *Banque Central de la Republique de Turquie v Weston Compagnie de Finance et d'Investissement SA*, 15 November 1978, 65 ILR 417, 422.

[958] Karl-Heinz Böckstiegel, *Arbitration and State Enterprises. A Survey on the National and International State of Law and Practice* (Kluwer Law and Taxation Publishers 1984) 49: '*The vast majority of answers received indicates that state enterprises will in practice fulfil arbitration awards voluntarily so that enforcement does not become necessary.';* Antonio Remiro Brotóns, 'La reconnaissance et l'exécution des sentences arbitrales etrangeres' (1984) 184 Recueil des Cours 169, 260: '*l'on peut se sentir soulagé par le fait que, en règle générale, les États respectent aussi, spontanément, les sentences qui les touchent*'; Brian King, Alexander Yanos, Jessica Bannon Vanto and Philip Riblett, 'Enforcing Awards Involving Foreign Sovereigns' in James H Carter and John Fellas (eds), *International Commercial Arbitration in New York* (Oxford University Press 2010) 413, 415; Alexis Blane, 'Sovereign Immunity as a Bar to the Execution of International Arbitral Awards' (2008-2009) 41 New York University Journal of International Law & Politics 453, 456.

[959] Georges R Delaume, 'State Contracts and Transnational Arbitration' (1981) 75 American Journal of International Law 784, 817.

[960] Mathias Audit, 'La renonciation par un État à son immunité d'exécution' in Anne Peters, Evelyne Lagrange, Stefan Oeter and Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Brill 2015) 70; Joseph W Dellapenna, *Suing Foreign Governments and Their Corporations* (Transnational Publishers, Inc, 2° edn 2003) 743 *et seq*; Stephan Kröll, 'Enforcement of Awards' in Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds), *International Investment Law* (CH Beck-Hart-Nomos 2015) 1482, 1499.

than government non-commercial purposes', provided that it is situated in the territory of the forum State.[961] The regime of immunity of State assets from seizure is identical in relation to both international commercial and investment awards.[962] However, as above mentioned, non-ICSID investment awards may benefit from a more favourable treatment at the enforcement stage, since the obligation to carry out the award without delay, as contained in the most frequently applied rules administered by international arbitral chambers, is to be interpreted as an express waiver of immunity from execution. The outstanding question whether an express waiver of immunity – contained in a written contract or in an arbitration agreement – is sufficient to oust the immunity from execution of the '*specific categories of property*' enumerated by UNCSI Article 21.1 has been answered in the negative by the preponderant majority of domestic jurisdictions.[963] These categories of property eminently comprise:

> (a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences;
> (b) property of a military character or used or intended for use in the performance of military functions;
> (c) property of the central bank or other monetary authority of the State;
> (d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;
> (e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.[964]

[961] UNCSI Article 19(c).
[962] Andrea K Bjorklund, 'State Immunity and the Enforcement of Investor-State Arbitral Awards' in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 302, 306.
[963] *Ex multis*, Cour d'Appel de Paris, 1re Chambre, 10 August 2000, *Ambassade de la Fédération de Russie en France et al v Compagnie Noga d'importation et d'exportation SA*, (2001) Revue de l'Arbitrage 116, note Isabel Pingel-Lenuzza; Cour d'Appel de Paris, 1e Chambre civile, 26 September 2001, *République du Cameroun v Winslow Bank and Trust*, (2001) Revue de Droit Bancaire et Financièr 239; Cour de Cassation, 1e Chambre civile, 28 September 2011, *NML Capital Ltd v République argentine*, (2012) 101 Revue Critique de Droit International Privé 124, note Hélène Gaudemet-Tallon, (2012) 139 Journal du Droit International (Clunet) 668, note Gilles Cuniberti. *Contra*, Cour d'Appel de Bruxelles, 17e Chambre civile, 21 June 2011, *NML Capital Ltd v République argentine*, (2012) 45 Revue Belge de Droit International 309, 312, note Pierre d'Argent. This decision has been reversed by Cour de Cassation (BE), 1e Chambre civile, 22 November 2012, *NML Capital Ltd v République argentine*, No C.11.0688.F.
[964] UNCSI Article 21(c).

