**International Law as the Basis for Extending Arbitration Agreements Concluded by States or State Entities to Non-Signatories**

# I. INTRODUCTION

This article examines the following question: is (i) the law governing the extension of arbitration agreements concluded by States or State entities to non-signatories different from (ii) the law governing the same issue in arbitrations between purely private parties? The answer usually given in the past was in the negative, albeit with varying degrees of hesitation.[[1]](#footnote-1) This article answers the question in the affirmative, arguing that the differencelies in the application of public international law to the matter. The argument is not that the extension of arbitration agreements concluded by States or State entities to non-signatories is governed *exclusively* by international law, but, rather, that international law is applicable in *parallel* to domestic law. By exploring the role of international law in that regard, this article makes an original contribution towards identifying the applicable legal framework governing the question of the extension of arbitration agreements to non-signatories in the context of arbitrations involving State or State entities.

The latest ICC dispute resolution statistics report took note of a ‘new all-time ICC record’, as in 2019 20% of the news cases involved States or State entities,[[2]](#footnote-2) representing an impressive 67% increase in the number of such arbitrations over the past five years.[[3]](#footnote-3) This trend is reinforced by the current backlash against investment treaty arbitration, exemplified inter alia by States’ withdrawal from the ICSID Convention,[[4]](#footnote-4) the termination of their Bilateral Investment Treaties (BITs),[[5]](#footnote-5) and the *Achmea* decision of the Court of Justice of the EU.[[6]](#footnote-6) Foreign investors will increasingly often seek protection against state action on the basis of *contracts* concluded with States or States entities providing for international arbitration rather than *investment treaties*. Therefore, delineating the scope of arbitration agreements contained in state contracts and determining the law applicable to them is of pivotal practical importance. Not least because, even after obtaining a favourable award against States (or State entities), investors will face serious and, in some cases, insurmountable obstacles in enforcing it against non-signatory State entities (or States). According to Emmanuel Gaillard, ‘it is in many cases the effectiveness of arbitral awards – and thus the commitment of a State to resolve certain disputes through arbitration – that will give way before State immunity from execution and respect for the division of the State’s commercial activities into separate legal entities’.[[7]](#footnote-7) However, in several cases courts refuse to disregard the separate legal personality of States or State entities at the enforcement stage.[[8]](#footnote-8) By way of example, in 2019 the Moscow Commercial Court refused to enforce an arbitral award against the State of Kyrgyzstan because the arbitration was signed by, and the award was issued against, the Ministry of Transport.[[9]](#footnote-9)

As a rule, an arbitration agreement contained in a contract is binding only upon the entities which have signed that contract.[[10]](#footnote-10) At the same time, arbitral tribunals and domestic courts recognise that in certain circumstances arbitration agreements can be extended to non-signatories. Unfortunately, there is no uniform approach as clearly highlighted by the antithetical approaches of the French and English Courts in *Dallah* and, more recently, in *Kabab-Ji* (which concerned private entities).[[11]](#footnote-11) Two ICSID contract tribunals also reached diametrically opposite results on whether Bangladesh could be joined in an arbitration pursuant to an arbitration agreement contained in a contract signed by Petrobangla, a State entity.[[12]](#footnote-12) Likewise, in *Westland*, while the tribunal extended the arbitration agreement between Westland Helicopters and the Arab Organisation for Industrialisation to four non-signatory States (Egypt, United Arab Emirates, Saudi Arabia, and Qatar), the Swiss Federal Tribunal set the award aside (with respect to Egypt).[[13]](#footnote-13)

This uncertainty is linked to the lack of a proper theoretical framework regarding the extension of arbitration agreements to non-signatories,[[14]](#footnote-14) especially in arbitrations involving States or State entities.[[15]](#footnote-15) According to a popular arbitrator, ‘the “extension” of the arbitration clause to the non-signatory State, is to a large extent a matter of personal judgment’, thus explaining ‘why, confronted with relatively similar factual and legal contexts, different arbitral tribunals or courts may sometimes reach – and have sometimes reached – opposite conclusions’.[[16]](#footnote-16) Indeed, most of the analysis to date directly proceeds with providing a typology of cases where such extension is justified,[[17]](#footnote-17) without first determining the applicable law on the issue.[[18]](#footnote-18) The German Supreme Court held that when there is a need to protect the non-signatory party, the issue of the extension of the arbitration agreement to it will be governed by the law applicable to the relationship between the third party and the party to the arbitration agreement (rather than the law applicable to the arbitration agreement).[[19]](#footnote-19) However, a case-by-case approach or the inevitable exercise of the adjudicators’ judgment cannot substitute methodology.[[20]](#footnote-20) In 2017 Professor Brekoulakis suggested a new theory for extending arbitration agreements to non-signatories based on the concept of ‘dispute’.[[21]](#footnote-21) However, the determination of the applicable law always comes *before* its application to specific facts. The extension of the arbitration agreement to non-signatories can be no different. ‘Consent’, ‘abuse’, ‘need for protection’, ‘dispute’ and other similar concepts are also legal – not purely factual – concepts and can only be interpreted and applied within one (or more) legal system(s).

The argument of this article is set out in three main sections below. **Section II.** explains that the extension of the arbitration agreement to third parties will be determined by reference to (i) the law applicable to the arbitration agreement, which will generally be either the law applicable to the contract containing the arbitration clause or the law of the seat, or (ii) by applying transnational legal principles. Next, this article examines whether international law plays a role in that regard, concluding that it is, indeed, relevant (**Section III.**). **Section IV.** explores the international legal principles that are relevant to the extension of arbitration agreements to non-signatories. The conventional *summa divisio* of the bases for extending arbitration agreements to non-signatories is between consensual theories, revolving around the idea of implied consent, and non-consensual theories.[[22]](#footnote-22) The discussion of the relevant international rules will follow that distinction in **Sections IV.A.** and **IV.B.** respectively. **Section V.** concludes.

Before analysing the salient issues two caveats are necessary. This article does not examine two questions: (i) the definition of ‘State contracts’ and (ii) the delineation of the concept of ‘State entities’. The analysis of either warrants the length of a separate article or even a monograph. The concept of State contracts is extensively discussed in the relevant literature.[[23]](#footnote-23) For the purposes of this article State contracts are understood as contracts between State or State entities and foreign investors concerning foreign investments.[[24]](#footnote-24) Likewise, questions regarding what counts as a State entity, and, perhaps more importantly, what are the relevant rules for such determination are beyond the scope of this article.[[25]](#footnote-25) However, these caveats do not diminish the article’s original contribution. Consensus among the parties about the nature of their contract or the characterisation of a particular entity as State entity does not prevent disputes regarding the extension of arbitration agreements to non-signatories.

# II. THE LAW GOVERNING THE EXTENSION OF THE ARBITRATION AGREEMENT TO NON-SIGNATORIES

The first answer in response to what is the law applicable to the issue of the extension of the arbitration agreement to non-signatories is that this is no other than the law governing such agreement.[[26]](#footnote-26) After all, the word “extension” is not entirely accurate[[27]](#footnote-27) and the question really revolves around the personal scope of the arbitration agreement (jurisdiction *ratione personae*).

The parties could very well explicitly choose a particular law to govern their agreement to arbitrate and, naturally, this would be the end of the matter.[[28]](#footnote-28) However, this rarely happens.[[29]](#footnote-29) In the absence of an explicit choice of the law applicable to the arbitration agreement, in most cases courts and tribunals either apply the law applicable to the contract containing that arbitration agreement or the law of the seat (*lex loci arbitri*), which governs procedural matters.[[30]](#footnote-30)

In the early 1990s the conventional wisdom, as expressed by Lord Mustill, was that it would be ‘exceptional’ for the law applicable to the arbitration agreement to be different from that applicable to the rest of the contract.[[31]](#footnote-31) Subsequent cases cast doubt on that approach in England and other jurisdictions. Ultimately, a more nuanced approach emerged distinguishing between (i) cases in which the parties have chosen explicitly the governing law of the contract and (ii) cases in which there is no such express choice. The UK Supreme Court recently held that in the former case, ‘an agreement on a choice of law to govern a contract should generally be construed as applying to an arbitration agreement set out or otherwise incorporated in the contract.’[[32]](#footnote-32) When the parties did not choose ‘the law applicable to the arbitration agreement, either specifically or by choosing a system of law to govern the contract as a whole including the arbitration agreement’, the court must determine ‘objectively and irrespective of the parties’ intention, with which system of law the arbitration agreement has its closest connection’.[[33]](#footnote-33) In that context, ‘as a general rule’, ‘the law of the place chosen as the seat of arbitration’ will constitute ‘the law most closely connected with the arbitration agreement which in the absence of choice will apply by default’.[[34]](#footnote-34) As a result, when the contract contains an express choice of law, that law will likely govern the arbitration agreement and the question of the extension of such agreement to third parties.[[35]](#footnote-35) When there is no such choice, the law governing the arbitration agreement and questions regarding its scope *ratione personae* will likely be the law of the seat.[[36]](#footnote-36) Naturally, the domestic law which is found to be applicable could (and in some cases does) contain a *renvoi* to another domestic law.[[37]](#footnote-37)

The second approach in relation to the law applicable to the issue of the extension of arbitration agreement to non-signatories is to look beyond a specific domestic legal system. This is often described as ‘transnational’ approach.[[38]](#footnote-38) More generally, transnational approaches are linked to the idea that international arbitrators ‘play a judicial role for the benefit of the international community’, rather than a particular State or States.[[39]](#footnote-39) In this context, the validity of the arbitration clause is not determined by a particular system of domestic law, but, rather, a set of transnational principles and ‘the common intention of the parties, without it being necessary to make reference to a national law’.[[40]](#footnote-40) According to a more nuanced view, instead of replacing domestic law as the law applicable to the arbitration agreement, transnational principles could play a corrective or supplementary role. [[41]](#footnote-41) Likewise, to determine the law applicable to the issue of the extension of the arbitration agreement to non-signatories, transnational principles can apply exclusively or in addition to a specific domestic law. In the latter case, transnational law will correct or supplement the domestic law applicable to the arbitration agreement, usually the law governing the contract or the law of the seat, as explained above. The former approach was adopted in the famous (or infamous) award in *Dow Chemical* which extended the arbitration agreement to non-signatory companies belonging to the same ‘group of companies’.[[42]](#footnote-42) The Paris Court of Appeal rejected the set-aside application,[[43]](#footnote-43) and more recently in *Kabab-Ji*, confirmed that the arbitration agreement was rightly extended to a non-signatory without references to a specific domestic law.[[44]](#footnote-44) Other tribunals also adopt a genuine transnational approach.[[45]](#footnote-45) For example, an arbitral tribunal held that there is a ‘[g]eneral principle that transnational norms should be applied to determine the issue of extension of the arbitration clause to a non-signatory, even when piercing the corporate veil is at issue’.[[46]](#footnote-46)

# III. THE APPLICATION OF INTERNATIONAL LAW TO THE EXTENSION OF ARBITRATION AGREEMENTS IN INVESTMENT CONTRACTS

The previous section explained that three systems of law potentially govern the extension of arbitration agreements to non-signatories: (i) the law of the contract (*lex contractus*); (ii) the law of the seat (*lex arbitri*), and (iii) transnational principles. Irrespective of which of the three is held to be applicable, public international law is part of all of them in arbitrations involving States or State entities on the basis of investment contracts. As a result, international law will be relevant to the issue of the extension of arbitration agreements contained therein to non-signatories.

