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Case Note

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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

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ABSTRACT

A matter of perspective? When a dispute arises and on the government's side a non-signatory to the arbitration agreement or investment treaty adopted the contested action, privity of contract and rules of attribution of conduct may apply. Both have been interpreted in different manners. When one put all these interpretations together, the result is a picture of impossible spaces and irreconcilable scenarios like in a drawing of Escher. If Escher expressed his artistic inspiration by challenging gravity and visual logic, practitioners may nowadays find challenging solving the dilemma of when and how an arbitration agreement can be extended to a non-signatory state or the conduct of a state entity be attributed to the state.

In its recent decision 4A_636/2018, the Swiss Supreme Court confirmed its case law that exceptions to the doctrine of privity of contract exist under Swiss law, but these are limited in number and scope. The same applies regardless of whether private or public entities are concerned. This article will examine decision 4A_636/2018 in light of Swiss case law and draw a comparison with investment arbitral tribunals' jurisprudence applying rules of attribution of conduct of customary international law when privity of contract lacks on the government's side.

1. OVERLAPPING PERSPECTIVES: PRIVITY OF CONTRACT AND RULES OF ATTRIBUTION OF CONDUCT

A matter of perspective? When a dispute arises and on the government's side a non-signatory to the arbitration agreement or investment treaty adopted the contested

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action, privity of contract and rules of attribution of conduct may apply. Both have been interpreted in different manners. Commercial and investment arbitral tribunals as well as the Swiss Supreme Court have provided overlapping if not contradictory interpretations. They apply these rules differently, or they give more weight to one aspect instead of the other (be it the public or private nature of an entity or the construction of the entire matter as a question of direct or indirect shareholding when it comes to the investor). Some even adopt one doctrine to the exclusion of the other. When one put all these interpretations together, the result is a picture of impossible spaces and irreconcilable scenarios like in a drawing of Escher.[1] If Escher expressed his artistic inspiration by challenging gravity and visual logic, practitioners may nowadays find challenging solving the dilemma of when and how an arbitration agreement can be extended to a non-signatory state or the conduct of a state entity be attributed to the state. In Escher's drawings different perspectives coexist. An observer would see stairs apparently climbing, but after a more attentive analysis the same staircase would turn out to be going downwards. There are cases of waterfalls where the water is going upwards instead of flowing down. There are floors merging with ceilings and people standing on what becomes a side wall for another subject. When one observes one part of the overall picture, everything seems correct. But when one pays more attention to each single component and their interaction with the overall picture, laws of physics are upside-down and what the eyes see conflicts with our understanding of time and space, gravity and perspective.

Case law of commercial and investment arbitral tribunals as well as of the Swiss Supreme Court on the extension of an arbitration agreement to a non-signatory state and on attribution of state entities' conduct (when privity of contract lacks) provides interpretations that appraised together compose a picture reminiscent of Escher's artwork. In its recent decision *4A_636/2018*, the Swiss Supreme Court confirmed its case law that exceptions to the doctrine of privity of contract exist under Swiss law, but these are limited in number and scope. The same applies regardless of whether private or public entities are concerned. Investment arbitral tribunals, instead, rely on privity of contract when dealing with the investor, but apply rules of attribution of conduct when the non-identity of the parties to the investment contract and the parties with locus standi before the arbitral tribunal materializes on the government's side. This article will examine decision *4A_636/2018* in light of Swiss case law and draw a comparison with investment arbitral tribunals' jurisprudence to show that these interpretations describe together a fundamentally contradictory picture.

2. SWISS SUPREME COURT'S CASE LAW

2.1 Decision *4A_636/2018* of 24 September 2019

The Swiss Supreme Court in decision *4A_636/2018* applied the doctrine of privity of contract on a private contract law basis.[2] The dispute arose out of a contract

1 Maurits Cornelis Escher (1898–1972), Dutch artist and one of the world's most famous graphic artist known for having experimented in manipulating space and perspectives. Official webpage <https://mcescher.com/>.

2 Privity of contract originates in the English Law of Contract and is more than 140 years old. Privity of contract means that a subject must be a party to a contract in order to invoke rights and bear obligations under the contract, to sue and be sued under that contract. Under different names, the concept belongs also to

concluded by a Turkish joint venture with a Libyan state-owned entity for the construction of a water pipe (Agreement). Following the disruption of the project in the aftermath of the Libyan revolution in 2011, the joint venture and its participating companies initiated arbitration proceedings against the state-owned entity responsible for the project as well as the state of Libya under the International Chamber of Commerce (ICC) Rules of Arbitration (ICC Rules). The arbitral tribunal's partial award accepting the claims against the state entity but denying jurisdiction towards the state was challenged before the Swiss Supreme Court.[3]

