Lifting the Corporate Veil between China and its State-Owned Enterprises: Revisiting the International Rules on Attribution of State Conduct

Freya Baetens[1]

ABSTRACT

State-owned enterprises (SOEs) are increasingly important international actors because of their impact on the global economy: in 2019, they held over US$2 trillion in assets. They form about 25% of the Fortune Global 500 companies, driven particularly by the growth of Chinese SOEs. International law is generally predicated on the division between the public and private spheres: SOEs straddle this divide, making them difficult to fit into existing international legal categories. As a result, there is a lack of clarity as to whether and which international rules apply to SOEs – and whether countries could be potentially using them to circumvent state obligations. Whatever their definition, SOEs test the boundaries of the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. As SOEs have a separate legal personality, their home State in principle cannot be held responsible for their conduct, unless the corporate veil is lifted. This presentation will examine how this has been done in the context of investment, WTO and human rights law.

AUTHOR

Freya Baetens (*Cand. Jur./ Lic.Jur*. (Ghent); *LL.M*. (Columbia); *Ph.D*. (Cambridge)) is Professor of Public International Law at the PluriCourts Centre (Faculty of Law, Oslo University), working on an interdisciplinary research project evaluating the legitimacy of international courts and tribunals. She is also affiliated with the Europa Institute (Faculty of Law, Leiden University) and has been a visiting professor at the Max Planck Institute for International, European and Regulatory Procedural Law (Luxembourg), Université Paris Nanterre (France), National University Singapore (Singapore), Sydney Law School (Australia), Xi'An Jiaotong Law School (China), FHR Lim A Po Institute (Suriname) and the World Trade Institute, Bern University (Switzerland).

As a Member of the Brussels Bar, she regularly acts as counsel or expert in international and European disputes. She is listed on the Panel of Arbitrators and Conciliators of the International Centre for the Settlement of Investment Disputes (ICSID), the South China International Economic and Trade Arbitration Commission (Shenzhen Court of International Arbitration) and the Hong Kong International Arbitration Centre (HKIAC). She is specialised in the law of treaties, responsibility of

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states and international organisations, privileges and immunities, law of the sea, WTO and investment law, energy law and sustainable development. Her latest book is *Identity and Diversity on the International Bench: Who is the Judge?* (OUP 2020).

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1. Introduction

State-owned enterprises ('SOEs') are increasingly relevant from an economic perspective in terms of their impact on the global economy: in 2019, UNCTAD identified around 1,500 SOEs operating transnationally and found that they had over US$2 trillion in foreign assets.[2] The proportion of SOEs among the Fortune Global 500 increased from 9% in 2005 to 23% in 2014, driven particularly by the growth of Chinese SOEs.[3] In 2017, the Swedish State declared it held a SEK 510 billion company portfolio of about 48 wholly or partially owned companies employing approximately 137,000 people.[4] In 2018, three of the top five corporations in the Fortune 500 were Chinese SOEs: State Grid, Sinopec Group, and China National Petroleum. The Chinese central government owns more than 51.000 enterprises,

[2] UNCTAD World Investment Report 2019 – Special Economic Zones, available at https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf, p. 24.

[3] PwC (2015), *State-Owned Enterprises: Catalysts for public value creation?*, available at https://www.pwc.com/gx/en/psrc/publications/assets/pwc-state-owned-enterprise-psrc.pdf, p. 6.

[4] Swedish Government, Government policy in Sweden & the EU, *State-owned enterprises*, available at https://www.government.se/government-policy/state-owned-enterprises/; Swedish Government, *Annual report for state-owned enterprises 2017*, p.3.

valued at nearly US$30+ trillion and employing over 20 million people.[5] China's subsidies to its SOEs (95% of which were operating at a loss) reportedly amounted to USD$151,1 billion between 1995 and 2005.[6] In 2019, newcomer Saudi Aramco, a Saudi SOE, placed 6th in the Fortune Global 500, generating USD$111 billion in profits.[7]

Yet at the same time, SOEs differ from private companies, and that difference impacts their funding, their immunities, their responsibilities (*e.g.,* in the context of disclosure or share issuance), the ability of States to 'hide' behind them or benefit from them without complying with certain obligations. SOEs' cross-border (even worldwide) reach and formidable economic power raise various questions regarding whether and how such enterprises should be regulated at the international level, e.g., in the areas of human rights or environmental protection, because of their public nature or control.

Much (if not most) of international law is predicated on the division between the public and private spheres; and State-owned enterprises straddle precisely this divide, making them difficult to fit into existing international legal categories. As a result, there is a lack of clarity as to whether and which international rules apply to SOEs, and when acts of SOEs are attributable to the State. For instance, as a recent EU concept paper on WTO reform notes,

> 'the growth and influence of SOEs in recent years is not yet matched with equivalent disciplines to capture any market-distorting behaviour under the current rules. [**…**] The EU therefore should propose a clarification [**…**] to determine whether a state-owned or a state-controlled enterprise performs a government function or furthers a government policy, as well as how to assess whether a Member exercise meaningful control over the enterprise in question'.[8]

This dual character is further amplified by the fact that some SOEs include other (private) shareholders (as is often the case),[9] while others are used by States to

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5 OECD (2017), The Size and Sectoral Distribution of State-Owned Enterprises, OECD, Paris.

6 https://tradevistas.org/feeding-chinas-state-owned-enterprises, based on data from the Chinese Statistical Yearbook (http://www.stats.gov.cn/tjsj/ndsj/2018/indexeh.htm).

7 Fortune, *China Takes Lead in Fortune Global 500*, (22 July 2017) available at https://fortune.com/2019/07/22/china-takes-lead-in-fortune-global-500-ceo-daily/.

8 European Commission, EU concept paper on WTO reform, (18 Sept. 2018), available at http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf.

9 See e.g. OECD, *Corporate Governance of State-Owned Enterprises – A Survey of OECD Countries* (2005), 70: 'on average around 40% of SOEs involve other shareholders. In approximately a half of these the state is a majority shareholder.' In recent years, China has embarked on a policy of 'mixed ownership reform', bringing in private investment. See also Yang Ge, '5 Things to Know About China's Mixed-Ownership Reform', *Caixin* (28 Aug. 2017), available at https://www.caixinglobal.com/2017-08-28/101136807.html.

outsource elements of what used to be classic 'governmental authority', such as security forces, public infrastructure and prison management.

Eluding any universally accepted definition, SOEs are sometimes described as 'commercial enterprise[s] predominantly owned or controlled by the state or by state institutions, with or without separate legal personality'.[10] Elsewhere, an SOE is defined as 'a legal entity in which the State has full ownership and control, or has a controlling interest, that enables the State to take part in commercial activities separately from its public administrative functions.'[11] The European Union adopts a broader definition, defining SOEs as 'non-financial companies where the state exercises control, regardless of the size of ownership'.[12]

There has been considerable variance in modern FTAs in terms of the extent to which SOEs have been defined. Some FTAs such as RCEP provide no definition of SOEs. CETA provides a basic definition in its first chapter, which gives 'general definitions'. Chapter 1, Article 1.1 defines 'state enterprise' as meaning "an enterprise that is owned or controlled by a Party".[13] The EU – China Comprehensive Agreement on Investment (CAI) contains definitions of 'enterprise' and 'enterprise of a party' that include some of the elements that typically feature in definitions of SOEs.[14]

The Transpacific Partnership (TPP) stipulates that an SOE is 'an enterprise that is principally engaged in commercial activities in which one or more States: (a) directly own(s) more than 50 per cent of the share capital; b) control(s), through

10 Karl-Heinz Böckstiegel, *Arbitration and State enterprises: Survey on the National and International State of Law and Practice* (Kluwer 1984), 34.

11 Peter Muchlinski, *State Owned Transnational Corporations and the UN Guiding Principles* (2011), 3, cited in Albert Badia, 'State-owned enterprises' *Jus Mundi* (entry updated 19 August 2020), fn 1.