The Permanent Court of International Justice (PCIJ) in *Serbian loans* adopted a binary understanding of agreements concluded by States dividing them into (i) contracts governed by a particular domestic law which will be determined by applying private international law (conflict of laws) rules and (ii) treaties which are subject to international law.[[47]](#footnote-47) Article 2(1)(a) of the Vienna Convention on the Law of Treaties (VCLT) provides that one of the defining characteristics of international treaties is that they are ‘governed by international law’.[[48]](#footnote-48) However, nowhere does the VCLT stipulate that any agreement concluded by a State which is not a treaty is governed exclusively by domestic law. In fact, public international law is often part of the *lex contractus* in contracts between foreign investors and States or State entities. A close examination of the universe of applicable clauses in contracts concluded by foreign investors and States or State entities reveals a complex picture, which in turn raises important questions regarding the relationship between domestic and international law.[[49]](#footnote-49) In *Texaco and Calasiatic v Libya* the sole arbitrator René-Jean Dupuy held that ‘treaties are not the only type of agreements governed by [international] law… contracts between States and private persons can, under certain conditions, come within the ambit of a particular and new branch of international law: The international law of contracts’.[[50]](#footnote-50)

Certain investment contracts contain applicable law clauses referring to the application of rules and principles of public international law[[51]](#footnote-51) or ‘considerations of equity and generally recognized principles of law and in particular international law’.[[52]](#footnote-52) In some cases international law applies alongside with domestic law[[53]](#footnote-53) or to the extent that it is not incompatible with it.[[54]](#footnote-54) In *BP v Libya*, *Texaco and Calasiatic v Libya*, and *LIAMCO v Libya* internationalisation was achieved by reference to the relevant applicable law clauses.[[55]](#footnote-55) Αll three tribunals accepted that ‘[t]he non-municipal system by which the contract is to be governed may be public international law’.[[56]](#footnote-56) The taxonomy of different applicable law clauses provided by Professor Böckstiegel summarises the different scenarios and is indicative of the complexity of the matter, with contracts being subject:

1 to two systems of national law; 2 to a national law and, in addition, to the ‘principle of good will and good faith’; 3 to a national law in combination with 'the general principles of law and justice’; 4 to the principles of law common to the national legal systems of the contracting partners; 5 to the ‘principles of law recognised by civilised nations’; 6 exclusively to the contract itself, possibly in addition to *bona fides*; 7 to legal principles or combinations of legal principles which go beyond any specific category; 8 to the arbitrators themselves, asking them to act as ‘*amiable compositeur*’ or decide ‘*ex aequo et bono*’; 9 and – to allow arbitrators to ‘decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances’.[[57]](#footnote-57)

More controversially, certain authorities accept that, even when the applicable law clause does not refer to international law, it still applies.[[58]](#footnote-58) In 1930 the tribunal in *Lena Goldfields* applied principles of public international law in a concession contract governed by English law[[59]](#footnote-59) to offer compensation for unjust enrichment[[60]](#footnote-60). A series of arbitral awards dealing with oil concessions applied general principles of international law in the light of the fact that the Host State law was (or perceived to be) insufficiently developed.[[61]](#footnote-61) The tribunal in *Aramco v Saudi Arabia* explicitly endorsed *Lena Goldfields.* Despite the absence of any reference to international law in the contract’s applicable law clause and the tribunal’s categorical statement that the contract ‘is not governed by public international law’,[[62]](#footnote-62) the tribunal did hold that ‘public international law should be applied to the effects of the Concession, when objective reasons lead it to conclude that certain matters cannot be governed by any rule of the municipal law of any State, as is the case in all matters relating to transport by sea, to the sovereignty of the State on its territorial waters and to the responsibility of States for the violation of its international obligations’.[[63]](#footnote-63) In *Sapphire v National Iranian Oil Company (NIOC)* general principles of law were applied *in lieu* of Iranian law, on the basis that the absence of an express choice of law indicated a ‘negative intention, namely to reject the exclusive application of Iranian law’.[[64]](#footnote-64) As a result, the sole arbitrator held that

[i]t is therefore perfectly legitimate to find in such a clause evidence of the intention of the parties not to apply the strict rules of a particular system but, rather, to rely upon the rules of law, based upon reason, which are common to civilized nations. These rules are enshrined in Article 38 of the Statute of the International Court of Justice as a source of law, and numerous decisions of international tribunals have made use of them and clarified them. Their application is particularly justified in the present contract, which was concluded between a State organ and a foreign company, and depends upon public law in certain of its aspects. This contract has therefore a quasi-international character which releases it from the sovereignty of a particular legal system and it different fundamentally from an ordinary commercial contract.[[65]](#footnote-65)

Importantly, the sole arbitrator added that ‘[s]uch a solution seems particularly suitable for giving the guarantees of protection which are indispensable for foreign companies, since these companies undergo very considerable risks in brining financial and technical aid to countries in the process of development’.[[66]](#footnote-66) As Alvik notes ‘[t]he substantial result of this, as perceived by the arbitrator, was to neutralise the legislative power of the Iranian government as far as the contract was concerned’.[[67]](#footnote-67) In *Texaco and Calasiatic v Libya*, sole arbitrator Dupuy accepted that ‘[i]t’ is therefore unquestionable that the reference to international arbitration is sufficient to internationalize a contract’, although in that case the applicable law clause did include reference to international law.[[68]](#footnote-68) Again, both the rationale and the result of this internationalisation was the same: affording protection to the foreign investor. In an arbitration between Electricity companies and Greece another tribunal chaired by Guggenheim referred to general principles of law and Article 38 of the International Court of Justice (ICJ) Statute, while there was no express choice of law (and therefore no reference to international law) in the contract.[[69]](#footnote-69) In *Bankswitch v Ghana* the tribunal aptly summarised this principle:

[t]hus, while Clause 22 of the Agreement states that the Agreement ‘shall be governed by the Laws of the Republic of Ghana’, that choice of law clause does not insulate the Government from its obligations under customary international law to treat what is essentially a foreign investment fairly and equitably and not to take that investment without compensation. Contracts between a State and a foreign entity are typically governed by the law of the State, but it would be untenable for that reason to allow a State to act freely in order to absolve itself of its obligations towards the foreign entity by altering the content of its governing law to evade the terms of its commitments without regard to the State’s obligations under international law.[[70]](#footnote-70)

After extensively analysing why and how the international legal principle of estoppel applies in that case,[[71]](#footnote-71) the tribunal concluded that Ghana was ‘estopped from arguing’ that its Constitution invalidated the Agreement.[[72]](#footnote-72) In *Cambodia Power Company v Kingdom of Cambodia*, an ICSID contract arbitration, the tribunal concluded that the choice of a particular domestic law by the parties in an investment contract cannot exclude the application of international law,[[73]](#footnote-73) and therefore it had jurisdiction to hear claims under customary international law.[[74]](#footnote-74)

In *Sandline v Papua New Guinea*, despite the fact that the agreement was governed by domestic (English) law, the tribunal emphasized that ‘[a]n agreement between a private party and a State is an international, not a domestic, contract. This Tribunal is an international, not a domestic, arbitral tribunal and is bound to apply the rules of international law’.[[75]](#footnote-75) Thus, the tribunal squarely rejected Papua New Guinea’s defence of the contract’s illegality based on its domestic law.[[76]](#footnote-76) In another ICSID arbitration, the tribunal held that

it cannot disregard, but must take into account international law, in particular mandatory rules of international law, when deciding the present dispute. In accordance with Clause 26.1 of the Contract, this Tribunal will apply Kazakh law to the merits of the dispute as the law chosen by the Parties. However, in doing so, it will afford a supplemental and corrective function to international law, supplementing and informing the Parties’ choice of law by the application of relevant international law rules.[[77]](#footnote-77)

In ICSID arbitrations, in the absence of the parties’ agreements on applicable law, both the law of the Host State and international law are applicable by default.[[78]](#footnote-78) In most cases, the relevant contract will contain an applicable law clause. In that context, the distinction between ICSID and non-ICSID arbitration should not be overemphasised in relation to the international character of the arbitral proceedings involving States or State entities. As Charles Leben accurately observed in his Hague Academy course, many investment treaties offer a choice between ICSID arbitration and arbitration under other rules and institutions such as the ICC and SCC.[[79]](#footnote-79)

The factual and legal context of each case cited above referring to the application of public international law in contract-based arbitrations is different. However, the common feature of all these cases is that the application of international law was deemed necessary to protect foreign investors, usually against abuse of state (legislative) power. This is clearly explained by the sole arbitrator in *Sapphire v NIOC*:

[u]nder the present agreement, the foreign company was bringing financial and technical assistance to Iran, which involved it in investments, responsibilities, and considerable risks. It therefore seems natural that they should be protected against any legislative changes which might alter the character of the contract, and that they should be assured some legal security. This could not be guaranteed to them by the outright application of Iranian law, which it is within the power of the Iranian State to change.[[80]](#footnote-80)

Another reason for the application of international law to international State contracts is the need to differentiate them from domestic law contracts concluded between private parties. In some jurisdictions (such as France) certain contracts concluded between private entities and the State are subject to public law (and to the jurisdiction of special courts).[[81]](#footnote-81) Because international law does not make such distinction,[[82]](#footnote-82) it is perhaps necessary to recognise the special nature of investment contracts between foreign investors and States by accepting that they are also governed by international law, irrespective of the applicable law chosen by the parties.[[83]](#footnote-83) In any event, for the purposes of the present analysis it suffices to state that even the most dedicated opponent of the ‘internationalisation’ of investment contracts must accept that public international law forms part of the law applicable to such contracts by express choice of the parties in many instances or by default in the ICSID context. This ‘internationalization’ of investment contracts was viewed as tool of (neo)imperial oppression.[[84]](#footnote-84) However, as Prosper Weil explained, this is not necessarily the case as public international law balances competing interests between developed and developing States.[[85]](#footnote-85) The lack of certainty could be attributed that post-1990 the relevant debate became moot and was effectively halted due to the ‘Βig Βang’ explosion of investment treaties in the universe of international economic law, which offered a more straightforward way for investors to invoke (and benefit from the substantive protection of) international law in an international forum.[[86]](#footnote-86) With the ongoing backlash against investment treaty arbitration,[[87]](#footnote-87) this debate will likely be resumed by courts, tribunals and scholars contributing towards greater clarity on the matter.