In its judgment, the Swiss Supreme Court held that the Applicants (Claimants in the arbitration proceeding) did not demonstrate the existence of circumstances on which they could in good faith rely to expect the state of Libya to be bound by the arbitration agreement.[4] The Swiss Supreme Court confirmed the arbitral tribunal's finding that the Claimants failed to demonstrate that the state was party to the arbitration clause by reason of either (i) the Libyan entity party to the contract being an instrument of the state according to Libyan or Swiss law or (ii) the state's interference in the negotiations or execution of the Agreement.[5]

The Swiss Supreme Court was of course bound by the determination of the facts of the case of the arbitral tribunal. The arbitral tribunal found that the Claimants did not prove that the Libyan entity was entirely financed from the Libyan state; this entity rather drew its finances from the independent sale of water. The arbitral tribunal further held that the General People's Committee did not intervene in the tender process and conclusion of the ensuing contracts, which were left to the People's Committee responsible for the entity in question.[6] The arbitral tribunal also decided that Claimants exaggerated the entity's excessive authority it allegedly received from the Libyan state. From the facts before the arbitral tribunal it was not clear to what extent the Responding entity could have exercised sovereign powers (which belonged to the General People's Committee). Moreover, the arbitral tribunal determined that the involvement of the Ministry of Water was necessary in order to conduct negotiations following the destruction of machinery and equipment during the

other legal traditions. An embryonic form already existed under Roman law, for whose lawyers '[contracts in favour of third parties] would have been inconceivable'. The expression *stipulatio alteri* is known in civil law traditions to refer to this concept. See Martina Magnarelli, *Privity of Contract in International Investment Arbitration: Original Sin or Useful Tool* (International Arbitration Law Library Series Vol 52, Kluwer Law International 2020) 43, 45, 49 *quoting from* Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (OUP 1996) 134–6; see also Robert Merkin, 'Historical Introduction to the Law of Privity' in Robert Merkin (ed), *Privity of Contract: The Impact of the Contracts (Right of Third Parties) Act 1999* (LLP 2000) 1–17; and Michael D Nolan and Frédéric G Sourgens, 'Limits of Consent: Arbitration Without Privity and Beyond' in David Arias and Miguel Ángel Fernández-Ballesteros (eds), *Liber Amicorum Bernardo Cremades* (La Ley 2010) 873, 888–90.

3 Valentina Hirsiger-Meier and Lukas Innerebner, 'Swiss Supreme Court Confirms High Barrier for Extension of a State-owned Entity's Arbitration Clause to the Non-signatory State' (Global Arbitration News 2020); and on economic sovereignty and the internationalization of investment contracts *see* Asif H Qureshi and Andreas R Ziegler, *International Economic Law* (Sweet & Maxwell 2019) 43–60, 410–12.

4 Swiss Supreme Court, *Case 4A_636/2018*, judgment dated 24 September 2019, para 4.5.3; on goof faith as a general principle of law see Andreas R. Ziegler and Jorun Baumgartner, 'Good Faith as a General Principle of (International) Law' in Andrew Mitchell, Muthucumaraswamy Sornarajah and Tania Voon (eds), *Good Faith and International Law: Trade and Investment Implications* (OUP 2015) 9–36.

5 Swiss Supreme Court, *Case 4A_636/2018*, para 4.2.

6 ibid, para 4.3.1.

Libyan revolution.[7] And although according to the Administrative Contracts Regulations the Audit Bureau had the authority to review contracts during the negotiation phase, the arbitral tribunal found that the Administrative Contracts Regulations did not apply and that there was no evidence that the Audit Bureau intervened in the negotiations nor that either the General People's Committee or the Prime Minister examined and approved the Agreement. Moreover, the Libyan Central Bank did not interfere with the Agreement, but had the limited role of providing financing as any other commercial bank.[8] The arbitral tribunal, therefore, excluded that the Libyan entity was part of or identified with the Libyan state ('Teil der libyschen Staatsorganisation bzw. mit dem Staat Libyen identisch sei').[9]

The Swiss Supreme Court further emphasized that the Applicants did not dispute that Libyan case law never held that the state is bound by an agreement as a non-signatory by reason of a public entity being party to that agreement. The Applicants rather drew from Libyan case law to contend that the only requisite for attribution of conduct of a state entity to the Libyan state is the latter's exercise of supervisory powers.[10] Under Swiss law, the Swiss Supreme Court also found—recalling its previous jurisprudence—that the circumstance that an entity established by the state signs an arbitration agreement does not entail that the state consented to arbitration.[11]

