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SPECIAL FOCUS ISSUE

Attribution in Investment Treaty Arbitration

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I. INTRODUCTION

Attribution, broadly defined as the operation or process aimed at identifying and circumscribing the conduct of individuals which is properly to be treated as constituting that of the State, plays a central role in public international law, including in the specialized sub-field of investment treaty arbitration. Despite its ubiquitous relevance in international law, the pre-eminent role played by the process of attribution is in the field of State responsibility, where its function is to identify the conduct which may, if it constitutes a breach of an international obligation of a State, result in that State's international responsibility. In large part as a result of the work of the International Law Commission (ILC) in elaborating the Articles on Responsibility of States for Internationally Wrongful Acts (the Articles, or ARSIWA),[2] the content of the relevant customary rules of attribution for the purposes of the law of State responsibility is relatively clear and well established. Rather than simply providing a detailed account of those rules and how they have been applied by tribunals in investment treaty arbitration, the present piece instead examines a number of more general issues relating to the correct application of the relevant rules of attribution in the context of investment treaty disputes.

First, precisely as a consequence of the fact that the rules of attribution under the law of State responsibility are well known and are easily accessible, there is a risk that they may be inappropriately applied to issues to which, on analysis, they are of no relevance. In this regard, the central underlying thesis is that the content of the rules of attribution under the law of State responsibility is inherently tied to the specific purpose for which they have developed (ie identifying the persons the conduct of which is capable of giving rise to a breach of the international obligations of the State), and that, as a consequence, those rules cannot and

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[2] International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts (2001) (ARSIWA); for the text of the Articles and the ILC's accompanying Commentary, see ILC, 'Report of the International Law Commission on the Work of its Fifty-third Session' UN Doc A/56/10, reproduced in ILC YB 2001, vol II/2, 31. The text of the Articles and the Commentary, together with an introduction and invaluable tables summarizing the drafting history, are usefully reproduced in James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002).

should not be applied to other issues which do not, as such, involve questions of State responsibility. Second, again as a result of their relatively settled nature, the application of the rules of attribution under the law of State responsibility by international investment tribunals in general contributes comparatively little to the substantive development of the law of State responsibility. That said, the particular context and issues raised in investment arbitration may nevertheless give rise to difficult questions as to precisely how the rules of attribution should be applied to particular situations and as regards the conduct of unusual entities. Third, questions have on occasion been raised as to the extent to which it is appropriate to apply the rules of attribution from the general international law of State responsibility in the specific sub-field of investment treaty arbitration.

Following an initial section which briefly explores the scope of the notion of attribution *lato sensu* in international law, and discusses the basis for attribution of conduct in the customary international law of State responsibility and sketches the content of the relevant rules (Section II), the present piece first examines the role of attribution in investment treaty arbitration and the appropriate scope of application of the specific rules of attribution under the law of State responsibility (Section III). Attention then turns to an assessment of the contribution which investment treaty arbitration has made to the development and consolidation of the international law of State responsibility in relation to questions of attribution of conduct to the State, including a survey of the application of the relevant rules to a selection of 'hard' cases (Section IV), followed by consideration of the doubts which have occasionally been expressed as to the application of the rules of attribution under general international law in the specific context of investment treaty arbitration (Section V). A final section provides brief concluding remarks.

II. ATTRIBUTION IN PUBLIC INTERNATIONAL LAW

As recognized by the Permanent Court of International Justice (PCIJ) in its Advisory Opinion on *German Settlers in Poland*, 'States can act only by and through their agents and representatives'.[3] On the other hand, as recognized by the ILC in its Commentary to the Articles, at the same time the State undoubtedly exists in the international legal system as 'a real organized entity, a legal person with full authority to act under international law'.[4] In order to bridge the gap between these two otherwise conflicting realities, public international law resorts to the concept of 'attribution' or 'imputability'.

'Attribution' in international law has been defined by Condorelli and Kress as being the 'term used to denote the legal operation having as its function to establish whether given conduct of a physical person, whether consisting of an action or an omission, is to be characterized, from the point of view of international law, as an "act of the State"',[5] and as referring 'to the body of criteria of connection and the conditions which have to be fulfilled, according to the relevant principles of international law, in order to conclude that it is a State . . .

[3] *German Settlers in Poland*, *Advisory Opinion* [1923] PCIJ Rep Series B No 6 at 22.
[4] ARSIWA Commentary to art 2, para 5; Crawford (n 2) 82.
[5] Luigi Condorelli and Claus Kress, 'The Rules on Attribution: General Considerations', in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 221, 221. The ILC characterized attribution of conduct to the State as being 'necessarily a normative operation': ARSIWA Commentary to art 2, para 6; Crawford (n 2) 83.

which has acted in the particular case'.[6] Notably, those attempts to describe and define the concept of 'attribution' are not dependent upon, nor do they in any way seek to specify or limit, the specific purpose for which conduct is attributed to the State.[7]

In light of the general inability of the State to accomplish any action on its own account save through the actions of individuals,[8] processes of attribution serve a variety of purposes in international law. For instance, in the context of the law of treaties, a specific body of rules of attribution define the categories of individuals who are to be regarded as empowered to represent the State for the purposes of expressing its consent to be bound.[9] Similarly, given that the State itself is incapable of having knowledge of any particular matter, the question of whether a State is to be held to be fixed with knowledge of a particular fact or matter also necessarily involves a process of attribution of the knowledge of relevant individuals.[10]

Despite these other important potential roles which attribution may be called upon to play in international law, its preeminent function, and the focus of the discussion which follows, is in the context of the international law of State responsibility. Under the modern conception, attribution and breach of an international obligation constitute the two positive elements which are necessary

[6] Condorelli and Kress (n 5) 221.

[7] As pointed out by Condorelli and Kress, while it appears to be the case that States (and other international legal persons) ultimately can only act through the agency of individuals, where there is attribution 'the actual author of the act, ie the individual is, as it were, forgotten, and is perceived as being the means by which the entity acts, a tool of the State (or other subject of international law) in question' (ibid). Of course, the process of attribution may involve a number of nested separate and distinct sub-processes of attribution, and, as a consequence, the fact that, in the final analysis, the conduct of a State is always ultimately that of one or more individuals may thus be further concealed. For instance, where the conduct of the individuals making up a collective body, such as a legislature, is treated as collectively constituting the act of that body (eg the votes of the majority in favour of the adoption of draft legislation which result, in accordance with the rules governing the internal functioning of the legislature, in the adoption of a law), it is the act of the legislature, regarded as an entity, which is treated as constituting an act of the State, without delving further into its inner workings.

[8] Although involving a failure to act, a process of attribution is equally required in order to attribute omissions to a State; an omission by a State results from the failure to take action by an individual who had the ability to take the relevant action and whose conduct is attributable to the State.

[9] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331 (VCLT) arts 7, 8, 46 and 47; for recognition of the point, see *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award (12 October 2005) para 84. A similar position arguably applies in relation to the identification of the category of organs, entities and individuals acting on behalf of the State whose conduct is to be treated as capable of giving rise to an estoppel: see eg the decision in *Duke Energy International Peru Investments No 1 Limited v Republic of Peru*, ICSID Case No ARB/03/28, Award (18 August 2008) paras 242–51, in which the Tribunal declined to apply the rules of attribution under the law of State responsibility in order to determine whether representations made by various organs and entities were attributable to Peru for the purposes of determining whether it was estopped; instead, the Tribunal drew inspiration by analogy from the rules contained in Article 46 VCLT which determine when a treaty is binding even though signed in violation of a country's internal law. Likewise, identification of the individuals and entities the conduct of which (in particular express promises, assurances or representations) is capable of giving rise to a legitimate expectation on the part of an investor, the frustration of which may result in a breach of the fair and equitable treatment standard, likewise involves a process of attribution; in this regard, cf the observations of the Tribunal in *Ioan Micula, Viorel Micula, SC European Food SA SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case No ARB/05/20, Award (11 December 2013) para 669: 'There must be a promise, assurance or representation attributable to a competent organ or representative of the state, which may be explicit or implicit.'

[10] cf the discussion of the decision in *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009) in text accompanying nn 32–35. For discussion of the relevance and role of the rules of attribution under the law of State responsibility in the context of issues of corruption in investment arbitration: see eg James Crawford and Paul Mertenskötter 'The Use of the ILC's Attribution Rules in Investment Arbitration', in Meg Kinnear and others (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2015) 27, 35–42.

and sufficient in order to determine the existence of an internationally wrongful act, and, as result, for the international responsibility of a State to arise.[11]

As regards the underlying rationale of the rules of attribution in the field of State responsibility, the International Court of Justice (ICJ) in *Bosnian Genocide* reiterated what it characterized as 'the fundamental principle governing the law of international responsibility', namely that 'a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf'.[12] In this context, the rules of attribution thus play a limiting role; they circumscribe the category of persons and entities the conduct of which is capable of breaching the international obligations of the State. In other words, in the context of the law of State responsibility, the rules of attribution govern the question of 'which persons should be considered as acting on behalf of the State, i.e. what constitutes an "act of the State" for the purposes of State responsibility'.[13]

A central role in approaching and resolving questions of attribution under the law of State responsibility is played by the provisions dealing with the question of attribution contained in Chapter II of Part One of the Articles, finally adopted as a whole by the ILC in the late summer of 2001,[14] and subsequently endorsed by the General Assembly later the same year.[15] The most important of those provisions (Article 4 ARSIWA) provides for the attribution of conduct of the organs of the State. In accordance with the rule there codified, the conduct of an organ is attributable whether it exercises legislative, executive, judicial or 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.[16] For these purposes, the scope of the category of organs is primarily defined by reference to the domestic law of the State in question; to the extent that a particular entity is defined as an organ by that domestic law, that is the end of the enquiry.[17] The rule set out in Article 4 of the Articles must, however, be

[11] See eg *United States Diplomatic and Consular Staff in Tehran*, Merits [1980] ICJ Rep 3, 29 para 56; and the various formulations reflecting the principle used by the Court in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, [2007] ICJ Rep 43 (*Bosnian Genocide*), 119 para 179, 199–200 para 379 and 202 para 385. See also ARSIWA art 2 and the Commentary to art 2, para 9; Crawford (n 2) 84.

[12] *Bosnian Genocide* (n 11) 210 para 406; the Court also later underlined 'the connection which must exist between the conduct of a State's organs and its international responsibility' (ibid). cf the ILC's observation that '[w]hat is crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is attributable to the State': ARSIWA Commentary to art 2, para 6; Crawford (n 2) 83.

[13] ARSIWA Commentary to art 2, para 5; Crawford (n 2) 82.

[14] See above (n 2).

