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Article

Attribution and the Umbrella Clause – Is there a Way out of the Deadlock?

Dr. Michael Feit, LL.M.*

I. INTRODUCTION

Foreign investors frequently contract with entities entrusted with a role previously fulfilled by the host state.¹ This is particularly true of utility and infrastructure industries, such as the production and distribution of energy (hydroelectric power, oil, gas, and coal), posts and telecommunications, transportation (railway, airports, and airlines), and financial services.² While these entities are typically state-owned or otherwise closely affiliated with the state, they often possess a separate legal personality.³ For ease of reference, these entities will be referred to as “state-owned entities” (SOE).

If an investor believes that a SOE is not complying with its contractual obligations, then the investor may bring a claim against the host state under the applicable bilateral or multilateral investment treaty

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1. See RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 198 (2008); Paul Michael Blyschak, *Arbitrating Overseas Oil and Gas Disputes: Breaches of Contract Versus Breaches of Treaty*, 27 J. INT’L ARB. 579, 610, 618 (2010); Barton Legum, *Are States Liable for the Conduct of Their Instrumentalities?: Case Law of Tribunals Other Than ICC and ICSID*, in STATE ENTITIES IN INTERNATIONAL ARBITRATION 57, 63 (Emmanuel Gaillard & Jennifer Younan eds., 2008); Srilal M. Perera, *State Responsibility—Ascertaining the Liability of States in Foreign Investment Disputes*, 6 J. WORLD INVESTMENT & TRADE 499, 500 (2005); Thomas W. Wälde, *Energy Charter Treaty-Based Investment Arbitration: Controversial Issues*, 5 J. WORLD INVESTMENT & TRADE 373, 396 (2004).

2. See ORG. FOR ECON. CO-OPERATION & DEV. [OECD], CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES 34 (2005); OECD, OECD GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES 9 (2005).

3. See, e.g., Wälde, *supra* note 1, at 396.

invoking, *inter alia*, the breach of the so-called “umbrella clause”.⁴ The umbrella clause is a regular feature of investment treaties and calls for host states to observe contractual obligations entered into by SOEs.⁵ For this type of claim to be successful two preconditions must be met.⁶ First,

4. See, e.g., *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, ¶ 68 (Oct. 12, 2005), <http://italaw.com/documents/Noble.pdf>; DOLZER & SCHREUER, *supra* note 1, at 161 et seq. (2008); Blyschak, *supra* note 1, at 591–92, 596; Kaj Hobér, *State Responsibility and Attribution*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 575 et seq. (Peter Muchlinski et al. eds., 2008).

5. For a typical version of a contemporary umbrella clause, see Energy Charter Treaty art. 10, Dec. 17, 1994, 2080 U.N.T.S. 95, 109 (“Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.”). See generally OECD, *Interpretation of the Umbrella Clause in Investment Agreements*, in *INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS* 101–34 (2008).

6. See Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, art. 2, U.N. Doc A/RES/56/83 [hereinafter Articles of Responsibility] (Dec. 12, 2001) which reads: “There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) [i]s attributable to the State under international law; and (b) [c]onstitutes a breach of an international obligation of the State.” See also *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR, 56th Sess., Supp. No. 10, at 68, U.N. Doc A/56/10 (2001), reprinted in Rep. of the Int’l Law Comm’n, 53d sess, Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles] (“Article 2 specifies the conditions required to establish the existence of an internationally wrongful act of the State, i.e. the constituent elements of such an act. Two elements are identified. First, the conduct in question must be attributable to the State under international law. Secondly, for responsibility to attach to the act of the State, the conduct must constitute a breach of an international legal obligation in force for that State at that time.”); see also, *EDF (Serv.) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, ¶¶ 213–14 (Oct. 8, 2009), <http://italaw.com/documents/EDFAwardandDissent.pdf> (“In the Tribunal’s view, such conduct, including the subsequent bringing to an end of the contract arrangements and the institution of a system of auctions in their place, was clearly designed to achieve a particular result within the meaning of the Commentary to Article 8 of the ILC Articles. As such, this conduct was attributable to Romania. The question, remains whether the acts and conduct that, according to the Tribunal’s determination were attributable to Romania, were in violation of the BIT, as alleged by Claimant. Claimant has summarized as follows the BIT breaches it alleges were committed by Romania: ‘. . . The BIT between Romania and the UK contains . . . Romania’s obligation to observe its contractual agreements These alleged breaches will be examined in turn.’”) (quoting Reply for Complainant, ¶ 377); *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, ¶ 318 (Aug. 18, 2008), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1611_En&caseId=C44. Regarding the preconditions of a state’s responsibility for the conduct of its instrumentalities, see generally Peter Tomka, *Are States Liable for the Conduct of Their Instrumentalities?—Introductory Remarks*, in *STATE ENTITIES IN INTERNATIONAL ARBITRATION* 8–9 (Emmanuel Gaillard & Jennifer Younan eds., 2008). Even though addressing violations of international law other than breach of the umbrella clause, a diligent discussion of attribution can be found in *Bayindir Insaat Turizm Ticaret VE Sanay A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, ¶ 113 (Aug. 26, 2009), <http://italaw.com/documents/Bayandiraward.pdf>.

the breach of contract must be attributable to the state.⁷ Second, the breach of contract must amount to a violation of the umbrella clause.⁸ Tribunals apply different legal standards to both requirements causing the same case to be decided differently depending on the constitution of the tribunal.⁹ As one commentator correctly notes, “[i]nvestors looking for consistency in pursuing claims and states contemplating new BITs have been placed in a quandary.”¹⁰

This article deals with the hotly debated first precondition of the state’s responsibility under the umbrella clause. Tribunals are split over the question of whether or not a breach of contract can be attributed to the state by applying the Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles).¹¹ When this question is answered in the affirmative tribunals move on to decide whether the respective breach amounts to a violation of the umbrella clause.¹² When, however, the question is answered in the negative, no further analysis is typically conducted because the state cannot be held responsible for conduct that cannot be attributed to it.¹³

7. See Articles of Responsibility, *supra* note 6, Annex, art. 2; see also *EDF*, ICSID Case No. ARB/05/13, ¶ 213; *Noble Ventures*, ICSID Case No. ARB/01/11, ¶ 68; *Nykomb Synergetics Tech. Holding AB v. Latvia*, Case No. 118/2003, Award, § 4.2 (Arb. Inst. of the Stockholm Comm. 2003), http://www.encharter.org/fileadmin/user_upload/Investor-State_Disputes/Nykomb.pdf; Nick Gallus, *An Umbrella Just for Two? BIT Obligations Observance Clauses and the Parties to a Contract*, 24 *ARB. INT’L* 157, 165 (2008).