Such assets benefit of a 'reinforced' immunity, in that international law creates a rebuttable presumption of their destination to a governmental purpose. Accordingly, courts have generally interpreted this rule as imposing to the private party the onus to demonstrate the destination of this kind of assets to a commercial end in order to overcome the presumption of their immunity from seizure.[965] In addition, in three decisions of March 2013 the French Court of Cassation deliberated that a State's renunciation to immunity from execution not only is required to be express, but also *specific*, thus demanding a previous explicit enumeration (or even earmarking) by the State of the properties that are possibly covered by its waiver.[966] This interpretation has been justified upon reference to the ILC Commentaries to the 1991 Draft Articles on Jurisdictional Immunities of States and Their Property.[967] However, it should be underlined that the position of the ILC in 1991 has been superseded by the final text of the Convention adopted in 2004, which establishes that the specific

[965] *AIG Capital Partners Inc et al v Republic of Kazakhstan* [2005] EWHC 2239 (Comm); *AIC Limited v Federal Government of Nigeria et al* [2003] EWHC 1357 (QB); *Af-Cap Inc v The Republic of Congo*, 383 F.3d 361 (2004) (holding that the district court erred in concluding that certain tax and royalty payment obligations owed by appellee oil companies, as garnishees, were not used for commercial purposes); *Connecticut Bank of Commerce v The Republic of Congo*, 309 F.3d 240 (2002); Oberlandesgericht Köln, 6 October 2003, *Franz J Sedelmayer v The Russian Federation*, (2005) 30 Yearbook Commercial Arbitration 541; German Federal Supreme Court, 4 October 2005, *Franz J Sedelmayer v The Russian Federation*, (2006) 31 Yearbook Commercial Arbitration 698, 707; German Federal Supreme Court, 28 May 2003, *Kenyan Diplomatic Residence* case, 128 ILR 632. For a 'dissenting' position, *see* Cedric Ryngaert, 'Embassy Bank Accounts and State Immunity from Execution: Doing Justice to the Financial Interests of Creditors' (2013) 26 Leiden Journal of International Law 73, 80 (supporting the reversal of the burden of proof on the State as to the destination of its assets to a governmental purpose).

[966] Cour de Cassation, 1e Chambre civile, 28 March 2013, *Sté NML Capital v République argentine*, (2013) 117 Revue Générale de Droit International Public 195, (2013) 140 Journal du Droit International (Clunet) 899, note Gilles Cuniberti. See also the observations of Sally El Sawah and Jorge E Viñuales, Note to International Tribunal of the Law of the Sea, 15 December 2012, *Ara Libertad (Argentina v Ghana)*, (2013) 140 Journal du Droit International (Clunet) 857, 881.

[967] Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries, in Report of the International Law Commission on the Work of its Forty-Third Session, 29 April – 19 July 1991, document A/46/10, Yearbook of the International Law Commission, 1991, Volume II (Part Two), 13, 59, para 8, document A/CN.4/SER.A/1991/Add.1 (Part 2): '*Notwithstanding the provision of paragraph 1, the State may waive immunity in respect of any property belonging to one of the specific categories listed, or any part of such a category by either allocating or earmarking the property within the meaning of article 18 (b), paragraph 1, or by specifically consenting to the taking of measures of constraint in respect of that category of its property, or that part thereof, under article 18 (a), paragraph 1. A general waiver or a waiver in respect of all property in the territory of the State of the forum, without mention of any of the specific categories, would not be sufficient to allow measures of constraint against property in the categories listed in paragraph 1.*'

destination of a State property to commercial purposes well entails an exception to immunity from measures of constraint (*a contrario* interpretation of UNCSI Article 19(c)). In addition, UNCSI Article 21.2 *a fortiori* clarifies that the presumption of immunity of '*specific categories of property*' *ex* UNCSI Article 21.1 is '*without prejudice to article 18 and article 19, subparagraphs (a) and (b)*', which include the possibility of an express waiver of State immunity from execution on any kind of property.[968] It is not possible to conclusively affirm that the 2013 decisions of the French Court of Cassation in the case of *Sté NML Capital v. République argentine* have been decisively inspired by a policy to counter-attack the recovery strategies of 'vulture funds', namely such corporations purchasing debt at a discounted price on the secondary market from the original creditors.[969] Regardless, it can firmly be submitted that such judicial resolutions should not affect the law of State immunity by inducing a regressive trend to the detriment of the generality of creditors of foreign sovereigns.

4.5.1 Targeting the Assets of the State or State-Owned Entities for Enforcement Purposes

A fundamental requirement for private parties seeking to execute an award against a State or SOE is to allege before the enforcing court a linkage between a seizable property and the summoned 'entity' ('*link*' issue). Indeed, UNCSI Article 19(c) dictates:

> post-judgment measures of constraint may only be taken against the property that has a *connection* with the entity against which the proceeding was directed. (*emphasis added*).[970]

[968] UNCSI Article 21.2.
[969] *See* Horatia Muir Watt, 'L'immunité souveraine et les fonds 'vautour'. À propos de *La Générale des Carrières et des Mines v. F.G. Hemisphere Associates LLC*' (2012) 101 Revue Critique de Droit International Privé 789.
[970] UNCSI Article 19(c). *Adde*, Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries, in Report of the International Law Commission on the Work of its Forty-Third Session, 29 April – 19 July 1991, document A/46/10, Yearbook of the International Law Commission, 1991, Volume II (Part Two), 13, 57, para 7, document A/CN.4/SER.A/1991/Add.1 (Part 2). This criteria has been famously established by Cour de Cassation, 14 March 1984, *République Islamique d'Iran et al v Société Eurodif et al*, (1984) 111 Journal du Droit International (Clunet) 598, (1984) 73 Revue Critique de Droit International Privé 644.