[15] In 2001, the United Nations General Assembly (UNGA) took note of 'the Articles on Responsibility of States for Internationally Wrongful Acts' (thereby removing the qualifier 'draft'), annexed them to its resolution and 'commend[ed] them to the attention of Governments' without prejudice to the question of their future adoption or other appropriate action: see UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83. Thereafter, in 2004, 2007, 2010 and 2013, the General Assembly has repeatedly deferred taking a definitive decision on what form the Articles should finally take and postponed further consideration for successive three year periods: see UNGA Res 59/35 (2 December 2004) UN Doc A/RES/59/35; UNGA Res 62/61 (6 December 2007) UN Doc A/RES/62/61; UNGA Res 65/19 (6 December 2010), UN Doc A/RES/65/19; UNGA Res 68/104 (16 December 2013), UN Doc A/RES/68/104. For a summary of the debate and the positions taken by States in the Sixth Committee in 2004 as to whether a diplomatic conference should be convened to conclude a multilateral treaty based on the Articles, see James Crawford and Simon Olleson, 'The Continuing Debate on a UN Convention on State Responsibility' (2005) 54 ICLQ 959.

[16] ARSIWA art 4(1). The ILC emphasized in this regard that '[t]he reference to a "State organ" covers all the individual or collective entities which make up the organization of the State and act on its behalf': ibid Commentary to art 4, para 1; Crawford (n 2) 94.

[17] ARSIWA art 4(2), although compare Georgios Petrochilos, 'Attribution' in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (OUP 2010), 293. See also the discussion of the role of domestic law in the characterization of an entity as an 'organ' under ARSIWA art 4 in Crawford and Mertenskötter (n 10) 28–30. For the residual role played by international law in characterizing a particular entity as

understood subject to the gloss provided by the ICJ in *Bosnian Genocide*. There, the Court made clear that that the conduct of a person, group of persons or entity which is not formally an organ (a *de jure* organ) may nevertheless be attributed to the State 'provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument', such that they are properly to be regarded as *de facto* organs.[18] As the Court went on to emphasize, the analysis in such a situation focuses on the substance of the relationship, rather than strict issues of form:

> 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.[19]

In addition, the conduct of persons, groups or entities not constituting an organ of the State may nevertheless be attributable to the State to the extent that they exercise elements of governmental authority (Art 5 ARSIWA), or act upon the State's instructions or under its direction and control (Art 8 ARSIWA). Further, conduct which is not attributable on another basis may be attributed to a State to the extent that it has acknowledged or adopted that conduct as its own (Art 11 ARSIWA).[20] Insofar as the factual situations commonly at issue in investment treaty arbitration involve investors contracting or otherwise interacting with entities which are not formally organs, and have separate personality under domestic law (eg State-owned corporations, or other separate agencies), these rules are of crucial relevance insofar as they may permit the attribution of the conduct of such separate entities to the State.

The circumstances in which conduct will be held to be attributable to a State for the purpose of State responsibility set out in the Articles are relatively well settled as a matter of general international law, and are to a large extent recognized as reflecting the customary rules of attribution. This is notably the case as regards Articles 4 and 8 ARSIWA, which the ICJ has authoritatively recognized as reflecting customary international law.[21] Even to the extent that the other

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an organ, irrespective of the position under domestic law, see ARSIWA Commentary to art 4, para 11; Crawford (n 2) 98.

[18] *Bosnian Genocide* (n 11) 205 para 392.

[19] ibid.

[20] In addition, and of less obvious relevance for the situations which typically arise in investment treaty arbitration, the Articles provide that conduct may be attributed where it is that of organs placed at the disposal of a State by another State (ARSIWA, art 6), of persons or groups of persons acting in the absence or default of the official authorities (ARSIWA, art 9), or of an insurrectional movement which becomes the new government of a State, or of an insurrectional or other movement which succeeds in seceding and establishing a new State (ARSIWA, art 10). ARSIWA, art 7 makes clear that the conduct of an organ, or of an entity exercising governmental authority is attributable under ARSIWA, arts 4, 5, or 6 notwithstanding that they were acting in excess of its authority or in contravention of instructions, provided that they were acting in that capacity in carrying out the relevant conduct.

[21] As to ARSIWA art 4, see *Bosnian Genocide* (n 11) 202 para 385. See also, previously, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, 226 para 160 and 242 para 213; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion* [1999] ICJ Rep 62, 87 para 62 (referring to an earlier version of what eventually became ARSIWA art 4). As to ARSIWA art 8, see *Bosnian Genocide* (n 11) 208–9 para 401 and 210–11 para 407. Note also at 209–10 paras 402–6, the Court's reaffirmation of the test of 'effective control' previously enunciated in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, *Merits* [1986] ICJ Rep 14, 64–5 para 115, and its categorical rejection, at least for the purposes of attribution under the law of State responsibility, of the 'overall control' test proposed by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia

provisions of the Articles relating to attribution have not been expressly endorsed by the Court, however, they probably in large part reflect the corresponding rules of customary international law.[22]

III. THE PROPER SCOPE OF APPLICATION OF THE RULES OF ATTRIBUTION UNDER THE LAW OF STATE RESPONSIBILITY IN INVESTMENT TREATY ARBITRATION

In assessing the scope of application of the rules relating to attribution of conduct under the law of State responsibility in the specific context of investment treaty arbitration, the fundamental (and obvious) point is that bilateral investment protection instruments—and the various multilateral instruments with chapters containing equivalent substantive protections and procedural mechanisms—are, first and foremost, treaties. It follows that claims for breach of the substantive obligations under such instruments are claims for breach of treaty (ie breaches of obligations under international law). It is accordingly self-evident that, as a general matter, 'the responsibility of States in the field of investment treaty arbitration is a species of State responsibility, i.e. the responsibility of a State party for breach of the substantive international obligations created by the investment treaty'.[23]

As a consequence, in principle, the rules of customary international law relating to attribution of conduct and breach of an obligation for the purposes of State responsibility apply fully to all issues involving a determination whether a State has breached its obligations under an investment treaty.[24] That analysis is unaffected by either the fact that the majority of bilateral and multilateral investment

(ICTY) in Case No IT-94-1 *Prosecutor v Tadić* (1999) 38 ILM 1518, 1546 para 145. See also previously *Armed Activities*, 226 para 160.

[22] For the more cautious position adopted by the Court in relation to the customary nature of ARSIWA arts 5, 6, 9 and 11, see *Bosnian Genocide* (n 11) 215 para 414; cf however, previously as regards ARSIWA art 5, *Armed Activities* (n 21) 226 para 160. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, *Judgment* [2015] ICJ paras 102–5, the ICJ avoided taking a position as to the extent to which ARSIWA art 10 reflects customary international law. For endorsement by investment treaty tribunals of the Articles as reflecting customary international law on the question of attribution, see eg *Noble Ventures v Romania* (n 9) para 69; *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; *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; *MCI Power Group LC and New Turbine Inc v Republic of Ecuador*, ICSID Case No ARB/03/6, Award (31 July 2007) para 42; *Noble Energy, Inc and Machalapower Cia Ltda v Ecuador and Consejo Nacional de Electricidad*, ICSID Case No ARB/05/12, Decision on Jurisdiction (5 March 2008) para 166; *Gustav FW Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award (18 June 2010) para 171; *Electrabel SA v Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) para 7.60; *Tulip Real Estate and Development Netherlands BV v Republic of Turkey*, ICSID Case No ARB/11/28, Award (10 March 2014) para 281. See also eg Kaj Hobér, 'State Responsibility and Attribution' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 549, 550; Crawford and Mertenskötter (n 10) 27. Note in this context Alain Pellet's comment that, in the context of investment treaty arbitration, there is a marked trend for tribunals to rely primarily on the ILC's Articles and Commentary as 'providing sufficient evidence of the applicable law', while the 'eclipsed jurisprudence' of the ICJ on questions of attribution is referred to only 'as a secondary argument to support the reasoning': Alain Pellet, 'The Case Law of the ICJ in Investment Arbitration' (2013) 28(2) ICSID Rev—FILJ 223, 234–5.

[23] James Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24 Arb Intl 351, 355. See also *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, ICSID Case No ARB(AF)/04/05, Award (21 November 2007) para 275.

[24] See James Crawford 'Investment Arbitration and the ILC Articles' (2010) 25(1) ICSID Rev—FILJ 127, 129; Martins Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility' (2013) 24 EJIL 617, 620; Hobér (n 22) 552–3.

instruments permit individuals and corporations to bring claims directly against States,[25] nor by the related issues which may arise in other contexts as to the precise theoretical basis underlying the right of investors to invoke a breach.[26] Similarly, that conclusion is independent of the precise rules which govern the consequences of a breach of an obligation and the content of international responsibility in investment treaty arbitration (in particular the obligation to make full reparation), and the question of whether they fully correspond to the applicable in inter-State relations under general international law.[27] As such, insofar as they can be taken accurately to reflect customary international law, in the investment treaty context the relevant provisions of the Articles presumptively (subject to the application of any *lex specialis*)[28] constitute the rules of attribution applicable to any enquiry as to whether a State has committed an internationally wrongful act, and thereby incurred its international responsibility.

Although the relevant rules codified in the Articles thus apply to all question of attribution of conduct for the purposes of determining responsibility of a State for breach of its obligations under an applicable investment protection treaty, as highlighted above in Section II, attribution plays a number of other roles in international law. The rules in those different contexts, however, do not necessarily have the same underlying rationale, nor do they necessarily have the same content. As a consequence, it bears emphasis that the rules of attribution under the customary international law of State responsibility apply only for the purposes of determining whether conduct is attributable to the State in order to determine whether an internationally wrongful act has occurred, and are not as such applicable to other issues. This is reflected in the approach adopted by the ILC as to the scope of the relevant provisions of the Articles relating to attribution. In that connection, the Introductory Commentary to Part One, Chapter II of the Articles makes clear that the purpose of the provisions on attribution 'is to specify the conditions under which conduct is attributed to the State as a subject of international law for the purposes of determining its international responsibility',[29] and that

> The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State. . . . In principle, the State's responsibility is engaged by conduct incompatible with its international obligations, irrespective of the level of administration or government at which the conduct occurs. Thus, the rules concerning attribution set out in this chapter are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its Government.[30]

[25] In terms of application of the rules of attribution contained in the Part One, Chapter II of the Articles, it is crucial that the relevant rules of attribution are framed solely by reference to the putatively responsible State, without reference to the beneficiary to whom the obligation allegedly breached is owed.

[26] Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 BYBIL 151; and Paparinskis (n 24) 619 and 621–7; and the discussion of the application of the varying theories as to the character of the rights of investors to particular issues at 635–46.

[27] See eg the argument by Douglas that restitution is not available as a form of reparation in ICSID arbitration, and that the measure of compensation in investment treaty disputes differs from that applicable under customary international law in inter-State disputes: Zachary Douglas, 'Other Specific Regimes of Responsibility: Investment Treaty Arbitrations and ICSID', in Crawford and others (eds) (n 5) 815, 829–32.

[28] cf ARSIWA art 55; see further below, Section IV.D, text accompanying nn 111 et seq.

[29] ARSIWA Introductory Commentary to Part One, Chapter II, para 7; Crawford (n 2) 92–3.

[30] ARSIWA Introductory Commentary to Part One, Chapter II, para 5; Crawford (n 2) 92.