8. See, Articles of Responsibility, *supra* note 6, Annex, art. 2; see also *EDF*, ICSID Case No. ARB/05/13, ¶ 213; *Noble Ventures*, ICSID Case No. ARB/01/11, ¶ 68; *Nykomb*, Case No. 118/2003, § 4.3; Gallus, *supra* note 7, at 165.

9. For a recent overview of the divergent constructions of the umbrella clause by ICSID tribunals, see Jonathan B. Potts, *Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization*, 51 *VA. J. INT’L L.* 1005 (2011); see also *Duke Energy*, ICSID Case No. ARB/04/19, ¶ 319–20; CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION—A COMMENTARY* 236 (2d ed. 2009) (“The exact meaning and effect of umbrella clauses has been the subject of much debate and disagreement in arbitral practice.”).

10. Potts, *supra* note 9, at 1030–31.

11. See Blyschak, *supra* note 1, at 611 (“To what degree this is possible, and under what circumstances, is a very uncertain area of law. Investment arbitration tribunal’s decisions on this point conflict, as do academic commentaries.”).

12. See, e.g., *Gustav F.W. Hamester GmbH & Co. KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, ¶ 313 (June 18, 2010), <http://italaw.com/documents/Hamesterv.GhanaAward.pdf> (“Naturally, if an act is considered attributable to the State, the Tribunal must then determine whether such an act is illegal and entails the international responsibility of the State If the Tribunal finds that an act is not attributable to the State, this should be the end of the matter.”); see also *EDF*, ICSID Case No. ARB/05/13, ¶¶ 213–14; *Nykomb*, Case No. 118/2003, ¶¶ 4.2–4.3.

13. See *AMTO LLC v. Ukraine*, Case No. 080/2005 (ECT), Final Award, ¶¶ 101, 107–8, 110 (Arb. Inst. of the Stockholm Comm. 2008), <http://www.italaw.com/documents/AmtAward.pdf> (holding that the conduct of the state-owned entity could not be attributed to the state and therefore concluding that the umbrella clause had no direct application to this case); see also *Hamester*, ICSID Case No. ARB/07/24, ¶ 313 (“If the Tribunal finds that an act is not attributable to the State, this

This article does not aim to contribute further arguments to one side or the other of this dispute. Rather, it intends to examine whether the existing case law is really as contradictory as it appears or whether it can be reconciled by taking the underlying motives of the tribunals into account.¹⁴ As will be shown, the controversy in some of the more high-profile cases only seemingly revolved around the question of the applicability of the ILC Articles and could have been avoided in the first place. Awareness that the real issue at stake may not necessarily be attribution under the ILC Articles can provide a way out of deadlock in some instances.

II. A RECENT EXAMPLE OF SEEMINGLY CONTRADICTING CASE LAW: *HAMESTER* AND *KARDASSOPOULOS*

A recent example of seemingly contradictory case law is *Hamester v. Ghana*¹⁵ and *Kardassopoulos v. Georgia*.¹⁶ In *Hamester*, the tribunal held the joint-venture agreement (JVA) entered into by the Ghana Cocoa Board (Cocobod), a SOE, could not be attributed to Ghana by relying on the ILC Articles.¹⁷ Therefore, Ghana could not be held responsible for any breach of the JVA under the umbrella clause.¹⁸ In contrast, the tribunal in *Kardassopoulos*, concluded that contractual commitments entered into by two SOEs, SakNavtobi and Transneft, could be attributed to Georgia by applying the ILC Articles.¹⁹

In *Hamester*, a request for arbitration was submitted against Ghana before the International Centre for Settlement of Investment Disputes (ICSID) on the basis of the BIT between Germany and Ghana.²⁰ The claimant argued that Cocobod breached the JVA on the processing of cocoa beans and asserted that these breaches were attributable to Ghana.²¹ According to the claimant, the breaches of the JVA were elevated to breaches of the BIT through the umbrella clause in Article

should be the end of the matter.”).

14. Such analysis appears to have first been conducted by Jean-Christophe Honlet and Guillaume Borg. See Jean-Christophe Honlet & Guillaume Borg, *The Decision of the ICSID Ad Hoc Committee in CMS v. Argentina Regarding the Conditions of Application of an Umbrella Clause: SGS v. Philippines Revisited*, 7 L. & PRAC. INT'L CT. & TRIBUNALS 1, 24–28 (2008) (examining contradictory decisions of tribunals and concluding “there may not be such a different approach . . .”). The present article intends to further develop their theory.

15. See *Hamester*, ICSID Case No. ARB/07/24.

16. See *Kardassopoulos v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (Mar. 3, 2010), <http://italaw.com/documents/KardassopoulosAward.pdf>.

17. See *Hamester*, ICSID Case No. ARB/07/24, ¶¶ 342–50.

18. *Id.*

19. See *Kardassopoulos*, ICSID Case Nos. ARB/05/18 and ARB/07/15, ¶¶ 273–80.

20. See *Hamester*, ICSID Case No. ARB/07/24, ¶ 1.

21. *Id.* ¶ 7.