The Swiss Supreme Court did not share the Applicants' viewpoint that the Swiss Supreme Court's case law in the *Westland* case needed to be revised. In *Westland*, the Swiss Supreme Court found that public entities are independent legal persons under public law and arbitration agreements concluded by these entities are not attributable to the state.[12] Westland signed a shareholders agreement (Shareholders Agreement) with the Arab Organization for Industrialization (AOI) to establish the joint stock company Arab British Helicopters Company (ABH). The United Arab Emirates (UAE), Saudi Arabia, Qatar and Egypt had set up AOI, accepted responsibility under the AOI's charter for the obligations contracted by AOI, had their ministers constituting AOI's managing council (Managing Council) and initially financed its setting up.[13] Nevertheless, AOI was a separate legal entity according to its by-laws, had legal, procedural and financial autonomy and was authorized to sign arbitration clauses and submissions agreements. Although the arbitral tribunal considered that Westland would have not concluded the transaction had the four states not provided their 'guarantees', the Swiss Supreme Court held that the close relationship between AOI and the four states was not enough to overcome the presumption that by not signing the Shareholders Agreement the four states decided not to be bound

7 ibid, para 4.3.1.
8 ibid, para 4.3.2.
9 ibid, para 4.4.1.
10 ibid, para 4.4.2.
11 ibid, para 4.5.1.
12 ibid; and see Nathalie Voser and Marco Vedovatti, 'Court finds State not Bound by Arbitration Clause Signed by State-owned Entity (Swiss Supreme Court)' (Practice Law 2020) para 15.
13 'Westland Helicopters (UK) v The Arab Republic of Egypt, The Arab Organization for Industrialization (Egypt) and The Arab British Helicopter Company (Egypt), Court of Appeal of the Canton of Geneva, 3 November 1987 and Federal Supreme Court of Switzerland, 1st Civil Law Chamber, 19 July 1988' in Albert Jan Van den Berg (ed), *Yearbook Commercial Arbitration* 1991 (Vol XVI, Yearbook Commercial Arbitration, ICCA & Kluwer Law International 1991) 174, 180–1.

by it. The Swiss Supreme Court also stated that by way of having AOI signing the Shareholders Agreement the four states manifestly showed that they did not want to be bound by the arbitration clause.[14]

The Swiss Supreme Court further reminded in decision *4 A_636/2018* that contractual obligations in principle only bind the parties to the contract, but—as previously stated by its case law—an arbitration agreement may bind non-signatories in case of assignment, assumption of debt or transfer of contract (cf. BGE 134 III 565 E. 3.2 p. 567). The Swiss Supreme Court highlighted, however, that the Applicants did not invoke any of these legal grounds. They instead argued that because of the state's interference with the Agreement they had in good faith relied on the state's commitment to the arbitration agreement.[15] Although the Swiss Supreme Court's case law recognized that a third party constantly and repeatedly involved in the execution of a contract is treated as if it consented to the agreement and the arbitration clause (cf. BGE 134 III 565 E. 3.2 p. 568; 129 III 727 E. 5.3.2 p. 737; Judgment 4 A_473/2018 of 5 June 2019 E. 5.1.2), it held nevertheless that the Applicants failed to demonstrate the existence of circumstances from which it could have been concluded in good faith that the state was bound by the Agreement and the arbitration clause. According to the Swiss Supreme Court, the authoritarian nature of the state and the importance of the project for the state were not enough to make the Applicants believe in good faith that the state consented to be bound by the Agreement and the arbitration clause.[16]

2.2 Westland, Wetco, and decision 4 A_646/2018

The Swiss Supreme Court's case law is constant. Not only the Swiss Supreme Court did not divert from the *Westland* case referred to by the Applicants in its decision *4 A_636/2018*,[17] but it also echoed the *Wetco* case, with which the Westland judgment had aligned. According to the Swiss Supreme Court's ruling in *Westland*, AOI even enjoyed greater independence than the relevant state entity in the *Wetco* case.[18] In *Wetco*, the Swiss Supreme Court stated that to hold that a state entity identifies with the state it is necessary that the law establishing the entity objectively provides it. Most fundamentally, if the law gives the entity independent legal personality even the tight relationship between the state entity and the state is not enough. In *Wetco*, the state partially financed, supervised, controlled, and imposed specific conduct rules on the entity; still this was not sufficient. In the Swiss Supreme Court's view, this and other factors leaning in favour of the autonomy of the entity from the state

14 Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 241, 291–92, 294–95.

