INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

Research Scholarship Report

Apparent Authority and the Formation of International Investment Contracts – International Law and Comparative Contract Law at the Crossroads

Daniel Nicholas Putra PAKPAHAN

Visiting Scholar at UNIDROIT (5 May – 4 July 2025)

Research Associate at Centre for International Law, National University of Singapore

Acknowledgments

I am grateful to the UNIDROIT Scholarship Committee for awarding me this scholarship to conduct a two-month research stay at the UNIDROIT Library. This research stay would not have been possible without the generosity of Yingke Law Firm, the sponsor of this research scholarship, and the UNIDROIT Asian Transnational Law Centre, who administered the scholarship funds, to which I express my sincere appreciation. I also would like to thank Prof. Nilüfer Oral and Prof. N. Jansen Calamita of the Centre for International Law, National University of Singapore, for approving and encouraging me to conduct this research as part of my work program in International Economic Law and Policy. Furthermore, I could not thank enough my referees who supported my scholarship application, Dr. Christophe Bernasconi (Hague Conference on Private International Law) and Prof. Giacomo Rojas Elgueta of (Chiomenti / Roma Tre Law School). Special thanks go to Dr. Gérardine Goh Escolar (Hague Conference on Private International Law) and Ms. Sharon Ong (Ministry of Law Singapore / UNIDROIT Governing Council), with whom I discussed my initial plan to do a research stay at UNIDROIT and who encouraged me to follow through with it.

I appreciate the warm welcome by the members of the UNIDROIT Secretariat and Library Staff who made my research stay enjoyable. I am particularly grateful to Ms. Laura Tikanvaara and Ms. Bettina Maxion for their kind support, as well as to Ms. Myrte Thijssen for allowing me to observe and follow the work of the UNIDROIT-ICC Working Group on International Investment Contracts. This research stay has greatly enriched my knowledge and inspired me as a young scholar interested in the interaction between municipal and (public) international law in the regulation of foreign direct investment.

Project Description

Contract Formation Authority and International Investment Contracts

Among the disciplines that form the pillars of international investment law, two are often in tension: international law (particularly the law of treaties and the law of State responsibility) and municipal contract law which governs international investment contracts (IICs). The topic of this research illustrates one of these tensions in investment arbitration, namely whether and to what extent a State may be held liable under an IIC concluded by its agents with a foreign investor. Two typical scenarios may be considered: (1) an investor argues that the State is a

real party in interest to the IIC, despite being signed by an agency or entity with separate legal personality from the State, in order to argue that a breach of contract is attributable to the State; and (2) a State raises a defense that an IIC (or portions thereof) is null and void because the agency or entity who signed the contract, even if generally considered an agent of the State, acted without or in excess of authority to bind the State through the particular IIC.

The first scenario arguably receives more attention in the international law literature, often discussed under the heading of attribution and State responsibility for contractual breaches, or the interpretation of so-called “umbrella clauses” in investment treaties. In contrast, with respect to the second scenario, international law is indifferent to the internal distribution of competences (and political struggles) among State organs in determining the responsibility of the State – promises made by a government agency, even if invalid under a State’s internal law, may still generate a legal obligation and responsibility of the State, e.g., under the fair and equitable treatment standard. Thus, the defense raised by the State in the second scenario rarely persuades a tribunal constituted under an investment treaty applying international law.

Viewed from the lens of contract law, the second scenario may constitute a legitimate defense. Under contract law, the extent to which a party is bound by a contract turns on legal principles relating to capacity and authority. Lack of capacity or authority of a contracting party/signatory affects the validity of the contract and may preclude the liability of the principal. Hence, the aim of this research is to explore the possibility of a different outcome on this issue if a dispute arising from or in connection with an IIC is decided pursuant to municipal (contract) law rather than international law.

Principles of contract law, which concern consensual relations between private parties, cannot be applied in a straightforward manner to a sovereign and the relationship between state organs, but only by analogy. ‘Capacity’ denotes an entity’s ability to enter binding contracts and is therefore a core element of contract formation. A State is by nature considered as having general capacity to make international agreements, including IICs, unless it does not have effective control over its territory. This is unlike a private legal person whose legal capacity may be limited by its objects and purposes as established in its own memorandum of association and subject to statutory provisions.