12 European Commission, 'State-Owned Enterprises in the EU: Lessons Learnt and Ways Forward in a Post-Crisis Context', Institutional Paper 31/2016 <https://ec.europa.eu/info/sites/info/files/file_import/ip031_en_2.pdf> (visited 20 January 2021). The exclusion of financial companies, while relevant in the context of that document, has little bearing on our analysis.

13 Chapter 1, General Definitions and Initial Provisions. This definition applies to Chapter 18 on State Enterprises, Monopolies, and Enterprises granted special rights or privileges.

14 Section I, Objectives and general definitions, ''enterprise' means any entity constituted or otherwise organised under the applicable laws, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, joint venture, sole proprietorship, association or similar organisation and a branch or representative office of an enterprise;
'enterprise of a Party' means: (a) an enterprise constituted or otherwise organised under the laws of that Party, and engaged in substantive business operations[2] in the territory of that Party; or (b) an enterprise that is constituted or otherwise organised under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under (a);

[2] In line with its notification of the Treaty establishing the European Community to the WTO(WT/REG39/1), the European Union understands that the concept of "effective and continuous link" with the economy of a Member State of the European Union enshrined in Article 54 of the TFEU is equivalent to the concept of "substantive business operations".

ownership interests, the exercise of more than 50 per cent of the voting rights; or (c) hold(s) the power to appoint a majority of members of the board of directors or any other equivalent management body.' The CPTPP's definition is virtually identical to this.[15] CUSMA contains a definition that builds on the one in TPP, but notably adds a fourth element, defining SOEs as an enterprise in which a Party also: 'holds the power to control the enterprise through any other ownership interest, including indirect or minority ownership.'[16] It also modifies paragraph (a) to include directly 'or indirectly' owning more than 50 percent of the share capital.

The EU–UK Trade and Cooperation Agreement includes four elements in their definition that reflect those found in CUSMA. These elements contain neither of the footnotes found in the CUSMA definition. The fourth element is also worded slightly differently to paragraph (c), its CUSMA equivalent: '(iv) has the power to exercise control over the enterprise. For the establishment of control, all relevant legal and factual elements shall be taken into account on a case-by-case basis.'[17]

Whatever their definition, SOEs test the boundaries of 'the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf.' [18] In other words, SOEs are created by States as separate legal entities: in principle, SOE conduct is not State conduct so the State cannot be held responsible for any misdeeds of the SOE. However, in practice, it is not always clear where the conduct of the SOE stops and that of the State begins. This may have significant legal repercussions: if SOE acts would have been violations of the international obligations of the State, had these acts been committed by the State, those affected by such acts may try to 'pierce the corporate veil' in order to 'attribute' those acts to the State and

15 CPTPP's Article 17.1's only difference in wording is that the term 'in which a Party' replaces 'in which one or more States'.

16 This new fourth element is found paragraph (c), while the third element from TPP is in paragraph (d). Paragraph (c) contains a footnote explaining: "For the purposes of this subparagraph, a Party holds the power to control the enterprise if, through an ownership interest, it can determine or direct important matters affecting the enterprise, excluding minority shareholder protections. In determining whether a Party has this power, all relevant legal and factual elements shall be taken into account on a case-by-case basis. Those elements may include the power to determine or direct commercial operations, including major expenditures or investments; issuances of equity or significant debt offerings; or the restructuring, merger, or dissolution of the enterprise."

17 EU–UK Trade and Cooperation Agreement, Chapter four: State-owned enterprises, enterprises granted special rights or privileges and designated monopolies, Article 4.1: Definitions, (j) "State-owned enterprise" means an enterprise in which a Party: (i) directly owns more than 50 % of the share capital; (ii) controls, directly or indirectly, the exercise of more than 50 % of the voting rights; (iii) holds the power to appoint a majority of the members of the board of directors or any other equivalent management body; or (iv) has the power to exercise control over the enterprise. For the establishment of control, all relevant legal and factual elements shall be taken into account on a case- by-case basis.

18 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* [2007] ICJ Rep 43, para. 406.

thus obtain redress. Conferral of separate personality under national law does not constitute a conclusive determination of autonomy *vis-à-vis* the State for the purposes of international law.[19] This situation has repeatedly arisen in human rights adjudication and investor-State arbitration, in which the claimant alleged that the State, by means of its SOE, had breached its obligations under the applicable treaty.

While closely associated with the field of international responsibility (and justifiably so, given its cardinal importance), attribution is not endemic to that area of international law. Instead, the question whether conduct can be held to be 'conduct of the State' is relevant in other fields of law — for example, the law of treaties and the law of State immunity.[20] The principles that govern the legal operation through which the conduct of persons is considered to be the conduct of the State for the purposes of international responsibility were articulated by the International Law Commission (ILC) in the context of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).[21] These Articles, however, have been applied in a broader context, not limited to the finding of international responsibility, but also to examine issues of standing. After offering a brief introduction to the rules contained in the ARSIWA, this paper examines how attribution has been applied by international courts and tribunals with respect to SOEs in three of the most prolific areas of international adjudication: investment law, WTO law, and human rights law.[22]

2. Attribution under the ILC Articles on State Responsibility

At its first session, in 1949, the ILC selected State responsibility as one of the topics for codification without, however, including it in the list of topics to which it gave priority.[23] Five years later, the Commission took note of the UN General Assembly's request to undertake the codification of the principles of international law governing State responsibility,[24] as soon as it considered it advisable, and work started in earnest. It turned out to be one of the longest-running projects in the ILC's history, taking half a century and four Special Rapporteurs before it could be completed.[25] Finally, in 2001, at its fifth-third session, under the special rapporteurship of James Crawford, the Commission adopted the entire set of final draft articles on

19 *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11) Award (12 Oct. 2005), paras. 252-5.

20 Luigi Condorelli and Claus Kress, 'The Rules of Attribution: General Considerations' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 222; see also James Crawford (Special Rapporteur), 'First report on State responsibility' UN Doc A/CN.4/490 and Add. 1-7 [1998] YbILC, Vol. II/2, 1, para 147 and fn 182.

21 [2001] YbILC, Vol. II/2, 20.

22 [INSERT SEPARATE NOTES]

23 https://legal.un.org/ilc/sessions/1/

24 General Assembly resolution 799 (VIII) of 7 December 1953.

25 [insert four Special Rapporteurs and duration of term]

responsibility of States for internationally wrongful acts consisting of 59 articles as well as commentaries thereto. In Resolution 56/83, the UN General Assembly took note of the completed articles and commended them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action.[26] In 2004, the UN General Assembly again commended the ARSIWA,[27] and requested the Secretary-General to invite Governments to submit their written comments on any future action regarding the articles, as well as to prepare an initial compilation of decisions of international courts, tribunals and other bodies referring to the articles and to invite Governments to submit information on their practice in this regard. No further action has been undertaken since but the ARSIWA are being applied by international courts and tribunals, either as guidance or as a codification of customary international law.[28]

The ARSIWA are divided into four parts: Part One deals with the internationally wrongful act of a State; Part Two with the content of the international responsibility of a State; Part Three with the implementation of the international responsibility of a State; and, Part Four with general provisions. The rules on attribution of conduct to a State are included as Chapter II of Part One. Upon reading the reports of the working group, the Special Rapporteurs and the drafting committee, as well as the comments of governments, it becomes clear that potential attribution of SOE conduct was not considered a major topic of consideration.

SOEs are not mentioned in the commentaries on Article 4 at all, but they are briefly referred to in the commentaries on Articles 5 and 8. Article 4 focuses on conduct of organs of a State:

> '1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.'

Article 5 regulates the conduct of persons or entities exercising elements of governmental authority, stipulating that

> 'The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the government authority shall be considered an act

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26 Resolution 56/83, adopted by the General Assembly [on the report of the Sixth Committee (A/56/589 and Corr.1)] (28 January 2002) Responsibility of States for internationally wrongful acts.

27 Resolution 59/35 of 2 December 2004 [complete reference]

28 [insert reference to Olleson]

> of the State under international law, provided the person or entity is acting in that capacity in the particular instance'.