Despite the clearly limited field of application of the rules on attribution contained in the Articles, some tribunals deciding investment treaty disputes have nevertheless on occasion invoked the relevant rules for purposes which do not, on analysis, involve questions of international responsibility.[31]

A particularly clear example is the decision in *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt*. In the context of an issue as to whether the State should be held to have waived an objection to jurisdiction by not raising it at the appropriate juncture in the proceedings, the Respondent took the position that it should not be fixed with knowledge of the actions of its own courts (in particular, the making of a bankruptcy order against one of the Claimants). In that connection, it argued that 'Article 4 [ARSIWA] . . . applied only to the responsibility of a state for the acts of its organs. It did not attribute to the state the knowledge of every decision rendered by its courts.'[32] In response, the Claimants asserted that Article 4 was 'a general principle of international law, which was not limited to the wrongful acts of a state organ'.[33]

The Tribunal, having referred to Article 4 and the principle contained in Article 7 of the Articles that conduct of an organ is attributable even if it is *ultra vires* or in excess of authority, reasoned that

> The clear corollary of that statement is that acts of a State's organs that are not contrary to law or in excess of authority will be applied a fortiori to the State. Accordingly the non-wrongful acts of Egypt's judiciary are the acts of the Egyptian State. As the Claimants have submitted, Egypt cannot deny knowledge of its own acts.[34]

The Tribunal's ultimate conclusion that Egypt was to be held to have had knowledge of the proceedings at the relevant time is unobjectionable, particularly in light of the fact that it appeared that the domestic authorities which had handled the litigation had in fact been aware of the proceedings at the relevant juncture.[35] Nevertheless, to the extent that the Tribunal relied on the Articles as relevant and as providing the applicable rule to determine whether the State should be held to have been aware of the proceedings, its reasoning is open to criticism. The question of attribution arose in circumstances in which the question was whether the State was to be regarded as having knowledge of particular facts, and not whether the relevant decisions of the courts constituted breaches of the applicable bilateral investment treaty. Whether or not the State was properly to be held to have had knowledge of the relevant domestic proceedings for the particular purposes of the specific jurisdictional question facing the Tribunal, Articles 4 and 7 ARSIWA provided no support for its ultimate conclusion. That is so even if the content or effect of the relevant rules of attribution for this purpose were similar to, or even the same, as those reflected in the Articles.

[31] For other issues, in addition to those discussed below, which involve an issue of attribution but not for the purposes of State responsibility, one may posit by way of example the questions of: (i) identification of the category of persons whose conduct can give rise to an estoppel binding the State (see eg the decision in *Duke Energy International Peru v Peru* (n 9)); and (ii) identification of the category of persons whose conduct is capable of giving rise to a legitimate expectation for the purposes of the fair and equitable treatment standard. As regards the latter issue, the Tribunal in *Micula v Romania* (n 9), although not expressly addressing the point, appears not to have regarded the question as falling to be determined by application of the rules of attribution under the law of State responsibility.

[32] *Siag and Vecchi v Egypt* (n 10) para 171.

[33] ibid para 194.

[34] ibid para 195.

[35] ibid paras 199–201.

Similarly, the rules of attribution have on occasion been invoked in order to argue that a State should be regarded as bound by a particular contractual obligation entered into by a separate entity in the context of claims under an umbrella clause.[36] In determining whether an umbrella clause is applicable to a particular obligation, much will depend on the particular formulation and scope of the umbrella clause in question, in particular whether it is expressed to apply to obligations undertaken in respect of investments, or in respect of the investor.[37] Whether or not the State is to be regarded as a party to a contract and therefore bound by it for the purposes of the umbrella clause, however, is not a question calling for the application of the rules of attribution under the international law of responsibility. That is so for the simple reason that the act of the relevant entity in entering into the contract will not normally be relied upon as constituting an internationally wrongful act.[38] Rather, and despite suggestions that the issue is one

[36] See eg *SwemBalt AB, Sweden v Republic of Latvia*, UNCITRAL Award (23 October 2000) para 37; *Nykomb Synergetics Technology Holding AB v Republic of Latvia*, SCC Award (16 December 2003) para 4.2.c; see also *Deutsche Bank v Sri Lanka* (n 1), where the Claimant argued that conduct of a State-owned entity, including conclusion of a hedging contract, was attributable to the State applying the rules of attribution under international law (ibid paras 351–70 and 373–4). The Tribunal in the end did not definitively decide the point (ibid para 404), although it set out a provisional view that action of the relevant State-owned entity (including, implicitly, its conduct in concluding the hedging contract), was attributable to the State on the basis of either art 4 or art 8: ibid paras 405–7. Note also the *dicta* in *EnCana v Ecuador* (n 1) para 154; *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on Jurisdiction (6 August 2003) para 166; *Consorzio Groupement LESI-DIPENTA v People's Democratic Republic of Algeria*, ICSID Case No ARB/03/08, Award (10 January 2005) s II, para 19; and *LESI SpA and Astaldi SpA v People's Democratic Republic of Algeria*, ICSID Case No ARB/05/3, Decision (11 July 2006) paras 78–9. Although occasionally cited in this respect, the decisions in *Noble Ventures v Romania* (n 9) paras 84–6 and *Eureko BV v Republic of Poland*, *Ad hoc* Partial Award (19 August 2005) paras 115–34 in particular para 129, to the extent that they held that the conclusion of the relevant contracts bound the State, are better understood as having been decided on the basis that the relevant entities in concluding the relevant contracts were authorized to act on behalf of the State as a matter of domestic law: cf Shotaro Hamamoto, 'Parties to the "Obligations" in the Obligations Observance ("Umbrella") Clause' (2015) 30(2) ICSID Rev—FILJ 449, 460–1.

Outside the context of treaty claims brought under the umbrella clause, see the decision in *Chevron Bangladesh Block Twelve, Ltd and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd v People's Republic of Bangladesh*, ICSID Case No ARB/06/10, Award (17 May 2010), (2010) 26(1) ICSID Rev—FILJ 256 paras 136–49, in which, in the context of a claim brought under a contract governed by Bangaldeshi law and containing a dispute resolution clause conferring jurisdiction on ICISD, the rules on attribution contained in ARSIWA were applied to conclude for jurisdictional purposes that Petrobangla, a separate entity, constituted an organ, and that the State was thus party to the contract concluded by Petrobangla; see also ibid paras 157–71, where the Tribunal subsequently purported to apply the rules of attribution under the international law of State responsibility (in particular ARSIWA arts 5 and 8) in order to conclude that the conduct of Petrobangla was 'attributable to Bangladesh under Bangladesh law' [sic!] (*Chevron Bangladesh*, para 171). Compare the contrasting decision in *Niko Resources (Bangladesh) Limited v People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited (BAPEX) and Bangladesh Oil Gas and Mineral Corporation (Petrobangla)*, ICSID Cases Nos ARB/10/11 and ARB/10/18, Decision on Jurisdiction (19 August 2013) paras 242–8, likewise a claim brought under contracts entered into by separate entities, governed by Bangladeshi law, and containing ICSID arbitration clauses, in which the Tribunal, in finding that it was without jurisdiction over claims against the State, declined to follow the decision in *Chevron Bangladesh* and held that the rules of attribution under the law of State responsibility were of no relevance in determining the question of whether the State had consented to arbitrate insofar as that question was not one involving a violation of its international obligations.

[37] Crawford (n 23) 367; for a perceptive analysis of the decisions, see Hamamoto (n 36).

[38] The position as regards organs of the State which enter into contracts is different, although the question of whether the umbrella clause is applicable is still not (necessarily) governed by the rules of attribution under the law of State responsibility: see ARSIWA Commentary to art 4, para 6; Crawford (n 2) 96:

> the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it might in certain circumstances amount to an internationally wrongful act. (Footnotes omitted)

The passage was quoted with approval by the tribunal in *Alpha Projektholding GmbH v Ukraine*, ICSID Case No ARB/07/16, Award (8 November 2010) para 402. It is suggested that the better view is that the question of the scope of the obligation contained in the umbrella clause in such circumstances is not one of attribution as such, but instead falls to be determined as a matter of interpretation of the term 'Party' in the umbrella clause and (possibly) in accordance

of whether the separate entity is to be regarded as having represented the State under international law (itself a different issue of attribution),[39] in principle the question falls to be decided in accordance with the relevant applicable domestic law governing the contract, in particular the rules relating to privity of contract or their analogue.[40]

The suggestion that application of the governing contractual law, and denial of the application of the rules of attribution under international law 'does a disservice to the very purpose of umbrella clauses' on the basis that conduct of a separate entity in breach of a contract to which it is a party could 'escape censure even if that conduct related to exercise of governmental authority and would otherwise be attributable to the State'[41] is flawed. On the one hand, it begs the question of the proper scope of application and reach of the umbrella clause; on the other, it ignores the possibility that the relevant (*ex hypothesi* attributable) conduct of a separate entity in breach of contract might nevertheless be held to constitute a breach of some other substantive standard of protection contained in the applicable investment treaty.[42]

The application of the customary international law rules of attribution in the decision on jurisdiction in *Emilio Agustín Maffezini v Kingdom of Spain* is problematic from a slightly different point of view. The issue relates not as such to

with the relevant governing law of the contract. Note also the observations of the *ad hoc* Committee in *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment (3 July 2002) para 96 (*Vivendi I* Annulment), albeit in a case not involving an umbrella clause: 'Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts', and see *Generation Ukraine, Inc v Ukraine*, ICSID Case No ARB/00/9, Award (16 September 2003) para 8.12.

[39] See eg Hamamoto (n 36) 463–4. For an overview of the debate, including criticism of the theory that the issue is one of whether the separate entity had authority to represent the State as a matter of international law, see Crawford and Mertenskötter (n 10) 30–5.

[40] See eg *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 223 (as to the umbrella clause) and the Tribunal's earlier very relevant discussion as to its lack of jurisdiction over claims of breach of a contract entered into by a separate entity (ibid paras 199, 210–11), and of the circumstances in which a breach of contract by a separate entity could result in a breach of the BIT (in particular, ibid paras 260, 262 and 266); *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Decision on Annulment (25 September 2007) paras 95(b) and (c); *EDF (Services) Ltd v Romania*, ICSID Case No ARB/05/13, Award (3 October 2009) paras 317–19. See also the observations of the Tribunal in *SGS Société Générale de Surveillance SA v Philippines*, ICSID Case No ARB/02/6, Decision on Jurisdiction (29 January 2004) para 128, and of the *ad hoc* Committee in *Vivendi I* Annulment (n 38) paras 95–6. See generally Crawford (n 23) in particular 366–70. For application of a similar approach on, as it were, the other side of the equation, see eg *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Liability (14 December 2012) paras 214–15, holding that the Claimant parent company of the party to the relevant contract was not entitled to invoke the umbrella clause because it was not a party to the contract in accordance with the applicable governing law. For a decision apparently treating the rules of State responsibility on attribution as applicable to the question of whether the State was a party to a contract concluded by a separate entity for the purposes of an umbrella clause, see *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine*, ICSID Case No ARB/08/11, Award (25 October 2013) para 246; the Tribunal however, had earlier held that the conduct of the relevant entity (a university) in concluding the contract was not attributable under Article 5 insofar as it had not been acting in the exercise of governmental authority (ibid paras 163–84), and in any case emphasized that in light of the terms of the relevant BIT, for the purposes of interpretation of the term 'Party' in the umbrella clause, a distinction was to be drawn between the State, and 'State enterprises' (ibid para 245); cf the discussion in Crawford and Mertenskötter (n 10) 31–2.