Accordingly, investors may face various scenarios in order to enforce an award or decision rendered in their favour. The actual defendant in the underlying proceedings invariably represents the point of departure of a credit recovery strategy, be it the State or the SOE (or both in case of a multi-party litigation). Accordingly, creditors should primarily direct their actions *in executivis* against the assets of the entity that was the formal party to the process of adjudication. In particular, UNCSI seems to envisage a parallelism between defendants in the proceedings of adjudication and execution. This may suggest that conviction of a given ministry, department or agency of government should form the basis for coercive actions against the assets of the same department, for instance by means of seizure of its individual bank accounts. Likewise, an award against a SOE should be enforced against the properties of the SOE itself. Provided that this course of action proves to be unsuccessful or is rendered impracticable (for instance by dissolution of a State instrumentality by the State), creditors may subsidiarily proceed against 'less connected' entities to their substantive claim, which require an operation of 'imputation' of the award for the sake of ultimate compliance of the 'State' with its undertakings.

4.5.2 Enforcing an Award Rendered Against a State-Owned Entity on the Properties of the State

It may occur that the enforcement against the assets of a State instrumentality is only partial, in that the entity is insufficiently capitalized, or impracticable, in that the entity has been dissolved by the State after the accrual of the dispute or after the commencement of proceedings. In this case, a private party may target its executive action against the properties of the State. This situation is expressly contemplated by the Annex to UNCSI in its Understanding with respect to Article 10.3, which regulates State enterprises:

> Article 10, paragraph 3, does not prejudge the question of "piercing the corporate veil", questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues.

This provision was historically conceived having regard to the phenomena of segregated State property possessed by State trading agencies in Socialist countries.[971] The rule is nevertheless applicable in every economic system to the extent that a State has orchestrated a manipulation of corporate forms in order that its SOEs surreptitiously circumvent their obligations vis-à-vis foreign contractors.[972] In addition, municipal courts have contemplated the possibility that an investor attaches the revenues deriving from the activities of the debtor SOE, but nevertheless detained by a State ministry or by a central bank.[973] It usually matters of the very same organs of an executive or regulatory nature entrusted with the supervision (*tutelle*) on the corporate life of the State instrumentality, which provide a 'meaningful' connection pursuant to UNCSI Article 19(c). Finally, it may occur that a State has interfered with the conducts of a parastatal entity to such an extent that lifting the corporate veil may be permitted for the purposes of enforcement.[974]

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[971] *Cf* Motoo Ogiso, Preliminary Report on Jurisdictional Immunities of States and Their Property, 20 May 1988, document A/CN.4/415, in Yearbook of the International Law Commission, 1988, Volume II (Part One), 96, 109, document A/CN.4/SER.A/1988/Add.1 (Part 1).

[972] *First National City Bank v Banco Para el Comercio Exterior de Cuba (BANCEC)*, 462 US 611, 633 (1983); *Bridas SAPIC, Bridas Energy International, Ltd, Intercontinental Oil And Gas Ventures, Ltd, and Bridas Corp v Government of Turkmenistan, Concern Bal-Kannebitgazsenagat and State Concern Turkmenneft*, 447 F.3d 411, 418-420 (5th Cir 2006); *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, paras 52, 62 (enforcement denied).

[973] *Karaha Bodas Company, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") and Ministry of Finance of the Republic of Indonesia*, 313 F.3d 70, 76-77 (2nd Cir 2002).

[974] *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC*, 17 July 2012, Privy Council Appeal No 6/2011 [2012] UKPC 27 (Judicial Committee of the Privy Council), para 30.

4.5.3 Enforcing an Award Rendered Against a State on the Property of a State-Owned Entity (*Reverse Attribution*)

An arbitral award condemning a State (like the generality of investment awards) may be subsidiarily enforced on the assets of its parastatal entities (*reverse attribution*, or *reverse piercing* or *umgekehrter Durchriff*).[975] However, this extension is not automatically warranted, but must be justified upon the demonstration of a link between the two 'persons'. Courts resort to different arguments to connect a SOE to its establishing State for enforcement purposes. On one hand, they may attempt to identify an organic link between a given State instrumentality and the State. On the other hand, they may emphasise functional and factual considerations warranting 'attribution' of the award from the latter to the former.