‘Authority’ governs an agent’s ability to act on behalf of its principals; and the ways in which third parties can rely on such principal-agent relationships. The authority of a representative may be granted by the principal or be derived from a rule of law. When an agent acts in accordance with the principal’s manifested wishes, it is said to have actual authority. The law may also deem an agent authorized, despite being against the principal’s wishes, in order to protect an innocent third party in his reliance upon the unauthorized agent's conduct. The latter form of authority is called ‘apparent authority’. Apparent authority is established by a third-party’s reasonable belief that the agent has authority to act on behalf of the principal, e.g., based on what the principal communicated to the third party.

In legal and political theory, a government/administration is traditionally considered an agent, where the population of the state is the principal. In an IIC where one party is a State, that State’s own law determines whether the signatory agency or entity has actual authority to bind the State (if one takes the State’s law as the manifestation of the principal’s wishes). The State’s law may distribute competences over certain issues to certain bodies. Thus, when a government agency made certain representations outside of its attributed competences, such representations would lack actual authority.

The important question to this research is whether a State may still be considered bound to the IIC through the mechanism of apparent authority, i.e., based on the third parties’ reasonable belief that the agent is authorized to make the representations on the State’s behalf. This depends on the law governing the contract, and turns on the following questions: (1) whether the law recognizes that a State may be bound to an IIC by virtue of ‘apparent authority’? If so, (2a) what factors may count as manifestations of authority by the State to the

third party; and (2b) what constitutes reasonable reliance by the third party of such manifestations of authority?

This research seeks to find common answers to these questions through a comparative study and to determine whether there exists a general principle of apparent authority which applies to IICs.

Binding States to International Investment Contracts via Apparent Authority

Zooming in on the first question of authority, the question arises whether the same principles of authority which govern the formation and validity of commercial contracts concluded between private parties (e.g., for the sale of goods) should apply to contracts of a public character concluded by an investor with a State, such as IICs.

Several factors distinguish IICs from ordinary commercial contracts. IICs would involve government agencies acting on behalf of the State as contracting party, entail significant transfer of capital and job creation, and create long-term legal relationship. The subject matter of IICs often concern allocation of public assets or resources. They may also contain representations of regulatory or fiscal stability to the investment project, which puts important public interest at stake. Thus, even if the principle of apparent authority is generally recognized across legal systems as part of private law, the principle cannot automatically apply to IICs, but must be justified taking into account the above-mentioned characteristics.

Another reason for the need for justification is that some legal systems, contracts involving a sovereign entity or whose subject matter implicates public interest, the state may not be bound via apparent authority – actual authority is required. A primary example is French law which recognizes the applicability of the “apparent mandate” doctrine (*le mandat apparent*) for the formation of private law contracts (*contrats de droit privé*), but not necessarily to administrative contracts (*contrats administratifs*).

Anglo-Saxon jurisdictions do not recognize a distinct body of law governing public contracts. For example, in the United States, government contracts “are governed generally by the law applicable to contracts between private individuals” (United States v. Winstar Corp., 518 U.S. 839, 895 (1996)). Nevertheless, federal courts have considered the public/private characterization of an act in determining to what extent the State can be bound by an unauthorized act of its agent (i.e., apparent authority, which is considered to be a form of estoppel). Under United States law, the general rule is that the federal government may not be equitably estopped from enforcing public laws, even though private parties may suffer hardship as a result in particular cases. The government cannot be estopped merely because it is engaging in "commercial undertakings" (Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947)). There is a debate on whether this rule applies to government contract concluded by an unauthorized agent, but it appears that the contractor must demonstrate serious affirmative misconduct by the agent in order to estop the government (Rumsfeld v. United Technologies Corp., 315 F.3d 1361, 1377 (Fed. Cir. 2003); United Pacific Ins. Co. v. Roche, 401 F.3d 1362, 1366 (Fed. Cir. 2005)). Another important consideration against government estoppel for invalid representations is the broad systemic risks to effective separation of powers that would result, especially when representations are made in private communications shielded from policy and legal scrutiny by other government actors and the general public.