9(2)²² of the BIT.²³ Ghana countered that the umbrella clause would not cover contractual obligations, and even if it did, it could only apply to contracts entered into by Ghana, not SOEs with a separate legal personality.²⁴

The tribunal conducted an in-depth analysis as to whether Cocobod's conduct could be attributed to Ghana under the ILC Articles and concluded that the preconditions of Articles 4, 5 or 8 of the ILC Articles were not met.²⁵ The tribunal explained that once it was decided that the act complained of was not attributable to the state, there was no need to determine whether this conduct was in breach of an international obligation of the state.²⁶ Nevertheless, in light of the parties' detailed submissions, the tribunal decided to expand its analysis based on the assumption that the acts were—contrary to the tribunal's conclusion—attributable to Ghana.²⁷

The tribunal therefore assessed whether the acts in question amounted to a breach of international law. In construing the breach of the umbrella clause, the tribunal first acknowledged that there were divergent decisions on the interpretation of the umbrella clause, “including the approach to the international law rules of attribution in this context.”²⁸ The tribunal quickly made clear that it shared the view that contracts concluded between the investor and legal entities separate from the state would not fall within the scope of the umbrella clause.²⁹ The tribunal pointed out that the JVA was signed by the claimant and Cocobod, not by Ghana, and provided three reasons for its conclusion.³⁰

First, pursuant to the wording of the umbrella clause, the contractual obligations that the claimant sought to impose on Ghana were not

22. The umbrella clause provided: “Each Contracting Party shall observe any other obligation it has assumed with regard to its investments in its territory by nationals or companies of the other Contracting Party.” Treaty between the Federal Republic of Germany and the Republic of Ghana for the encouragement and reciprocal protection of investments, Ger.-Ghana, art. 9(2), Feb. 24, 1995, http://www.unctad.org/sections/dit e/ia/docs/bits/germany_ghana.gr.pdf.

23. See *Hamester*, ICSID Case No. ARB/07/24, ¶¶ 1, 70, 75, 148–62.

24. *Id.* ¶¶ 83, 340 (citing Respondent's Counter-Memorial, ¶ 311).

25. *Id.* ¶¶ 182–285. Articles 4, 5, and 8 of the ILC Articles each set forth a basis for attribution to the state. Article 4 refers to state organs, article 5 to conduct of persons or entities exercising elements of governmental authority, and article 8 to conduct directed or controlled by the state. See Gallus, *supra* note 7, at 165.

26. See *Hamester*, ICSID Case No. ARB/07/24, ¶ 313.

27. See *id.*

28. See *id.* ¶ 343.

29. See *id.* The Tribunal cited with approval *Impregilo S.p.A. v. Islamic Republic of Pakistan*. See *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, ¶ 223 (Apr. 22, 2005), 12 ICSID Rep. 245 (2007) (“[C]ontracts concluded between an investor and a legal entity separate from the Islamic Republic of Pakistan did not fall within the scope of the umbrella clause.”).

30. See *Hamester*, ICSID Case No. ARB/07/24, ¶ 347.

“assumed by it.”³¹ “Given that the umbrella clause in this BIT is specifically delimited by reference to obligations that have been “assumed by the State,” the tribunal saw no basis to ignore these words, and to extend the ambit of the provision to contractual obligations assumed by other separate entities.”³²

Second, given the wording of Article 9(2), the tribunal concluded that the contracting states, Germany and Ghana, did not intend to “transform the nature, extent and governing law of domestic law contractual obligations concluded by separate entities.”³³

Third, the tribunal explained that it was “aware that some tribunals extended the ambit of ‘umbrella clauses’ to contracts concluded by separate entities, by reference to the international law principles of attribution.”³⁴ The tribunal held: “even if the international law principles of attribution are applicable in construing the ambit of Article 9(2) of the BIT here, it was clear that Cocobod’s act of concluding the JVA was not attributable” to Ghana under the ILC Articles.³⁵

The tribunal explained that in these circumstances, the contractual commitments of Cocobod, being a separate entity from the state, could not be considered as elevated by Article 9(2), into treaty commitments of the state itself.³⁶ Thus a violation committed by Cocobod could not constitute a violation of the BIT.³⁷

In *Kardassopoulos*, the tribunal favored another approach. *Kardassopoulos* was an ICSID arbitration brought under the Energy Charter Treaty and the BITs between Georgia and Greece and Georgia and Israel, dealing with an investment in the development of oil pipelines.³⁸ In this case, the tribunal did not have to assess the breach of the umbrella clause, but it dealt in another context with the question of whether Georgia was bound by the contractual commitments of two SOEs, SakNavtobi and Transneft.³⁹

Georgia rejected claims of unlawful expropriation and breach of the fair and equitable treatment standard by arguing it was not responsible for the contractual commitments of SakNavtobi and Transneft.⁴⁰ The tribunal held that Georgia was bound by the contractual commitments of

31. *See id.* ¶ 347i.

32. *See id.*

33. *See id.* ¶ 347ii.

34. *See id.* ¶ 347iii.

35. *See Hamester*, ICSID Case No. ARB/07/24.

36. *See id.* ¶ 348.

37. *See id.*

38. *See Kardassopoulos v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, ¶¶ 1–2 (Mar. 3, 2010), <http://italaw.com/documents/KardassopoulosAward.pdf>.

39. The claimants abandoned this claim in their Reply. *See id.* ¶ 212.

40. *See id.* ¶ 272.

SakNavtobi and Transneft by way of attribution pursuant to the ILC Articles.⁴¹ Further, the conduct of SakNavtobi and Transneft could be attributed to Georgia under Articles 4, 5 and 11 of the ILC Articles, an opposite conclusion from *Hamester*.⁴² It noted that “[w]hen considered together, the representation by SakNavtobi and Transneft and the various espousals by the Georgian Government of the JVA and the Deed of Concession are conclusive”⁴³ and concluded that “for the purpose of determining a breach of the applicable treaties, any acts or omissions of SakNavtobi and/or Transneft constituting such breach may be attributed to the Respondent.”⁴⁴

These recent awards reflect the conflicting views on the question of attribution. While the tribunal in *Hamester* denied that contractual undertakings could be attributed to the state under the ILC Articles, the tribunal in *Kardassopoulos* concluded otherwise. These resulting discrepancies between tribunals fail to provide adequate guidance on how to assess attribution by similarly acting SOEs.