International law forms part of the *lex arbitri* in contract arbitrations involving States or State entities. In ICSID contract arbitrations, there is no arbitral seat and the arbitral process is governed by the ICSID Convention and international law. Even outside the ICSID system, international law is considered part of the law governing the arbitral process.[[88]](#footnote-88) For example, an 1978 agreement between an African Arab State and an Asian Arab State to establish an industrial and agricultural investment company provided for arbitration to resolve disputes relating to that instrument, specifying that ‘[t]he arbitral tribunal shall draw the rules of procedure appropriate for its mission without being bound with the procedural laws of the two States’.[[89]](#footnote-89)

Finally, at least in cases involving States or State entities it is uncontroversial that a transnational approach includes public international law. As Jean-Flavien Lalive noted in 1964,

[t]he great majority of lawyers drafting contracts, judges, arbitrators and writers have taken for granted that the ‘general principles’ belong to international law and are to be equiparated to ‘general principles of international law’.[[90]](#footnote-90)

The ICSID *East Kalimantan v PT Kaltim Prima Coal and others* (*East Kalimantan v KPC*) case is relevant to the role of international law in the extension of the arbitration agreement to non-signatory States. Indonesia had concluded a contract (‘the KPC contract’) with foreign investors, which was governed by Indonesian law, and provided for ICSID arbitration.[[91]](#footnote-91) The contract also provided for non-ICSID arbitration, ‘[i]f the services of the Centre are unavailable to the Parties’.[[92]](#footnote-92) The Government of East Kalimantan, a province of Indonesia, commenced ICSID arbitration under the contract, although it was not a contracting party. For an ICSID arbitral tribunal to exercise jurisdiction, in addition to the jurisdictional requirements of the arbitration agreement, the jurisdictional requirements of the ICSID Convention must also be met.[[93]](#footnote-93) In *East Kalimantan v KPC*, the parties agreed on both the existence and the content of the ICSID jurisdictional requirements, one of these four requirements being that ‘the dispute must be between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State’.[[94]](#footnote-94) However, the parties disagreed

on the law governing the Tribunal’s jurisdiction. This is in particular so because their alleged consent is not based on a treaty but on an arbitration agreement which is part of a contract governed by national law, and more specifically by an alleged third party beneficiary right to such arbitration agreement.[[95]](#footnote-95)

East Kalimantan argued that the issue would have to be determined by reference to Indonesian law, while the respondents submitted that the tribunal should apply international law.[[96]](#footnote-96) The tribunal held that

[t]he fact that international law sets the requirements for ICSID jurisdiction does not mean that other laws, specifically national laws, may *never* be considered when reviewing whether the requirements set by international law are met. A review of ICSID cases shows that tribunals do refer to national law, for instance to determine whether the requirements of nationality or of the existence of an investment are fulfilled. In other words, depending on the circumstances, certain jurisdictional requirements under Article 25 of the ICSID Convention *may sometimes* have to be assessed taking into account national law. This may especially be true of the requirement of consent when the agreement to arbitrate is contained in a contract governed by national law.[[97]](#footnote-97)

Further, the tribunal held that

[u]nder the principle of autonomy, the arbitration agreement contained in a contract is not necessarily governed by the same law as the contract itself. In this case, however, both Parties have pleaded the issue of third party beneficiary rights under Indonesian law. This is particularly noteworthy with respect to the Respondents, who had previously argued that international law applied to the Tribunal’s jurisdiction… In sum, the Arbitral Tribunal concludes that international law applies to the determination of its jurisdiction over this dispute and that, in assessing the requirement of consent set by international law, it will take Indonesian law into account because of the specifics of the consent involved here.[[98]](#footnote-98)

Ultimately, the tribunal declined jurisdiction because it found that East Kalimantan is a separate entity from Indonesia (a party to the ICSID Convention)[[99]](#footnote-99) and was not a ‘designated constituent subdivision’,[[100]](#footnote-100) but also noted that ‘if the Claimant still intends to pursue its claims, the KPC Contract provides for an alternative dispute settlement mechanism’.[[101]](#footnote-101) Therefore, this decision can be interpreted as confirming (i) the possibility of the extension of the arbitration to non-signatories in case of arbitrations involving States or State entities and (ii) the argument that this issue is governed by national *and* international law.

A similar issue has arisen in relation to the interpretation of domestic investment laws providing for ICSID arbitration.[[102]](#footnote-102) The relevant ICSID case law ‘is rare and lacks coherence’,[[103]](#footnote-103) and with varying degrees of emphasis, tribunals held that that domestic investment laws have to be interpreted by applying international legal principles as well.[[104]](#footnote-104)

The above analysis demonstrates that irrespective of which approach one follows to determine the issue of the extension of the arbitration agreement to non-signatories (*lex contractus*, *lex arbitri*, or transnational law) pubic international law is part of all these laws in arbitrations under international State contracts.

# IV. INTERNATIONAL LAW AS THE BASIS FOR EXTENDING ARBITRATION AGREEMENTS CONCLUDED BY STATES OR STATE ENTITIES TO NON-SIGNATORIES

Domestic laws, while emphasising the central role of the principle of consent in arbitration, also contain exceptions under which arbitration agreements can be extended to non-signatories. The question is whether, to what extent, and under which conditions, this is the case under *public international law*. This is immensely important in practice. If international law (which as **Section III** explained is relevant) contains rules allowing the extension of arbitration agreements concluded by States or State entities to non-signatories, then it can be invoked as the basis for such extension, irrespective of the applicable *domestic* law.

## **A.** ***Attribution or implied consent?***

In *Sogea v the Ethiopian Road Authority and the State of Ethiopia*, the arbitration agreement was extended to the State, a non-signatory, on the basis of international law and the rules applicable to attribution of conduct.[[105]](#footnote-105) In *Chevron v Bangladesh* the tribunal accepted that, in addition to Petrobangla (a State entity and signatory to the relevant contracts), Bangladesh had also consented to ICSID arbitration, despite the fact that Bangladesh has not signed the relevant contracts. What was crucial for the tribunal was that by applying the public international rules on attribution Betrobangla was found to be a state organ.[[106]](#footnote-106) In *Niko Resources v Bapex and Petrobangla* another ICSID tribunal took note of the fact that the *Chevron* tribunal, ‘applied rules on attribution in the context of its analysis on jurisdiction’,[[107]](#footnote-107) but creatively distinguished it on the basis that Bangladesh ‘had concluded with the investor a contract containing an ICSID clause’ and that contract was ‘related’ to the contract concluded Petrobangla.[[108]](#footnote-108)

The international law on attribution should not be used for determining whether the arbitration agreement can be extended to non-signatories in arbitrations involving States or State entities. The relevant international rules on attribution are limited to the attribution of ‘international wrongful acts’, i.e. breaches of public international law rather than any act in general. The International Law Commission (ILC) made clear that its Articles on State Responsibility ‘concerning attribution … are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its Government’.[[109]](#footnote-109) Therefore, public international rules regarding international responsibility cannot be used to delineate the scope of a State’s contractual commitments.[[110]](#footnote-110) In the second *Bridas* arbitration, the tribunal held that

even if Turkmengeologia and the successor Ministry can properly be regarded as aims or organs of the Government, Bridas has not discharged and could not discharge the burden of proving that the Government itself was a party to the JV Agreement. If it has not been shown to be a party to the JV Agreement, it follows that it cannot be a party in this arbitration.[[111]](#footnote-111)

The famous *Southern Pacific Properties (SPP) v Egypt* case aptly highlights the distinction between attribution rules on the hand, and implied consent on the other.[[112]](#footnote-112) The basis of the tribunal’s jurisdiction was an investment contract between SPP and the Egyptian General Company for Tourism and Hotels (EGOTH), an Egyptian State entity. The Egyptian Minister of Tourism had also signed the contract indicating that it was ‘agreed, approved, ratified’, although Egypt was not a party to the contract. The arbitral tribunal extended the arbitration agreement to Egypt on the basis of the latter’s implied consent as evidenced inter alia by the Minister’s signature.[[113]](#footnote-113) The award was annulled by the Paris Court of Appeal holding that the Ministry’s involvement was essentially supervisory and did not express consent to be bound by the contract and arbitrate.[[114]](#footnote-114) Although the Minister was undoubtedly a State organ and therefore his actions were clearly attributable to Egypt, this was irrelevant for the Paris Court of Appeal. The crucial factor was whether Egypt has given its implied consent to arbitrate. The US Court of Appeals for the Fifth Circuit did not accept that the arbitration agreement between Bridas and Turkmenneft (a Turkmen State-owned entity) could be extended to Turkmenistan (a non-signatory) because it was ‘simply unable to conclude that the parties … *intended* Turkmenneft to sign the JVA as an agent of the Government in the absence of clearer language to that effect’.[[115]](#footnote-115) Although,

Bridas has set forth ample evidence regarding the extent to which Turkmenneft was controlled by the Government subsequent to the signing of the JVA. Such evidence, however, does not establish that Turkmenneft had the apparent authority to bind the Government in 1993.[[116]](#footnote-116)

In *Dallah*, a Saudi Arabian construction company initiated arbitration proceedings against the Government of Pakistan, despite the fact that Pakistan was not a signatory to the relevant contract (and the arbitration agreement contained therein) which had been concluded between Dallah and a Trust established by Pakistan. The arbitral tribunal and the Paris Court of Appeal accepted that the arbitration agreement could be extended to the Government of Pakistan, but the UK Supreme Court did not.[[117]](#footnote-117) The UK and French Court essentially disagreed about whether Pakistan intended to be part of the arbitration agreement or not. Lord Collins held that ‘there was no material sufficient to justify the tribunal’s conclusion that the Government’s behaviour showed and proved that the Government had always been, and considered itself to be, a true party to the Agreement and therefore to the arbitration agreement’.[[118]](#footnote-118) By contract the Paris Court of Appeal reached the opposite conclusion:

[T]he Government [of Pakistan] acted as if the Agreement was its own;… this involvement of the Government [of Pakistan], in the absence of evidence that the Trust took any actions, as well as the [Government’s] behavior during the pre-contractual negotiations, confirm that the creation of the Trust was purely formal and that the Government of Pakistan… – as Dallah had acknowledged behaved as if it were the true Pakistani party during the economic transaction’.[[119]](#footnote-119)

In another case the arbitration agreement contained in contracts between two companies belonging to the same group (Ax and Ay) on the one hand, and the Ministry of Agriculture of State Z (which had separate legal personality) on the other, was extended to the non-signatory State.[[120]](#footnote-120) The basis for such extension was ‘[t]he direct involvement of the highest authority of the Government of Z in the fulfilment of the Ministry’s obligations under the contracts’.[[121]](#footnote-121) Therefore, while international rules on attribution of conduct cannot serve as a basis for extending the arbitration agreement to non-signatory States or State entities, the concept of ‘implied consent’ can.[[122]](#footnote-122)

International law recognises the concept of *implied* consent. As with arbitration, the rule under public international law is that State cannot be brought before an international court or tribunal without its consent. This *sine qua non* character of consent constitutes one of the main differences between (i) litigation and arbitration before international courts or tribunals and (ii) litigation before domestic courts.[[123]](#footnote-123) The ICJ has time and again emphasized that ‘a State may not be compelled to submit its disputes to arbitration without its consent’.[[124]](#footnote-124) The ICJ’s ‘jurisdiction is based on the consent of the parties and is confined to the extent accepted by them’,[[125]](#footnote-125) and ‘[w]hen considering whether it has jurisdiction or not, the Court’s aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it’[[126]](#footnote-126). At the same time, there is no requirement that such consent ‘should be expressed in any particular form’.[[127]](#footnote-127) The Court’s jurisdiction can be accepted implicitly, provided that ‘[t]he attitude of the respondent State must, however, be capable of being regarded as “an unequivocal indication” of the desire of that State to accept the Court’s jurisdiction in a “voluntary and indisputable” manner’.[[128]](#footnote-128)

## **B. *Abuse of separate legal personality and Estoppel***

It is well established that a State cannot invoke its domestic law to circumvent its contractual undertaking to submit a dispute to arbitration.[[129]](#footnote-129) In *Benteler v Belgium* the ad-hoc arbitral tribunal emphasised that ‘the State which has subscribed to an arbitration clause or an arbitration agreement would act contrary to international public order in later invoking the incompatibility of such an obligation with its domestic legal order’.[[130]](#footnote-130) Its enduring influence is also seen in the following extract from a 2002 award:

[i]n light of the *Benteler et al. v. Belgian State* award, international arbitral tribunals have been very reluctant to decline jurisdiction when a State or a State entity relies upon its own national law to deny arbitrability.[[131]](#footnote-131)

According to Jan Paulsson, *Benteler v Belgium* ‘clearly approves the rule against recognition of such national bars to international arbitration’.[[132]](#footnote-132) In *Framatome v the Atomic Energy Organization of Iran* the tribunal referred to the same principle:

[i]t is superfluous to add that a general principle, universally recognized nowadays in both inter-State relations and international private relations (whether this principle is considered as international public policy, as appertaining to international commercial usages or to *recognized principles of public international law* and the law of international arbitration or *lex mercatoria*) would in any case prohibit the Utopian State [Iran] - even if it had the intention, which is not the case to repudiate the undertaking to arbitrate which it made itself or which a public organization such as ABC [Atomic Energy Organization of Iran] would have made previously.[[133]](#footnote-133)