In this context, the ILC considered that the conduct of SOEs could be attributed if it concerned State-owned airlines with delegated powers in relation to immigration control or quarantine, or, as established in a precedent by the Iran-US Claims Tribunal (IUSCT), foundations holding property for charitable purposes including the identification of property for seizure.[29]

Article 8 governs conduct directed or controlled by a State:

> 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.

Some have questioned 'whether the conduct of non-state actors should be considered 'acts of the State' proper, at least in Roberto Ago's terminology. It may be submitted that only the effects of the acts and omissions of the individual are attributed to the State, rather than the conduct itself.' [30] The Commentaries state that attribution can take place of 'conduct of companies that are State-owned and controlled': 'international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the "corporate veil" is a mere device or a vehicle for fraud or evasion', as found by the International Court of Justice in the *Barcelona Traction* case.[31] Insofar as SOEs are 'considered to be separate, prima facie their conduct in carrying out their activities is not attributable', as confirmed by the IUSCT in case dealing with the *de facto* seizure of property by an SOE without evidence that the State had used its ownership interest to direct the company to seize the property.[32] Only when there is proof that the State is using its ownership interest in or control of a corporation specifically in order to achieve a particular result, will the conduct be attributed to the State.[33]

3. Attribution in investment arbitration

This section examines attribution of SOE conduct as established by investor-State arbitral tribunals. First, attribution in relation to questions of standing is considered, since most treaties only allow private parties to bring claims. In such cases, if the corporate veil is lifted from an SOE claimant, the tribunal will *not* have jurisdiction. Subsequently, this section looks at attribution in the context of international

[29] (IUSCT) (para 2 – check references)

[30] Carlo de Stefano, 'Attribution in International Law and Arbitration,' *OUP* (2020) 125.

[31] [insert reference]

[32] check cases in fn 163: did the IUSCT state what threshold of proof they required?

[33] [elaborate on 'specifically in order to achieve a particular result']

responsibility of respondents: in these cases, a breach of substantive provisions can only be found if the corporate veil *can* be lifted as most investment treaties (with some exceptions) only impose obligations on States.

3.1 Attribution in the context of standing

In the context of standing before investment tribunals, attribution of the conduct of an entity to a State may be relevant for the purpose of determining whether that entity constitutes a (foreign) investor, which in turn may be a condition either for enjoying the substantive protection of investment provisions or for having access to dispute settlement mechanisms under a treaty. For example, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention') of 1965 confines the jurisdiction of the Centre to disputes between a Contracting State 'and a national of another Contracting State'.[34] Accordingly, a tribunal constituted under the ICSID Convention will have to satisfy itself, for jurisdictional purposes, that one of the disputing parties is not a State—namely, that its conduct cannot be assimilated to that of a State.[35]

Aron Broches, the 'principal architect' of the ICSID Convention,[36] proposed that jurisdiction of tribunals under that Convention should only be rejected with respect to an SOE that 'is acting as an agent for the government or is discharging an essentially governmental function.'[37] Taking this criterion as its point of departure, the tribunal in *CSOB* held that the fact that a State was the majority shareholder, thus retaining absolute control, of the claimant company did not disqualify the latter from bringing a claim against another State under the Convention.[38] In order to determine whether the company was 'discharging an essentially governmental function', the tribunal focused on the nature of the company's activities, rather than their purpose.[39] The tribunal concluded that these activities, being those of a bank, were commercial rather than governmental in nature; the fact that the company may have been

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34 Convention on the settlement of investment disputes between States and nationals of other States (signed 18 March 1965, entered into force 14 October 1966), 575 UNTS 159, Art 25.

35 Paul Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and their Investments Protected' (2011) 6 JILIR 1, 27; Aron Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1972) 136 RdC 331, 354.

36 Christoph H Schreuer, *The ICSID Convention: A Commentary* (CUP 2009) 2, cited in Mark Feldman, 'State-Owned Enterprises as Claimants in International Investment Arbitration' (2016) 31 ICSID Review 24, 27 (fn 11).

37 Aron Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1972) 136 RdC 331, 355.

38 *Ceskoslovenska Obchodni Banka AS* v. *The Slovak Republic* (ICSID Case No ARB/97/4), Decision of the Tribunal on Objections to Jurisdiction (24 May 1999), para 18.

39 *Ceskoslovenska Obchodni Banka AS* v. *The Slovak Republic* (ICSID Case No ARB/97/4), Decision of the Tribunal on Objections to Jurisdiction (24 May 1999), para 20.

promoting the governmental policies or purposes of the State was immaterial for the jurisdictional question.[40]

The tribunal in *Beijing Urban Construction* faced the same question when the respondent State contested its jurisdiction, contending that the claimant did not qualify as 'a national of another Contracting State' under Article 25(1) ICSID, because its conduct was attributable to a State.[41] The claimant was a publicly funded and State-owned entity established by China,[42] which had undertaken to construct the terminal facility at Sana'a International Airport in Yemen.[43] The tribunal invoked the *Broches* criteria which, in its view, constituted two alternative bases for the attribution of conduct to the State.[44] Assessing the first basis, the tribunal observed that the corporations owned by the Chinese State are frequently subject to 'corporate controls and mechanisms', yet emphasized that 'the issue is not the corporate framework of the State-owned enterprise, but whether it *functions* as an agent of the State in the fact-specific context.'[45] In the tribunal's view, the evidence established that the enterprise was performing its work as a commercial contractor, rather than as an agent of China.[46] By the same token, the enterprise was not held to discharge a governmental rather than a commercial function in its capacity as contractor of the project in question.[47] The focus of the tribunal on the specific project at hand may be explained by the fact that the tribunal explicitly considered that the *Broches* criteria were 'the mirror image of the attribution rules in Articles 5 and 8 of the [ARSIWA]'.[48] What the tribunal did was perhaps not the discovery of a 'mirror image' of these rules but rather Broches' extrapolation of general principles of attribution from the principles articulated with respect to international responsibility.

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40 *Ceskoslovenska Obchodni Banka AS* v. *The Slovak Republic* (ICSID Case No ARB/97/4), Decision of the Tribunal on Objections to Jurisdiction (24 May 1999), para 20.

41 *Beijing Urban Construction Group Co Ltd* v. *Republic of Yemen* (ICSID Case No ARB/14/30), Decision on Jurisdiction (31 May 2017), para 29.

42 *Beijing Urban Construction Group Co Ltd* v. *Republic of Yemen* (ICSID Case No ARB/14/30), Decision on Jurisdiction (31 May 2017), para 32.

43 *Beijing Urban Construction Group Co Ltd* v. *Republic of Yemen* (ICSID Case No ARB/14/30), Decision on Jurisdiction (31 May 2017), para 3.

44 *Beijing Urban Construction Group Co Ltd* v. *Republic of Yemen* (ICSID Case No ARB/14/30), Decision on Jurisdiction (31 May 2017), para 33.

45 *Beijing Urban Construction Group Co Ltd* v. *Republic of Yemen* (ICSID Case No ARB/14/30), Decision on Jurisdiction (31 May 2017), para 39 (emphasis in the original).

46 *Beijing Urban Construction Group Co Ltd* v. *Republic of Yemen* (ICSID Case No ARB/14/30), Decision on Jurisdiction (31 May 2017), para 41.

47 *Beijing Urban Construction Group Co Ltd* v. *Republic of Yemen* (ICSID Case No ARB/14/30), Decision on Jurisdiction (31 May 2017), para 42–43.

48 *Beijing Urban Construction Group Co Ltd* v. *Republic of Yemen* (ICSID Case No ARB/14/30), Decision on Jurisdiction (31 May 2017), para 34.

The applicable framework may permit the filing of claims by SOEs without any further scrutiny as to their relationship with the State owning or controlling them.[49] Thus, the tribunal in *Stadwerke* accepted a claim brought by a company controlled and fully owned by the Council of the City of Munich (Germany), observing that the applicable treaty—the Energy Charter Treaty—did not differentiate between State-owned and privately owned entities.[50]

3.2 Attribution in the context of international responsibility

More commonly, the question may arise whether the conduct of an SOE is attributable to the host State with a view to establishing the latter's responsibility under the applicable provisions of investment law.