III. THE QUESTION IN DISPUTE: CAN CONTRACTUAL OBLIGATIONS BE ATTRIBUTED UNDER THE ILC ARTICLES?

Hamester and *Kardassopoulos* are just two recent examples of an ongoing dispute. Tribunals and commentators alike are split over the question of whether the legal undertaking assumed by the SOE can be attributed to the state under the ILC Articles.⁴⁵ Only if the contractual obligations are attributable to the state, it is argued, can the subsequent breach be meaningfully attributed:

It must be noted that there are two points in time at which rules of attribution are important in applying obligations observance clauses to sub-state entity obligations. As with a claim for breach of any international obligation, rules of attribution can be applied to the act breaching the obligation. However, determining that the act breaching the obligation is attributable to the state is not the end of the matter. The act breaching the obligation is meaningless if the obligation is not that of the state. . . .It is the application of international rules of attribution at this first point in time – to determine the obligations of the state – which appears to have divided BIT tribunals.⁴⁶

41. *See id.* ¶ 274 (“In the Tribunal’s opinion, there can be no real question in these arbitrations as to the attribution of any acts or omissions on the part of SakNavtobi or Transneft to the Respondent. The Tribunal invoked Article 7 of the Articles on State Responsibility in its Decision on Jurisdiction, but Articles 4, 5 and 11 are equally applicable here.”).

42. *See id.* ¶¶ 274–80.

43. *See id.* ¶ 279.

44. *See id.* ¶ 280.

45. *See Gallus, supra* note 7, at 166 (“The key difference in the reasoning of the two sets of decisions reaching conflicting conclusions on the attribution of sub-state entity contracts seems to be the role of international law rules of attribution, as reflected in the ILC Articles.”); *see also Blyschak, supra* note 1, at 612–13.

46. Gallus, *supra* note 7, at 166; *see also Blyschak, supra* note 1, at 610–11.

Some tribunals and legal writers reject the idea that legal undertakings assumed by the SOE are attributable to the state under the ILC Articles. They take the stance that the ILC Articles are not general rules of attribution and cannot be used to attribute conduct, which does not constitute a breach of an international obligation. This position is supported by the commentary to the ILC Articles as adopted by the ILC in 2001 (Commentary) which explains that “[t]he 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”⁴⁷ and clarifies that “[s]uch rules have nothing to do with attribution for the purposes of State responsibility.”⁴⁸ The Commentary continues: “the State’s responsibility is engaged by conduct incompatible with its international obligations”⁴⁹ and makes clear that “[t]hus, 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.”⁵⁰

Early comments during the drafting stage of the ILC Articles lend further support to the argument that these provisions were not intended to serve as general rules of attribution. A report from 1973 explains that:

[a]ttaching to the State a manifestation of will which is valid, for example, in order to establish its participation in a treaty is, however, in no way identifiable with the operation which consists of attributing to the State particular conduct for the purpose of imputing to it an internationally wrongful act entailing international responsibility.⁵¹

The report continues to point out the narrow meaning of the envisioned ILC Articles by arguing that:

[i]t would be wrong to adopt the same criteria in these two cases and to propose an identical solution based on a general and common definition of ‘act of the State’. In the context of the responsibility of States for internationally wrongful acts, the ‘act of the State’ has its own specific character and must be defined according to particular criteria.⁵²

In line with these comments, Malcolm D. Evans also underlines the difference between rules of representation on the one hand and attribution under the ILC Articles on the other. He explains that “[t]he rules of attribution specify the actors whose conduct may engage the responsibility of the State, generally or in specific circumstances”⁵³

47. See Draft Articles, *supra* note 6, at 39.

48. See *id.*

49. See *id.*

50. See *id.*

51. *Documents of the Twenty-Fifth Session Including the Report of the Commission to the General Assembly*, [1973] 2 Y.B. Int’l L. Comm’n 189, U.N. Doc. A/CN.4/SER.A/1973/Add.1.

52. *Id.*

53. See James Crawford & Simon Olleson, *The Nature and Forms of International*

whereas he emphasizes that “[i]t should be stressed that the issue here is one of responsibility for conduct allegedly in breach of existing international obligations of the State”⁵⁴ and “does not concern the question which officials can enter into those obligations in the first place.”⁵⁵

A clear stance against the attribution of legal undertakings by applying the ILC Articles is taken by Richard Happ:

Contrary to a recently voiced opinion, it is not possible to attribute a contract concluded by a sub-division or state-entity to the state by using the rules on state responsibility. The rules of attribution have been developed in the context of attributing acts to the state in order to determine whether those acts are in breach of international law. They cannot be applied *mutatis mutandis*. A clear distinction exists between the responsibility of a state for the conduct of an entity that violates international law (e.g. a breach of treaty) and the responsibility of a State for the conduct of an entity that breaches a municipal law contract.⁵⁶

Other tribunals and commentators, however, attach a different meaning to the ILC Articles. They understand the ILC Articles to constitute general rules of attribution under which both wrongful and non-wrongful acts can be attributed to the state. While Andrew Newcombe and Lluís Paradell acknowledge that “[i]t may be argued that these rules have been developed in the context of attributing responsibility for international law breaches and are not transposable to attributing the undertaking (the contract), i.e., the legal obligation, to the state”⁵⁷ they counter that “the language and approach of the ILC’s Articles on State Responsibility and commentaries seem to suggest that they refer to attribution of conduct generally.”⁵⁸

Thomas W. Wälde also shares the view that, as a general matter, contractual undertakings can be attributed to the state, explaining that “[i]f a State enterprise . . . has entered into a contract, and if this contract, or rather contractual relationship, can be attributed, from entry to the end, to the State, then the State has entered into a commitment and is obliged to respect it.”⁵⁹

That the ILC Articles, or at least Article 4, constitute general rules of attribution and were therefore also applicable to conduct that would not constitute a wrongful act was upheld in *Siag v. Egypt*. The tribunal expressly followed the claimant’s argument that “Article 4 was a general

Responsibility, in INTERNATIONAL LAW 451, 460 (Malcolm D. Evans ed., 2d ed. 2006).