After observing that there is a ‘substantial body of law establishing that a state cannot rely on its own law to renege on an arbitration agreement’,[[134]](#footnote-134) another tribunal held that same applies to recourse by the State to domestic courts.[[135]](#footnote-135) These authorities highlight the idea that a State cannot use its domestic law to circumvent its international obligations.[[136]](#footnote-136)

 This article argues that the same principle applies to the issue of the extension of the arbitration agreement for precisely the same reasons (preventing denial of justice). In *Niko Resources v Bapex and Petrobangla* the tribunal made clear that ‘abuse of th[e] corporate structure’ could justify deviation from the principle of privity of contract.[[137]](#footnote-137)The ICJ also emphasised that ‘the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law’.[[138]](#footnote-138) If the State abuses the separate legal personality of its entities, but the applicable *domestic* law does not provide for the possibility of extending the arbitration agreement to non-signatories, international law could be used as the basis for such extension. In *First National City Bank v Bancec* the US Supreme Court disregarded the separate legal personality of a Cuban State entity applying both international law and common law:

[t]o give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts. We decline to permit such a result.[[139]](#footnote-139)

The Court emphasised that ‘[h]aving dissolved Bancec and transferred its assets to entities that may be held liable on Citibank’s counterclaim, Cuba cannot escape liability for acts in violation of international law simply by retransferring the assets to separate juridical entities. To hold otherwise would permit governments to avoid the requirements of international law simply by creating juridical entities whenever the need arises’.[[140]](#footnote-140) If the concept of ‘abuse’ of separate legal personality is one way of holding State accountable by submitting them to the jurisdiction of arbitration tribunals, estoppel is another. Professor Hanotiau observes that ‘estoppel is regarded today as a general principle of international law’ and his reservations about the principle’s general applicability ‘in continental Europe’ concern ‘international commercial arbitration *between private parties*’.[[141]](#footnote-141) For example, in the second *Bridas* case before the US Court of Appeals (which was decided on the basis of US law), the fact that ‘the Government then exercised its power as a parent entity to deprive Bridas of a contractual remedy’, in other words ‘[i]ntentionally bleeding a subsidiary’, was found to constitute a valid ground for piercing the corporate veil and extending the arbitration agreement to Turkmenistan.[[142]](#footnote-142) Examining the relevant practice of different international courts and tribunals, Wass concludes that

[t]he principles of estoppel and acquiescence are powerful weapons in the hands of an international tribunal. They should not be misused, but I have sought to demonstrate that they have a valuable role to play in the context of jurisdiction: in mediating the relationships between states; in preventing them from abusing their sovereign freedom at the expense of other actors; and in promoting the adjudication of disputes in good faith. Precedent, practice and policy all suggest that the consensual nature of international adjudication does not preclude the application of estoppel or acquiescence to questions of jurisdiction, but the important values at stake require that the court or tribunal take a careful and rigorous approach.[[143]](#footnote-143)

# V. CONCLUSIONS

The analysis of the law(s) applicable to the extension arbitration agreements contained in investment contracts with States or State entities to non-signatories (most likely the law of the contract, law of the seat, or transnational law) demonstrated that public international law constitutes an integral part of the applicable legal matrix. Like many domestic laws, public international law recognises that arbitration agreements can be extended to non-signatories on the basis of implied consent or abuse of separate legal personality and estoppel. This is practically significant, as foreign investors can rely on public international law to extend arbitration agreements to non-signatories in arbitrations under investment contracts concluded by States or State entities, even if the relevant domestic law is agnostic or hostile to the idea of extension. After all, if public international law applies to State contracts to enhance the substantive protection of foreign investors as well as access to arbitration, there is no reason to exclude from its protective scope the issue of the extension of the arbitration agreement to non-signatories.