3.2.1 Attribution under *lex specialis* rules

An investment tribunal may not need to address the point of attribution under the secondary rules on State responsibility, when the case is dismissed on different grounds,[51] or when the primary rules impose specific obligations on the State to ensure a certain type of conduct on the part of the SOEs. For example, the Energy Charter Treaty provides that '[n]o Contracting Party shall encourage or require … a state enterprise to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under other provisions of this Treaty.'[52] A similar provision was at play in *Bosh,* where the applicable BIT obligated each Party to ensure that State enterprises act in conformity with the provisions of the BIT 'wherever such enterprise[s] exercise[] any regulatory, administrative or other governmental authority that the Party has delegated to [them]'.[53] The same BIT defined 'State enterprise' as 'an enterprise owned, or controlled through ownership interests, by a Party'.[54] The claimants sought to attribute the conduct of a public

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49 By way of illustration, see the examples cited in Mark Feldman, 'State-Owned Enterprises as Claimants in International Investment Arbitration' (2016) 31 ICSID Review 24, 26 (fn 7).

50 *Stadtwerke München GmbH, RWE Innogy GmbH and others* v. *Kingdom of Spain* (ICSID Case No ARB/15/1), Award (2 December 2019), para 134.

51 e.g. *Orascom TMT Investments S.à.r.l.* v. *People's Democratic Republic of Algeria* (ICSID Case No ARB/12/35), Award (31 May 2017), para 556.

52 The Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998), 2080 UNTS 95, Art 22 (2); see also Art 22 (1): '[e]ach Contracting Party shall ensure that any state enterprise which it maintains or establishes shall conduct its activities in relation to the sale or provision of goods and services in its Area in a manner consistent with the Contracting Party's obligations under Part III of this Treaty.'

53 Article II(2)(b) of the Treaty between the United States of America and Ukraine concerning the Encouragement and Reciprocal Protection of Investment (signed 4 March 1994, entered into force 16 November 1996), cited in *Bosh International Inc and B&P Ltd Foreign Investments Enterprise* v. *Ukraine* (ICSID Case No ARB/08/11), Award (25 October 2012), para 155.

54 Article I(1)(f) of the Treaty between the United States of America and Ukraine concerning the Encouragement and Reciprocal Protection of Investment (signed 4 March 1994, entered into

university to the State on the basis of this provision. As the tribunal emphasised, however, this provision did not have the effect of making the conduct of the State enterprise attributable to the State; rather, it imposed a positive obligation on the State to ensure compliance by State enterprises with the State's obligations under the BIT—an obligation whose breach by the State would give rise to a separate claim under the BIT.[55]

At other times, the question may be governed by special rules of attribution, which in principle prevail over the rules of attribution under general international law.[56] The case of *Adel A Hamadi Al Tamimi* v. *Sultanate of Oman* is an instance where the general rules of attribution were displaced by specific provisions — in that case, the provisions of the US–Oman Free Trade Agreement. That Agreement specified that the obligations incumbent on each State under its provisions would apply 'to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party'.[57] The tribunal found that this provision constituted a *lex specialis* limiting the circumstances under which the acts of an entity were attributable to the State, so that rules of attribution under the ARSIWA were rendered irrelevant.[58] Accordingly, the tribunal did not find it necessary to assess whether the State exercised 'effective control' over the corporation in question ('OMCO') through its 99 percent shareholding or through its influence over the corporation's directors or managers, as alleged by the claimant.[59]

3.2.2 Attribution under general international law

In the absence of such special provisions, however, the rules on attribution contained in the ILC Articles are applicable in the context of investment law, insofar as they reflect customary international law.[60] Three principles of attribution are of particular relevance in the context of arbitration: they are the ones reflected in Articles 4, 5, and 8, covering the attribution of conduct of (*de jure* and *de facto*) organs of the State, of

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force 16 November 1996), cited in *Bosh International Inc and B&P Ltd Foreign Investments Enterprise* v. *Ukraine* (ICSID Case No ARB/08/11), Award (25 October 2012), para 156.

55 *Bosh International Inc and B&P Ltd Foreign Investments Enterprise* v. *Ukraine* (ICSID Case No ARB/08/11), Award (25 October 2012), para 183.

56 See Art 55 ARSIWA, [2001] YbILC, Vol. II/2, 140.

57 Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area, (signed 19 January 2006, entered into force 1 January 2009) (US–Oman FTA), Art 10.1.2.

58 *Adel A Hamadi Al Tamimi* v. *Sultanate of Oman* (ICSID Case No ARB/11/33), Award (3 November 2015), para 321.

59 *Adel A Hamadi Al Tamimi* v. *Sultanate of Oman* (ICSID Case No ARB/11/33), Award (3 November 2015), para 322.

60 Simon Olleson, 'Attribution in Investment Treaty Arbitration' (2016) 31(2) ICSID Review 457, 463.

conduct of entities exercising elements of governmental authority, and of conduct directed or controlled by the State, respectively.[61] The principle that conduct is attributable to the State if the latter acknowledges as its own (Article 11 ARSIWA), while in principle apposite in the context of investment law, does not appear to have been extensively applied in investment arbitration.[62]

These three principles impose separate standards for the attribution of conduct and provide for a different scope of attribution. For example, when an entity is affirmed as a State organ (whether de jure or de facto), *all* of its conduct is attributable to the State.[63] By contrast, when it comes to entities which, despite not being State organs, are exercising elements of governmental authority or are acting under the instructions, direction or control of the State, their conduct is attributable to the State only insofar as they are acting in that capacity in the particular operation in question.[64] The question whether the conduct under scrutiny consists in the exercise of governmental authority (or, is an act *iure imperii*, to use a term borrowed from the law of State immunity)[65] is irrelevant for the attribution of conduct of State organs (Article 4) and of entities directed or controlled by the State (Article 8)[66] but crucial when attributing conduct of entities exercising elements of governmental authority (Article 5).[67] Indeed, when it comes to the application of Article 5 ARSIWA, investment tribunals have emphasised that two conditions must cumulatively be met: first, the entity must be empowered by domestic law to exercise elements of governmental authority and, second, the conduct of the entity must relate to the

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61 Simon Olleson, 'Attribution in Investment Treaty Arbitration' (2016) 31(2) ICSID Review 457, 460–61.

62 In *Bilcon of Delaware et al* v. *Canada* (PCA Case No 2009-04) Award on Jurisdiction and Liability (17 March 2015), the tribunal established that the legal entity in question was a de jure organ of the State (para 319) and then added that its conduct would in any case be attributable to the State because the State had adopted the entity's findings with respect to the rejection of the claimant's project (para 321). The tribunal noted that '[i]t is possible to imagine a case in which a government arrives at the same conclusion as a recommendatory body, but in which the government does so by pursuing investigations and reasoning that are so distinctly its own that it might not be viewed as acknowledging and adopting the conduct of the recommendatory body', but this was not the case at hand (para 322).

63 *Jan de Nul N.V. and Dredging International N.V.* v. *Arab Republic of Egypt* (ICSID Case No ARB/04/13), Award (6 November 2008), para 155.

64 *Jan de Nul N.V. and Dredging International N.V.* v. *Arab Republic of Egypt* (ICSID Case No ARB/04/13), Award (6 November 2008), para 163 (Article 5 ARSIWA); *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* (ICSID Case No ARB/07/24), Award (18 June 2010), paras 197 and 200 (for Articles 5 and 8 ARSIWA, respectively).

65 This use is apposite, and even desirable, in the interests of consistency among the various areas of international law: James Crawford, *State Responsibility: The General Part* (OUP 2013) 130.