15 Swiss Supreme Court, *Case 4A_636/2018* (n 4), para 4.5.2.

16 ibid, para 4.5.3; and see also 'République arabe d'Egypte et autres v Westland Helicopters Ltd, Tribunal fédéral, 1ère Cour civile, 1675/1978; 1677/1987, 19 July 1988', 7 Association Suisse de l'Arbitrage 1 (1989) 63, 73: '[E]n laissant l'AOI conclure seule le 'Shareholders Agreement' avec WHL, les Etats fondateurs, qui ont en outre conféré expressément à l'AOI le pouvoir d'ester en justice et de fixer avec ses partenaires contractuels la manière de trancher les conflits, ont manifesté qu'ils ne voulaient pas se soumettre à la convention d'arbitrage.'

17 See subsection 2.1 above.

18 'Westland Helicopters (UK) v The Arab Republic of Egypt, The Arab Organization for Industrialization (Egypt) and The Arab British Helicopter Company (Egypt)' (n 13), at 181.

do not allow to supersede the presumption that the state is not bound by the arbitration agreement as a non-signatory.[19] In other words, such a relationship is not enough to justify an exception to privity of contract.

In its decision *4A_646/2018* of 17 April 2019, the Swiss Supreme Court again stated that under Swiss law an arbitration agreement cannot be extended to non-signatories unless in cases of assignment, assumption of a debt, transfer of contract, intentional interference with the performance of the contract in full knowledge of the arbitration agreement or in case of a contract for the benefit of a third party. In the specific case, the Swiss Supreme Court extended the arbitration clause in the agreement between two private entities to the entity on whose behalf the agreement was signed, and which performed the agreement for many years even after it expired. In this circumstance, the Swiss Supreme Court relied on the principle *non venire contra factum proprium*.[20]

C. Swiss Supreme Court's constant application of privity of contract—could there be another perspective?

In decision *4A_636/2018*, the Swiss Supreme Court examined the dispute from a private contract law perspective. But the circumstance that one of the parties to the arbitration agreement was a state entity bears further considerations. When a state enters into a contract with a private entity, it can either exercise public functions or act as any other commercial party. And in either scenario, the state can contract with the private entity either directly or through a state agency or state-owned enterprise. Investment arbitral tribunals' case law reveals that the divide between the state acting as any other commercial party and the state exercising sovereign prerogatives is thin and it becomes even more blurred when state entities are involved.

3. PRIVITY OF CONTRACT AND RULES OF ATTRIBUTION OF CONDUCT IN INVESTMENT ARBITRAL TRIBUNALS' CASE LAW

3.1 Different perspectives: privity of contract on the investor's side *versus* rules of attribution of conduct on the State's side

Privity of contract has 'come to land on the shores of international investment arbitration' and spurred a considerable number of decisions across the entire spectrum of investment treaty arbitration. Privity of contract has been repeatedly applied, *inter alia*, to decide (i) whether an investor could raise a claim under the treaty despite a

19 'République arabe d'Egypte et autres v Westland Helicopters Ltd' (n 16) at 72 *quoting from République Arabe de Libye c Wetco ltd, arrêt du Tribunal fédéral rendu le 14 novembre 1979 (partiellement publié in SJ 1980 p 443 ss.)*: '[P]our admettre que l'Etat et la société ne font en réalité qu'une seule et même personne, il faut que la loi organique puisse être interprétée objectivement dans ce sens; tel n'est pas le cas d'une société même en situation d'étroite dépendance par rapport à l'Etat, qui la finance partiellement, la surveille, la contrôle et lui impose des règles de comportement très précises, si la loi organique lui accorde le statut de société nationale avec personnalité morale; ce facteur, combiné avec d'autres dispositions dénotant l'autonomie de la société, plaide pour l' indépendance juridique de la société et vient renforcer la conclusion que l'on peut tirer de l'absence de la signature du contrat par l'Etat'.

20 Simon Gabriel, 'Congruence of the NYC and Swiss lex arbitri regarding the extension of arbitral jurisdiction to non-signatories – BGE 145 III 1999 (BGer Nr. 4A_646/2018)' ASA Bulletin 4 (2019) 883, 884, 888–89.

forum selection clause in the investment contract or a fork-in-the-road provision in the treaty or (ii) whether the investor's umbrella clause claim could be successful when party to the investment contract was not the investor itself but a related entity.[21] If on the investor's side arbitral tribunals may decide not to abide by a strict interpretation of the doctrine of privity of contract—although this is not always the case—and basically pierce the corporate veil, on the government's side they apply rules of attribution of conduct. Albert Badia considers rules of attribution of conduct as 'an exception to "privity of contract"' and points out that veil-piercing (another exception to privity of contract)[22] is hardly ever or never applied to state entities.[23] The conditions of application of these legal notions are different. Therefore, relying on privity of contract (or rather on one of several private and commercial law exceptions to it)[24] or rules of attribution of conduct leads to different results.