The first approach has been adopted by the courts of France at the time of the Libyan nationalizations,[976] and in more recent cases.[977] This theory aims to demonstrate that a State instrumentality merely is an organ (*de facto*) of the State, notwithstanding its 'artificial' separate legal personality of domestic law, based on the absence of truly real autonomy. Notably, in the case of the *Société nationale des pétroles du Congo (SNPC) v. Walker International Holdings Ltd*, the French Court of Cassation confirmed the decision of the Court of Appeal of Paris to grant execution of an arbitral award against the Republic of Congo on the assets of a Congolese SOE operating in the oil and gas sector, which did not have any connection with the previous arbitration. The Court's reasoning was grounded on the finding

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[975] The question has been phrased as '*Can a Party Benefitting from an Award Rendered Against a State Enforce the Award Against an Instrumentality of Such State?*'. *See* Emmanuel Gaillard and Jennifer Younan (eds), *State Entities in International Arbitration* (Juris Publishing, Inc 2008) 97-178, with contributions of Charles Poncet, Eric Teynier, Judith Gill, Eugene Gulland, and Sigvard Jarvin.

[976] Tribunal de Grande Instance de Paris (référé), 5 March 1979, *Procureur de la République v LIAMCO*, (1979) 106 Journal du Droit International (Clunet) 861, note Bruno Oppetit. *Contra*, Cour de Cassation, 2 November 1971, *Clerget v Banque commercial pour l'Europe du Nord*, (1972) 61 Revue Critique de Droit International Privé 310, note Pierre Bourel, (1972) 99 Journal du Droit International (Clunet) 267; Cour de Cassation, 1e Chambre civile, 1 October 1985, *Sonatrach v Migeon*, 26 ILM 998.

[977] Cour de Cassation, 1e Chambre civile, 6 February 2007, *Société nationale des pétroles du Congo (SNPC) v Walker International Holdings Ltd*, (2007) Revue de l'Arbitrage 483, note Laurence Franc-Menget.

that the SOE *could not* benefit of legal autonomy by virtue of its lack of functional independence and in light of its intermingling of assets with the State Treasury.[978] Accordingly, the traditional theory of *émanations de l'État* tends to completely assimilate a State instrumentality to its corporator. It should be noted that the possibility to attach the properties of *any* SOE, irrespective of its connection with the underlying dispute, has been criticized in legal scholarship as being susceptible to undermine certainty and predictability in the international commerce to the ultimate detriment of private businesses.[979] Thus, the Judicial Committee of the Privy Council excluded the possibility to assimilate a SOE to the State for all purposes, thus confirming a punctual application and circumscribed effects of a piercing of the corporate veil:

> There is no doubt that Gécamines' assets originated in the State, but there is nothing surprising or significant about that. Once it acquired them, they became its assets, albeit that dispositions and acquisitions were liable to veto by State authorities. Those in day-to-day charge of Gécamines' affairs were vulnerable to having any important decisions which they took reviewed and vetoed by other State authorities. But that does not mean that Gécamines had no real existence as a separate entity, or that it should be viewed for all purposes as assimilated to the DRC. […] Gécamines was clearly active as a separate entity for many other purposes.[980]

The second (predominant) approach consists in the identification of a qualified link ('*un rôle clé*') between the SOE and the original dispute formally litigated between the private party and the State, which should demonstrate the instrumental character of the conduct of the parastatal entity to specific State policies or mandates, so that the entity, although distinct in

[978] Cour de Cassation, 1e Chambre civile, 6 February 2007, *Société nationale des pétroles du Congo (SNPC) v Walker International Holdings Ltd*, (2007) Revue de l'Arbitrage 483, note Laurence Franc-Menget. *See also* the description of SNPC in *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC*, 17 July 2012, Privy Council Appeal No 6/2011 [2012] UKPC 27 (Judicial Committee of the Privy Council), para 32, 41.

[979] Paul Lagarde, 'Une notion ambivalente: l'« émanation » de l'Etat nationalisant' in *Droits et libertés à la fin du XXe siècle – Etudes offertes à Claude-Albert Colliard* (Éditions A Pedone 1984) 539, 544: '*Le seul critère organique de l'émanation, s'il était retenu par la jurisprudence, serait de nature à paralyser irrémédiablement le commerce international, puisque les biens de n'importe quelle compagnie contrôlée par un Etat qui a pris au cours de son histoire une quelconque mesure de nationalisation, seraient exposés, en permanence, hors de cet Etat, aux saisies des victimes de cette mesure de nationalisation […]*'.

[980] *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC*, 17 July 2012, Privy Council Appeal No 6/2011 [2012] UKPC 27 (Judicial Committee of the Privy Council), para 54, 73.

legal personality, appears to have acted as an *alter ego* of the State.[981] Indeed, as above mentioned, ordinary supervision or control over a State-owned company is not recognized as sufficient ground to allow piercing of the corporate veil.[982] The US Court of Appeals of the Second Circuit has recently reiterated this concept in relation to the enforcement of the judgments rendered in the context of the ongoing Argentinian bonds' litigation. Indeed, the Court rejected the allegation that the Banco Central de la República Argentina (BCRA) was an alter ego of the Republic of Argentina for the purposes of the enforcement of the judgments on the ground of lack of extensive control.[983] This recent US judgment further confirms the departure of domestic courts from exclusive recourse to the organic criteria for the purposes of 'reverse attribution'.