1. See e.g. G Petrochilos, ‘Extension of the Arbitration Clause to Non-Signatory States or State Entities: Does It Raise a Difference?’ in B Hanotiau and E Schwartz (eds), *Multiparty Arbitration* (Wolters Kluwer, Law and Business, International, ICC, 2010 The Alphen aan den Rijn) 119-130. Cf J Stoehr, ‘A Question of Sovereignty, Development, and Natural Resources: A New Standard for Binding Third Party Nonsignatory Governments to Arbitration’ (2009) 66 Washington and Lee Law Review 1409, 1434. [↑](#footnote-ref-1)
2. On the role of State entities see J-F Lalive, ‘Contracts between a State or a State Agency and a Foreign Company: Theory and Practice: Choice of Law in a New Arbitration Case’ (1964) 13 ICLQ 987, 990; [↑](#footnote-ref-2)
3. ICC, *ICC Dispute Resolution 2019 Statistics* (2020) 10, available at <https://iccwbo.org/publication/icc-dispute-resolution-statistics/>; the same figure was 8.6% in 2001, C Leben, ‘La théorie du contrat d’État et l’évolution du droit international des investissements’ (2003) 302 RCADI 197, 297. See also J-F Lalive, ‘Contrats entre Etats ou entreprises étatiques et personees privées. Développements récents’ (1983) 181 RCADI 9. [↑](#footnote-ref-3)
4. See J C Hamilton et al, ‘Latin American Arbitration and Investment Protections’ in Jonathan C Hamilton et al (eds), *Latin American Investment Protections* (Martinus Nijhoff, Leiden 2012) 2; E Gaillard, ‘The denunciation of the ICSID Convention’ (2007) 237 New York Law Journal 1; C Schreuer, ‘Denunciation of the ICSID Convention and Consent to Arbitration’ in M Waibel et al (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, Alphen aan den Rijn 2010) 353-368; O M Garibaldi, ‘On the denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the limits of contract analogy’ in C Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, Oxford 2009) 251-277. Having denounced the ICSID Convention in 2009, Ecuador signed it again in June 2021, <https://icsid.worldbank.org/news-and-events/news-releases/ecuador-signs-icsid-convention>. [↑](#footnote-ref-4)
5. Examples include Ecuador and Indonesia, see N Bernasconi-Osterwalder et al, ‘Terminating a Bilateral Investment Treaty’, International Institute for Sustainable Development (March 2020), available at <https://www.iisd.org/system/files/publications/terminating-treaty-best-practices-en.pdf>; see also T Voon and A Mitchell, ‘Denunciation, termination and survival: the interplay of treaty law and international investment law (2016) 31 ICSID Review 413. [↑](#footnote-ref-5)
6. Case C-284/16, *Slovak Republic v Achmea* BV, 6 March 2018. The CJEU held that Investor-State Dispute Settlement (ISDS) contained intra-EU BITs are incompatible with the EU. Following the *Achmea* decision, 23 EU Member States signed the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, 5 May 2020. [↑](#footnote-ref-6)
7. E Gaillard, ‘Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities: Three Incompatible Principles’ in E Gaillard and J Younan (eds), *State Entities in International Arbitration* (Juris Publishing, Huntington NY 2008) 179-193, 189; see also ibid, for further references. See also E Teynier, ‘Can A Party Benefiting from an award rendered against a State enforce the award against an instrumentality of such State? French Law’, in E Gaillard and J Younan (eds), *State Entities in International Arbitration* (Juris Publishing, Huntington NY 2008) 103-130; J Gill, ‘Can A Party Benefiting from an award rendered against a State enforce the award against an instrumentality of such State?: English Law’ in E Gaillard and J Younan (eds), *State Entities in International Arbitration* (Juris Publishing, Huntington NY 2008) 131-148; E Gaillard, ‘Can A Party Benefiting from an award rendered against a State enforce the award against an instrumentality of such State?: U.S. Law’ E Gaillard and J Younan (eds), *State Entities in International Arbitration* (Juris Publishing, Huntington NY 2008) 149-164. [↑](#footnote-ref-7)
8. See e.g. *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC* [2012] UKPC 27. [↑](#footnote-ref-8)
9. Arbitrazh Court of the City of Moscow, Case No А40-230382/2018, 27 February 2019. [↑](#footnote-ref-9)
10. Swiss Federal Tribunal, 4A 128/2008, 19 August 2008, para 3.2.; E Gaillard and J Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, The Hauge 1999) 280; see Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959), 330 UNTS 3 (‘New York Convention’), Art II.1; UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 (‘UNCITRAL Model Law’), Art 7(1); *Banque Arabe et Internationale d’Investissement v Inter-Arab Investment Guarantee Corp*, Award, 17 November 1994, (1996) 21 Yearbook of Commercial Arbitration 13, 18. G Born, *International Commercial Arbitration*, (3rd, Kluwer Law International, The Hague 2009) 1406-1407. [↑](#footnote-ref-10)
11. Cf *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6 and CA Paris, *Kabab-Ji SAL Company v Kout Food Group Company*, Judgment, 23 June 2020, English transnational available at <https://jusmundi.com/en/document/decision/en-kabab-ji-s-a-l-company-v-kout-food-group-company-judgment-of-the-paris-court-of-appeal-tuesday-23rd-june-2020#decision_11637>. [↑](#footnote-ref-11)
12. Cf *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, 30 June 2006 (‘*Chevron v Bangladesh*’); *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Limited (Bapex) and Bangladesh Oil Gas and Mineral Corporation (Petrobangla)*, ICSID Case No ARB/10/18 Decision on Jurisdiction, 19 August 2013 (‘*Niko Resources v Bapex and Petrobangla*’). See below **Section IV**. [↑](#footnote-ref-12)
13. Swiss Federal Tribunal, 29 July 1988 (1991) 16 Yearbook of Commercial Arbitration 180. [↑](#footnote-ref-13)
14. S Brekoulakis, ‘Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories’ (2017) 8 Journal of International Dispute Settlement 610, 616; P Martines-Fraga ‘The Dilemma of Extending International Commercial Arbitration Clauses to Third Parties: Is Protecting Federal Policy While Accommodating Economic Globalization a Bridge to Nowhere?’ (2013) 46 Cornell International Law Journal 291, 294; see also Petrochilos (n 1) 119-130; A Mišović ‘Binding non-signatories to arbitrate—the United States approach’ (2021) Arbitration International (forthcoming). [↑](#footnote-ref-14)
15. M Magnarelli and A R Ziegler, ‘Irreconcilable perspectives like in an Escher’s drawing? ‘Extension of an arbitration agreement to a non-signatory state and attribution of state entities’ conduct: privity of contract in Swiss and investment arbitral tribunals’ case law’ (2020) 36 Arbitration International 509, 519. [↑](#footnote-ref-15)
16. B Hanotiau, ‘The issue of non-signatory States’ (2012) 23 The American Review of International Arbitration 379, 405. Cf the approach of the arbitral tribunal and the Paris Court of Appeal in the *Pyramides* case, discussed below in **Section IV.A.** [↑](#footnote-ref-16)
17. See G Born, *International Commercial Arbitration* (3rd, Kluwer Law International, The Hague 2009) 1137-1138; B Hanotiau, ‘Problems Raised by Complex Arbitrations Involving Multiple Contracts – Parties - Issue’ (2001) 18 Journal of International Arbitration 251, 263; W W Park, ‘Non-signatories and International Contracts: An Arbitrator’s Dilemma’ in Permanent Court of Arbitration (ed), *Multiple Party Actions in International Arbitration* (OUP, Oxford 2009) 3-33; G Petrochilos, ‘Extension of the Arbitration Clause to Non-Signatory States or State Entities: Does It Raise a Difference?’ in B Hanotiau and E Schwartz (eds), *Multiparty Arbitration* (Kluwer Law International, ICC, The Hague 2010) 119-128. Hanotiau (n 16). [↑](#footnote-ref-17)
18. J M Hosking, ‘Non-Signatories and International Arbitration in the United States: the Quest for Consent’ (2004) 20 Arbitration International 289, 302; D Girsberger and C Hausmaninger, Assignment of Rights and Agreement to Arbitration (1992) 8 Arbitration International 121, 149-150. See also Hosking, ibid. [↑](#footnote-ref-18)
19. See BGH, III ZR 371/12, 8 May 2014; see also J Landbrecht and A Wehowsky, ‘Determining the Law Applicable to the Personal Scope of Arbitration Agreements and its “Extension” (2017) 35 ASA Bulletin 837, 851 and K Schwedt, ‘When Does an Arbitration Agreement Have a Binding Effect on Non-Signatories? The Group of Companies Doctrine vs. Conflict of Laws Rules and Public Policy’, Kluwer Arbitration Blog, 30 July 2014, available at http://arbitrationblog.kluwerarbitration.com/2014/07/30/when-does-an-arbitration-agreement-have-a-binding-effect-on-non-signatories-the-group-of-companies-doctrine-vs-conflict-of-laws-rules-and-public-policy/. [↑](#footnote-ref-19)
20. P C Mavroidis, ‘Legal Eagles? The WTO Appellate Body’s First Ten Years’ in M Janow et al (eds), *The WTO: Governance, Dispute Settlement, and Developing Countries* (Juris Publishing, Huntington NY 2008) 345-367, 360. [↑](#footnote-ref-20)
21. S Brekoulakis, ‘Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories’ (2017) 8 Journal of International Dispute Settlement 610, 629 (‘Under this approach, what matters is not whether a non-signatory has presumably consented to arbitration but whether and to what extent a non-signatory is actually implicated in the dispute before an arbitration tribunal’). However, in public international law, the fact that, without being subject to the jurisdiction of an international court or tribunal, a State is intrinsically implicated in a dispute between two States which is subject to that court’s or tribunal’s jurisdiction, speaks against – and not in favour of – the expansion of their jurisdiction ratione personae (personal jurisdiction). See *Case of the monetary gold removed from Rome in 1943* (Preliminary Question), (1954) ICJ Rep 19, 32; *Military and Paramilitary Activities in and against Nicaragua*, Jurisdiction and Admissibility (1984) ICJ Reports 392, 431, para 88; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, (1990) ICJ Rep 92, 114-116, paras 54-56; *Certain Phosphate Lands in Nauru*, Preliminary Objections, Judgment (1992) ICJ Rep 240, 258-262, paras 48-55; *East Timor* (1995) ICJ Rep 90, 102-105, paras 28-35; *The M/V “Norstar” Case (Panama v Italy)*, Case No 25, Preliminary Objections Judgment, 4 November 2016, para 172; *Larsen v Hawaiian Kingdom*, PCA Case No 1999-01, Award 5 February 2001, para 11.17; *Chevron Corporation and Texaco Petroleum Corporation v Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, 27 February 2021, para 4.60. Cf N Zamir, ‘The applicability of the Monetary Gold principle in international arbitration’ (2017) 33 Arbitration International 523; O Pomson, ‘Does the *Monetary Gold* Principle Apply to International Courts and Tribunals Generally ?’ (2019) 10 Journal of International Dispute Settlement 88; M Paparinskis, ‘Revisiting the Indispensable Third Party Principle’ (2020) 103 Rivista di diritto internazionale 49; A Orakhelashvili, ‘The Competence of the International Court of Justice and the Doctrine of the Indispensable party: from Monetary Gold to East Timor and beyond’ (2011) 2 Journal of International Dispute Settlement 373. [↑](#footnote-ref-21)
22. See e.g. G Born, *International Commercial Arbitration* (3rd, Kluwer Law International, The Hague 2009) 1142. [↑](#footnote-ref-22)
23. Cf R Jennings, ‘State Contracts in International Law’ (1961) 37 BYIL 156; A McNair, The General Principles of Law Recognized by Civilized Nations’ (1957) 23 BYIL 1; F A Mann, ‘State Contracts and State Responsibility’ (1960) 54 AJIL 572; P Weil, ‘Problèmes relatifs aux contrats passés entre un État et un particulier’ (1969) 105 RCADI 95; W Wengler, ‘Les accords entre Etats et entreprises étrangères sont-ils des traités de droit international’ (1972) Revue générale de droit international public 313; G Sacerdoti, *I Contratti tra Stati e Stranieri nel Diritto Internazionale* (Giuffrè, Milan, 1972); J Verhoeven, ‘Droit international des contrats et droit des gens’ (1978-1979) Revue belge de droit international 209; A A Fatouros, ‘International Law and the Internationalized Contract’ (1980) 74 AJIL 134; G R Delaume, ‘State Contracts and Transnational Arbitration’ (1981) 75 AJIL 784; P Leboulanger, Les Contrats entre etats et entreprises étrangères (Economica, Paris 1985); F Rigaux, ‘Les situations jurisdiques individuelles dans un système de relativité générale’ (1989) 213 RCADI 9, 154-169; A F M Maniruzzaman, ‘State Contracts in Contemporary International Law: Monist versus Dualist Controversies’ (2001) 12 EJIL 309; L El-Zein Lankarani, *Les contrats d’État à l’épreuve du droit international* (Bruylant, Brussels 2001); Leben (n 3); I Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (Hart, Oxford 2011) 45-96; J Ho, ‘Unraveling the Lex Causae in Investment Claims’ (2014) 15 The Journal of World Investment and Trade 757; C L Lim, J Ho, and M Paparinskis, *International Investment Law and Arbitration: Commentary, Awards and other Materials* (2nd ed, CUP, Cambridge 2021) 37-56. [↑](#footnote-ref-23)