3.2 Privity of contract and rules of attribution of conduct: investment treaty tribunals' case law

Privity of contract repeatedly comes into play in investment treaty arbitration especially when investors conclude concession contracts. Concession contracts are concluded between (i) the government of the host state, either directly or through an administrative subdivision, governmental entity or state-owned enterprise and (ii) a company incorporated either abroad or locally (as often required by the domestic law on market access).[25] Case law has not always expressively referred to privity of contract, but it has constantly considered it.

In *Enron v Argentina*, Enron raised an umbrella clause claim as a minority shareholder of local company TGS. Although the Argentine government concluded the

21 Magnarelli (n 2), at 174;for more on the application of privity of contract in international investment application, including in cases of multiparty arbitration, consolidation, counterclaims, etc. see Magnarelli (n 2).

22 On examples of exceptions to privity of contract under Swiss law see Section 2 above.

23 Magnarelli (n 2), at 70 *quoting from* Albert Badia, *Piercing the Veil of State Enterprises in International Arbitration* (International Arbitration Law Library Series Vol 29, Kluwer Law International 2014) 168–69.

24 For more on the principles of private and commercial law applied by arbitral tribunals and domestic courts to extend arbitration agreements to third parties see Magnarelli (n 2), at 63; Stavros L Brekoulakis, *Third Parties in International Commercial Arbitration* (OUP 2010) 2–10, 28–26, 128–36, 150–64; Stavros L Brekoulakis, 'Parties in International Arbitration: Consent v Commercial Reality' in Stavros Brekoulakis, Julian DM Lew and Loukas Mistelis (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International 2016) 119; Simon Allison and Kanaga Dharmananda, 'Incorporating Arbitration Clauses: The Sacrifice of Consistency at the Altar of Experience' 30 Arbitration International 2 (2014) 265–68, 276–82; and William W Park, 'Non-signatories and International Contracts: An Arbitrator's Dilemma' in Permanent Court of Arbitration, *Multiple Party Action in International Arbitration* (OUP 2009) 3, 15–16.

25 Magnarelli (n 2), at 63; Nicholas Miranda, 'Concession Agreements: From Private Contract to Public Policy' 117 The Yale Law Journal 3 (2007) 510; Martina Magnarelli, *The Unresolved Conundrum of Contract-Based and Treaty-Based Claims: An Extra Element of Contention: Privity of Contract and Forum Selection Clauses in Investment Contracts*, 1 European Investment Law and Arbitration Review (2016) 76, 77–78; see Upendra Baxi, 'Sovereign Rights, State Obligations and Natural Resources' in Shawkat Alam, Jahid Hossain Bhuiyan and Jona Razzaque (eds), *International Natural Resources Law, Investment and Sustainability* (Routledge 2018) 45; and Junji Nakagawa, *Nationalization, Natural Resources and International Investment Law* (Routledge 2017) 24–74.

investment contract with TGS, the arbitral tribunal considered Enron's power to influence TGS and to take decisions on its behalf, the reference to commitments undertaken 'with regard to investments' in the umbrella clause in the Argentina–United States Bilateral Investment Treaty (BIT) and the Argentine government having specifically sought Enron's involvement in the investment. Therefore, the arbitral tribunal found that it could not be in doubt that the state expressed its consent to arbitration also for claims raised by Enron.[26] In *CMS v Argentina*, the decision of the arbitral tribunal has been quashed by the Annulment Committee for lack of reasoning, but the Annulment Committee admitted that CMS as a minority shareholder of the Argentine company TGN could raise its claim. The Annulment Committee addressed the issue from the perspective of a shareholder's direct right of action entitling it to enforce the rights of the investment company on its own interest.[27]

By contrast, in *Burlington Resources v Ecuador* and *WNC v Czech Republic*, the arbitral tribunals expressively referred to privity of contract, or rather to the lack of it, to dismiss the investors' umbrella clause claims.[28] Hence, in these cases, the identity of the parties to the investment contract and investment agreement was a fundamental requirement. In *Vivendi v Argentina*, *Aguas del Tunari v Bolivia*, and *Biwater Gauff v Tanzania*, instead, the non-identity of the parties to the investment contract and investment agreement was the reason why the forum selection clause in the former did not impede the investor from raising claims under the latter.[29] In *Alex Genin v Estonia*, the non-identity of the parties before the arbitral tribunal (Alex Genin, ECL and A.S. Baltoil) and the domestic courts (EIB) led the arbitral tribunal to conclude that the fork-in-the-road provision in the Estonia–United States BIT had not been triggered.[30] Yet, other arbitral tribunals came to opposite conclusions. In *SGS v Pakistan*, *SGS v Philippines*, and *BIVAC v Paraguay*, for instance, the arbitral tribunals considered the investors to be bound by the dispute resolution clause in the

26 Magnarelli (n 2), at 157; *Enron Corporation and Poderosa Assets, LP v The Argentine Republic (also known as Enron Creditors Recovery Corp and Ponderosa Assets, LP v The Argentine Republic)*, ICSID Case No ARB/01/3, Decision on Jurisdiction (14 January 2004), paras 52, 56; Argentina–United States BIT (1991); and Raúl Pereira de Souza Fleury, 'Umbrella Clauses: A Trend Towards its Elimination' 31 Arbitration International 4 (2015) 679, 686.