54. *See id.*

55. *See id.*

56. Richard Happ, *The Nykomb Case in the Light of Recent ICSID Jurisprudence*, in INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY 324 (Clarisse Ribeiro ed., 2006).

57. *See* ANDREW NEWCOMBE & LLUÍS PARADELL, THE LAW AND PRACTICE OF INVESTMENT TREATIES, STANDARDS OF TREATMENT 461 n.133 (Kluwer Law Int’l 2009).

58. *See id.*

59. Wälde, *supra* note 1, at 397.

principle of international law, which was not limited to the wrongful acts of a state organ"⁶⁰ and therefore concluded that "the non-wrongful acts of Egypt's judiciary are the acts of the Egyptian State."⁶¹

Kaj Hobér explains that if the ILC Articles are not applied to attribute contractual undertakings, "it would seem that this would allow states to do precisely what the rules of state responsibility were intended to prevent, namely to avoid responsibility by delegating responsibilities, to allow states to 'contract out' of state responsibility."⁶²

As this collection of authorities shows, two camps exist whose views appear irreconcilable. If the ILC Articles are regarded as general rules of attribution, both the legal undertaking assumed by the SOE and its subsequent breach will be attributed to the host state if the preconditions of Articles 4, 5 or 8 of the ILC Articles are met.⁶³ If the ILC Articles are only applied to conduct that potentially constitutes a breach of an international obligation, the legal undertaking is not attributable. As explained above, it is generally considered that the breach of contract alone cannot be meaningfully attributed because only a party to a contract can commit a breach.⁶⁴

IV. IS THERE A WAY OUT OF THE DEADLOCK?

Honlet and Borg suggest that the discrepancy between the two camps "may be more apparent than real."⁶⁵ Based on an analysis of *Eureko v. Poland*⁶⁶ and *Noble Ventures v. Romania*⁶⁷, the authors conclude that despite appearances, the states were held to be obliged by the legal undertaking because at the conclusion of the contract, they were

60. See *Siag v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, ¶ 194 (June 1, 2009), http://italaw.com/documents/WaguiehElieGeorgeSiag-AwardandDissentingOpinion_001.pdf.

61. See *id.* ¶¶ 194–95 (The tribunal based its argument on a comment by Dolzer & Schreuer to Article 7 of the ILC Articles: "The Tribunal prefers the arguments of the Claimants on this issue. In taking that view, the Tribunal notes the provisions of Article 7 of the ILC Articles, which states that: 'The conduct of an organ of a State...shall be considered an act of the State under international law . . . even if it exceeds its authority' [emphasis added]. Dolzer and Schreuer state that under Article 4 of the ILC Articles, '[a]cts of a state's organs will be attributed to that state even if they are contrary to law...' [emphasis added]. 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.") (citations omitted).

62. Hobér, *supra* note 4, at 575.

63. See Gallus, *supra* note 7, at 165.

64. See *id.* at 166.

65. See Honlet & Borg, *supra* note 14, at 24 (footnote omitted).

66. See *Eureko B.V. v. Republic of Poland*, Partial Award and Dissenting Opinion (Rajski), (Aug. 19, 2005), 12 ICSID Rep. 331 (2007).

67. See *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, (Oct. 12, 2005), <http://italaw.com/documents/Noble.pdf>.

represented by the state treasury and a SOE, respectively.⁶⁸ Thus, they explain, the states were considered to be responsible because of ab initio representation rather than post hoc attribution.⁶⁹

Honlet and Borg rightly suggest that when examining the apparently contradictory case law, it is worthwhile to look beyond the surface and to switch the focus from the apparent decisive point, namely attribution, to the potentially actual point, namely the parties to the contract. In several instances the role played by the state at the conclusion of the contract appeared to be a decisive factor when tribunals assessed the question of whether or not the contractual obligation entered into by the SOE could be attributed to the state.

It is possible to reconsider *Kardassopoulos* and examine the tribunal's considerations in light of Honlet and Borg's observations. In its award, the tribunal repeatedly emphasized the involvement of the government of Georgia in the negotiations:

The assurances given to Claimant regarding the validity of the JVA and the Concession were *endorsed by the Government* itself, and some of the *most senior Government officials of Georgia* (including, inter alia, President Gamsakhurdia, President Shevardnadze, Prime Minister Sigua and Prime Minister Gugushvili) were *closely involved in the negotiation of the JVA and the Concession*. The Tribunal also notes that the Concession was *signed and "ratified"* by the *Ministry of Fuel and Energy*, an organ of the Republic of Georgia.⁷⁰

....

The reasoning in *Southern Pacific Properties* is apposite to this case in many respects. Thus, even if the JVA and the Concession were entered into in breach of Georgian law, the fact remains that these *two agreements were 'cloaked with the mantle of Governmental authority'*. Claimant had every reason to believe that these agreements were in accordance with Georgian law, not only because they were entered into by Georgian State-owned entities, but also because their content was *approved by Georgian Government officials* without objection as to their legality on the part of Georgia for many years thereafter.⁷¹

While the tribunal formally based its argument that Georgia was bound by the contracts concluded by the state entities on the ILC Articles, these passages suggest that the tribunal was influenced in its decision to hold the host state responsible by the host state's strong involvement in the conclusion of the agreements. The tribunal argued that the agreements were "cloaked with the mantle of Governmental authority";⁷² this can be construed to mean that the SOEs acted on behalf of Georgia, or that Georgia entered into the agreement as an additional

68. See Honlet & Borg, *supra* note 14, at 27.

69. See *id.*

70. *Kardassopoulos v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, ¶ 273 (Mar. 3, 2010), <http://italaw.com/documents/KardassopoulosAward.pdf> (emphasis added).