In light of this distinct treatment of government contracts in municipal legal systems, it is regrettable that investment arbitration tribunals rarely refer to this distinction in applying principles of estoppel or apparent authority to enforce IICs concluded by government agents without proper authority. Such cases include *Bankswitch v. Ghana* and *Balkan Energy v. Ghana*, where the tribunals effectively circumvented the Ghanaian constitution, which requires IICs to be concluded with parliamentary approval. The tribunals proceeded to find the State bound by the unauthorized representations of its agents in light of the investors’ detrimental

reliance, notwithstanding constitution's clear separation of powers and express limitation on the government's contracting authority.

A possible justification for the application of the apparent authority principle to IICs is the "international" nature of these contracts, and the close cooperation that it requires from the investor and the State over a long period of time, which militates in favor of greater certainty for the investor that the representation made by the State will not easily be overruled at a later time. However, in dealing with a sovereign, the investor should not be absolved from the duty to conduct proper due diligence regarding the scope of its counterparty's authority. Thus, if the State has put the investor on notice regarding the possible lack of authorization (e.g., when the ministry of trade made assurances of favorable tax treatment while a decision by the competent ministry, such as the ministry of finance, is still pending), and if the investor knew, or should have known, that the representative breached his authority, the investor may not successfully invoke apparent authority.

A similar approach is taken by the UNIDROIT-ICC Working Group on International Investment Contracts in its ongoing discussion of a draft instrument. It first affirms that actual authority is necessary for a State to be bound by IICs. Furthermore, there is no strong affirmation that Article 2.2.5(2) of the UNIDROIT Principles on International Commercial Contracts on apparent authority should be extended to IICs. Instead, the Working Group emphasizes the importance of the principle of good faith as applicable to both the State and the investor: the host State is partly responsible for the investor's understanding of the State's organization and internal division of competence, but the investor may also be required to exercise due diligence and ascertain the competence of the body with which it negotiates.

A suggestion was made by the Working Group that the parties may incorporate a language in their IIC in the form of a representation that each party bears the burden of verifying the applicable law on the other party's legal capacity, that each party has a duty to disclose relevant information requested by the other party whenever (legally) possible, and that each party will not claim that the other party is bound beyond the authority ascertained in this manner. Therefore, if the investor has committed to diligently assess the legal capacity of its contracting partner, and any restrictions in the scope of capacity were publicly accessible or disclosed after the investor's request, expectations that the State be nevertheless bound by *ultra vires* conduct may not be deemed to be legitimate. This suggestion may be helpful in practice, since this kind of representation will help in assessing the reasonableness of the investor's reliance on the promises of an unauthorized agent, and whether the State should be bound by these promises.

Additional Advantages of the Research Stay

UNIDROIT Library's vast collection on private law, uniform law, and international law allowed me to compare the different approaches to contract formation authority in multiple jurisdictions. It gave me access to specialist literature which are not available in my home university library.

Another significant benefit of this research stay is the opportunity to follow actively UNIDROIT's work in progress, Study L-IIC - International Investment Contracts. I managed to learn more about the various proposals discussed by the Working Group on International Investment Contracts and integrated into a draft working paper which is not publicly accessible. Thanks to the invitation of the Secretariat, I also had the opportunity to participate in the 6th Working Group Meeting on 10 – 12 June 2025, held at the ICC Institute of World Business Law in Paris. In this three-day meeting, I followed the discussions on cross-cutting issues which intersect with my line of research, and I engaged in thoughtful conversations with several experts on the margins.

Besides focusing on my research on international investment contracts, I made the most out of my research stay by attending conferences and academic events on adjacent legal topics organized by UNIDROIT and Sapienza University of Rome. Furthermore, it was a notable

experience being in the room when the 105th Session of the UNIDROIT Governing Council took place. I witnessed in person how the delegations and the Secretariat take stock of the current and future work programs of the organization. In the last few days of my research stay, I also sat in on several seminar sessions of the UNIDROIT International Programme on Law and Development (IPLD). Overall, this research stay is an unforgettable experience and an important highlight of my academic career.