27 Magnarelli (n 2), at 35; *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic (25 September 2007) para 95; and see Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 177.

28 Magnarelli (n 2), at 155, 157–58; *Burlington Resources Inc v The Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Liability (14 December 2012) paras 208–18; Ecuador–United States BIT (1993); *WNC Factory Limited v The Czech Republic*, PCA Case No 2014-34, Award (22 February 2017), paras 312–41; and Czech Republic–United Kingdom BIT (1990).

29 Magnarelli (n 2), at 73, 79, 82; *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v The Argentine Republic (formerly Compañía de Aguas del Aconquija S.A. and Compagnie Générale des Eaux v The Argentine Republic)* ICSID Case No ARB/97/3, Decision on Annulment (3 July 2002) para 105; *Aguas del Tunari, SA v The Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005), para 114; and *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, Award (24 July 2008), paras 285, 351.

30 Magnarelli (n 2), at 84; *Alex Genin, Eastern Credit Limited, Inc (ECL) and AS Baltoil v the Republic of Estonia*, ICSID Case No ARB/99/2, Award (25 June 2001), paras 1, 43–61, 323–32; Estonia–United States BIT (1994); and see Christopher F Dugan and others, *Investor-State Arbitration* (OUP 2012) 373–74.

investment contract with the exclusion of treaty protection.[31] In *Waste Management v Mexico (I)*, the majority of the NAFTA arbitral tribunal found that it lacked jurisdiction because the investor failed to discontinue (i) the proceeding initiated by the investor's Mexican subsidiary Acaverde against the state-owned bank Banobras and (ii) the local arbitration started by Acaverde against the city of Acapulco.[32]

On the government's side, arbitral tribunals apply rules of attribution of conduct.

In *Deutsche Bank A.G. v Sri Lanka*, the arbitral tribunal attributed the conduct of company CPC, challenged by the investor under the investment treaty, to Sri Lanka. The arbitral tribunal considered that CPC had been established by law, was fully owned by the state, had its directors appointed and removed by ministerial authority, its decision-making process and finances subject to government control and it run the national oil policy in the public interest.[33] On the contrary, in *Bosh v Ukraine*, the arbitral tribunal did not attribute the challenged conduct to the state. The arbitral tribunal found that the state entity, in this case a university, was from a structural point of view under government's control, but from a functional one not entrusted with governmental activity. The arbitral tribunal regarded in particular the contract with the investor as a commercial undertaking.[34] In an ever-different perspective, in *Noble Ventures v Romania*, the arbitral tribunal did not even deem necessary to investigate whether the government, this time through a state-owned enterprise, exercised public powers or acted as any other commercial party. The arbitral tribunal attributed the challenged conduct to the state on the ground that the government had charged the entity to take care, on its behalf, of the privatization process out of which the dispute with the foreign investor arose.[35]

In this respect, it bears noting that in *Impregilo v Pakistan* the arbitral tribunal found that '[o]nly the state in the exercise of its sovereign authority ("*puissance publique*"), and not as a contracting party, may breach the obligations assumed under

31 Magnarelli (n 2), at 79–81; *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 August 2003), paras 161–62; *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004), para 134; and *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v The Republic of Paraguay*, ICSID Case No ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction (29 May 2009), paras 132, 143–47.

32 Magnarelli (n 2) at 88–9; *Waste Management, Inc v United Mexican States (I)*, ICSID Case No ARB(AF)/98/2, Arbitral Award (2 June 2000), paras 6, 27–31; Emmanuel Gaillard, 'How Does the So-Called "Fork-in-the-Road" Provision in Article 26(3)(b)(i) of the Energy Charter Treaty Work? Why Did the United States Decline to Sign the Energy Charter Treaty?' in Graam Coop and Clarisse Ribeiro (eds), *Investment Arbitration and the Energy Charter Treaty* (Arbitration Institute of the Stockholm Chamber of Commerce, JurisNet, LLC 2006) 221, 223; and Andrea K Bjorklund, 'Waiver of Local Remedies and Limitation Periods' in Meg N Kinnear and others (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2015) 237, 238–43.

33 Magnarelli (n 2), at 70; Badia, (n 23), at 168–69; and *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/09/2, Award (31 October 2012) para 405.