71. *Id.* (emphasis added).

72. See *id.*

party.

In *EnCana v. Ecuador*, the considerations provided by the tribunal also suggest that its finding of attribution was based on the contractual undertakings assumed by the SOE Petroecuador to Ecuador because of the state's involvement during the conclusion and performance of the contract.⁷³ It is interesting to note in this context that the domestic law of Ecuador defined agreements of the type concluded as "entered into by the State, through PETROECUADOR".⁷⁴ When dealing with the question of whether Ecuador was responsible for the obligations entered into by the SOE, the tribunal did not expressly, however, base its conclusion on the argument that Ecuador was represented by Petroecuador but rather relied on Article 5 and 8 of the ILC Articles.

In *Noble Ventures*, representation rather than attribution was even more manifestly the actual reason for considering the state bound by the obligations assumed by the SOE. When assessing whether the conduct of the entities SOF and APAPS could be attributed to Romania under Article 5 of the ILC Articles,⁷⁵ the tribunal reviewed the statutory bases under Romanian law of these entities and concluded that they were authorized to act on behalf of the state:

Consequently, the Tribunal concludes that SOF and APAPS were *entitled by law to represent the Respondent and did so in all of their actions as well as omissions*. The acts allegedly in violation of the BIT are therefore attributable to the Respondent for the purposes of assessment under the BIT.⁷⁶

....

Both SOF and APAPS were responsible, as a matter of Romanian law, for the transfer of publicly owned assets to private investors. Both entities were *clearly charged with representing the Respondent* in the process of privatizing State-owned companies and, for that purpose, *entering into privatization agreements*

73. See *EnCana Corp. v. Republic of Ecuador*, LCIA Case No. UN3481, Award, ¶ 154 (Feb. 3, 2006), <http://italaw.com/documents/EncanaAwardEnglish.pdf> ("The Respondent did not deny that entering into Participation Contracts with foreign companies to exploit the natural resources of Ecuador, the conduct of Petroecuador as a State-owned and State-controlled instrumentality is attributable to Ecuador for the purposes of the BIT. In this respect it is relevant that Petroecuador was, in common with the SRI, subject to instructions from the President and others, and that the Attorney-General pursuant to the law had and exercised authority 'to supervise the performance of . . . contracts and to propose or adopt for this purpose the judicial actions necessary for the defence of the national assets and public interest'. According to the evidence this power extended to supervision and control of Petroecuador's performance of the participation contracts and to their potential renegotiation. Thus the conduct of Petroecuador in entering into, performing and renegotiating the participation contracts (or declining to do so) is attributable to Ecuador. It does not matter for this purpose whether this result flows from the principle stated in Article 5 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts or that stated in Article 8. The result is the same.") (footnotes omitted).

74. See *id.* ¶ 26 (citation omitted).

75. See *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, ¶ 70 (Oct. 12, 2005), <http://italaw.com/documents/Noble.pdf>.

76. *Id.* ¶ 80 (emphasis added).

and related contracts on behalf of the Respondent. Therefore, this Tribunal cannot do otherwise than conclude that *the respective contracts, in particular the SPA, were concluded on behalf of the Respondent* and are therefore attributable to the Respondent for the purposes of Art. II(2)(c)BIT.⁷⁷

The tribunal expressly held that these entities represented Romania in the negotiations and concluded the contract on behalf of the state.

The tribunal in *LESI-Dipenta v. Algeria* relied on a similar argument when explaining that the contract concluded with a separate legal entity may be attributed to the state where the state was at least indirectly involved in the contract negotiation and exercised influence over the entity.⁷⁸

In contrast, tribunals that argued that the contractual undertaking could not be attributed to the state emphasized the distinction between the entity concluding the agreement and the state. In *Hamester*, the tribunal explained:

The JVA was signed by Hamester and Cocobod, *with no implication of the ROG* [Republic of Ghana]. The ROG was not named as a party, and did not sign the contract. There has been *no suggestion that the ROG was intended to be a party thereto* (and indeed there may well have been reasons why it was not a party thereto).⁷⁹

The tribunal stressed that Ghana was by no means involved in the conclusion of the contract. Therefore, the tribunal expressed its belief that Ghana did not cause the claimant to believe that Ghana intended to become a party to this agreement. Thus, even under the assumption that the SOE's conduct could be attributed to Ghana,⁸⁰ the tribunal refused to consider Ghana bound by the contract because it was clear under the circumstances that Ghana did not intend to become a party.

In *Nagel v. Czech Republic*,⁸¹ the claimant inter alia argued that the Czech Republic breached the umbrella clause contained in the BIT between the United Kingdom and the Czech Republic because of the failure of a SOE to meet its obligation to involve the claimant in any telecommunications license awarded to the entity.⁸² The tribunal rejected this claim on the grounds that the contract was entered into by the SOE and not the Czech Republic:

77. *Id.* ¶ 86 (emphasis added).

78. *See* Consorzio Groupement LESI-DIPENTA v. People's Democratic Republic of Algeria, ICSID Case No. ARB/03/8, Award, § II, ¶ 19 (ii) (Jan. 10, 2005), 15 ICSID Rep. 3 (2010).

79. Gustav F.W. Hamester GmbH & Co. KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, ¶ 347 (June 18, 2010), <http://italaw.com/documents/Hamesterv.GhanaAward.pdf> (emphasis added).

80. *See id.* ¶ 313.