[41] Georgios Petrochilos, 'Case Comment: *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine*; When is Conduct by a University Attributable to the State?' (2012) 28(2) ICSID Rev—FILJ 262, 272.

[42] Similar criticism can be levelled at the concern of Hamamoto that the term 'Party' in the umbrella clause should be interpreted widely in accordance with the principle of *effet utile* so as to encompass separate entities, and that giving full effect to the separate legal personality of separate entities under domestic law 'would allow the host State to easily escape from the scope of the obligations observance clause by setting up entities having a domestic legal personality distinct from the State when concluding any agreement with foreign investors': Hamamoto (n 36) 459. That argument is likewise based on a *petitio principii* insofar as it implicitly assumes that the inapplicability of the umbrella clause in such a situation would be incompatible with its purpose.

the application of the rules of attribution to a situation to which they have no relevance, but rather to the manner in which the Tribunal purported to apply those rules in resolving the jurisdictional issue before it. That question in turn relates to the wider issue of the extent to which questions of attribution can give rise to purely jurisdictional issues, and whether it is possible and appropriate to attempt to resolve issues of this type at a preliminary, jurisdictional stage.

Maffezini concerned an investment made by the claimant Argentine national in a Spanish chemicals corporation (EAMSA). At its incorporation, a part of the shares in EAMSA were owned by the Sociedad para el Desarrollo Industrial de Galicia (SODIGA), a corporation under Spanish law, which had been established and was owned and controlled by various public entities (including the Ministry of Industry and the National Institute for Industry) for the purpose of promoting the development of the region of Galicia. The Claimant made various complaints as to the conduct of both SODIGA and a number of entities which undoubtedly constituted organs of the State. In turn, the respondent State argued that, notwithstanding its State ownership and control, SODIGA was a private corporation; that, as a consequence, its conduct was not attributable to the State; that the dispute was therefore essentially a purely contractual one between the Claimant and SODIGA; and that, in light of the limitation of the jurisdiction of ICSID under Article 25 of the ICSID Convention to disputes 'between a Contracting State and a national of another Contracting State', the Tribunal was without jurisdiction to hear the claim.[43]

The Tribunal, having noted that Article 25 ICSID Convention did not define the term 'Contracting State', and that the applicable Argentina–Spain BIT provided no further assistance,[44] observed:

> Accordingly, the Tribunal has to answer the following two questions: first, whether or not SODIGA is a State entity for the purpose of determining the jurisdiction of the Centre and the competence of the Tribunal, and second, whether the actions and omissions complained of by the Claimant are imputable to the State.
>
> Since neither the Convention nor the Argentine–Spanish BIT establish guiding principles for deciding the here relevant issues, 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.[45]

The Tribunal went on to analyse the status of SODIGA, applying what it characterized as 'structural' and 'functional' tests,[46] and concluded that 'the Claimant has made out a prima facie case that SODIGA is a State entity acting on behalf of the Kingdom of Spain',[47] and that it therefore had jurisdiction.

The approach of the Tribunal in *Maffezini v Spain* as to the question of its jurisdiction is, to say the least, problematic. On the one hand, the Tribunal failed

[43] *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000) paras 73–4.
[44] ibid para 74.
[45] ibid paras 75–6.
[46] ibid paras 77–9.
[47] ibid para 89.

adequately to disentangle and distinguish between the character of the various claims put forward by the Claimant. Further, it appears to a large extent substantially to have predetermined the question of attribution of the conduct of SODIGA to the State.[48]

In circumstances involving a claim of breach of a BIT arising out of the conduct of a separate entity (in particular where the relevant conduct said to breach the BIT is also alleged to constitute a breach of a contract), however, the question of whether a particular dispute is one falling within the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID) is primarily a relatively formal one of analysing against which entity the claims are made, and depending on the scope of the arbitration provision, the nature of those claims (eg whether the particular conduct is alleged to constitute a breach of the BIT or whether the claim is one solely for breach of contract). Admittedly, as later tribunals have recognized, that process of analysis of the claims may involve as a central element a consideration of whether particular conduct of a separate entity is attributable to the State. Nevertheless, contrary to the approach of the Tribunal in *Maffezini*, that process is not equivalent to, nor can it neatly be reduced to, an abstract *a priori* enquiry as to whether any particular entity is properly to be characterized as a 'State body' or 'State entity'. In turn, the issue of jurisdiction cannot be resolved by a global analysis of the status and powers of the relevant State-owned entity, without reference to the specific conduct which is relied upon as constituting a breach of the treaty, and which it is sought to attribute to the State.

Fortunately, although the approach in *Maffezini* as to the pure question of jurisdiction has subsequently been applied in a number of cases,[49] it appears to have been of only limited lasting influence.[50] Subsequent cases have applied a far

[48] In its subsequent decision on the merits of the claim, the Tribunal applied the same 'structural and 'functional' analysis in order to conclude, as regards the second question identified, that certain of the relevant conduct of SODIGA was attributable to Spain: *Emilio Agustin Maffezini v Kingdom of Spain*, ICSID Case No ARB/97/7, Award on Merits (13 November 2000) paras 47–83. The Tribunal's approach to the applicable test for attribution of the conduct of a separate entity is in itself problematic, at least insofar as the Tribunal took the view at the jurisdictional stage that fulfilment of the 'structural' test or of State control would give rise to a 'rebuttable presumption' that SODIGA was a State entity [*Maffezini* Jurisdiction (n 43) para 77], and appears subsequently to have transposed that reasoning in deciding the question of the attribution of the conduct of SODIGA (*Maffezini* Merits, paras 47–9). cf ARSIWA art 5, and the discussion in the text accompanying n 68.

[49] cf the similar reasoning, applying the decision in *Maffezini*, in the parallel decisions in *Consortium RFCC v Kingdom of Morocco*, ICSID Case No ARB/00/6, Decision on Jurisdiction (16 July 2001) paras 34–40 and *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction (31 July 2001) paras 30–5; the Tribunal in both cases held that the Claimants had established that the relevant separate entity (ADM) 'is a State company, acting in the name of the Kingdom of Morocco': *Consortium RFCC*, para 40; *Salini*, para 35. The Tribunal's reasoning on this point, however, is arguably entirely *obiter*, insofar as the Tribunal concluded that it had jurisdiction on the basis that the claims were against the respondent State for breach of the applicable Italy–Morocco BIT, such that it was not necessary to decide for jurisdictional purposes whether ADM was a 'State entity'; it expressly proceeded to resolve that question on the basis that it was appropriate to do so 'in order to satisfy the legitimate expectations of the Parties': *Consortium RFCC*, para 34; *Salini*, para 30. In any case, the analysis of the Tribunal was far more sophisticated and conscious of the problems raised by claims involving alleged breaches of contracts entered into by separate entities, and the tribunal held that, under the jurisdictional provisions of the relevant BITs, it had no jurisdiction over pure contractual claims against ADM: *Consortium RFCC*, paras 67–9; *Salini*, paras 59–62. Note also that, in its decision on the merits in *Consortium RFCC*, the Tribunal ultimately held that it was not necessary to decide whether the conduct of ADM was in fact attributable to the State, as in any case the relevant conduct did not constitute a breach of the BIT: *Consortium RFCC v Kingdom of Morocco*, ICSID Case No ARB/00/6, Award (22 December 2003) para 109; see also *Consortium RFCC v Kingdom of Morocco*, ICSID Case No ARB/00/6, Decision of the *ad hoc* Committee (18 January 2006) (2006) 26(2) ICSID Rev—FILJ 196–214.

[50] See, however, the application of the Decision in *Maffezini* Jurisdiction (n 43) (in conjunction with ARSIWA arts 4, 5 and 8) in the context of an objection to the jurisdiction of the tribunal in *Chevron Bangladesh* (n 36) paras 129–49. cf the recent (unsuccessful) attempt by a Claimant to convince the Tribunal to apply the combined 'structural' and 'functional' approach in *Maffezini* for the purposes of determining the attribution of conduct of a separate entity

more sophisticated analysis of questions of jurisdiction in circumstances where the allegedly wrongful conduct relied upon is that of a separate entity whose conduct it is sought to attribute to the State. That clarity of analysis is of particular importance where the relevant conduct is that of a separate entity which is allegedly in breach of a contract between the entity and the investor. In this regard, the decision in the *Vivendi I* Annulment[51] has played an important role in elucidating the difference between contract claims and treaty claims, and the need to distinguish between purely contractual claims (in particular those under contracts entered into with a State-owned entity) and the separate question of whether the same conduct may amount to a breach of an applicable BIT.

In this more nuanced and developed jurisprudence, in general, it will be sufficient for jurisdictional purposes that the claim purports to be brought against the State for breach of the relevant BIT;[52] questions of attribution of the conduct of separate entities in general do not fall to be decided at the jurisdictional stage, save (perhaps) where it is manifest that the relevant conduct is not attributable to the State, such that a finding of non-attributability can safely be made.[53] As the Tribunal in *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* observed:

> it is not for the Tribunal at the jurisdictional stage to examine whether the case is in effect brought against the State and involves the latter's responsibility. An exception is made in the event that if it is manifest that the entity involved has no link whatsoever with the State.[54]

in *Tulip Real Estate v Turkey* (n 22) paras 235 and 289. For a different manifestation of the distinction between 'functional' and 'structural' tests for attribution, see *EDF (Services) Ltd v Romania*, ICSID Case No ARB/05/13, Award (3 October 2009) para 187, where the Tribunal characterized ARSIWA Article 5 as constituting a 'functional' basis for attribution, in contradistinction to the 'structural' basis of attribution under ARSIWA Article 4 and attribution on the basis of 'control' under the rule codified in ARSIWA Article 8.

[51] *Vivendi I* Annulment (n 38) paras 95–101 and 112–13.

[52] *Impregilo v Pakistan* (n 40) paras 108 and 219; *LESI-DIPENTA v Algeria* (n 36) Section II, para 19; and *LESI and Astaldi v Algeria* (n 36) paras 78 and 79; *Hamester v Ghana* (n 22) para 141.