66 See ARSIWA Commentary to Art 4, para 6 and Commentary to Art 8, para 2.

67 See ARSIWA Commentary to Art 5, para 5; *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* (ICSID Case No ARB/07/24), Award (18 June 2010), para 180.

exercise of that governmental authority.[68] Accordingly, the conduct to be attributed to the State must have been performed in the use of 'prérogatives de puissance publique', such that the conduct could not have been performed by a commercial entity.[69]

Despite these differences, investment tribunals tend to examine all separate bases of attribution together, and often to draw from the same facts a series of conclusions that are relevant for different bases of attribution—for example, the examination of the structure or mandate of an entity may inform both the question whether it is a State organ and whether it exercises elements of governmental authority. For these reasons, the ensuing analysis will examine each arbitral award separately.

The problem of attribution was presented in *Maffezini v. Spain* as a question whether the claimant could admissibly bring claims under ICSID against a legal entity (SODIGA) concerning his investment in a company that he owned jointly with that entity. The tribunal held that its jurisdiction under ICSID, which is confined to disputes in which one party is a State,[70] was dependent on whether SODIGA was 'a State entity'; in the affirmative, the question whether its conduct was attributable to the State was one to be discussed as an aspect of the merits.[71] In addressing the first question, the tribunal set out to apply a 'structural' and a 'functional' test. From a structural point of view, the tribunal held that

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68 *Jan de Nul N.V. and Dredging International N.V.* v. *Arab Republic of Egypt* (ICSID Case No ARB/04/13), Award (6 November 2008), para 163; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS* v. *Islamic Republic of Pakistan* (ICSID Case No ARB/03/29), Award (27 August 2009), para 122; *Bosh International Inc and B&P Ltd Foreign Investments Enterprise* v. *Ukraine* (ICSID Case No ARB/08/11), Award (25 October 2012), para 164; *Tulip Real Estate Investment and Development Netherlands BV* v. *Republic of Turkey* (ICSID Case No ARB/11/28), Award (10 March 2014), para 292; see also *Helnan International Hotels AS* v. *The Arab Republic of Egypt* (ICSID Case No ARB/05/19) Decision of the Tribunal on Objection to Jurisdiction (17 October 2006), para 93. Contrast this with the approach taken under the auspices of the WTO: *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* WT/DS379/AB/R (11 March 2011), para 309: 'The connecting factor for attribution pursuant to the ILC Articles is the particular *conduct*, whereas, the connecting factors in Article 1.1(a)(1) of the *SCM Agreement* are *both* the particular *conduct* and the *type of entity*.' (emphasis in the original).

69 *Jan de Nul N.V. and Dredging International N.V.* v. *Arab Republic of Egypt* (ICSID Case No ARB/04/13), Award (6 November 2008), para 170; *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* (ICSID Case No ARB/07/24), Award (18 June 2010), para 193. An oft-quoted outlier is *Noble Ventures Inc* v. *Romania* (ICSID Case No ARB/01/11), Award (12 October 2005), para 82, where the tribunal held that there was 'no reason why one should not regard commercial acts as being in principle also attributable' to the State. However, it is not entirely clear whether the tribunal considered the actors in question as *de facto* organs (in which case its conclusion would be correct) or as entities exercising elements of governmental authority (in which case its conclusion would be questionable): see ibid, paras 70 and 79–80.

70 See again Art 25 ICSID.

71 *Emilio Agustín Maffezini* v. *Kingdom of Spain* (ICSID Case No ARB/97/7), Decision of the Tribunal on Objections to Jurisdiction (25 January 2000), para 75.

> 'a finding that the entity is owned by the State, directly or indirectly, gives rise to a rebuttable presumption that it is a State entity. The same result will obtain if an entity is controlled by the State, directly or indirectly. A similar presumption arises if an entity's purpose or objectives is the carrying out of functions which are governmental in nature or which are otherwise normally reserved to the State, or which by their nature are not usually carried out by private businesses or individuals.'[72]

Besides, the additional, functional test 'looks to the functions of or the role to be performed by the entity.'[73] Under this test, a private corporation operating for profit could still be considered an organ of the State if was doing so while discharging essentially governmental functions.[74] Turning to the facts of the case, the tribunal held that SODIGA was a State entity, because it was created by governmental decree discussed and approved by the Council of Ministers and because, under that decree, the government would own no less than 51% of the entity's capital (the tribunal observed that, in fact, the governmentally owned capital was 88%).[75] At the stage of the merits, the tribunal held that some of SODIGA's functions were essentially governmental in character, while others were essentially commercial, therefore it examined its various acts separately.[76]

The rebuttable presumption articulated in *Maffezini*, whereby State-owned and -controlled enterprises are presumed to constitute organs of the State, was relied on in *Flemingo v. Poland*, which concerned a State-owned and controlled enterprise managing a State airport.[77] Applying that presumption, the tribunal observed that the supervision and control by the Ministry of Transport over the company was 'structural and remain[ed] very substantial',[78] a conclusion which was not displaced by the fact that domestic legislation provided that the company was independent, self-governing and self-financing.[79] Thus, the tribunal concluded that the company at hand

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72 *Emilio Agustín Maffezini* v. *Kingdom of Spain* (ICSID Case No ARB/97/7), Decision of the Tribunal on Objections to Jurisdiction (25 January 2000), para 77.

73 *Emilio Agustín Maffezini* v. *Kingdom of Spain* (ICSID Case No ARB/97/7), Decision of the Tribunal on Objections to Jurisdiction (25 January 2000), para 79.

74 *Emilio Agustín Maffezini* v. *Kingdom of Spain* (ICSID Case No ARB/97/7), Decision of the Tribunal on Objections to Jurisdiction (25 January 2000), para 80.

75 *Emilio Agustín Maffezini* v. *Kingdom of Spain* (ICSID Case No ARB/97/7), Decision of the Tribunal on Objections to Jurisdiction (25 January 2000), paras 83–85.

76 *Emilio Agustín Maffezini* v. *Kingdom of Spain* (ICSID Case No ARB/97/7), Award (13 November 2000), para 57.

77 *Flemingo DutyFree Shop Private Limited* v. *The Republic of Poland,* Award (12 August 2016), para 426–27.

78 *Flemingo DutyFree Shop Private Limited* v. *The Republic of Poland,* UNCITRAL, Award (12 August 2016), para 430.

79 *Flemingo DutyFree Shop Private Limited* v. *The Republic of Poland,* UNCITRAL, Award (12 August 2016), paras 431–32.

was a de facto organ of the State for the purposes of attribution.[80] The tribunal added that, even if the company were not a de facto organ, its conduct in question was performed in the exercise of governmental authority, and was therefore attributable to the State.[81] For the tribunal, the operation and modernisation of the airport (which gave rise to the contract at the heart of the dispute) was a governmental authority, delegated and supervised by the Ministry of Transport.[82]

Tenaris v. Venezuela constitutes another example where attribution under the two separate bases reflected in Articles 4 and 5 ARSIWA was considered in a similarly intertwined manner. In that case, the tribunal observed that the corporation of whose acts the claimants complained (CVG FMO), a supplier of iron ore in Venezuela, was wholly owned by the State through a separate entity (CVG);[83] by governmental decree, the latter was vested with the function of iron ore exploitation in Venezuela monopolistically.[84] The tribunal placed considerable emphasis on the fact that the CVG FMO was an entity legally distinct from CVG and that its activities were, under its constitution, of a commercial character.[85] For these reasons, the tribunal resolved that the CVG FMO was neither an organ of the State[86] nor an enterprise exercising elements of governmental authority[87] for the purposes of attribution under Articles 4 and 5 ARSIWA, respectively. The tribunal went on to observe that 'there [wa]s nothing in the evidence to suggest that its [CVG's] oversight of CVG FMO went beyond the exercise of general supervision of a kind which international tribunals have determined would be insufficient for the purposes of attribution'.[88]

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80 *Flemingo DutyFree Shop Private Limited* v. *The Republic of Poland,* UNCITRAL, Award (12 August 2016), para 435.

81 *Flemingo DutyFree Shop Private Limited* v. *The Republic of Poland,* UNCITRAL, Award (12 August 2016), para 436.

82 *Flemingo DutyFree Shop Private Limited* v. *The Republic of Poland,* UNCITRAL, Award (12 August 2016), paras 439–446.