81. *See* Nagel v. Czech Republic, Case No. 49/2002, Award, (Arb. Inst. of the Stockholm Comm. 2003), http://www.italaw.com/documents/Nagel_v_CzechRep_Award.pdf.

82. *See id.* ¶¶ 72–76, 91.

While Sra—subsequently succeeded by CRa—was a party to the Cooperation Agreement, the Czech Republic was not. Although Sra was a fully owned State enterprise, it was a separate legal person whose legal undertakings did not as such engage the responsibility of the Czech Republic.

... .
 The Arbitral Tribunal notes that Mr Nagel's accounts of frequent and close contacts with persons on the Government side differ a great deal from Mr Dyba's and Mr Sedlacek's statements that they were neither involved in nor informed about Mr Nagel's and Millicom's action and plans in the Czech Republic. However, the Arbitral Tribunal does not find it necessary, for the purpose of this case, to go into details in this regard but finds it sufficient to note that, in any event, *there is no convincing evidence of such concrete Government involvement in connection with the conclusion of the Cooperation Agreement as would make the Czech Republic responsible for the implementation of the Agreement.* Moreover, as explained to the Arbitral Tribunal, Government approval or any other binding commitment by the Government would have had to be made in a form which was certainly not applied in this case, and *Mr Nagel cannot have been justified in believing that, as a result of the Cooperation Agreement, the Government had made any commitment or undertaken any legal obligations towards him.*⁸³

This analysis provides particular insight if contrasted with the involvement of the Georgian government in *Kardassopoulos*. As noted, in *Kardassopoulos* the tribunal pointed out that “[t]he assurances given to Claimant regarding the validity of the JVA and the Concession were endorsed by the Government itself”⁸⁴ and that “some of the most senior Government officials of Georgia . . . were closely involved in the negotiation of the JVA and the Concession.”⁸⁵ Considering these differences, it is not surprising that the tribunals arrived at opposite conclusions as to the question of whether the host state was bound by the contract.

Finally, some tribunals emphasize the parties that are involved at the close of contract negotiations. While *Impregilo v. Pakistan*⁸⁶ did not address the investor's justifiable expectations in such clear terms as was the case in *Nagel*, the lack of such expectation can be read into the tribunal's repeated emphasis that the relevant “[c]ontracts were concluded with WAPDA and not with the State of Pakistan”⁸⁷ and that “the [c]ontracts at issue were concluded between the Claimant and WAPDA”⁸⁸.

In the cited cases, the extent to which the host state was involved in

83. *Id.* ¶ 321, 324 (emphasis added).

84. *See Kardassopoulos v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Decision on Jurisdiction, ¶ 191 (July 6, 2007), http://italaw.com/documents/Kardassopoulos_000.pdf (emphasis added).

85. *Id.*

86. *See Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, (Apr. 22, 2005), 12 ICSID Rep. 245 (2007).

87. *See id.* ¶¶ 198, 216.

88. *See id.* ¶ 216.

the negotiations appears to have played a decisive role in the tribunal's examination of whether or not the legal undertaking in question could be attributed to the state. However, it would be more convincing to take into account the state's involvement in the negotiations at an earlier stage, namely when the parties to the agreement are determined. If the state's participation in the conclusion of the agreement leads to the result that the state has become a party to the contract and assumed the obligations subsequently breached, attribution is no longer required and thus there is no need to engage in the discussion of whether the ILC Articles can be used to attribute legal undertakings.

Two scenarios can be distinguished when assessing whether the state has become a party to the agreement. First, the involvement of the state causes the investor to reasonably and in good faith believe that the SOE represented the state at the conclusion of the agreement. In this case, the state, and not the SOE, has become the obligor of the contractual duties. Because the SOE acts as a representative of the state when performing the contract, the state is responsible for any subsequent breach under the umbrella clause based on principles of agency and not attribution. Second, the involvement of the state causes the investor to reasonably and in good faith believe that the state intended to become a party to the agreement along with the SOE. In this case, it must be determined which obligations have been assumed by the state. If the state was heavily involved in the negotiation phase, as was apparently the case in *Kardassopoulos*,⁸⁹ it can be argued that the investor could reasonably understand that the state jointly and severally assumed the same obligations as the SOE.⁹⁰ In such a case, the failure to perform by the SOE would also constitute a failure of the state, and no attribution would be required. Only if an analysis of the parties' intent shows that the state did not assume the subsequently breached obligation, does the question arise whether this legal undertaking can be attributed to the state based on the ILC Articles.

The question of whether the state has become a party to the contract can be assessed by applying general principles of law.⁹¹ Whether the SOE negotiated "cloaked with the mantle of Governmental authority" can be determined by applying the doctrine of apparent authority as formulated in several transnational codifications, such as Article 14(2) of the Convention on Agency in the International Sale of Goods,⁹² Article

89. *See id.* ¶ 273.

90. *See id.* ¶ 280 ("For the purpose of determining a breach of the applicable treaties, any acts or omissions of SakNavtobi and/or Transneft constituting such breach may be attributed to the Respondent.").

91. For the relevance of general principles of law in investment arbitration, see generally Tarcisio Gazzini, *General Principles of Law in the Field of Foreign Investment*, 10 J. WORLD INVESTMENT & TRADE 103, 103–19 (2009).

92. *See* Convention on Agency in the International Sale of Goods art. 14 ¶ 2, Feb. 17,

2.2.5 of the UNIDROIT Principles of International Commercial Contracts 2010,⁹³ and Article 3:201 of the Principles of European Contract Law.⁹⁴ All these provisions share the same underlying idea: The principal shall be bound by an agreement entered into by the agent and the third party if the principal's conduct causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority.⁹⁵

Whether the state by its involvement expressed its intention to become a party along with the SOE can also be assessed by applying the principle of implied consent as formulated in Article 2.1.1 of the of the UNIDROIT Principles of International Commercial Contracts 2010⁹⁶ or Article 2:102 of the Principles of European Contract Law.⁹⁷ These provisions appear to reflect a generally acknowledged principle, as noted by Gary B. Born "[m]ost legal systems recognize that a party's assent to contractual terms may be established by conduct."⁹⁸

Inspiration can also be taken from the discussion on commercial arbitration regarding the legal bases for subjecting non-signatories to the arbitration agreement. When addressing the question of which legal principle the joinder of "less-than-obvious parties" shall be determined, William W. Park explains:

1983, 22 I.L.M. 249 ("Nevertheless, where the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.").