24. See Leben (n 3) 212. [↑](#footnote-ref-24)
25. See also the difficulties in determining what constitutes ‘state entity’ for the purposes of applying Article 13(4) of the ICC Rules; ICC, Arbitration Involving States and State Entities under the ICC Rules of Arbitration, Report of the ICC Commission on Arbitration and ADR Task Force on Arbitration Involving States or State Entities (2012), para 40. [↑](#footnote-ref-25)
26. See *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6, para 10. See also E S Romero and L M Velarder Saffer, ‘The Extension Of The Arbitral Agreement To Non-Signatories In Europe: A Uniform Approach?’ (2018) 5American University Business Law Review 371, 373 (‘The analysis of the extension of the arbitral agreement to nonsignatories should begin by identifying the law applicable to said agreement’). [↑](#footnote-ref-26)
27. B Hanotiau, ‘Problems Raised by Complex Arbitrations Involving Multiple Contracts – Parties - Issue’ (2001) 18 Journal of International Arbitration 251; 255; W W Park, ‘Non-signatories and International Contracts: An Arbitrator’s Dilemma’ in Permanent Court of Arbitration (ed), *Multiple Party Actions in International Arbitration* (OUP, Oxford 2009) 3-33, para 1.03. Disputes regarding the law applicable to arbitration agreements usually arise because the arbitration agreement is valid under one law, but void or enforceable under another legal system. See also New York Convention, Art V(1)(a); see also UNCITRAL Model Law, Art 34(2)(a)(i). For that reason, certain legal systems opt for greater flexibility, and by implication, higher chances of upholding the validity of the arbitration clause. See PILA, Article 178(2) and Article 9(6) of the Spanish Arbitration Act 60 / 2003 of 23 December 2003. [↑](#footnote-ref-27)
28. *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 (‘*Enka v Chubb*’), para 29; *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, para 25. The parties can also agree on what the applicable law is after a dispute erupts; see e.g. *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, para 6. [↑](#footnote-ref-28)
29. *Enka v Chubb*, para 43; *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, para 11; S Pearson, ‘*Sulamérica v. Enesa*: The Hidden Pro-validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement’ (2013) 29 Arbitration International 115, 117; K P Berger, ‘Re-Examining the Arbitration Agreement, Applicable Law Consensus or Confusion?’ in A van den Berg (ed), *ICCA, International Arbitration 2006: Back to Basics?* (Kluwer Law International, The Hague 2007) 301-334, 302. [↑](#footnote-ref-29)
30. The distinction between the law of the seat (governing procedural matters (*lex loci arbitri*)) and the law applicable to the dispute (*lex cause*) is fundamental in international arbitration, see W W Park, The Lex Loci Arbitri and International Commercial Arbitration (1983) 32 ICLQ 21; R Goode, The Role of the Lex Loci Arbitri in International Commercial Arbitration, (2001) 17 Arbitration International 19, 19. See also N Blackaby and C Partasides, *Redfern and Hunter on International Arbitration* (6th ed, OUP, Oxford 2015) para 1.10; *State Joint Stock Company (Uzbekistan) v State agency (India)*, ICC Case No 14667, Final Award, 2011 in A Jan van den Berg (ed), Yearbook Commercial Arbitration 2015, Volume 40 (Kluwer Law International, The Hague 2015) 51, 60-61. [↑](#footnote-ref-30)
31. *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 1 All ER 664, 682, [1993] AC 334, 357–358. See also *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1982] 2 Lloyd’s Rep 446, 455, 456. [↑](#footnote-ref-31)
32. *Enka v Chubb*, para 54. This was the conclusion reached in 2020 by the English Court of Appeal, *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6, para 62. See also *Sulamérica Cia Nacional de Seguros SA & Others v Enesa Engenharia SA* [2012] EWCA Civ 638, para 26; *Arsanovia v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm), para 21; *Channel Tunnel Group Ltd v Balfour Beatty Ltd* [1993] AC 334, 357-8 (per Lord Mustill); cf *C v D* [2007] EWCA Civ 1282, para 22; *Abuja International Hotels Ltd v Meridien SAS* [2012] EWHC 87 (Comm), paras 21 and 22. The approach of the Courts in Singapore is more ambiguous: cf *BCY v BCZ* [2016] SGHC 249 para 65; *BNA v BNB and BNC* [2019] SGCA 84, para 94; *FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others* [2014] SGHCR 12, para 12. See also A Yoong, ‘Of principle, practicality, and precedents: the presumption of the arbitration agreement’s governing law’ (2021) Arbitration International (forthcoming). [↑](#footnote-ref-32)
33. *Enka v Chubb*, para 118. [↑](#footnote-ref-33)
34. Ibid, para 120.See also *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Company Ltd* [2013] EWHC 4071 (Comm), paras 101 and *Balkan Energy (Ghana) Limited v Republic of Ghana*, PCA Case No 2010-7, Interim Award, 22 December 2010, para 151. [↑](#footnote-ref-34)
35. *Peterson Farms Inc v C & M Farming Ltd* [2004] EWHC 121 (Comm), para 45. [↑](#footnote-ref-35)
36. Cf 2020 and 2014 LCIA Rules, Art 16(4); 1998 LCIA Rules, Art 16(3). [↑](#footnote-ref-36)
37. *Ashot Egiazaryan and Vitaly Gogokhiya v OJSC OEK Finance and The City of Moscow* [2015] EWHC 3532 (Comm), para 21. [↑](#footnote-ref-37)
38. See R Nazzini, ‘The Law Applicable to the Arbitration Agreement: towards Transnational Principles’ (2016) 65 ICLQ 681. The term ‘transnational’ is relatively new (coined by Philipp Jessup in the 1950s) compared to the term ‘international’, which was introduced by Jeremy Bentham in 1789 to describe what was known until then as the ‘law of nations’, P Jessup, *Transnational Law* (Yale University Press, New Haven 1956) 2. [↑](#footnote-ref-38)
39. E Gaillard, ‘The Representation of International Arbitration’ (2010) 1 Journal of International Dispute Settlement 271, 278. See also *Government of Kuwait v American Independent Oil Company (Aminoil)*, Award, 24 March 1982, 66 ILR 518 (‘*Aminoil*’), 560. Cf F A Mann, ‘*Lex Facit Arbitrum*’ in P Sanders (ed), *International Arbitration: Liber Amicorum for Martin Domke* (Martinus Nijhoff, The Hague, 1967) 157-183, 161 and E Gaillard, ‘International Arbitration as a Transnational System of Justice’ in A J Van Den Berg (ed), *Arbitration - The Next Fifty Years, ICCA Congress Series No 16* (Kluwer Law International, Alphen aan den Rijn 2012) 66-73 (and more generally E Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff, The Hague 2010)); for a good overview of the debate see J Paulsson, ‘Arbitration in three dimensions’ (2011) ICLQ 291 and R Goode, ‘The Role of the *Lex Loci Arbitri* in International Commercial Arbitration’ (2001) 17 Arbitration International 19. See also F M Mann, (1986) Arbitration International 241, 242; C Fragistas, ‘Arbitrage étranger et arbitrage international en droit privé’ (1960) Revue critique de droit international privé 1, 14; J-F Poudret and S Besson, *Comparative Law on International Arbitration* (2nd ed, Sweet and Maxwell Ltd, London 2007) 114-118; J Lew, L Mistelis and S Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague 2003) and G Petrochilos, *Procedural Law in International Arbitration* (OUP, Oxford 2004), chapter 2. See also Cour de Cassation(CC), *Société PT Putrabali Adyamulia v Société Rena Holding et Société Moguntia Est Epices*, 05-18.053, 29 June 2007; *S v State X*, ICC Case No 10623, Award, 7 December 2001, (2003) 21(1) ASA Bulletin 82-11, 83; see also [↑](#footnote-ref-39)
40. CC, *Municipalité de Khoms El Mergeb v Dalico*, Judgment, 20 December 1993, 1994 Revue de l’arbitrage 116, 117. See G Born, *International Commercial Arbitration* (3rd, Kluwer Law International Law, Alphen aan den Rijn 2021) Chapter 4, fn 45 for further references. [↑](#footnote-ref-40)
41. Nazzini (n 38) 607. [↑](#footnote-ref-41)
42. *Dow Chemical v Isover-Saint-Gobain*, ICC Case No 4131, Interim Award, 23 September 1982 (1984) 9 Yearbook Commercial Arbitration 131, 137. See also K Youssef, ‘The limits of consent: the right or obligation to arbitrate of non-signatories in groups of companies’ in B Hanotiau and E Schwartz (eds), *Multiparty Arbitration* (Wolters Kluwer, Law and Business, International, ICC, 2010 The Alphen aan den Rijn) 71-110; Y Derains, ‘Is there a Group of Companies Doctrine?’ in B Hanotiau and E Schwartz (eds), *Multiparty Arbitration* (Wolters Kluwer, Law and Business, International, ICC, 2010 The Alphen aan den Rijn) 131-145; A Meyniel, ‘That Which Must Not Be Named: Rationalizing the Denial of U.S. Courts With Respect to the Group of Companies Doctrine’ (2013) 3 The Arbitration Brief 18-55. On the application of the ‘Group of Companies’ doctrine to arbitrations involving States see M Henry, ‘La Théorie du Groupe de Sociétés Appliquée aux Arbitrages Impliquant un Etat - The Group of Companies Doctrine Applied to Arbitrations Involving a State’ (2006) International Business Law Journal 297. [↑](#footnote-ref-42)
43. CA Paris, 21 October 1983, (1984) Rev Arb 98. [↑](#footnote-ref-43)
44. CA Paris, *Kabab-Ji SAL Company v Kout Food Group Company*, Judgment, 23 June 2020, English transnational available at <https://jusmundi.com/en/document/decision/en-kabab-ji-s-a-l-company-v-kout-food-group-company-judgment-of-the-paris-court-of-appeal-tuesday-23rd-june-2020#decision_11637>, para 25. For a criticism of transnational approaches see B Wortmann, ‘Choice of Law by Arbitrators: The Applicable Conflict of Laws System’ (1998) 14 Arbitration International 97; J Paulsson, ‘Arbitration in three dimensions’ (2011) ICLQ 291, 305-306. Cf *Kabab-Ji SAL Company v Kout Food Group* Company, ICC, Award, 11 September 2017, para 127, quoted in Paris Cour d’appel, *Kabab-Ji SAL Company v Kout Food Group Company*, Judgment, 23 June 2020, para 26. [↑](#footnote-ref-44)
45. See e.g. ICC Case No 8385, 1995, (1997) 124 JDI (Clunet) 1061. [↑](#footnote-ref-45)
46. ICC Case No 14208/14236, Partial Award, 2008, (2013) 24(2) ICC Court Bulletin, para 391. [↑](#footnote-ref-46)
47. *Case concerning the payment of various Serbian loans issued in France*, Judgment, 12 July 1929, Series A, No 14, 41 (‘[a]ny contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country. The question as to which this law is forms the subject of that branch of law which is at the present day usually described as private international law or the ‘doctrine of the conflict of laws’’). See also *Ceskoslovenska Obchodni Banka, AS v The Slovak Republic*, ICSID Case No ARB/97/4, Award, 29 December 2004, para 59. [↑](#footnote-ref-47)
48. Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art 2(1)(a). See also *RSM Production Corporation v Central African Republic*, ICSID Case No ARB/07/2, Decision on Jurisdiction and Liability (excerpts), 7 December 2010, para 79. [↑](#footnote-ref-48)
49. Maniruzzaman (n 23). [↑](#footnote-ref-49)
50. *Texaco Overseas Petroleum Co / California Asiatic Oil Co v Government of the Libyan Arab Republic*, Award on the Merits, 19 January 1977, 53 ILR 389 (‘*Texaco and Calasiatic v Libya*’), 447, para 32; as the sole arbitrator in *Texaco and Calasiatic v Libya* held, ‘the application of the principles of Libyan law does not have the effect of ruling out the application of the principles of international law, but quite the contrary: it simply requires us to combine the two in verifying the conformity of the first with the second’, ibid, para 49; J Cantegreil, ‘The Audacity of the *Texaco/Calasiatic* Award: René-Jean Dupuy and the Internationalization of Foreign Investment Law’ (2011) 22 EJIL 441; A A Fatouros, ‘International Law and the Internationalized Contract’ (1980) 74 AJIL 134; G Cohen-Jonathan, ‘L’arbitrage Texaco-Calasiatic contre Gouvernement Libyen: décision au fond du 19 janvier 1977’ (1977) 23 AFDI 452; J-F Lalive, ‘Un grand arbitrage pétrolier entre un Gouvernement et deux société privées étrangères (Arbitrage Texaco/Calasiatic c. Gouvernement Libyen)’ (1977) 104 JDI (Clunet) 319. [↑](#footnote-ref-50)
51. K-H Böckstiegel, ‘States in the international arbitral process’ in J D M Lew (ed), *Contemporary Problems in International Arbitration* (Springer, London 1986) 40-49, 45-46. See e.g. Article 22 of the Agreement between the Imperial Government of Persia and the Anglo-Persian Oil Company Ltd (Teheran, 29 April 1933), reproduced in the *Anglo-Iranian Oil Co case* (1952) ICJ Pleadings 21. [↑](#footnote-ref-51)