83 *Tenaris S.A. and Talta-Trading E Marketing Sociedade Unipessoal LDA* v. *Venezuela* (ICSID Case No. ARB/11/26), Award (29 January 2016), para 406.

84 *Tenaris S.A. and Talta-Trading E Marketing Sociedade Unipessoal LDA* v. *Venezuela* (ICSID Case No. ARB/11/26), Award (29 January 2016), para 407.

85 *Tenaris S.A. and Talta-Trading E Marketing Sociedade Unipessoal LDA* v. *Venezuela* (ICSID Case No. ARB/11/26), Award (29 January 2016), para. 412; the constitution is cited ibid, paras 409–10.

86 *Tenaris S.A. and Talta-Trading E Marketing Sociedade Unipessoal LDA* v. *Venezuela* (ICSID Case No. ARB/11/26), Award (29 January 2016), para 413.

87 *Tenaris S.A. and Talta-Trading E Marketing Sociedade Unipessoal LDA* v. *Venezuela* (ICSID Case No. ARB/11/26), Award (29 January 2016), paras 413 and 415.

88 *Tenaris S.A. and Talta-Trading E Marketing Sociedade Unipessoal LDA* v. *Venezuela* (ICSID Case No. ARB/11/26), Award (29 January 2016), para 417; see also ibid, para 421, suggesting that an intervention into the management of CVG FMO by Venezuela might constitute a ground of attribution.

The tribunal in *Kardassopoulos v. Georgia* was less clear when determining the question of attribution of the conduct of two State-owned oil companies to the State. The tribunal held that the relationship between the companies and the State 'b[ore] all of the hallmarks of attribution under international law',[89] even though it did not specify whether these enterprises were de facto organs of the State or entities exercising governmental authority. In fact, the tribunal considered that Articles 4, 5, 7, and 11 ARSIWA were 'equally applicable' in the case,[90] noting that the two companies were incorporated within the structure of the State, operating under its auspices, and clearly exercised governmental authority.[91] Similarly, the tribunal in *Nykomb v. Latvia* invoked no specific ground of attribution when it affirmed that the conduct of a fully State-owned enterprise producing, purchasing and distributing electric power was attributable to the State because the enterprise lacked commercial freedom and was not an 'independent commercial enterprise' but instead 'a constituent part of the [State's] organization of the electricity market and a vehicle to implement the [State's] decisions concerning the price setting.[92]

In *Jan de Nul v. Egypt*, the claimants contented that the conduct of the Suez Canal Authority should be attributed to the State under the 'structural' and 'functional' tests set out in *Maffezini v. Spain* and subsequent cases.[93] The tribunal recalled that, if the enterprise was held to be a State organ, any of its acts would be attributable to the State, whereas if it was an entity exercising elements of governmental authority, then only the acts demonstrating such elements would be attributable to the State.[94] The tribunal considered that the enterprise fulfilled the functional test, because it carried out public activities as a general matter, namely the management and operation of the Suez Canal.[95] However, the enterprise was held not to fulfil the structural criterion because, under domestic law, it had a separate juridical personality, a mandate to perform activities of a commercial nature, and an

89 *Ioannis Kardassopoulos and Ron Fluchs* v. *The Republic of Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15), Award (3 March 2010), para 280.

90 *Ioannis Kardassopoulos and Ron Fluchs* v. *The Republic of Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15), Award (3 March 2010), para 274.

91 *Ioannis Kardassopoulos and Ron Fluchs* v. *The Republic of Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15), Award (3 March 2010), paras 275–76.

92 *Nykomb Synergetics Technology Holding AB* v. *The Republic of Latvia*, Award (16 December 2003), 31.

93 *Jan de Nul N.V. and Dredging International N.V.* v. *Arab Republic of Egypt* (ICSID Case No ARB/04/13), Award (6 November 2008), paras 144–47.

94 *Jan de Nul N.V. and Dredging International N.V.* v. *Arab Republic of Egypt* (ICSID Case No ARB/04/13), Award (6 November 2008), para 155.

95 *Jan de Nul N.V. and Dredging International N.V.* v. *Arab Republic of Egypt* (ICSID Case No ARB/04/13), Award (6 November 2008), para 161.

autonomous budget consisting of private funds.[96] For these reasons, the tribunal held that the enterprise was not an organ of the State.[97]

Then, the tribunal held that attribution under Article 5 ARSIWA could be made if two cumulative conditions were met: first, the entity must be empowered by domestic law to exercise elements of governmental authority and, second, the act itself must be performed in the exercise of that governmental authority.[98] For the tribunal, the first criterion was met as the entity was empowered to issue decrees related to the navigation in the canal, to impose and collect charges for the navigation and passing through the canal.[99] Under the second criterion, only acts that were essentially governmental, rather than commercial, in character would be attributable to the State.[100] In this connection, the tribunal emphasised that the fact that the contract in question was awarded through a bidding process governed by the laws on public procurement was irrelevant: for the tribunal, what mattered was not whether the act contained elements of 'service public', but rather whether it was performed in the use of 'prérogatives de puissance public' or governmental authority.[101] Besides, the tribunal found no evidence to satisfy the 'very demanding' test of attribution under Article 8 ARSIWA which, in the tribunal's words, 'require[d] both a general control of the State over the person or entity and a specific control of the State over the act in question.[102]

In *Hamester v. Ghana*, the tribunal found that the Cocobod, the cocoa board whose acts were complained of, was not a de facto organ of the Ghanaian State because, under domestic law, the government could only give directions 'of a general character not being inconsistent with … the contractual or other legal obligations' of the enterprise.[103] The tribunal went on to hold that the enterprise was entrusted with governmental functions, such as the regulation of the marketing and export of cocoa, for which it was granted governmental powers, such as the power to enact regulations

96 *Jan de Nul N.V. and Dredging International N.V.* v. *Arab Republic of Egypt* (ICSID Case No ARB/04/13), Award (6 November 2008), para 161.

97 *Jan de Nul N.V. and Dredging International N.V.* v. *Arab Republic of Egypt* (ICSID Case No ARB/04/13), Award (6 November 2008), para 162.

98 *Bosh International Inc and B&P Ltd Foreign Investments Enterprise* v. *Ukraine* (ICSID Case No ARB/08/11), Award (25 October 2012), para 164.

99 *Jan de Nul N.V. and Dredging International N.V.* v. *Arab Republic of Egypt* (ICSID Case No ARB/04/13), Award (6 November 2008), para 166.

100 *Jan de Nul N.V. and Dredging International N.V.* v. *Arab Republic of Egypt* (ICSID Case No ARB/04/13), Award (6 November 2008), para 168.

101 *Jan de Nul N.V. and Dredging International N.V.* v. *Arab Republic of Egypt* (ICSID Case No ARB/04/13), Award (6 November 2008), para 170.

102 *Jan de Nul N.V. and Dredging International N.V.* v. *Arab Republic of Egypt* (ICSID Case No ARB/04/13), Award (6 November 2008), para 173.

103 *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* (ICSID Case No ARB/07/24), Award (18 June 2010), para 187, citing Article 32 of (Ghanaian) Law 1984.

by legislative instruments, coupled with the power to impose penalties for their violation.[104] For the tribunal, however, it was not enough to establish that Cocobod was an entity exercising elements of governmental authority for attribution to be affirmed under Article 5 ARSIWA. It was necessary that 'the precise act in question was an exercise of such governmental authority and not merely an act that could be performed by a commercial entity.'[105]

On the other hand, attribution under Article 8 ARSIWA was independent of the question whether the acts were performed in the exercise of governmental power but rested on the question whether they were performed 'under the direct command or effective control' of the State.[106] Whether under Article 5 or under Article 8 ARSIWA, by contrast, required an enquiry into the specificities of each of the acts complained of by the claimant.[107] Against the backdrop of this standard, the tribunal found no evidence to support the claimant's allegation that the State had used its public power in the course of negotiations between the claimant and Cocobod with respect to the contract between them[108] or that Cocobod acted under the direction or control of the government,[109] thus rejecting attribution of these acts to the State.[110]

In *Bosh v. Ukraine*, the question arose whether the acts of the Taras Shevchenko National University were attributable to the State through the operation of the principle reflected in Article 5 ARSIWA. The tribunal considered that attribution under Article 5 rested on two propositions: first, that the entity be empowered by domestic law to exercise elements of governmental authority and, second, that the conduct of the entity related to the exercise of that governmental authority.[111] The tribunal perused the domestic applicable framework, making specific mention of the university's largely State-funded budget[112] and the

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104 *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* (ICSID Case No ARB/07/24), Award (18 June 2010), para 190.