[53] *LESI-DIPENTA v Algeria* (n 36) Section II, para 19; and *LESI and Astaldi v Algeria* (n 36) para 78 and 79; *Jan de Nul* Jurisdiction (n 22) para 85; *Saipem v Bangladesh* Jurisdiction (n 22) para 143. cf *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentine Republic*, ICSID Case No ARB/09/1, Decision on Jurisdiction (21 December 2012) para 271, in which the Tribunal expressed the view that issues of attribution should be decided at the jurisdictional stage 'where they represent a fairly cut-and-dry issue that will determine whether there is jurisdiction', and referred to the decision in *Maffezini* as an example. However, as noted above, the issue decided at the jurisdictional stage in *Maffezini* was not, as such, one of attribution, and in any case the issues of attribution which arose were very far from being 'cut and dried'.

[54] *Jan de Nul* Jurisdiction (n 22) para 85; see similarly *Saipem v Bangladesh* Jurisdiction (n 22) para 143. It seems likely that, save in exceptional circumstances, it will normally be appropriate to resolve a jurisdictional objection based on non-attribution of the relevant conduct relied upon as a preliminary matter, without joining it to the merits, only in circumstances in which either (a) the relevant entity is unambiguously an organ of the State, such that all of its conduct is attributable to the State and there is in any case jurisdiction, or (b) as suggested by the Tribunal in *Jan de Nul* Jurisdiction (n 22), the only relevant conduct relied upon as constituting a breach of the applicable BIT is that of a person or entity which is undoubtedly not an organ within ARSIWA art 4, and as to which there is no colourable argument that the relevant conduct is attributable on the basis of either ARSIWA art 5 or art 8, such that there is clearly no jurisdiction; the latter type of case is likely to be exceedingly rare. cf however, the approach adopted by the tribunals in *Helnan International Hotels A/S v Republic of Egypt*, ICSID Case No ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction (17 October 2006) paras 91–4, in which the Tribunal decided, at the jurisdictional stage, that conduct of a separate entity was attributable under ARSIWA art 5; and *Toto Costruzioni Generali SpA v Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction (11 September 2009) paras 43–60, in which the Tribunal determined at the jurisdictional stage that, applying ARSIWA art 5, a separate entity and its successor were 'exercising in the context of the Contract the governmental authority of the Republic of Lebanon[.] Therefore their acts are acts of the State of Lebanon . . .' (*Toto Costruzioni* para 60).

That will normally be the case even if the alleged breaches of the relevant BIT are said to arise from the conduct of a separate entity which it is alleged can be attributed to the State, and even where the alleged conduct is argued to amount to no more than a breach of purely contractual obligations.

As a consequence, disputes as to question of attribution of the conduct of a separate entity are normally more appropriately joined to and dealt with as part of the merits of the dispute.[55] As subsequent refinements to this approach have recognized, 'questions of attribution and questions of legality are closely intermingled, and it is then difficult to deal with the question of attribution without a full enquiry into the merits',[56] and, as a consequence, the issue of attribution 'is usually best dealt with at the merits stage, in order to allow for an in-depth analysis of all the parameters of the complex relationship between certain acts and the State'.[57]

IV. CONTRIBUTION OF INVESTMENT TREATY ARBITRATION TO THE DEVELOPMENT AND CLARIFICATION OF THE LAW OF STATE RESPONSIBILITY

The question may be posed as to the extent to which the decisions of investment treaty tribunals can be seen as having contributed to the development of the general international law of State Responsibility in relation to questions of attribution. In that regard, since their adoption by the ILC in 2001, the Articles have been extensively referred to by tribunals in investment arbitration cases, with particular reliance being placed on the provisions on attribution.[58] To the extent that, the content of the relevant customary rules in this field is comparatively clear and settled,[59] the application of the Articles by investment treaty tribunals adds relatively little to the development of customary international law. Nevertheless, citation and application by tribunals undoubtedly contributes to the consolidation of both the status of the Articles as an authoritative source of reference, and of the rules of attribution that they enshrine.

A. *Attribution of Conduct of Organs (Article 4 ARSIWA)*

In the vast majority of investment cases, there has been no real dispute as to the attribution of particular conduct to the State, particularly where the conduct relied

[55] See in particular *Hamester v Ghana* (n 22) paras 143–5; and *Electrabel v Hungary* (n 22) para 7.61. Note also *Tulip Real Estate v Turkey* (n 22) paras 276–8 and the *ad hoc* Committee's rejection of the argument that the Tribunal had in fact decided the question of attribution as a matter going to its jurisdiction: *Tulip Real Estate and Development Netherlands BV v Republic of Turkey*, ICSID Case No ARB/11/28, Decision on Annulment (30 December 2015) paras 171–202.

[56] See *Hamester v Ghana* (n 22) para 143.

[57] ibid para 145.

[58] For an overview of reliance on the Articles as at 2009, see James Crawford 'Investment Arbitration and the ILC Articles' (2010) 25(1) ICSID Rev—FILJ 127, in particular the table at 136–99, summarizing relevant decisions. For a comprehensive study of the manner in which the Articles have been applied by tribunals in investment treaty disputes, as well as by international and domestic courts and tribunals more generally, see Simon Olleson, *The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts—Preliminary Draft* (BIICL 2007), and the updated and expanded study: Simon Olleson, *State Responsibility before International and Domestic Courts; The Impact and Influence of the ILC's Articles* (OUP forthcoming 2016).

[59] See nn 21 and 22 and accompanying text.

upon as constituting a breach of the relevant BIT is undoubtedly that of an organ of the State.[60] Nevertheless, States have on occasion sought to dispute the attribution of conduct of entities which *prima facie* constituted organs within the meaning of Article 4 ARSIWA.[61]

For instance, in *Eureko v Poland*, the Respondent attempted to argue that conduct of the Minister of the State Treasury in relation to a share purchase agreement and subsequent agreements concluded between the State Treasury and the Claimant in respect of the privatization of a State-owned insurance company was not attributable to it. It did so on the basis that the State Treasury, in entering into the relevant agreements was, as a matter of Polish law, to be treated as acting as a private 'commercial actor'[62] and argued that, as a result, its conduct was not the result of the exercise of governmental powers, and was thus not attributable to Poland.[63]

The Tribunal rejected that argument, noting that it 'flies in the face of well recognized rules and principles of international law',[64] and observed that:

> [i]n 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.[65]

Similarly, in *Generation Ukraine, Inc v Ukraine*, the Respondent challenged the Tribunal's jurisdiction *ratione personae*, arguing that Ukraine was not the proper party to the proceedings since the dispute related to the acts or omissions of the Kyiv City State Administration, which 'being the embodiment of the state executive power at the local level, . . . does not act on behalf of Ukraine as a State at the international arena'.[66] The Tribunal rejected Ukraine's objection to its jurisdiction, explaining that

[60] See eg the acknowledgement of the USA that the actions of state municipal authorities and decisions of state courts were attributable to it for the purposes of assessing whether it had complied with its obligations under NAFTA in *Mondev International Ltd v United States of America*, ICSID Additional Facility Case No ARB(AF)/99/2, Award (11 October 2002) para 67, and the acceptance by the USA that it was responsible for the actions taken by its various constituent states: *Grand River Enterprises Six Nations Ltd and others v United States of America*, NAFTA/UNCITRAL Decision on Objections to Jurisdiction (20 July 2006) para 1, and Final Award (12 January 2011) para 1. Similarly, as recorded by the Tribunal, in *Electrabel v Hungary* (n 22), it was common ground that the conduct of organs of the Hungarian government was attributable (para 7.62); see also at para 7.69 as regards attribution of conduct of the Hungarian Parliament.

[61] For further discussion of relevant decisions of investment treaty tribunals applying ARSIWA art 4, see eg James Crawford and Simon Olleson 'International Investment Agreements and the General Body of Rules of Public International Law; The Application of the Rules of State Responsibility', in Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (Nomos/Beck/Hart Publishing 2015), 411, 425–31.

[62] As a matter of Polish law, the State Treasury is the residual repository of the State's right of ownership of all State property not belonging to other legal persons forming part of the State: see *Eureko v Poland* (n 36) paras 119–20. Although apparently not regarded as having separate legal personality, under Polish law the State Treasury is referred to as the 'State' when taking sovereign actions, but as the 'State Treasury' when exercising the State's rights of property or ownership: see the summary of the expert evidence: ibid para 133.

[63] ibid paras 123–4; cf however, ibid 46 fn 8. The issue as to the attributability of actions of the State Treasury to Poland had been raised by the Tribunal, inviting comments from the parties on the question in the light of the Articles and the relevant rules of international law: ibid para 122.

[64] ibid para 125.

[65] ibid para 127. The Tribunal further observed that even if the conduct of the State Treasury was not attributable on the basis that it was acting as an organ, its conduct would be attributable to the extent that it had been exercising elements of governmental authority (ie under art 5 of the Articles) or had in fact acted on the instructions of, or under the direction or control of the State (ie under art 8) [*Eureko v Poland* (n 36) para 132]. The Tribunal concluded that, 'whatever may be the status of the State Treasury in Polish law', from the perspective of international law 'the Republic of Poland is responsible to Eureko for the actions of the State Treasury. These actions, if they amount to an internationally wrongful act, are clearly attributable to the Respondent' (ibid para 134).

[66] *Generation Ukraine v Ukraine* (n 38) para 10.1.

> [t]he Respondent has failed to differentiate between disputes arising under domestic law and disputes arising under the BIT. Insofar as this statement relates to a cause of action based on the BIT, it discloses a confusion about the juridical nature of such a cause of action. By invoking [the prohibition of expropriation contained in the applicable BIT], the Claimant is seeking to invoke the international responsibility of Ukraine on the basis that various acts or omissions of officials of the Kyiv City State Administration are attributable to Ukraine in accordance with the rules of international law and that such acts or omissions amount to an expropriation. . . . There is no doubt that the conduct of a municipal authority such as the Kyiv City State Administration, which is listed as an organ of State power by the Ukrainian Constitution, is capable of being recognised as an act of the State of Ukraine under international law. . . . The Respondent is correct to affirm that 'the [Kyiv City State Administration] does not act on behalf of Ukraine as a State at the international arena'. This is precisely the reason that Ukraine rather than the Kyiv City State Administration is the proper party to these international arbitration proceedings, where the international obligations of the former are alleged to have been breached by the conduct of the latter. . . . There is no difficulty in applying the international rules of attribution in this case. The proper focus is instead on whether the Claimant can establish that the conduct of the Kyiv City State Administration, or other relevant Ukrainian State organs, amounts to a breach of an international obligation set out in the BIT.[67]

B. *Attribution of Conduct of Separate Entities (Articles 5 and 8 ARSIWA)*

Given the frequent involvement of separate entities which do not constitute organs in the implementation of investments by foreign investors, an important body of jurisprudence has developed which clarifies the situations in which the conduct of such entities may properly be attributed to the State on the basis of the rules embodied in Articles 5 or 8 ARSIWA (ie conduct carried out in the exercise of governmental authority, and conduct carried out on the instructions, or under the direction and control of the State, respectively). Despite the occasional questionable decision, tribunals have in general applied the rules governing the circumstances in which the conduct of such separate entities may be attributed to the State appropriately.