52. Article 41 of the Agreement between the National Iranian Oil Company (NIOC) and Enterprise de Recherches et d’Activités Petroliers (ERAP) and Société Française des Petroles d’Iran (SOFIRAN) quoted in *Elf Aquitaine Iran v National Iranian Oil Company*, Preliminary Award, 14 January 1982, 96 ILR 251, 252. [↑](#footnote-ref-52)
53. Clause 28 of the Deeds of Concession between Texaco and Libya, quoted in *Texaco Overseas Petroleum Co / California Asiatic Oil Co v Government of the Libyan Arab Republic*, Preliminary Award, 27 November 1975, 53 ILR 389, 404; Clause 28, Deeds of Concession between LIAMCO and Libya, quoted in *LIAMCO v Libya*, Award, 12 April 1977, (1981) 20 ILM 1, 33; Agreement between AGIP and the People’s Republic of Congo (now the Republic of the Congo), quoted in *AGIP SpA v People’s Republic of the Congo*, ICSID Case No ARB/77/1, Award, 30 November 1979, 67 ILR 318, 330-331, para 43; Agreement between Kaiser and Jamaica, quoted in *Kaiser Bauxite Company v Jamaica*, ICSID Case No ARB/74/3, Decision on Jurisdiction and Competence, 6 July 1975, para 12. See also Article III(2) of the 1979 Arbitration Agreement between Aminoil and Kuwait quoted in *Aminoil* 561. [↑](#footnote-ref-53)
54. See e.g. Section 4 of the Venezuelan State oil company PDVSA Guaranty regarding the Petrozuata project quoted in *Phillips Petroleum Company Venezuela Limited (Bermuda) and ConocoPhillips Petrozuata BV (The Netherlands) v Petroleos de Venezuela, SA (Venezuela)*, ICC Case No 16848, Award, 17 September 2012, para 131. [↑](#footnote-ref-54)
55. See C Greenwood, ‘State Contracts in International Law--The Libyan Oil Arbitrations’ (1983) 53 BYIL 27; J J van Haersolte-van Hof and E V Koppe, ‘International arbitration and the *lex arbitri*’ (2015) 31 Arbitration International 27, 47-48. [↑](#footnote-ref-55)
56. Greenwood (n 55) 79-80. [↑](#footnote-ref-56)
57. Böckstiegel (n 51) 45-46. Respect for party autonomy in relation to the choice of law is naturally part of public international law, *Grenada Private Power Limited and WRB Enterprises, Inc v Grenada*, ICSID Case No ARB/17/13, Award, 19 March 2020, para 215. [↑](#footnote-ref-57)
58. For a counter-example see *Dunkwa Continental Goldfields Limited and Continental Construction and Mining Company Limited v The Government of the Republic of Ghana*, ICC Case No 18294, Award, 9 July 2015, paras 339-347. [↑](#footnote-ref-58)
59. *Lena Goldfields Ltd v Soviet Government*, Award, 3 September 1930, reproduced in (1950) 36 Cornell Law Review 31. See also *Himpurna California Energy Ltd v PT PLN (Persero)*, UNCITRAL, Final award, 4 May 1999, paras 41-43 and 337. [↑](#footnote-ref-59)
60. V V Veeder, ‘The Lena Goldfields Arbitration: The Historical Roots of Three Ideas’ (1998) 47 ICLQ 747, 750. [↑](#footnote-ref-60)
61. *Saudi Arabia v Arabian American Oil Company (ARAMCO)*, Award, 23 August 1958, (1963) 27 ILR 117 (‘*Aramco v Saudi Arabia*’); *In the matter of an arbitration between Petroleum Development (Trucial Coast) Ltd and the Sheikh of Abu Dhabi*,Award, 28 August 1951reproduced (1952) 1 ICLQ 247; *Ruler of Qatar v International Marine Oil Company Ltd*, Award, June 1953 (1957) 20 ILR 534. See also N Mersadi Tabari, *Lex Petrolea and International Investment Law: Law and Practice in the Persian Gulf* (Informa Law from Routledge, Abingdon 2017); I Alvik, ‘Arbitration in long-term international petroleum contracts: the “internationalization” of the applicable law’ in K P Sauvant (ed), *Yearbook on international investment law and policy 2011-2012* (OUP, Oxford 2013) 387-417; A Z El-Chiati, ‘Protection of investment in the context of petroleum agreements’ (1987) 204 RCADI 9; K Mohammed Al-Jumah, ‘Arab State Contract Disputes: Lessons from the Past’ (2002) 17 Arab Law Quarterly 215. Cf T Daintith, ‘Against “lex petrolea”’ (2017) 10 The Journal of World Energy Law & Business 1. Outside the oil concessions context, see *Societe Rialet v Government of Ethiopia* (1928-9) 8 Recueil des decisions des tribunaux arbitraux mixtes 742 (applying European Public Law in the absence of sufficiently developed Ethiopian law). See also J Gillis Wetter and Stephen M Schwebel, ‘Some Little-Known Cases on Concessions’ (1964) 40 BYIL 183. [↑](#footnote-ref-61)
62. *Aramco v Saudi Arabia*, 165. [↑](#footnote-ref-62)
63. Ibid, 172. [↑](#footnote-ref-63)
64. *Sapphire International Petroleums Ltd v National Iranian Oil Company (NIOC)*, Award, 15 March 1963, 35 ILR 136 (‘*Sapphire v NIOC*’), 172. [↑](#footnote-ref-64)
65. Ibid, 173; [↑](#footnote-ref-65)
66. Ibid, 175; see also M Paparinskis, ‘Sapphire Arbitration’ Max Planck Encyclopaedia of Public International Law (2010). [↑](#footnote-ref-66)
67. Alvik (n 23) 35. [↑](#footnote-ref-67)
68. *Texaco and Calasiatic v Libya*, 455, para 44; Greenwood (n 51) 51; R B v Mehren and P N Kourides, ‘International Arbitrations between States and Foreign Private Parties: The Libyan Nationalization Cases’ (1981) 75 AJIL 476. See also See also *Mobil Oil Iran, Inc v The Government of the Islamic Republic of Iran*, Partial Award, 14 July 1987, 16 Iran–USCTR 1, 37, para 81. [↑](#footnote-ref-68)
69. Unpublished, cited in Weil (n 23) 169. [↑](#footnote-ref-69)
70. *Bankswitch Ghana Ltd v The Republic of Ghana*, UNCITRAL, Award Save as to Costs, 11 April 2014 (‘*Bankswitch v Ghana*’), para 11.68. See also *CPconstruction Pioneers Baugesellschaft Anstalt v Government of the Republic of Ghana, Ministry of Roads and Transport,* ICC Case No 12048/DB/EC, Partial Award, 22 December 2003, para 131. See also *Bankswitch v Ghana*, para 11.64; ICC Case 5030, Award, 1992, Y Derains, ‘Chronique des sentences arbitrales de la CCI’ (1993) JDI (Clunet) 1004-1016 and *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH (DST) et al v The Government of the State of R’as Al Khaimah (UAE), The R’as Al Khaimah Oil Company (Rakoil) (UAE)*, ICC Case No 3572, Final Award, 1982 in A Jan van den Berg (ed), *Yearbook Commercial Arbitration 1989, Vol 14* (Kluwer Law International, The Hague 1989) 111-121, 117. Cf H E Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law* (OUP, Oxford 2013) 196-197; S M Schwebel, L Sobota, and R Manton, *International Arbitration Three Salient Problems* (2nd ed, CUP, Cambridge 2020) 65-151. [↑](#footnote-ref-70)
71. *Bankswitch v Ghana*, paras 11.71-11.97. [↑](#footnote-ref-71)
72. Ibid, para 11.97. [↑](#footnote-ref-72)
73. *Cambodia Power Company v Kingdom of Cambodia*, ICSID Case No ARB/09/18, Decision on Jurisdiction, 22 March 2011 (‘*CPC v Cambodia*’), para 332. See also K Parlett, ‘Claims under Customary International Law in ICSID Arbitration’ (2016) 31 ICSID Review 434. [↑](#footnote-ref-73)
74. *CPC v Cambodia*, para 339. [↑](#footnote-ref-74)
75. *Sandline International Inc and the Independent State of Papua New Guinea*, Interim Award, 9 October 1998, 117 ILR 552 (‘*Sandline v Papua New Guinea*’), 560. See also *Société d’Investigation de Recherche et d'Exploitation Minière v Burkina Faso*, ICSID Case No ARB 97/1, Award, 19 January 2000, paras 5.39 and 5.44.See also *Petrobart Limited v The Kyrgyz Republic*, UNCITRAL, Award, 13 February 2003, section 4.1.3.5., para 71; cf *Wintershall AG, International Ocean Resources, Inc (formerly Koch Qatar, Inc) and others v The Government of Qatar*, Partial Award on Liability, 5 February 1988, (1989) 28 ILM 795, para 2. [↑](#footnote-ref-75)
76. *Sandline v Papua New Guinea*, 561-63. [↑](#footnote-ref-76)
77. *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan*, ICSID Case No ARB/13/13, Award, 27 September 2017, para 290. In that case international law was relevant both to merits (expropriation) and quantum of damages. [↑](#footnote-ref-77)
78. Convention on the settlement of investment disputes between States and nationals of other States (18 March 1965, entered into force 14 October 1966) 575 UNTS 159, Article 42(1). [↑](#footnote-ref-78)
79. Leben (n 3), 344. [↑](#footnote-ref-79)
80. *Sapphire v NIOC*, 171. [↑](#footnote-ref-80)
81. H Flavier and C Froge, ‘Administrative justice in France: Between singularity and classicism (2016) 2 BRICS Law Journal 80; G Langrod, ‘Administrative Contracts: A Comparative Study’ (1955) 4 American Journal of Comparative Law 32. [↑](#footnote-ref-81)
82. *Texaco and Calasiatic v Libya*, 467-8; *Mohamed Abdulmohsen Al-Kharafi & Sons Co v The Government of the State of Libya, The Ministry of Economy in the State of Libya, The General Authority for Investment Promotion and Privatization Affairs (formerly the General Authority for Investment and Ownership), Ministry of Finance in Libya, The Libyan Investment Authority*, Final Award, 22 March 2013, para 14.4.3. [↑](#footnote-ref-82)
83. See also Alvik (n 23) 288. [↑](#footnote-ref-83)
84. J Linarelli, M Salomon and M Sornarajah, *The Misery of International Law: Confrontations of Injustice in the Global Economy* (OUP, Oxford 2018) 160; see also M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP, Cambridge 2015). [↑](#footnote-ref-84)
85. P Weil, ‘The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of Ménage À Trois’ (2000) 15 ICSID Review 401, 407. [↑](#footnote-ref-85)
86. It is another matter whether the investment treaty system radically enhanced the protection that foreign investors already enjoyed under contracts providing for international arbitration. See J Webb Yackee, ‘Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality’ (2008) 32 Fordham International Law 1551-1552. On the ‘pre-history’ of international investment law see J Hepburn, M Paparinskis, L N Skovgaard Poulsen, and M Waibel, ‘Investment Law before Arbitration’ (2020) 23 EJIL 929. [↑](#footnote-ref-86)
87. See also **Section I.** above. [↑](#footnote-ref-87)
88. Cf J Paulsson, ‘Arbitration Unbound: Award Detached from the Law of Its Country of Origin’ (1981) 30 ILCQ 358; W W Park, ‘The *Lex Loci Arbitri* and International Commercial Arbitration’ (1983) 32 ICLQ 21. [↑](#footnote-ref-88)
89. Quoted in *An industrial and agricultural investments company established by a convention between two Arab states to do business in the territory of one of them v The Minister of Economy and Finance in the host state*, Award, CRCICA Case No 112/1998, 29 September 1998 in M E I Alam Eldin (ed), Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration II, (Kluwer Law International, The Hague 2003) 147-154, 148.See also *Aramco v Saudi Arabia*, 156. [↑](#footnote-ref-89)
90. Lalive (n 2) 1000. [↑](#footnote-ref-90)
91. *Government of the Province of East Kalimantan v PT Kaltim Prima Coal and others*, ICSID Case No ARB/07/3, Award on Jurisdiction, 28 December 2009, para 14. [↑](#footnote-ref-91)
92. Ibid. [↑](#footnote-ref-92)
93. M Dekastros, ‘Portfolio Investment: Reconceptualising the Notion of Investment under the ICSID Convention’ (2013) 14 Journal of World Investment and Trade 286, 290-293. This is often described as the ‘double-barrelled test’. Τhe relevant requirements are to be found in Article 25 of the Convention on the settlement of investment disputes between States and nationals of other States (the ‘ICSID Convention’) (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159. See generally C H Shreuer, L Malintoppi, A Reinisch and A Sinclair, *The ICSID Convention: A Commentary* (2nd ed, CUP, Cambridge 2009) 71-341. [↑](#footnote-ref-93)
94. *Government of the Province of East Kalimantan v PT Kaltim Prima Coal and others*, ICSID Case No ARB/07/3, Award on Jurisdiction, 28 December 2009, para 162. [↑](#footnote-ref-94)
95. Ibid, para 163. [↑](#footnote-ref-95)
96. Ibid, para 164. [↑](#footnote-ref-96)
97. Ibid, para 166 (emphasis added). [↑](#footnote-ref-97)
98. Ibid, paras 167-168. [↑](#footnote-ref-98)
99. Ibid, paras 177-185. [↑](#footnote-ref-99)
100. Ibid, paras 186-202. [↑](#footnote-ref-100)
101. Ibid para 219. [↑](#footnote-ref-101)
102. See M Potesta, ‘The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws’ (2011) 27 Arbitration International 149. [↑](#footnote-ref-102)
103. *Mobil Corporation, Venezuela Holdings, BV, Mobil Cerro Negro Holding, Ltd, Mobil Venezolana de Petróleos Holdings, Inc, Mobil Cerro Negro, Ltd, and Mobil Venezolana de Petróleos, Inc v Bolivarian Republic of Venezuela*, Decision on Jurisdiction, 10 June 2010 (‘*Mobil v Venezuela*’), para 76. [↑](#footnote-ref-103)