34 Magnarelli (n 2), at 160–61; Pereira de Souza Fleury (n 26), at 687–88; and *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine*, ICSID Case No ARB/08/11, Award (25 October 2012), paras 176–78, 184.

35 Magnarelli (n 2), at 159; *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award (12 October 2005), paras 79–82; see Dolzer and Schreuer (n 27), at 175; and Pereira de Souza Fleury, (n 26), at 687–88.

the BIT'.[36] While, in *SGS v Paraguay*, the arbitral tribunal held that every state's act, including the act 'to breach or terminate contracts to which the State is a party' is a sovereign act.[37] In this perspective, some maintain that rules of attribution of conduct only find application in case of conduct incompatible with a state's international obligations. Therefore, the violation of a contract is not *per se* an international wrongful act and there would be no need to ascertain whether a state entity's conduct is attributable to the state. However, Michael Feit, for example, suggests first investigating who are the parties to the agreement, as a state undertakes obligations under a contract from the date of its conclusion till its end. The other way around, states would escape the responsibility the rules of attribution of conduct are meant to establish.[38]

4. EXTENSTION OF AN ARBITRATION AGREEMENT TO A NON-SIGNATORY STATE AND ATTRIBUTION OF STATE ENTITIES' CONDUCT: ONE PICUTRE, DIFFERENT PERSPECTIVES?

A comparative analysis of the case law reported above, shows that both the Swiss Supreme Court and investment arbitral tribunals apply in principle the doctrine of privity of contract. The most striking difference lies in the reference solely to notions of domestic private law by the Swiss Supreme Court, also when the matter of a possible extension of an arbitration agreement to a non-signatory concerns a state entity. Rules of attribution of conduct, after all, are customary international law rules finding application when a state's compliance with international obligations is disputed. According to the Swiss Supreme Court's case law, an arbitration agreement can be extended to a non-signatory either (i) in cases of assignment, assumption of debt or transfer of contract or (ii) when the non-signatory interferes with the contract wilfully committing to the arbitration clause in that contract. In the latter case, the Swiss Supreme Court's case law share common features with the jurisprudence of investment treaty tribunals on rules of attribution of conduct. Both investigate the level of involvement of the state in the organization and operation of the state entity.

However, the rules of attribution of conduct seem to lead more frequently to a finding of the state's involvement in a dispute arising out of a state entity's conduct in investment treaty arbitration than exceptions to privity of contract in commercial cases pending before a commercial arbitral tribunal or domestic court to the extension of arbitration agreements to non-signatory states. In case *4A_636/2018*, in *Westland* and *Wetco*, for example, the state set up and managed the state entity. In case *4A_636/2018*, the state entity party to the contract containing the arbitration

36 Magnarelli (n 2), at 64; *Impregilo SpA v The Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction (22 April 2005), para 260; and Magnarelli (n 25), at 77, 79.

37 Magnarelli (n 2), at 146; Elvira R Gadelshina, 'Hermeneutic Reflections on the Specific Purpose of Umbrella Clauses', 14 The Journal of World Investment & Trade 5 (2013) 804, 807, 812–13; Alfred Siwy, 'Contract Claims and Treaty Claims' in Crina Baltag (ed), *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International 2017) 209–26; *Pan American Energy LLC and BP Argentina Exploration Company v The Argentine Republic*, ICSID Case No ARB/03/13, Decision on Preliminary Objections (27 July 2006) para 108; and *SGS Société Générale de Surveillance SA v The Republic of Paraguay*, ICSID Case No ARB/07/29, Award (10 February 2012), para 135.

38 Magnarelli (n 2), at 160 referring to Michael Feit, 'Attribution and the Umbrella Clause: Is There a Way out of the Deadlock?' 21 Minnesota Journal of International Law 1 (2012) 21, 31–32.

clause was partially financed by the state and various other state entities were involved in the negotiation and financing of the project. In *Westland*, ministries sat at the Managing Council of AOI, AOI's setting up was financed and its obligations guaranteed by the Responding states. As to *Wetco*, the Swiss Supreme Court itself admitted that the state's involvement was even greater than in *Westland*. Nevertheless, these factors were not enough to extend the arbitration agreement to the non-signatory state.

In investment treaty cases, instead, the conduct of an entity structurally and functionally subject to governmental control is generally attributed to the state. Case law has its own nuances, but one may point out in particular to *Deutsche Bank v Sri Lanka* (because the factual circumstances evidencing the state's involvement are comparable) where the state entity was established by law, fully owned by the state, organizationally had its directors appointed and removed by ministerial authority, was financially subject to governmental control and was exercising its functions in the public interest. Moving now to case *4A_636/2018*, it bears noting that although the Swiss Supreme Court underlined that the state entity partially drew its finances from the sale of water, for the part that it did not independently finance itself it must have also been subject to governmental control. Furthermore, if the state entity was responsible for the conclusion of a contract for the construction of a water pipe and for the sale of water, it operated in a sector commonly subject to strict control by the state. Hence, it could have been found to exercise its functions in the public interest. In sum, case law is not consistent.