In broad synthesis, tribunals have normally given effect to the separate legal personality of separate entities, and recognized that the mere fact that a State has created a separate entity, that it is its owner, or exercises a certain measure of general control over it (for instance by appointing its officers), is normally insufficient in and of itself to justify the attribution of its conduct.[68] To the extent that it is sought to attribute the conduct of a separate entity to the State on the basis that the entity was acting in the exercise of elements of governmental authority under Article 5 ARSIWA, tribunals have emphasized that 'it must be shown that the precise act in question was an exercise of such governmental authority and not merely an act that could be performed by a commercial

[67] ibid paras 10.2–10.7.

[68] See eg *White Industries Australia Limited v Republic of India*, Final Award (30 November 2011) para 8.1.6; *Tulip Real Estate v Turkey* (n 22) para 306 (in the context of ARSIWA art 8); *Helnan International Hotels v Egypt* (n 54) para 93; *Hamester v Ghana* (n 22) paras 191–2 (as regards ARSIWA art 5). See also ARSIWA Commentary to art 5, para 3 and Commentary to art 8, para 6; Crawford (n 2) 100 and 112–13. cf the approach of the Tribunal in *Maffezini*, discussed above (n 48).

entity'.[69] This approach has led tribunals to deny the attribution of the conduct of separate entities which undoubtedly have broadly public functions and in some circumstances exercise elements of governmental authority, if the entity was acting pursuant to a contract, acted in a manner which could have been carried out by any party to a contract, and was not therefore exercising elements of 'governmental authority' in so acting.[70] A restrictive approach has also been adopted in relation to attribution under Article 8 of the Articles. Aligning themselves with the position taken by the ICJ in *Bosnian Genocide*,[71] tribunals have in general held that, in order for conduct of a separate entity to be attributable on the basis of instructions, direction or control under Article 8 of the Articles, it is insufficient that that the State exercised general or 'overall' control over an entity; rather, it must be shown that the State gave instructions to the entity, or exercised direction and control over it, in relation to the specific conduct which it is sought to attribute ('effective control').[72]

In this context, Tribunals have recognized that there is a fundamental distinction between attribution of the conduct of a separate entity under the rule contained in Article 8 ARSIWA, pursuant to which any conduct is in principle attributable if it was carried out on the instructions or under the direction and control of the State, and the rule embodied in Article 5 ARSIWA, under which, by definition, only conduct carried out in the exercise of governmental authority may be attributed, to the exclusion of purely commercial conduct.[73]

C. *Attribution of Conduct in 'Hard' Cases*

Whilst not characterizable as constituting development of the law, the elevated number of cases and variety of factual situations thrown up by litigation in investment treaty cases have provided a fertile ground in which the application of the international law rules of attribution to the conduct of unusual entities and novel factual patterns has occurred. While tribunals have generally grappled with the sometimes difficult issues which have arisen, there is at the same time a notable tendency to refrain from expressing a final and concluded view where it is possible to resolve a dispute on other grounds.

[69] *Hamester v Ghana* (n 22) para 193; see also ibid paras 176–7, 180 and 201; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award on Merits (6 November 2008) para 163; *Bayindir Insaat Turizm Ticaret ve Sanayi v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award (24 August 2009) para 122; *Tulip Real Estate v Turkey* (n 22) paras 292–9.

[70] See eg *Jan de Nul* Merits (n 69) paras 161, 165–71 (in relation to the Suez Canal Authority); *Hamester v Ghana* (n 22) paras 190–3, 197, 255, 266, 284 (as regards the entity responsible for regulating the marketing and export of cocoa, coffee and sheanuts in Ghana (COCOBOD)); *Bayindir v Pakistan* (n 69) paras 120–3 (as regards the Pakistani National Highways Authority); and *Ulysseas, Inc v Republic of Ecuador*, Final Award (12 June 2012) paras 136, 139, 178 and 185 (in relation to the entity responsible for regulating and controlling activities relating to electric power in Ecuador (CONELEC)); see also *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Award (30 June 2009) para 191.

[71] See in particular *Bosnian Genocide* (n 11) 208 para 400.

[72] See eg *Jan de Nul* Jurisdiction (n 22) para 173; *Saipem v Bangladesh* Jurisiction (n 22) para 148; *Jan de Nul* Merits (n 69) para 173; *Hamester v Ghana* (n 22) paras 179 and 199; *White Industries v India* (n 68) paras 8.1.16–8.1.18; *Electrabel v Hungary* (n 22) para 7.70; *Tulip Real Estate v Turkey* (n 22) para 309. For an overview of the debate as to the rival *Nicaragua* (n 21) ('effective control') and *Tadić* (n 21) ('overall control') tests, definitively settled by the ICJ in *Bosnian Genocide* (n 11) in favour of the former, see Crawford and Olleson (n 61) 436 and n 21 above. cf the somewhat more flexible approach adopted by the Tribunal in *Bayindir v Pakistan* (n 69), discussed in Section V (text accompanying nn 124–6).

[73] For particularly clear expositions of the distinction, see eg *Hamester v Ghana* (n 22) para 180; and *Bayindir v Pakistan* (n 69) paras 122 and 129. Compare ARSIWA Commentary to art 5, para 5 and Commentary to art 8, para 2; Crawford (n 2) 101 and 110. For a different view, cf *Noble Ventures v Romania* (n 9) para 82.

For instance, in *Vivendi II*, the question arose whether the conduct of an ombudsman and of individual members of a provincial legislature (principally members of the opposition) was attributable to the State. As regards the members of the legislature, the Claimants, relying on Article 4 ARSIWA, argued that the members of the local legislature 'exercising as they do "legislative" functions at "a territorial unit of the State", individually and collectively are "State organs" whose conduct shall be considered an act of the state under international law'.[74] In relation to the Ombudsman, they argued, relying on Articles 4 and 5, that

> having regard to his governmental functions, relationship with the Legislature and sweeping authority, [the Ombudsman] also has the status of a 'State organ' for whose conduct the state is responsible. And even if the Tribunal were to conclude that the Ombudsman is not a state organ, it is certainly an entity 'empowered by the law' of Argentina 'to exercise elements of governmental authority' within the meaning of Article 5 for which the state must take responsibility.[75]

In response Argentina took the position that the actions of the individual members of the provincial legislature, in particular those belonging to the opposition, lacked the necessary governmental authority in making the statements relied upon.[76] As regards the Ombudsman, it was argued that it was neither a State organ, nor an agent of the State, relying in particular on 'the domestic characterization of the functions of the Ombudsman . . . as a body opposed to government'.[77]

The Tribunal, apparently with some relief, concluded that it was not required finally to decide either question, as it was able to find a breach of the fair and equitable treatment standard on the basis of conduct of persons and entities which it was not disputed constituted organs of the State.[78] While expressing no opinion as to whether the conduct of the individual members of the provincial legislature was attributable, as regards the Ombudsman the Tribunal did venture a provisional view, observing that

> Had it been necessary, we would have been inclined to find that many of the acts of the Ombudsman that were complained of involved the exercise of governmental authority and would thus have been attributable to Argentina in the event they too constituted a breach of Article 3 [the guarantee of fair and equitable treatment].[79]

The Tribunal's caution in this regard is understandable. Yet, it is suggested that the answers to the two issues are relatively clear. As regards the individual members of the legislature there is a significant difference between on the one hand, legislation (the act of a collective body, the legislature, which is an organ exercising legislative functions) and, on the other, expressions of view or opinion by individual legislators, who are mere constituent elements of that organ, have no legislative power of their own, and represent the public, not the State. As regards the ombudsman, much will depend on his or her precise status and the scope of his or her powers under the relevant domestic legislation. In certain circumstances, an ombudsman might well be considered to constitute an organ for the purposes

[74] *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, ICSID Case No ARB/97/3, Award (20 August 2007) para 5.4.2 (*Vivendi II*).
[75] ibid.
[76] ibid paras 6.8.4–6.8.6.
[77] ibid paras 6.8.7–6.8.9.
[78] ibid para 7.4.4.
[79] ibid.

of Article 4; nevertheless, insofar as the powers of an ombudsman are normally confined to the making of recommendations, in general it is likely to be only in exceptional circumstances that the conduct of an ombudsman will be capable of involving any breach of an international obligation of the State.[80]

A further issue which has given tribunals some pause for thought is the question of whether the conduct of administrators, liquidators or other independent court-appointed insolvency professionals under domestic insolvency regimes is attributable to the State. Under many domestic systems of insolvency law, such practitioners, although appointed by the courts and subject to their supervision, operate independently whilst at the same time exercising wide powers pursuant to statute over the estate of an insolvent individual or company.

In *Plama Consortium Limited v Republic of Bulgaria*, the Claimant complained of various conduct of syndics[81] appointed to manage the affairs of a company (Nova Plama) in which the Claimant had invested. The conduct complained of included allegations of, amongst other things, improperly admitting non-existent debts against Nova Plama, and misappropriating its funds.[82] The Respondent, whilst denying those specific allegations of wrongdoing on the facts and arguing that the actions of the syndics had been in accordance with the relevant domestic law, in any case denied that the conduct of the syndics was attributable to it.[83]

The Tribunal rejected certain of the factual allegations as being unproven,[84] and others on the basis that the evidence in fact disproved the Claimant's allegations and supported the Respondent's version of events.[85] In addition, and as a more general matter, the tribunal observed that the questions it was required to answer in order to determine the responsibility of the Respondent under the Energy Charter Treaty (ECT) were

> whether the State is legally responsible for the actions of syndics, whether syndics are instruments of the State and perform State functions and whether the Bulgarian courts failed to control or supervise the syndics in a way which gives rise to State responsibility.[86]

The Tribunal, however, did not directly answer all of those questions. Instead, having set out Article 8 of the Articles,[87] the Tribunal held that the syndics 'are not instruments or organs of the State for whose acts the State is responsible'.[88] That conclusion was reached on the basis of its evaluation of the expert evidence presented by the parties as to the status and powers of syndics as a matter of Bulgarian law, including accepting the evidence of the Respondent's expert that a syndic 'is not a State organ'.[89] It concluded that

[80] As the *Vivendi II* Tribunal clearly appears to have recognized; see also Crawford and Olleson (n 61) 439.
[81] Under the Bulgarian insolvency regime, syndics are individuals appointed by the courts upon the nomination of creditors in order to manage, subject to the supervision of the courts, the affairs of companies which are insolvent.
[82] *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award (27 August 2008) paras 229–38.
[83] ibid paras 240–7.
[84] ibid paras 248–9.
[85] ibid para 250.
[86] ibid para 251.
[87] ibid para 252.
[88] ibid para 253.
[89] ibid; the Tribunal's finding in this regard should probably be understood as concerning the status of a syndic as an organ of the State as a matter of Bulgarian law.