The enforcement of an award rendered against the State on the assets of a SOE may also be affected by the nature of the underlying dispute and cause of action. In case of international business litigation involving a previous finding of piercing the corporate veil (by virtue of the theories above discussed), an enforcing court may consider the same arguments in order to 'attribute' the award condemning the State to the same instrumentality.[984] This may also occur in case the arbitrator or judge in the original dispute has applied a private law doctrine, such as agency or third party beneficiary. In addition, where the State has tortuously interfered in a transaction between a private contractor and one of its SOEs, the resulting award may possibly be executed against that SOE on the ground of their collusive interaction. In case of international investment litigation – or public international dispute settlement in general – the convicted party is invariably a State, save for the special mechanism of

[981] Paul Lagarde, 'Une notion ambivalente: l'« émanation » de l'Etat nationalisant' in *Droits et libertés à la fin du XXe siècle – Etudes offertes à Claude-Albert Colliard* (Éditions A Pedone 1984) 539, 556.
[982] *Ex multis*, Cour de Cassation, 1e Chambre civile, 4 January 1995, *Office des céréales de Tunisie v Bec frères*, (1995) 122 Journal du Droit International (Clunet) 649, note Ahmed Mahiou.
[983] *EM Ltd and NML Capital, Ltd v Banco Central de la República Argentina and Republic of Argentina*, 800 F.3d 78, 91 *et seq* (2015).
[984] *See supra* para 3 of this Chapter.

designation pursuant to ICSID Convention Article 25(1)-(3). However, a SOE may have retained a decisive role in the dispute, so as to justify attribution under ARSIWA Article 5 or 8, in that it acted in the exercise of governmental authority or under the instructions, or direction or control of State organs. Both the functional and factual link embodies a significant connection between the award and the relevant SOE for the purposes of execution before a domestic court. In addition, where the State has (collusively) interfered in a transaction between a foreign investor and a State instrumentality, it is clear that the State may be held responsible under international law for its *own* conduct (ARSIWA Article 4). Moreover, this connection may turn out to be relevant for the purposes of enforcement on the assets of the SOE. Another scenario may be at issue when the assets of a foreign investor are expropriated by the host State and later transferred and allocated to a SOE, either already in existence or newly created, as occurred in the *Yukos* saga.[985] It is hardly deniable that the receiving SOE retains a 'connection' with the subject matter of the dispute, which resulted in the award. This entails that a winning investor may aptly proceed *in executivis* against the properties in use or intended to use for a commercial purposes of such State instrumentalities.[986]

In strictly analytical terms, the succesful application of the alter ego doctrine – or other doctrine ending up with veil-piercing – at the adjudicative stage does not automatically warrant disregarding corporate personality of State instrumentalities at the enforcement stage.

[985] *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, UNCITRAL, PCA Case No AA 226, Final Award, 18 July 2014; *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 227, Final Award, 18 July 2014; *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, UNCITRAL, PCA Case No AA 228, Final Award, 18 July 2014.

[986] Maria Davies, 'Winning the Battle Does Not Mean Winning the War: Challenges Facing the Yukos Shareholders in Enforcing Their Arbitration Awards Against the Russian Federation in England and Wales', Transnational Dispute Management (June 2015) (focusing on Yukos's strategy to enforce its investment awards against the assets of Rosneft and Gazprom).

This has been expressly stated by the Judicial Committee of the Privy Council in the case of *La Générale des Carrières et des Mines v. FG Hemisphere Associates LLC*:

> Merely because a State's conduct makes it appropriate to lift the corporate veil to enable a third party or creditor of a state-owned corporation to look to the State does not automatically entitle a creditor of the State to look to the state-owned corporation. Lifting the veil may mean that a corporation is treated as part of the State for some purposes, but not others.[987]

Gécamines is correct in that it imposes to an enforcing court to re-consider the issue of "attribution" in multiple party litigation involving sovereigns and parastatal entities, notwithstanding previous determinations of the same issue at the adjudicative stage (arbitration or court litigation). However, such determinations should not grossly differ, irrespective of their procedural stage.