Interestingly, in *Westland*, the Swiss Supreme Court held that '[t]he fact that these States, in the absence of any arbitration clause, must be sued before their national courts does not constitute a violation of equity'.[39] However, by agreeing on arbitration parties expect disputes to be solved out of domestic courts. This consideration is even stronger for investment treaty arbitration. What is more, repercussions stretch beyond the limits of commercial or investment treaty arbitration considered individually. It is reported, for example, that parallel to case *4A_636/2018* an investment treaty arbitration under the Organization of the Islamic Cooperation (OIC) Treaty is pending and is being administered under the ICC Rules.[40] A strict interpretation of privity of contract has exactly the effect of determining the multiplication of proceedings.[41]

5. THE INFINITE UNIVERSES OF THE EXTENSTION OF AN ARBITRATION AGREEMENT TO A NON-SIGNATORY STATE AND OF THE ATTRIBUTION OF STATE ENTITIES' CONDUCT

If one had to describe the current state of case law on the extension of arbitration agreements to non-signatories and on attribution of state entities' conduct, the more immediate representation would be an Escher's drawing where different perspectives compose an apparently realistic picture built on an illusion. By looking more

39 'Westland Helicopters (UK) v The Arab Republic of Egypt, The Arab Organization for Industrialization (Egypt) and The Arab British Helicopter Company (Egypt)' (n 13), at 181.

40 Voser and Vedovatti (n 12), at para 10.

41 For more on the proliferation of parallel proceedings because of a strict interpretation of privity of contract in international investment arbitration see Magnarelli (n 2).

carefully, one sees that different perspectives which cannot all coexist in the same scenario overlap and concur to the realization of an (impossible) space.

First, in comparison to investment treaty tribunals, the Swiss Supreme Court applies specific and limited exceptions to the doctrine of privity of contract also when deciding whether to extend an arbitration agreement to a non-signatory state.

Secondly, the Swiss Supreme Court's case law generally requires a greater involvement of the non-signatory state in the performance of the contract or in the organization and functions of the state entity in order to extend the arbitration agreement to the state.

Thirdly, even within case law of investment treaty tribunals inconsistencies exist. Arbitral tribunals rely on privity of contract (or exceptions thereof) when dealing with non-signatories on the investor's side, but on rules of attribution of conduct on the government's side. Some arbitral tribunals have been more lenient in the application of either instrument. Some have even bypassed the question of privity of contract altogether and referred to the shareholder's direct right of access to dispute settlement. And with regard more specifically to rules of attribution of conduct, case law diverges as to whether and under what circumstances the conduct of a state entity can be attributed to the state.

Fourthly, these irreconcilable scenarios acquire even more prominence when the same conduct may be challenged before a commercial arbitral tribunal or court and an investment treaty tribunal. Case *4A_636/2018* is emblematic.[42] Keeping aside any consideration on the proliferation of proceedings caused by a strict application of the doctrine of privity of contract,[43] challenging the same conduct before different adjudicative bodies—although under a different cause of action and between different parties (for eg the state instead of the state entity)—can lead to contradictory decisions. Indeed, the risk is higher when case law of commercial arbitral tribunals and courts differs from that of investment arbitral tribunals.

The current state of case law resembles a drawing of Escher. By looking at each of its components individually, one may consider it to be delivering a consistent solution. But if one looks at it holistically, the resulting image is as dizzying as an Escher's drawing. Each segment apparently fits with the others, only to realize at a more careful observation that the picture they overall compose defies the rules of logic (or in the case of dispute settlement legal certainty and the parties' right to have their dispute finally settled). One interpretation overlaps or even conflicts with the other and practical consequences can be far-reaching.

By way of a conclusion, it would be good that the inconsistencies highlighted above do not lead to impossible scenarios where parties in dispute do not reach the result for which they entered into the arbitration agreement, ie solving their dispute. Multiple contradictory decisions leave the parties with no solution.[44] The dynamics of such case law risk drawing a picture of impossible scenarios or cyclical perspectives with neither beginning nor end. To use a visual image, let's hope this is not a staircase as those so typical of Escher climbing to nowhere.

42 See Section 4 above.

43 See Magnarelli (n 2).

44 For more considerations on the risk that the proliferation of proceedings due to a strict interpretation of privity of contract in international investment arbitration leads to disputes not being finally solved see Magnarelli (n 2).