> the acts of the syndics if they were wrongful—and the Tribunal makes no finding in this respect—are not attributable to Respondent, which cannot, therefore, be said to have violated its obligations towards [the Claimant] under the ECT.[90]

The Tribunal likewise rejected the Claimant's argument that Bulgaria had breached its obligations as a result of the alleged failure of the Bulgarian courts adequately to supervise the conduct of the syndics. That conclusion was reached, inter alia, on the basis that, whilst the courts had relatively limited powers of supervision and control, the Claimants had had the opportunity to make complaints as to the conduct of the syndics, they had done so in respect of certain of the matters complained of, and there was no evidence that access to the courts had been obstructed or that the courts had decided the issues presented to them in anything other than a fair manner.[91]

A similar issue arose in *Frontier Petroleum Services Ltd v Czech Republic* in relation to the conduct of trustees in bankruptcy appointed under Czech law. The Claimant argued that the conduct of the trustees in bankruptcy in refusing to admit the Claimant's claim arising from an international arbitral award against the estate of a company in bankruptcy proceedings was in breach of the State's obligations under the BIT, and was attributable to the State.[92] The Tribunal, however, focused its attention on the conduct of the Czech courts (which it was not disputed was attributable to the Respondent).[93] Having found that the refusal by the courts to admit the relevant arbitral award in the bankruptcy (on the basis that the award was inconsistent with Czech public policy) was consistent with Czech law, the Tribunal held that this outcome should have been foreseeable by the Claimant, and that the principal cause of the claimed loss was the Claimant's own conduct.[94] The Tribunal concluded that it was not in the event necessary to determine whether the relevant conduct of the trustees were also attributable to the State.[95]

Most recently, in *Dan Cake SA v Republic of Hungary*, a question arose as to whether the conduct of a liquidator appointed under Hungarian insolvency law in relation to a local company in which the Claimant had made an investment was attributable to the Respondent. The Claimant had argued that the conduct of the liquidator in selling a factory belonging to the company was attributable on the basis of Article 5 and/or Article 8 ARSIWA; in particular, it argued that the conduct of the liquidator in proceeding to the sale had been carried out pursuant to an indication of the relevant supervisory court, given in a judgment, that the liquidation should proceed expeditiously.

The Tribunal had earlier concluded that the refusal of the supervisory court to order the convening of a composition hearing, which had been the only way in which to prevent the sale of the relevant assets, constituted a breach of the State's obligations to accord fair and equitable treatment and not to impair the use, enjoyment, management, disposal or liquidation of the investment by unfair or

[90] ibid.
[91] ibid para 254.
[92] *Frontier Petroleum Services Ltd v Czech Republic*, PCA, Final Award (12 November 2010) paras 350–2; for the Respondent's position on the question of attribution, see ibid paras 361–2.
[93] ibid paras 363–415.
[94] See, in particular, ibid paras 413 and 415.
[95] ibid para 416.

discriminatory measures.[96] As a consequence, it was not necessary for it to decide whether the conduct of the liquidator was attributable to the respondent State. The Tribunal nevertheless gave some indication of its views on the question, although its observations are somewhat elliptical and provide no clear answer as to what its conclusion would have been had it been required to decide the issue.

As to the argument based on Article 8 ARSIWA that the liquidator had acted upon the instructions of the court in conducting the sale, the Tribunal acknowledged that that question 'may be relevant to the question whether the *Court* misbehaved'.[97] However, it went on to opine that the question was not relevant to the issue of whether the liquidator had been exercising elements of governmental authority under Article 5 ARSIWA; in that regard, it simply observed that the relevant question was not whether the liquidator had been empowered by the Court to proceed to the sale, since that power derived from the relevant legislation.[98] As to whether the exercise of the power of sale constituted an exercise of governmental authority under Article 5 ARSIWA, the Tribunal rejected the Respondent State's contention that this was an act which a private person could accomplish, since

> it rests on a power specifically conferred by the law to the liquidator, and it is an act which deprives, under constraint, the debtor of the ownership of its assets. It certainly involves an element of public authority. Can it be said to constitute an element of *governmental* authority? The Parties did not discuss this point.[99]

The Tribunal did not, however, decide the issue, holding that, even if attributable to the State, the sale by the liquidator did not in itself constitute a breach of international law.[100] In that connection, the Tribunal emphasized that, consequent upon the decision of the domestic court, the liquidator had been required by the relevant domestic law to proceed to the sale:

> What was shocking was the refusal by the Court, in violation of Hungarian law, to convene a composition hearing, which was the only way to prevent the sale of the factory. The liquidator did not take any part in that decision. From the moment the Court refused to convene a composition hearing, the liquidator, who did not have the power to challenge the decision, could but accept that he was not relieved from his duty to proceed to the sale—even if, as Claimant remarks, he should have waited a few days more. Proceeding with the sale of the debtor's assets, as the final act of liquidation proceedings, is not a specific feature of Hungarian law; it is the normal outcome of liquidation proceedings under any law.[101]

The three cases involved different factual situations and different allegedly wrongful conduct on the part of the relevant court-appointed officer. As a consequence, the common ground which can be extracted from the three cases is relatively limited. Nevertheless, it seems clear that court-appointed insolvency professionals will not normally be regarded as constituting organs of the State, and that, at least under normal circumstances, the mere fact that they are appointed by

[96] *Dan Cake SA v Republic of Hungary*, ICSID Case No ARB/12/9, Decision on Jurisdiction and Liability (24 August 2015) paras 142 and 143–57.
[97] ibid para 158 (emphasis in original).
[98] ibid para 158.
[99] ibid para 159 (emphasis in original).
[100] ibid para 160.
[101] ibid.

the courts does not in and of itself mean that their conduct in carrying out their statutory functions will be held to constitute action performed upon the instructions or under the direction or control of the State.[102] By contrast, whether particular action taken by court-appointed insolvency professionals in performance of their role and pursuant to powers conferred by statute may constitute the exercise of governmental authority for the purposes of Article 5 ARSIWA remains to a large extent an open question, although the distinction tentatively raised by the *Dan Cake* tribunal between 'public' and 'governmental' authority arguably does not sit well with the approach adopted by the ILC in Article 5.[103]

Intuitively it may seem surprising that the conduct of a liquidator, trustee in bankruptcy or equivalent should be regarded as capable of giving rise to the responsibility of the State under an investment protection agreement, at least in circumstances in which he or she has acted in compliance with the applicable domestic law. The appropriate approach, however, may not be to concentrate on the question of attribution, but instead to follow that adopted by the *Dan Cake* Tribunal, namely to shift the focus of attention to the question of whether the relevant conduct constitutes a breach of the applicable obligations. Connected to such an approach, and in any case, the decisions suggest that in general the focus should not be upon the conduct of the relevant insolvency professional as such, but upon the substance of the relevant domestic law, the availability of remedies before the domestic courts which exercise a supervisory role to correct any errors committed, whether any such remedies have been pursued by the investor, and whether the courts have properly performed their supervisory functions.

A further example of application of the rules of attribution to a somewhat unusual entity is the decision in *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Canada*, in which the Claimants complained that the refusal of an authorization for a quarrying operation in Nova Scotia constituted a breach of various provisions of the North American Free Trade Agreement (NAFTA). Under the relevant Canadian environmental legislation, a Review Panel (an independent body composed of experts), could be appointed in to carry out an environmental assessment of proposed projects and make recommendations. The refusal of authorizations for the Claimants' quarry by the relevant Nova Scotian and federal authorities had occurred following the report and recommendation made by a Joint Review Panel (JRP), established by the federal government and the provincial government of Nova Scotia to undertake an environmental assessment in relation to the Claimants' project. Canada did not dispute that the conduct of the relevant Ministers and other organs of the federal government was attributable to it, nor that it was responsible for the actions of the province of Nova Scotia, one of its constituent subdivisions.[104] It did, however, deny that the conduct of the JRP in

[102] The situation might be different in a case of clearly improper conduct by a trustee in bankruptcy or equivalent, to the detriment of an investor, which was shown to have been carried out on the instructions of the State.

[103] cf ARSIWA Commentary to art 5, para 2; Crawford (n 2) 100, which takes as the touchstone of attribution under Art 5 whether the relevant entity 'is empowered by the law of the State to exercise functions of a public character normally exercised by State organs'; see also ARSIWA Commentary to art 5, para 6; Crawford (n 2) 101.

[104] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Canada*, PCA Case No 2009-04, Award on Jurisdiction and Liability (17 March 2015) para 283.

carrying out the inquiry leading to the environmental assessment and recommendation was attributable to it.[105]

The Tribunal concluded that the conduct of the JRP was attributable to Canada under either Article 4 or Article 5 of the Articles, on the basis that the JRP was an 'integral part of the government apparatus of Canada', and that, even if it were not, it was empowered to exercise elements of Canada's governmental authority.[106] The remainder of the Tribunal's reasoning in support of that conclusion, in which it examined in detail the nature of the JRP, its purpose, and the relevant legislation granting its powers,[107] does not however distinguish clearly between the two alternative bases of attribution.

The decision is also of interest to the extent that the Tribunal concluded that the conduct of the JRP was in any case attributable to Canada on the alternative basis that Canada had adopted it and acknowledged it as its own insofar for the purposes of Article 11 ARSIWA, as the JRP's conclusions had been relied upon by the relevant decision-makers in refusing the grant of the permit for the Claimants' quarrying operations.[108] In that context, the Tribunal referred to its conclusion that the JRP was, 'by its nature, a part of the apparatus of the Government of Canada'[109] and expressed the view that 'Article 11 would establish the international responsibility of Canada even if the JRP were not one of its organs'.[110]

D. *Application of Special Rules of Attribution as Lex Specialis*

Finally, in a number of cases tribunals have found that, in accordance with the *lex specialis* principle,[111] specific contrary provision as to the rules for attribution under a particular instrument is sufficient to exclude the application of the normally applicable rules under customary international law.[112] One recent decision is worthy of particular comment; in *Adel A Hamadi Al Tamimi v Sultanate of Oman*, an issue arose as to the extent to which conduct of a State-owned corporation (OMCO) in purporting to terminate a lease of the site for a quarry entered into with a company which was part-owned and controlled by the Claimant was attributable to the Respondent.

Article 10.1.1 of the applicable US–Oman Free Trade Agreement (US-Oman FTA) specified that the substantive investment protection provisions contained in Chapter 10 applied to 'measures adopted or maintained by a Party' relating to an investor of the other Party or covered investments, whilst Article 10.1.2 provided that

[105] ibid paras 284–96.
[106] ibid para 308.
[107] ibid paras 309–20.
[108] ibid para 321.
[109] ibid.
[110] ibid para 322.
[111] cf ARSIWA art 55.
[112] See eg *United Parcel Services, Inc v Canada*, Award (11 June 2007) paras 57–63; for cogent criticism of the decision on account of both the 'thinness' of its reasoning, and the substantive correctness of the conclusion that NAFTA Chapter 15 constituted *lex specialis* governing the question of attribution of the conduct of Canada Post, see Jürgen Kurtz, 'The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration' (2010) 25(1) ICSID Rev—FILJ 200, 208–10. For application of the *lex specialis* principle outside the specific field of attribution, see eg *Archer Daniels v Mexico* (n 23) para 116–18; *Corn Products International, Inc v United Mexican States*, ICSID Case No ARB(AF)/04/01, Decision on Responsibility (15 January 2008) para 76 and 159; for discussion, see Kurtz, 214–16.