105 *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* (ICSID Case No ARB/07/24), Award (18 June 2010), para 193.

106 *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* (ICSID Case No ARB/07/24), Award (18 June 2010), para 198.

107 *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* (ICSID Case No ARB/07/24), Award (18 June 2010), paras 197 and 200 (for Articles 5 and 8, respectively).

108 *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* (ICSID Case No ARB/07/24), Award (18 June 2010), para 248.

109 *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* (ICSID Case No ARB/07/24), Award (18 June 2010), para 256.

110 By contrast, acts of State organs such as the Minister for Finance or the police were attributed to Ghana: *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* (ICSID Case No ARB/07/24), Award (18 June 2010), para 291.

111 *Bosh International Inc and B&P Ltd Foreign Investments Enterprise* v. *Ukraine* (ICSID Case No ARB/08/11), Award (25 October 2012), para 164.

112 *Bosh International Inc and B&P Ltd Foreign Investments Enterprise* v. *Ukraine* (ICSID Case No ARB/08/11), Award (25 October 2012), para 169.

appointment of its Rector by the government.[113] While acknowledging that the university had a large degree of autonomy with respect to the organisation of its educational and scientific programmes, the tribunal concluded that it was empowered by domestic law to exercise elements of governmental authority.[114] Turning to the second limb, the tribunal observed that the university was entitled to enter into the contract (which it then allegedly breached) in its own right, without the requirement for State authorisation.[115] For that reason, the tribunal found that this conduct constituted not a governmental activity but rather a private and commercial activity, not attributable to the State.[116]

In *Karkey v. Pakistan*, the tribunal referred to the bases of attribution articulated in Articles 5 and 8 ARSIWA when ascertaining whether the acts of Lakhra, a power generating company that had concluded a contract with the claimant, were attributable to the State.[117] After observing that the company in question was owned and controlled by the State,[118] the tribunal held that the company 'did not enter the Contract with Karkey [the claimant] out of its own free will and self-interest' but rather that the conclusion of the contract, as well as the bulk of the company's obligations thereunder, was decided by organs of the State.[119] In this connection, the tribunal noted that the company undertook obligations that a purely private entity could not have undertaken, such as the commitment that no State organ would expropriate Karkey's assets.[120] Accordingly, the tribunal held that the acts related to the conclusion and execution of the contract 'were directed, instructed or controlled' by the State, and therefore attributable to the latter.[121] Similarly, the tribunal found that 'the chain of causation of the non-payment by Lakhra [the State-owned company] can be traced directly to the Ministry of Finance and the State Bank' of the

113 *Bosh International Inc and B&P Ltd Foreign Investments Enterprise* v. *Ukraine* (ICSID Case No ARB/08/11), Award (25 October 2012), para 170.

114 *Bosh International Inc and B&P Ltd Foreign Investments Enterprise* v. *Ukraine* (ICSID Case No ARB/08/11), Award (25 October 2012), paras 172–73.

115 *Bosh International Inc and B&P Ltd Foreign Investments Enterprise* v. *Ukraine* (ICSID Case No ARB/08/11), Award (25 October 2012), para 177.

116 *Bosh International Inc and B&P Ltd Foreign Investments Enterprise* v. *Ukraine* (ICSID Case No ARB/08/11), Award (25 October 2012), para 178 (see also para 176).

117 *Karkey Karadeniz Elektrik Uretim AS* v *Islamic Republic of Pakistan* (ICSID Case No ARB/13/1), Award (22 August 2017), paras 566–71.

118 *Karkey Karadeniz Elektrik Uretim AS* v *Islamic Republic of Pakistan* (ICSID Case No ARB/13/1), Award (22 August 2017), para 572.

119 *Karkey Karadeniz Elektrik Uretim AS* v *Islamic Republic of Pakistan* (ICSID Case No ARB/13/1), Award (22 August 2017), paras 573–75.

120 *Karkey Karadeniz Elektrik Uretim AS* v *Islamic Republic of Pakistan* (ICSID Case No ARB/13/1), Award (22 August 2017), para 578.

121 *Karkey Karadeniz Elektrik Uretim AS* v *Islamic Republic of Pakistan* (ICSID Case No ARB/13/1), Award (22 August 2017), para 582.

State,[122] which in turn led to the conclusion that the company's acts under the contract were made 'under the instructions, direction and control' of the State.[123]

In *Staur* v. *Latvia*[124] the tribunal found that there was insufficient evidence of direct control for SJSC Airport to be treated as a *de facto* organ of the Latvian State under Article 4 ARSIWA, having regard to its distinct legal personality, separate budget and management structure.[125] In relation to Article 5, the tribunal found that neither of the conditions required for Article 5 were satisfied. It was not persuaded that there had been any delegation of governmental authority to the Airport under Latvian Law or that the conduct of the Airport could be said to implicate the exercise of governmental authority.[126] The Claimants failed to establish that: 1) the Airport was full dependent on the Ministry of Transport for Land Lease Agreements; 2) the Airport was exercising elements of governmental authority in its relationship with the claimant; 3) there is an inherently governmental character to development of commercial facilities of this kind; and 4) SJSC Airport's development plans were an exercise of governmental authority, as they were neither binding nor required State approval.[127] Also the link between the actions of the airport and those of the Ministry needed to find direction or control, was not considered sufficiently direct.[128]

In *EDF v Romania*, the tribunal attributed the conduct to the Respondent pursuant to ARSIWA Article 8, when it found an articulated system of mandates through which the government had issued compelling directives to the two SOEs. This was manifestly demonstrated by the adoption by AIBO's general assembly of the shareholders of a resolution conforming verbatim to said instructions.[129] *UAB v. Latvia* concerned a freezing order brought against the investor by two companies wholly owned by a Latvian municipality and whether this could be attributed to the State under ARSIWA Article 8. The Tribunal found that there was 'a dearth of direct evidence as to any such instruction, direction or control' due to the failure of the

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122 *Karkey Karadeniz Elektrik Uretim AS* v *Islamic Republic of Pakistan* (ICSID Case No ARB/13/1), Award (22 August 2017), para 585.

123 *Karkey Karadeniz Elektrik Uretim AS* v *Islamic Republic of Pakistan* (ICSID Case No ARB/13/1), Award (22 August 2017), para 593; the tribunal reached the same conclusion with respect to a second State-owned company: ibid, paras 594–97.

124 *Staur Eiendom AS, EBO Invest AS and Rox Holding AS* v. *Republic of Latvia*, ICSID Case No. ARB/16/38, Award (28 February 2020).

125 *Staur Eiendom AS, EBO Invest AS and Rox Holding AS* v. *Republic of Latvia*, ICSID Case No. ARB/16/38, Award (28 February 2020), para 336.

126 *Staur Eiendom AS, EBO Invest AS and Rox Holding AS* v. *Republic of Latvia*, ICSID Case No. ARB/16/38, Award (28 February 2020), 342-343.

127 *Staur Eiendom AS, EBO Invest AS and Rox Holding AS* v. *Republic of Latvia*, ICSID Case No. ARB/16/38, Award (28 February 2020), 347-351.

128 *Staur Eiendom AS, EBO Invest AS and Rox Holding AS* v. *Republic of Latvia*, ICSID Case No. ARB/16/38, Award (28 February 2020), [CHECK PARAS].