5. Concluding Remarks: Relevance of Public International Law in International Commercial Arbitration and Domestic Courts' Resolutions on "Attribution" Issues

In the context of public-private international business disputes, domestic courts and arbitrators have experienced a certain inadequacy of categories and doctrines of private international law (forged in relation to ordinary business-to-business litigation) to address the treatment of States and notably State instrumentalities, especially in triangular settings of possible extension ('imputation') of the subjective scope of dispute resolution agreements and substantive obligations. This inconvenience is *inter alia* elicited by the attempt to incongruously broaden the doctrine of the alter ego, so as to treat given parastatal entities as *de facto* State organs. It is instead submitted that any doctrine of piercing the corporate veil should operate *hic et nunc* to punctually disregard distinct legal personality, provided that either the State or the SOE in question (in case of *reverse attribution*) has retained a certain

[987] *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC*, 17 July 2012, Privy Council Appeal No 6/2011 [2012] UKPC 27 (Judicial Committee of the Privy Council), para 30.

qualified connection – mainly factual – with the dispute or with the award. It is remarked that this submission is notably in line with the spirit of ARSIWA Article 8, which regulates a legal relationship of 'private' agency. Another demonstration of the inadequacy of the classic alter ego doctrine is acknowledged in the courts' tendency to attenuate the prong of fraud or injustice by diluting it within the analysis under the prong of complete or extensive control.[988]

Public international law already provides well-settled criteria for the 'treatment' of States and parastatal entities, by establishing rules of attribution of conducts and of sovereign immunity from jurisdiction and execution.[989] Arguments grounded on the insurmountable differences in the laws applicable to the subject matter of the dispute (customary international law, international investment law, or private international law) are not ultimately decisive in displacing international principles of imputability. This is understood in light of the peculiar nature and function of the rules of attribution. Indeed, as the ARSIWA Commentaries observe:

> As a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility. To show that conduct is attributable to the State *says nothing*, *as such*, about the legality or otherwise of that conduct, and rules of attribution should not be formulated in terms which imply otherwise. (*emphasis added*)[990]

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[988] *Bridas SAPIC, Bridas Energy International, Ltd, Intercontinental Oil And Gas Ventures, Ltd, and Bridas Corp v Government of Turkmenistan, Concern Bal-Kannebitgazsenagat and State Concern Turkmenneft*, 447 F.3d 417 (5th Cir 2006); *S & Davis International, Inc v Republic of Yemen*, 218 F.3d 1292, 1299-1300 (11th Cir 2000).

[989] Kaj Hobér, 'State Responsibility and Attribution' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 550, 554: '*the ILC Articles are widely accepted as guidelines for purposes of attribution in situations where the activities of state organs are being reviewed*'; Srilal M Perera, 'State Responsibility: Ascertaining the Liability of States in Foreign Investment Disputes' (2005) 6 The Journal of World Investment & Trade 499, 529: '*Traditional principles of State responsibility have and will continue to have a tremendous practical significance for cross-border business transactions.*'

[990] ARSIWA Commentaries 39, para 4. *Adde*, *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (formerly *Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux v Argentine Republic*) *(Vivendi I)*, ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2003, para 16, fn 17: '*Attribution has nothing to do with the standard of liability or responsibility.*' *See also* J G Starke, 'Imputability in International Delinquencies' (1938) 19 British Year Book of International Law 104, 106: '*Responsibility only begins where imputability ends.*'

Logical, technical and 'objective' features of the rules of attribution, as codified by ARSIWA, recommend them to be taken into consideration by adjudicators also outside the 'official' province of public international law dispute settlement, namely in international commercial arbitration and in international business litigation involving States or SOEs before domestic courts.[991] This proposition emphasises the appropriateness of convergent solutions in the treatment of public law bodies (State organs and 'State entities') '*selon le droit international*', which proceed from the international law of attribution (applicable by the international judge) to the law of State immunity (applicable by the domestic judge), and are ultimately grounded on a consistent definition of *acta jure imperii* and *acta jure gestionis*, as such determinative of the functioning of both regimes. In addition, this visible *fil rouge* should also be considered by the commercial arbitrator in light of the obligation to render an award enforceable '*at law*'. To this extent, public international law and private international law should not be perceived as reciprocally irreconciliable ('*l'un contro l'altro armati*').[992] A necessary meeting is instead envisaged for the purposes of legal certainty, predictability, and ultimately stable justice to the benefit of private litigants.[993] After all, the experience of the Iran-US Claims Tribunal, vested with a unique hybrid jurisdiction on both *public international law claims* and *private municipal law claims*, already demonstrated the possibility to develop tests of attribution rooted in customary international law, but nevertheless applicable to contract claims.[994] Hints

[991] As to domestic courts, *see La Générale des Carrières et des Mines v FG Hemisphere Associates LLC*, 17 July 2012, Privy Council Appeal No 6/2011 [2012] UKPC 27 (Judicial Committee of the Privy Council), paras 15-19; *Compagnie Noga d'Importation et d'Exportation SA v The Russian Federation*, 361 F.3d 676, 688-689 (2004). As to international commercial arbitrators, *see Salini Costruttori SpA v Ethiopia and Addis Ababa Water and Sewerage Authority*, ICC Case No 10623/AER/ACS, Award Regarding the Suspension of the Proceedings and Jurisdiction, 7 December 2001, para 169 *et seq*, (2003) 21 ASA Bulletin 82.
[992] Alessandro Manzoni, *Il cinque maggio*, 50.
[993] Diego P Fernández-Arroyo and Claudia Lima Marques (eds), *Private International Law and Public International Law – A Necessary Meeting* (CEDEP 2011).
[994] David D Caron, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules of State Responsibility' in Richard B Lillich and Daniel B Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational Publishers, Inc 1998) 109, 113.

of a similar approach have been already recorded in early arbitral practice.[995] Convergence on attribution issues in both treaty and contract claims is also increasingly demanded in light of the State practice to contract umbrella clauses in IIAs. Even if the principle of privity of contract should firmly be enforced, the transposition of the contractual claim into the international arena through the 'lift' quite inevitably exposes its adjudication to 'international' rules, to the inclusion of imputability issues.