93. See UNIDROIT, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 82 (Int'l Inst. for the Unification of Private L., 2d ed. 2010) ("However, where the principal causes the third party reasonably to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.").

94. See THE COMM'N ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW: PARTS I AND II, at 201 (Ole Lando & Hugh Beale eds., 2000) ("A person is to be treated as having granted authority to an apparent agent if the person's statements or conduct induce the third party reasonably and in good faith to believe that the apparent agent has been granted authority for the act performed by it.").

95. See also GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: VOLUME I 1150 (2009) ("There are few principled grounds for choosing among these options, providing the basis for a substantial argument that, where international commercial contracts are concerned, a specialized rule of international law governing apparent authority should apply.").

96. See UNIDROIT, *supra* note 93, at 34 ("A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.").

97. See THE COMM'N ON EUROPEAN CONTRACT LAW, *supra* note 94, at 143 ("The intention of a party to be legally bound by contract is to be determined from the party's statements or conduct as they were reasonably understood by the other party.").

98. See BORN, *supra* note 95, at 666 (containing numerous references); see also *id.* at 1150.

Arbitral jurisdiction based on implied consent involves a non-signatory that should reasonably expect to be bound by (or benefit from) an arbitration agreement signed by someone else, perhaps a related party. In such circumstances, no unfairness results when arbitration rights and duties are inferred from behaviour.

....

Implied consent focuses on the parties' true intentions. Building on assumptions that permeate most contract law, joinder extends the basic paradigm of mutual assent to situations in which the agreement shows itself in behavior rather than words.⁹⁹

A related concept is the principle of deemed consent:

Properly understood, 'deemed consent' operates simply as a way to objectify assent for fact patterns where an agreement exists, notwithstanding that traditional formalities may be absent or unclear. The circumstances of the parties' relationship will be seen as 'tantamount' to an agreement (perhaps a 'backdoor' contract) even if the conduct does not fit squarely within the contours of classic contract doctrine.¹⁰⁰

Park notes, however, that this doctrine "should never replace clear-minded analysis of who agreed to what."¹⁰¹ Reliance on deemed consent is only appropriate where "the parties' reasonable expectations require that arbitration be imposed by virtue of facts which in fairness must be assimilated to consent."¹⁰²

Relying on non-domestic principles to determine the parties to an agreement is not uncommon in commercial arbitration. Gary B. Born observes that "[a] number of arbitral awards have applied principles of international law to ascertain the parties to an international arbitration agreement."¹⁰³

Obviously, the scope of the principle of implied or deemed consent is not limited to a determination of the parties to an arbitration agreement; rather, these principles are generally applicable to such a determination.¹⁰⁴

99. William W. Park, *Non-Signatories and International Contracts: An Arbitrator's Dilemma*, in MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION ¶ 1.12 (Belinda McMahon ed., 2009); see also NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 2.52 (5th ed. 2009) ("As between the original parties to the arbitration agreement, such consent may be either express, implied, or by reference to a particular set of arbitration rules"); W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 177 (3d ed. 2000) ("The addition as respondents of non-signatory parties, parent corporations, or members of a group of companies, is justified only where there are special circumstances (including participation in the performance of the contract) from which a contractual intention to include them within the scope of the arbitration clause can be implied.").

100. Park, *supra* note 99, ¶ 1.45.

101. See *id.*

102. See *id.* ¶ 1.47.

103. See BORN, *supra* note 95, at 1212 (containing numerous references).

104. See THE COMM'N ON EUROPEAN CONTRACT LAW, *supra* note 94, at 143; UNIDROIT, *supra* note 93.

Finally, it should be clarified that the purpose of this article is not to provide yet another basis to hold host states responsible. Rather, by assessing whether the state has become a party can be advantageous to the state. For instance, if proper analysis shows that in light of all relevant circumstances the investor could not have reasonably assumed that the state had become a party, the risk is reduced that the tribunal will take the state's conduct inappropriately into account when dealing with attribution. The involvement of the state during the negotiation phase plays an incidental role under the ILC Articles, which focus chiefly on the attribution of wrongful acts.¹⁰⁵ The involvement of the state during the negotiation phase plays an incidental role. It may primarily be of relevance under Article 8 of the ILC Articles. If determination of the parties to an agreement and attribution under the ILC Articles is strictly separated, a more convincing result can be achieved.

V. CONCLUSION

Analysis shows that in some instances, the tribunal's decision as to whether a subsequently breached contractual undertaking can be attributed to the host state appears to be influenced by the involvement of the host state in the conclusion of the contract. However, such involvement is already and primarily relevant when determining the parties to the agreement. The state may be considered to be a party of the agreement if its involvement caused the investor reasonably to believe that it intended to become a party to the agreement. Such assessment could be conducted based on the generally acknowledged principles of apparent authority, implied consent or deemed consent.

If a proper assessment of the parties' expectations at the conclusion of the contract leads to the result that the state had become a party to the agreement, the hotly debated question of whether contractual obligations are attributable under the ILC Articles can be avoided. However, if an examination shows that the investor could not have reasonably assumed that the state has become a party, a focused analysis can be conducted as to whether the preconditions of the ILC Articles are met. In such assessment, the host state's participation in the negotiations plays only an incidental role.

105. See, e.g., Gallus, *supra* note 7, at 166 (illustrating that primarily international law rules of attribution are traditionally applied to acts breaching an international law obligation).