Bibliography

Ansell, Fred, 'Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government' (1986) 53 *University of Chicago Law Review* 1026

Berger, Raoul, 'Estoppel against the Government' (1954) 21 *University of Chicago Law Review* 680

Bonell, Michael Joachim, 'International Investment Contracts and General Contract Law: a Place for the UNIDROIT Principles of International Commercial Contracts?' (2012) *17 Uniform Law Review* 141

Cole, Michael J, 'Don't "Estop" Me Now: Estoppel, Government Contract Law, and Sovereign Immunity If Congress Retroactively Repeals Public Service Loan Forgiveness' (2022) 26 *Lewis & Clark Law Review* 153

Conant, Michael, 'Objective Theory of Agency: Apparent Authority and the Estoppel of Apparent Ownership' (1968) 47 *Nebraska Law Review* 678

Danis-Fatôme, Anne, *Apparence et contrat* (LGDJ 2004)

Elliott, Mark, 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' (1999) 58 *Cambridge Law Journal* 129

Ferrari, Giuseppe Franco, 'The contracts of public administrations' (2018) 68 *Revista de la Facultad de Derecho de México* 229

Grund, Sebastian and Roshak Momtahen, 'Contested Authority: The Legal Framework for Ultra Vires Sovereign Debt and its Implications for Public Debt Transparency' SSRN (13 May 2025) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5239335>

Hernández, José Ignacio, 'The Venezuelan Constitutional Provisions on Public National Interest Contracts and their Implications in the Public Debt Ruled by the New York Law' SSRN (24 April 2024) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4768100->

Holstrom, Stephen, 'Contract Law—Estopping Big Brother: The Constitution, Too, Has Square Corners' (2011) 33 *Western New England Law Review* 163

Kuhlman, Frederick S, 'Government Estoppel: The Search for Constitutional Limits' (1991) 25 *Loyola of Los Angeles Law Review* 228

Laitos, Mary V, Daneille V Smith, and Amy E Mang, 'Equitable Defenses against the Government in the Natural Resources and Environmental Law Context' (2000) 17 *Pace Environmental Law Review* 273

Lemaire, Sophie, *Les contrats internationaux de l'administration* (LGDJ 2005)

Lupo-Pasini, Federico, 'Capacity to Borrow and Sovereign Debt' SSRN (29 October 2020) <https://papers.ssrn.com/sol3/Delivery.cfm?abstractid=3772703>

McDonald, Patrick, 'Contradictory Government Action: Estoppel of Statutory Authorities' (1979) 17 *Osgoode Hall Law Journal* 160

McLean, Janet, 'Convergence in Public and Private Law Doctrines - the Case of Public Contracts' (2016) 2016 *New Zealand Law Review* 5

Mišović, Andrijana, 'Attributing Investment Contracts: The General Principles Approach' (2025) 00 *Journal of International Economic Law* 1

Pasley, Robert S, 'Formation of Government Contracts Application of Common Law Principles – A Reply' (1955) 40 *Cornell Law Quarterly* 518

Reuschlein, Harold Gill and William A Gregory, *The Law of Agency and Partnership, 2nd Edition* (West Publishing Company 1990)

Roy III, Daniel P, '(Don't) Take Another Little Piece of My Immunity, Baby: The Application of Agency Principles to Claims of Foreign Sovereign Immunity' (2015) 84 *Fordham Law Review* 1283

Saltman, Alan I, 'The Government's Liability for Actions of Its Agents That Are Not Specifically Authorized: The Continuing Influence of *Merrill* and *Richmond*' (2003) 32 *Public Contract Law Journal* 775

Shalev, Gabriela, 'Administrative Contracts' (1979) 14 *Israel Law Review* 444

Stelzenmuller, CV, 'Formation of Government Contracts – Application of Common Law Principles' (1955) 40 *Cornell Law Review* 238

Street, Howard A, *A Treaties on the Doctrine of Ultra Vires: Being an investigation of the principles which limit the powers and liabilities of corporations, quasi-corporate bodies and non-sovereign legislatures* (Sweet & Maxwell 1930)

Thompson, David K, 'Equitable Estoppel of the Government' (1979) 79 *Columbia Law Review* 551

Thompson, Joshua, 'Estoppel by Representation in Administrative Law' (1994) 26 *Federal Law Review* 84