This 'fertilization' originating from public international law rules of attribution *ex* ARSIWA Article 4, 5 and 8 may induce consistent judicial resolutions at the stage of adjudication, as to issues of imputability or immunity from jurisdiction, depending on the dispute pending before the international or municipal judge, and of enforcement, as to issues of immunity from execution. More specifically, this approach may turn out to promote more advanced solutions with regard to the thorny question of the extension of the *engagement substantiel et juridictionnel* from the SOE to its establishing State. The triangular relationship involving the State, its SOE (acting *jure gestionis*) and a private party should be possibly resolved having regard to the corresponding key rule of attribution *ex* ARSIWA Article 8, so as to tailor the alter ego (or other cognate) doctrine to the peculiar characters of governmental control. It might be remarked that in the adjudication of international business disputes a judge or arbitrator is seemingly reluctant to apply norms not imported by the notion of *statut personnel* (or *lex societatis*, where applicable) of the SOE. Indeed, the precise *locus* of rules of public international law within the system of sources of private international law is sistematically problematic. ARSIWA's attribution rules may nevertheless function in international business disputes as *narrative norms* suggesting ('whispering') to the

[995] *Trumbull*, in Moore, IV (GPO 1898) 3569; *La Guaira Electric Light and Power Company Case*, 1903-1905, 9 RIAA 240.

adjudicator the achievement of a given operative result.[996] While according to Erik Jayme's theory a narrative norm mainly derives its force from a fundamental moral content, rules of attribution would instead impose themselves on the basis of their technical content. Indeed, it has already been submitted that a normative dimension of *de facto* non-derogability not only may pertain to fundamental primary norms, but also to secondary norms.[997] On a positivistic legal perspective, the narrative norm may eventually nurture the soil for the establishment of uniform substantive rules (*règles matérielles*) of private international law for the treatment of States and parastatal entities engaging in commercial transactions with aliens.[998]

In line with a realist posture of international law, this treatise has attempted to show that a complete privatization – for all purposes – of the *statut personnel* of the State as merchant (*État commerçant*) or of its SOEs engaging in *acta jure gestionis* is not tenable, in light of the unitary socio-political phenomena of the intervention of the State in the economic systems. While invariably remaining behind the scene, this consideration reasonably suggests the adoption of a consistent treatment of the 'acts of the State', as such possibly overriding the effect of fragmentation induced by the application of a plethora of different laws to basically similar questions.

[996] Erik Jayme, 'Narrative Norms in Private International Law – The Example of Art Law' (2014) 375 Recueil des Cours 9, 49: '*They help to find solutions in international situations, particularly in cases where the domestic law has to be adapted in order to resolve transboundary fact situations.*'
[997] *See supra* Chapter III, para 1.2.
[998] This view is even consistent with the traditional posture of *Serbian Loans (France v Serbia)*, Judgment No 14, 12 July 1929, PCIJ Reports 1929, Series A, Nos 20/21, 5, 41.

CONCLUSION

This treatise has attempted to explain and clarify the functioning of the mechanisms of attribution of conducts to States in the context of public international law disputes before international jurisdictions and international business litigation before municipal courts and in international commercial arbitration. This section aims to recapitulate in a comprehensive and brief manner the conclusions advocated in the previous chapters of this study.

With regard to public international law, it is emphasised that each single rule of imputability provided by customary international law for State organs, State 'entities' and 'private' individuals is respectively vested with its own specificity and independence, which is supported by the differences in the nature of the relevant *link* whence they proceed (institutional, functional, and factual). Indeed, the analytical distinction between the various tests of imputability is of threshold importance in order to determine the precise regime of attributability and the reach of the effects of their application. The main consequences affect the possibility of imputation of the conducts of a private nature (*acta jure gestionis*), which operates for State organs only (plenary attribution), and of the conducts *ultra vires* executed by a given 'person', which is excluded with regard to 'private' individuals (private law agency). In relation to the thresholds of control of the State on its organs (both *de jure* and *de facto*) for the purposes of attribution, this study has concluded that it should not be necessarily effective, which was instead upheld in early arbitration practice (for instance, in the *Zafiro* case) and by the ICJ in the *Nicaragua* case. This is clearly confirmed by the customary rule of attribution of *ultra vires* conducts of State officials, which represents in and of itself a corollary of the cardinal principles of supremacy of international law and of institutional unity and continuity of the State. Indeed, the institutional link of the status of *organ* (even if

exceptionally established *ex post facto*) normatively supplements the absence of an official empowerment (authority or superior instructions) to execute a particular conduct. This principle should receive utter application also in the case of *de facto* organs, which, once the establishment of *de facto* agency has been completed, are to be treated exactly as if they were *de jure* organs as to the relevant regime of attribution.