104. *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Decision on Jurisdiction, 14 April 1988, para 61; *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No ARB/81/1, Decision on the Application for Annulment, 16 May 1986, paras 20-23; *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No ARB/81/2, Ad hoc Committee Decision on Annulment, 3 May 1985, para 69; *Liberian Eastern Timber Corporation (LETCO) v Liberia*, ICSID Case No ARB/83/2, Award, 31 March 1986, (1987) 26 ILM 647, 658; *Zhinvali Development Ltd v Republic of Georgia*, ICSID Case No ARB/00/1, Award, 24 January 2003, para 297; *Mobil v Venezuela*, para 85; *Brandes Investment Partners, LP v The Bolivarian Republic of Venezuela*, ICSID Case No ARB/08/3, Award, 2 August 2011, para 81. *Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe, CA, et al v The Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5, Decision on Jurisdiction, 8 February 2013, para 81; *OPIC Karimun Corporation v Bolivarian Republic of Venezuela*, Award, 28 May 2013, para 76; *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v Democratic Republic of Timor-Leste*, ICSID Case No ARB/15/2, Award, 22 December 2017, para 151. See also *Société Resort Company Invest Abidjan, Stanislas Citerici and Gérard Bot v Republic of Côte d’Ivoire*, ICSID Case No ARB/16/11, Decision on the Respondent Preliminary Objection to Jurisdiction, Dissenting Opinion of Kaj Hobér, 1 August 2017, para 5; Without taking a position, the ad hoc annulment committee in *Wena Hotels v Egypt* (an investment treaty case) summarized the conflicting views on the matter *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Decision on Application for Annulment, 5 February 2002, paras 38 and 39. See also W M Reisman, ‘The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of Its Threshold’ (2000) 15 ICSID Review 362; E Gaillard and Y Banifatemi, ‘The Meaning of “and” in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process’ (2003) 28 ICSID Review 375. Cf *Togo Electricité and GDF-Suez Energie Services v Republic of Togo*, ICSID Case No ARB/06/7, Award, 10 August 2010, paras 135-138. [↑](#footnote-ref-104)
105. Unpublished, see M Blessing, ‘Extension of an Arbitration Clause to Non-Signatories (Third Parties)’, Summary / Hand-out by Marc Blessing, prepared for the KIEV Arbitration Days 14 / 15 November 2013, available at <http://www.uba.ua/documents/doc/mark_blessing_1.pdf>, para 32. [↑](#footnote-ref-105)
106. *Chevron v Bangladesh*, paras 132-149; ibid, paras 148-149. [↑](#footnote-ref-106)
107. *Niko Resources v Bapex and Petrobangla*, para 247. [↑](#footnote-ref-107)
108. Ibid. [↑](#footnote-ref-108)
109. See ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) II(2) Yearbook of the International Law Commission, 2001, at 39. These rules are generally applicable irrespective of the nature of the violation, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, (2007) ICJ Rep 43, 201, para 408. [↑](#footnote-ref-109)
110. *Boru Hatlari Ile Petrol Taşima AŞ and others v Tepe Insaat Sanayii AS* [2018] UKPC 31, para 19; J Crawford, ‘Treaty and Contract in Investment Arbitration’ (2008) 24 Arbitration International 351, 363. *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, 8 October 2019, para 319. See also *Georg Gavrilovic and Gavrilovic doo v Republic of Croatia*, ICSID Case No ARB/12/39, 25 July 2018, para 856; *The City of London v Sancheti*, (2008) EWCA Civ 1283, para 35. On a more nuanced analysis of attribution rules in international investment arbitration see C Kovacs, *Attribution in International Investment Law* (Kluwer International Law, The Hague 2018). In *Gécamines*, references to these rules has been made only to support that ‘[t]he express distinction between a state and a separate entity has also achieved more general international legal recognition’, *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC* [2012] UKPC 27, para 15. [↑](#footnote-ref-110)
111. *Joint Venture Yashlar and Bridas SAPIC v Government of Turkmenistan*, ICC Case No 9151, Interim Award, 8 June 1999, Mealey’s International Arbitration Report, Document 05-011026-020A, (2001) 16(10) International Arbitration Report 6, para 568. [↑](#footnote-ref-111)
112. For an excellent background of the saga, see J Paulsson, ‘The Pyramids Case’ in (2014) 1 Collected Courses of the International Academy for Arbitration Law Year 2012, 1. [↑](#footnote-ref-112)
113. *SPP (Middle East) Ltd and Southern Pacific Properties Ltd v Arab Republic of Egypt and Egyptian General Company for Tourism and Hotels*, ICC Case No YD/AS 3493, Award, 16 February 1983, (1984) IX Yearbook of Commercial Arbitration 111, (1985) 112 JDI (Clunet) 130; 86 ILR 434. [↑](#footnote-ref-113)
114. Paris CA, (1987) JDI (Clunet) 638, 86 ILR 474, 477. SPP successfully initiated ICSID arbitration against Egypt on the basis of Egypt’s investment promotion legislation marking the beginning of a new era of ‘arbitration without privity’, J Paulsson, ‘Arbitration Without Privity’ (1995) 10 ICSID Review 232; *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Decision on Jurisdiction, 14 April 1988. [↑](#footnote-ref-114)
115. *Bridas SAPIC, Bridas Energy International Ltd, Intercontinental Oil and Gas Ventures Ltd and Bridas Corporation v Government of Turkmenistan and State Concern Tukmenneft*, 345 F 3d 347 (5th Cir 2003) (‘Bridas I’) at 17 (emphasis added). Cf *Joint Venture Yashlar and Bridas SAPIC v Government of Turkmenistan*, ICC Case No 9151, Interim Award, 8 June 1999, Mealey’s International Arbitration Report, Document 05-011026-020A, (2001) 16(10) International Arbitration Report 6, section 6. [↑](#footnote-ref-115)
116. *Bridas I*, 18. On the second Bridas case before the US Court of Appeal see below **Section IV.B**. [↑](#footnote-ref-116)
117. Lord Mance, ‘Arbitration: a Law unto itself’ (2016) 32 Arbitration International 223; J Kleinheisterkamp, ‘Lord Mustill and the Courts of Tennis - Dallah v Pakistan in England, France and Utopia’ (2012) 75 Modern Law Review 639, 653; P Mayer, ‘The extension of the Arbitration Clause to Non-signatories – the irreconcilable positions of French and English Courts’ (2012) 27 American University International Law Review 831; Hanotiau (n 16) 398-401; D Khanna, ‘Dallah: The Supreme Court’s Positively Pro-Arbitration “No” to Enforcement’ (2011) 28 Journal of International Arbitration 127; G A Bermann, ‘The UK Supreme Court Speaks to International Arbitration: Learning from the Dallah Case’ (2011) 22 American Review of International Arbitration 1. See generally the S L Brekoulakis, *Third Parties in International Commercial Arbitration* (OUP, Oxford 2011). [↑](#footnote-ref-117)
118. *Dallah v Government of Pakistan* [2010] UKSC 46, para 145, per Lord Collins. [↑](#footnote-ref-118)
119. *Gouvernement du Pakistan – Ministère des Affaires Religieuses c Dallah Real Estate and Tourism Holding Company*, Case No 09/28533, 17 February 2011, English translation in (2012) 51 ILM 288, 291. [↑](#footnote-ref-119)
120. *Contractor A (Luxembourg) v Ministry of Agriculture and Water Management of Z (Republic of Z), State Fund for Development of Agriculture of Z, (Republic of Z) and others*, ICC Case No 9762, Final Award, 2001 in A Jan van den Berg (ed), *Yearbook Commercial Arbitration 2004, Vol 29* (Kluwer Law International; The Hague 2004) 26-45. [↑](#footnote-ref-120)
121. Ibid 53; see also ibid 51. [↑](#footnote-ref-121)
122. Cf the analysis in *Mohamed Abdulmohsen Al-Kharafi & Sons Co v The Government of the State of Libya* and others (Ad-hoc arbitration subject to the Unified Agreement for the Investment of Arab Capital in the Arab States), Final Arbitral Award, 22 March 2013, 257-267 as well as CA Paris, *Le Gouvernement de l’Etat Libyen et al c Société Mohamed Abdel Moshen Al-Kharafi et Fils*,28 October 2013, 13/18811 and 13/19246. [↑](#footnote-ref-122)
123. *Banque Arabe et Internationale d’Investissement v Inter-Arab Investment Guarantee Corp*, Award, 17 November 1994 (1996) 21 Yearbook of Commercial Arbitration 13. See C Greenwood, ‘Some Challenges of International Litigation’ (2012) 1 Cambridge Journal of International Law 1, 14-16. [↑](#footnote-ref-123)
124. *Ambatielos case*, Judgement (1953) ICJ Rep 10, 19; see also *Status of Eastern Carelia*, PCIJ, Series B, No 5, 1923, 27; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment (1986) ICJ Rep 14, 32, para 44; *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia / Libyan Arab Jamahiriya) (Tunisia v Libyan Arab Jamahiriya)*, Judgment (1985) ICJ Rep 192, 216, para 43; *Interpretation of Peace Treaties, Advisory Opinion* (1950) ICJ Rep 65, 71; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening), Judgment* (2002) ICJ Rep 303, 421, para 238. [↑](#footnote-ref-124)
125. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction and Admissibility, Judgment (2006) ICJ Rep 6, 39, para 88; see also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment (2008) ICJ Rep 177, 200-201, para 48. [↑](#footnote-ref-125)
126. *Case Concerning the factory at Chorzów*, PCIJ Rep Series A, No 9, 27 July 1927, 32. [↑](#footnote-ref-126)
127. *Corfu Channel case*, Judgment on Preliminary Objection (1948) ICJ Rep 15, 27. [↑](#footnote-ref-127)
128. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction and Admissibility, Judgment (2006) ICJ Rep 6, 18-19, para 21; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment, (1996) ICJ Rep 595, 621. [↑](#footnote-ref-128)
129. ICC Case No 1939 cited by Y Derains in (1973) Rev Arb 145; also quoted in *Company Z and Others v State Organization ABC*, Award, April 1982 in P Sanders (ed), *Yearbook Commercial Arbitration 1983, Volume 8* (Kluwer Law International, The Hague 1983) 94-117, 115. [↑](#footnote-ref-129)
130. *Benteler v Belgium*, Award, 18 November 1983, (1984) Journal of International Arbitration 184, 190. [↑](#footnote-ref-130)
131. *A Insurance Companies v B and C*, Interim Award, ICC Case No 10947/ESR/MS, June 2002, (2004) 22 ASA Bulletin 308-332, 320-321. [↑](#footnote-ref-131)
132. J Paulsson, ‘May a state invoke its internal law to repudiate consent to international commercial arbitration?’ (1986) 2 Arbitration International 90, 97-98. See also *Malicorp Ltd (UK) v The Government of the Arab Republic of Egypt and others*, CRCICA Case No 382/2004, Final Award, 7 March 2006 in M E I Alam Eldin (ed), *Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration Vol IV* (Kluwer Law International, The Hague 2014) 18. [↑](#footnote-ref-132)
133. *Company Z and Others v State Organization ABC* [Framatome v Atomic Energy Organization of Iran], Award, April 1982 in P Sanders (ed), *Yearbook Commercial Arbitration 1983, Volume 8* (Kluwer Law International, The Hague 1983) 94-117, 108-109 (emphasis added). [↑](#footnote-ref-133)
134. *S v State X*, ICC Case No 10623, Award, 7 December 2001, (2003) 21(1) ASA Bulletin 82, 92. See also ICC Case No 14470, Final Award, 2008 (2011) JDI 1229, 1233. [↑](#footnote-ref-134)
135. *S v State X*, ICC Case No 10623, Award, 7 December 2001, (2003) 21(1) ASA Bulletin 82, 96. See also Paris Court of Appeal, *Bec Frères v The Ministry of Infrastructure of Tunisia*, 24 February 1994. See also *Sapphire v NIOC*, *Sandline v Papua New Guinea*, and *Bankswitch v Ghana* discussed above in **Section III**. [↑](#footnote-ref-135)
136. D Sarooshi, ‘Investment Treaty Arbitration and the World Trade Organization: What Role for Systemic Values in the Resolution of International Economic Disputes?’ (2014) 445, 456, fn 54 for further references. See also *Sandline v Papua New Guinea*, 561. [↑](#footnote-ref-136)
137. *Niko Resources v Bapex and Petrobangla*, para 255. [↑](#footnote-ref-137)
138. *Barcelona Traction, Light and Power Company, Limited*, Judgment, (1970) ICJ Rep 3, 39, para 58. See also Leben (n 3) 237. [↑](#footnote-ref-138)
139. *First National City Bank v Banco Para El Comercio Exterior de Cuba* 462 US 611 (1983), 621-623; [↑](#footnote-ref-139)
140. Ibid, 633. See also M A Finklestein, ‘First National City Bank v. Banco Para El Comercio Exterior de Cuba: Act of State and Choice of Law Aspects of Suing Foreign Governmental Corporations’ (1983) 9 North Carolina Journal of International Law 147; M Leigh, ‘The Supreme Court and the Sabbatino Watchers: First National City Bank v. Banco Nacional de Cuba’ (1972-1973)13 Virginia Journal of International Law 33; A F Lowenfeld, ‘Act of State and Department of State: First National City Bank v Banco Nacional de Cuba’ (1972) 66 AJIL 795. [↑](#footnote-ref-140)
141. B Hanotiau, *Complex Arbitrations, Multiparty, Multicontract, Multi-Issue* (2nd ed , Kluwer Law International, The Hague 2020) 47 (emphasis added). [↑](#footnote-ref-141)
142. *Bridas SAPIC v Government of Turkmenistan (Bridas II)*, 447 F.3d 411, 420 (5th Cir 2006). [↑](#footnote-ref-142)
143. J Wass, ‘Jurisdiction by Estoppel and Acquiescence in International Courts and Tribunals’ (2015) 86 BYIL 155, 194. [↑](#footnote-ref-143)