> A Party's obligations under this Section shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party.[113]

The Tribunal observed that Article 10.1.2 of the US-Oman FTA 'sets out a relatively narrow test for the circumstances under which the actions of a state enterprise may be attributed to the State'.[114] In that regard the Tribunal accepted that

> contracting parties to a treaty may, by specific provision (*lex specialis*), limit the circumstances under which the acts of an entity will be attributed to the State. To the extent that the parties have elected to do so, any broader principles of State responsibility under customary international law or as represented in the [Articles] cannot be directly relevant.[115]

It then held that the effect of Article 10.1.2 was

> to limit Oman's responsibility for the acts of a state enterprise such as OMCO to the extent that: (a) the state enterprise must act in the exercise of '*regulatory, administrative or governmental authority*'; and (b) that authority must have been delegated to it by the State.[116]

On that basis, it held that Articles 5 and 8 of the Articles were not as such relevant to the question of attribution,[117] although it observed that Article 5 might nevertheless provide useful guidance as to 'the dividing line between sovereign and commercial acts'.[118] It accordingly held that, even if the State had exercised 'effective control' over OMCO through its 99 percent shareholding, or through the exercise of influence over its directors or managers, as alleged by the Claimant, this was irrelevant.[119] On the basis of the evidence, the Tribunal further held that OMCO had not exercised any 'regulatory, administrative, or other governmental authority' delegated to it and accordingly held that the relevant conduct was not attributable.[120]

Insofar as the Claimant had relied upon the conduct of the relevant government ministries, the public prosecutor and the police, the Tribunal confirmed 'for the avoidance of doubt' that their conduct was attributable to the Respondent. In explaining that conclusion, it observed:

> There is no question that State organs such as government ministries and the State police force operate as arms of the State, and indeed—unlike OMCO—such entities are characterised by their exercise of '*regulatory, administrative or governmental*' authority. Although State responsibility for the conduct of State organs is not directly expressed in

[113] Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area, (signed 19 January 2006, entered into force 1 January 2009) (US–Oman FTA).

[114] *Adel A Hamadi Al Tamimi v Sultanate of Oman*, ICSID Case No ARB/11/33, Award (3 November 2015) para 318. The Tribunal in a footnote dismissed the Claimant's argument that OMCO constituted an organ: ibid 112 fn 677.

[115] ibid para 321 (footnotes omitted).

[116] ibid para 322 (emphasis in original).

[117] ibid paras 322 and 324.

[118] ibid para 324; in that regard, the Tribunal also noted that, under ARSIWA art 5, '[t]he conduct at issue must be "*governmental*" or sovereign in nature (*acta jura imperii*). Purely commercial conduct (*acta jure gestionis*) cannot be attributed to the State under Article 5': *Al Tamimi* (n 114) para 323.

[119] *Al Tamimi* (n 114) para 322.

[120] ibid paras 325–34.

> the text of the US–Oman FTA, the attribution of such conduct to the State is broadly supported in international law[121]

The Tribunal's approach in this latter regard, in particular the efforts it went to in order to justify its attribution of the conduct of organs in terms of Article 10.1.2 is open to question. First, as noted above, Article 10.1.1 of the US-Oman FTA stated that the relevant investment protection provisions contained in Chapter 10 applied to 'measures adopted or maintained by a Party'. On its face it was thus apt to encompass the attribution of the conduct of organs. Second, and in any case, the scope of Article 10.1.2 was explicitly limited to the question of attribution of the conduct of State enterprises and other persons, such that it did not conflict with the rule providing for attribution of organs of the State as *lex specialis*.[122] As a consequence, there was simply no need for the Tribunal to examine whether the ministries and other organs of the Respondent had exercised 'regulatory, administrative or other governmental authority' within the meaning of Article 10.1.2 of the US-Oman FTA, as the normal rule of customary international law providing for the attribution of the organs of a State was not in any case excluded.

V. DIFFERENTIATED APPLICATION OF THE RULES OF ATTRIBUTION IN THE CONTEXT OF INVESTMENT TREATY ARBITRATION?

As noted above, insofar as the substantive standards of protection at issue in investment arbitration derive from treaties, questions of attribution which arise in assessing whether there has been a breach of relevant international obligations in principle are governed by the generally applicable rules of customary international law. Nevertheless, a question has been raised as to whether the rules of attribution are different, or at the least, are capable of being applied in a different fashion, in the context of investment treaty arbitration.

The issue has arisen principally in relation to entities which do not constitute organs of the State (in particular State-owned entities), but the conduct of which is alleged to be attributable under the principle codified in Article 8 ARSIWA insofar as they were acting on the instructions, or under the direction or control of the State in carrying out the particular conduct. In this regard, the International Court of Justice has stated, in a relatively categorical fashion, 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*'.[123] Although made in the very different context of the attribution to a State of allegedly genocidal conduct carried out by independent armed groups, there is no indication that the Court did not intend that observation to constitute a statement of principle of general application.

Some tribunals have nevertheless expressed doubts as to whether the rule of attribution contained in Article 8 of the Articles should apply in the same manner in the context of investment treaty arbitration. For instance, the Tribunal in

[121] ibid para 344; the Tribunal had earlier observed in passing that the conduct of the Ministry of Environmental and Climate Affairs was, in principle, attributable to the Respondent on the basis that it constituted an organ of the Omani State: ibid para 337.

[122] cf ARSIWA Commentary to art 55, para 4; Crawford (n 2) 307.

[123] *Bosnian Genocide* (n 11) 208–9 para 401.

Bayindir Insaat Turizm Ticaret ve Sanayi v Islamic Republic of Pakistan in concluding that the conduct of a separate entity (the National Highways Authority (NHA)), was attributable to the State on the basis of Article 8, made clear that it was

> 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.[124]

In the circumstances of the case, the Tribunal's concern as to the consistency of its findings with the rule of customary international law embodied in Article 8 ARSIWA appear to relate to the extent to which the conduct allegedly amounting to instructions, or direction or control exercised by the State over the relevant actions of NHA could properly be characterized as resulting in the exercise of 'effective control' by the State over NHA's actions.[125] Nevertheless, insofar as express reference was made by the Tribunal to Article 8 ARSIWA, it purported to apply the relevant customary rule. The issue is not so much one of challenging the substance of the applicable rule requiring 'effective control', but rather whether there is scope for some flexibility in its application to the concrete facts of a particular case.

In principle, such an approach in the field of investment arbitration is not in itself either problematic or inimical to the coherence of the customary international law of attribution. A certain degree of flexibility may be appropriate and justified so long as the conduct of the State constituting instructions, direction or control is not too far removed from the relevant conduct of the separate entity which is alleged to have acted upon it, and that the separate entity in carrying out the relevant conduct can accordingly properly be described as having acted 'on behalf' of the State.[126]

VI. CONCLUDING OBSERVATIONS

Attribution plays an essential role in international law generally, and is a central part of the assessment required under the law of State responsibility in determining whether a State has committed an internationally wrongful act. To the extent that breach of a BIT or multilateral investment protection treaty necessarily falls to be decided as a question of State responsibility under international law, the determination of whether particular conduct is attributable to a State constitutes an integral part of the task which investment treaty tribunals are called upon to perform. Three concluding considerations are appropriate, taken in descending order of generality.

[124] *Bayindir v Pakistan* (n 69) para 130. See also the comments of the Tribunal in *Al Tamimi* (n 114), which, whilst recognizing that conduct may be attributed where the conduct of a person or entity is closely directed or controlled by the State, commented in passing that 'the parameters of imputability on this basis remain the subject of debate' (at para 321).

[125] See *Bayindir v Pakistan* (n 69) paras 125–8, referring to the 'express clearance' received by NHA from the Government of Pakistan to terminate the contract (para 125), and the evidence that there was 'a certain degree of government involvement', and that the decision to terminate 'could not have been taken without some guidance from higher levels of the Pakistani government' (para 128). Note also that the Tribunal ultimately concluded that there was no breach of the BIT insofar as there a valid contractual basis for the termination and other conduct, which was therefore not characterizable as a sovereign act: ibid paras 129, 133–9, 281–315, 367–79 (in particular para 377), 458 and 461, 471 and 474, and 482.

[126] cf the passage from *Bosnian Genocide* (n 11) 210 para 406 (quoted at fn 12).

First, in carrying out their ultimate task of adjudicating upon allegations that a State has breached its international obligations, investment treaty tribunals may be faced with a variety of more or less difficult issues as to whether the conduct of a particular individual or entity is attributable to the State. In that context, not all of the questions which may arise are necessarily questions of attribution under the law of State responsibility. As a consequence, a significant and essential element of the task which confronts tribunals is clear analysis of the purpose for which the operation of attribution is necessary, and the correct identification of the appropriate body of rules to be applied to resolve the issues which they face. In this regard, the rules of State responsibility exist for a particular purpose and are based on a specific rationale which derives from and is intrinsically linked to that purpose. As a consequence, it is inappropriate to seek to apply the rules of attribution under the law of State responsibility in other contexts, where the rules and the underlying relevant considerations which might justify the attribution of conduct to the State may very well be different.

Second, as discussed above, on the prevailing view, where a separate entity has breached a contract concluded with an investor, the State is to be held responsible for the breach only in circumstances in which either (a) the separate entity has, in breaching the contract, had resort to elements of governmental authority conferred upon it by the State, beyond those which any contracting party possesses; or (b) the State has itself intervened in order to interfere with the performance of the contract by the separate entity by causing it to take a particular course of action. The difficulties which a claimant investor which has contracted with a separate entity may face in this context in arguing that the relevant conduct of that separate entity should be attributed to the State derive from the fact that the relevant rules of international law in principle recognize and give effect to the independence and separate legal personality under domestic law of separate entities. Such an approach is entirely appropriate; it is no part of the role of investment instruments to insulate the investor from the normal commercial risk of non-performance by a counterparty which any contracting party faces. Given the content of the relevant rules of international law, the fact that the State is not normally to be held responsible for the breach of contract by a separate entity constitutes precisely part of the risk of contracting with a separate entity which a foreign investor should assess in deciding whether to make an investment. If it is felt that the risks are too great, other mechanisms are available to a prudent foreign investor to provide a measure of comfort and protection prior to committing themselves to making an investment.

Third, and as a corollary of the first two points, the rules of attribution under the law of State responsibility have no role to play in determining whether the State should be held responsible for violation of an umbrella clause contained in an investment instrument as a result of the breach of a contract concluded by a separate entity, to which the State is not party. It is only where the State is party to and therefore bound by a relevant contractual obligation that it is appropriate that it should be held internationally responsible for breach of the obligation under the normal formulation of the umbrella clause to observe obligations undertaken by it. Attempts to apply the rules of attribution under the law of State responsibility in this context are not only flawed as a matter of principle, but risk distorting the scope of the umbrella clause beyond that which States are to be taken to have agreed upon the ordinary meaning of the terms used.