With regard to international investment law, this treatise has ascertained that IIAs do not normally codify attribution rules at all, or, in any event, do not considerably deviate from customary international law in that respect. Accordingly, the innovative findings rendered on various issues of imputability by ISDS Tribunals may embody an important contribution for the evolution and update of public international law in general. First, Tribunals have generally established the status of *de jure* organs of 'independent' public law bodies exercising functions of a regulatory and administrative nature, such as central banks and independent administrative agencies. This finding seems to be decisively justified by the ascertainment of the public law character of their separate legal personality under domestic law, as contrasted to the distinct juristic personality of private law of State enterprises or parastatal entities in general. Second, the practice of international investment arbitration (especially *Maffezini v. Spain*) seems to warrant a trend to enlarge the scope of the attributability of the conducts of parastatal entities to their establishing State. Provided that the definition of 'exercise of governmental authority' (*acta jure imperii*) vis-à-vis 'commercial activity' (*acta jure gestionis*) for the purposes of attribution should be based on the contex-based nature test resorted to for the purposes of State immunity from jurisdiction, the inception of a principle of competitive neutrality or equality in this test is susceptible to widen the reach of the imputation of conducts of parastatals. This philosophy of competitive neutrality of SOEs would entail that the finding that a parastatal entity has performed an activity by availing itself

of its status of *émanation de l'État* may be considered as a qualified redolence of governmental authority (*allure étatique*) as such capable of triggering attribution pursuant to the ordinary mechanism of customary international law. This conclusion is notably supported by a fair demand of effective enforcement of the host States' policy to attract foreign investors by signalling them with the creation of economic parastatal entities. Third, arbitrators have proffered innovative solutions with regard to the attribution of conducts *jure gestionis* of SOEs, which in this respect fall under the customary rule of attribution of acts of 'private' individuals acting on the instructions, or under the direction or control of a State organ. The Tribunals' consideration of the multifarious dynamics associated with the governmental control in State enterprises, as such not ultimately ascribable to a business-to-business relationship as in the canonical theory of group of companies, seem to suggest overcoming the restrictive conditions for piercing the corporate veil in international law established by the ICJ in the case of the *Barcelona Traction*.

With regard to international business disputes between States and SOEs, on one side, and aliens, on the other side, domestic courts and arbitrators have tested the inadequacy of corporate law doctrines ending up with veil-lifting – elaborated in relation to ordinary business-to-business litigation – in order to address the treatment of States and State instrumentalities, notably in triangular settings where the extension of the subjective scope of the arbitration agreement and substantive obligations may be at issue. Instead, this treatise submits that "attribution" issues in public-private international business disputes should be adjudicated not inconsistently with the customary international law principles of imputability of conducts to sovereigns. Indeed, public international law already provides well-settled and tested mechanisms for the treatment of States and parastatal entities, by establishing rules of attribution of conducts and of sovereign immunity from jurisdiction and execution.

Accordingly, neither an international commercial arbitrator nor a domestic judge is prevented from taking into consideration the influence of the international rules of attribution, which is actually recorded in their decisions. This convergence in the resolution of attribution issues is desirable in so far it contributes to build a coherent concept of the State '*selon le droit international*'.

This treatise has advocated on several occasions the development of consistent *practices* for the scrutiny of the activities of the 'State' by various categories of adjudicators of issues of international law rather independently of the formal element of the structure or design of a given dispute settlement system or of the applicability of a given proper law to the objective element of responsibility. This scenario is rendered as practicable upon the consideration of the logical, technical and 'objective' characters of the international rules of attribution that universally proceeds from the physiology of the State, its apparatus and ramifications in the society. The international dispute settlement of economic disputes involving States and SOEs displays an abundant *jurisprudence* that definitely provides useful analysis of issues of attribution in contemporary times and may accordingly contribute to more revised and updated scrutiny of the phenomenology of the exercise of State authority, by detecting in a subtler way its colour,[999] its scent,[1000] or other of its multifaceted sensible manifestations.

[999] ARSIWA Commentaries 42, para 13.
[1000] Daniel Cohen, 'Sur l'émanation d'État' in Louis d'Avout, Dominique Bureau and Horatia Muir Watt (eds), *Mélanges en l'honneur du Professeur Bernard Audit. Les relations privées internationales* (LGDJ 2014) 233.

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