129 EDF Award, paras 204-08. [COMPLETE REF]

Respondent to produce the requested documents and witnesses for cross-examination. Nevertheless, there was 'a body of circumstantial evidence which, taken as a whole, permits the inference that the Municipality (as an organ of the Respondent) must have instructed [the two SOEs] to bring the claims against [the Claimant] and must have instructed [one of the SOEs involved] not to comply with the October 2007 Agreement'.[130]

In general, investment tribunals have adopted a stringent approach when it comes to attribution under Article 8 ARSIWA.[131] In this sense, the fact that the State owns a separate entity and even exercises a measure of overall control over it normally does not suffice to render its conduct attributable to that State.[132] In light with the application of Article 8 ARSIWA under general international law, investment tribunals have ruled that it does not regularly cover activities performed in the exercise of authority.[133] As stated above, under Article 8, the conduct of a person or group of persons is attributable to the State if they are acting 'on the instructions of, or under the direction or control of the State in carrying out the conduct'. As a result, the rule of attribution in investment arbitration cases operates on the basis of a 'radically different mechanism' compared to Article 4(2) ARSIWA, as supported by the omission of the phrase 'in fact acting on behalf of the State' in Article 8.[134]

Attribution under Article 8 is seen as employing a private law concept of agency that 'entails the absence of any exercise of elements of *official* (Article 4) or *governmental* (Article 5) authority whatsoever, but instead requires the existence of a *factual* link'.[135] It may be for this reason that attribution under the rubric of 'instructions, direction, or control' is sometimes not pleaded at all by the claimant, who instead may choose to invoke exclusively the capacity of the SOE as an agent (a *de facto* organ) of the State or as exercising elements of governmental authority.[136] Arbitral tribunals have consistently held that majority ownership or shareholding by

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130 *AB E Energija v Latvia*, ICSID Case No ARB/12/33, Award, 22 December 2017, paras. 826-827.

131 Simon Olleson, 'Attribution in Investment Treaty Arbitration' (2016) 31 ICSID Review 457, 473, citing *Jan de Nul NV and Dredging International NV* v. *Arab Republic of Egypt* (ICSID Case No ARB/04/13), Award (6 November 2008), para 173, *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* (ICSID Case No ARB/07/24), Award (18 June 2010), paras 179 and 199; *White Industries Australia Ltd* v. *The Republic of India*, Final Award (30 November 2011), 8.1.18.

132 Simon Olleson, 'Attribution in Investment Treaty Arbitration' (2016) 31 ICSID Review 457, 472, citing *White Industries Australia Limited* v. *The Republic of India*, Final Award (30 November 2011) para 8.1.6; *Tulip Real Estate Investment and Development Netherlands BV* v. *Republic of Turkey* (ICSID Case No ARB/11/28), Award (10 March 2014), paras 306–09.

133 Carlo de Stefano, 'Attribution in International Law and Arbitration,' *OUP* (2020) 127.

134 Carlo de Stefano, 'Attribution in International Law and Arbitration,' *OUP* (2020) 124.

135 Carlo de Stefano, 'Attribution in International Law and Arbitration,' *OUP* (2020) 125.

136 *Flemingo DutyFree Shop Private Limited* v. *The Republic of Poland,* Award (12 August 2016), para 349.

the State of a corporate entity is insufficient for the purposes of attribution pursuant to Article 8 ARSIWA.[137] Attribution under Article 8 ARSIWA is regarded as an 'exceptional mechanism, which requires a high threshold based on the two alternative prongs of instructions or authorization, on the one hand, and direction or control on the other'.[138]

4. Attribution in WTO dispute settlement

4.1. Attribution in the WTO Treaty texts

While the WTO system establishes special rules with respect to some aspects of the law of international responsibility such as countermeasures,[139] it is largely silent on matters of attribution of conduct to the State.[140] That said, there exist several provisions that touch on questions of attribution in the WTO agreements, even if they do not exclusively concern such questions.[141] For example, Article XVII of the GATT is entitled 'State Trading Enterprises' and provides, *inter alia*, that

> '[e]ach contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.'[142]

The accompanying Interpretative Note clarifies that measures that 'do not empower the government to exercise control over the trading activities of the enterprise in question, do not constitute 'exclusive or special privileges'. On that basis, it has been argued that the conferral of exclusive or special privileges

137 Carlo de Stefano, 'Attribution in International Law and Arbitration,' *OUP* (2020) 172.

138 Carlo de Stefano, 'Attribution in International Law and Arbitration,' *OUP* (2020) 172. FN332 refers to cases, including *White Industries Australia Limited* v. *Inida*, UNCITRAL Final Award, para 8.1.4, 8.1.10.

139 Cf Commentary to Art 55 ARSIWA (*Lex specialis*), para 3.

140 Santiago Villalpando, 'Attribution of Conduct to the State: How the Rules of State Responsibility May Be Applied Within the WTO Dispute Settlement System' (2002) 5 JIEL 393, 395; Yenkong Ngangjoh Hodu, 'The Concept of Attribution and State Responsibility in the WTO Treaty System' (2007) 4(3) Manchester Journal of International Economic Law 62, 72.

141 Some of these provisions contain concepts similar to those applicable under general international law, as reflected in the ARSIWA: Graham Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (CUP 2015) 31.

142 Article XVII (1) (a) of the General Agreement on Tariffs and Trade, annexed to the Marrakesh Agreement establishing the World Trade Organization (signed 15 April 1994, entered into force 1 January 1995), 1867 UNTS 3.

constitutes one form of governmental control over an entity, which in turn qualifies as a State trading enterprise.[143] Practice confirms that governmental control is indeed the decisive criterion for characterising an entity as a State trading enterprise: for instance, in *Korea — Beef* the monopoly to import beef was considered to be a privilege which subjected the activity to the provisions of Article XVII.[144] Similarly, a company enjoying the exclusive right to purchase and sell wheat was considered a State trading enterprise that was subjected to Article XVII.[145]

The Interpretative Note accompanying Articles XI to XIV and XVIII of the GATT clarifies that the import and export restrictions regulated under those provisions 'include restrictions made effective through state-trading operations'. It has been held that '[t]he basic purpose of this note is to extend to state-trading the rules of the General Agreement governing private trade and to ensure that the contracting parties cannot escape their obligations with respect to private trade by establishing state-trading operations.'[146]

Besides, the Agreement on Subsidies and Countervailing Measures includes, in its definition of a subsidy,

> 'financial contribution[s] by a government or any public body … where … a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions [defined as 'subsidies' if performed by the government] which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.'[147]

This provision has given rise to rich body of case law applying principles of attribution to SOEs.

4.2 Attribution in WTO case law

WTO case law has found attributability for "acts and omissions to the State based on the conduct of the legislature, of the executive branch and of the judiciary".

143 Petros Mavroidis, *The Regulation of International Trade*, volume I (MIT Press 2016) 403.

144 *Korea — Measures affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R and WT/DS169/R (31 July 2000), paras 763–69.

145 *Canada — Measures relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R (6 April 2004), para 6.108.

146 *Japan — Restrictions on Imports of Certain Agricultural Products*, L/6253–35S/163 (2 February 1988) 5.2.2.2.

147 Article 1.1(a)(1)(iv) of the Agreement on Subsidies and Countervailing Measures, annexed to the Marrakesh Agreement.

In *US — Anti-dumping and countervailing duties*[148] the question arose as to whether wholly or majority government-owned enterprises that produce and sell goods and services should be held to be 'public' or 'private' bodies within the meaning of Article 1 of the SCM Agreement.[149] The Panel considered that 'public bodies' could not be limited to bodies exercising governmental functions but that it instead extended to entities controlled by governments.[150] In doing so, the Panel echoed an earlier Panel report which had rejected the character of the function—governmental or commercial—as an appropriate criterion for the distinction between public and private bodies because, in its view, such a criterion would introduce uncertainty by suggesting that the same entity could change character as public or private body depending on the way in which it conducted itself in the market.[151]

The Appellate Body disagreed. Interpreting the terms of the provision in question, the Appellate Body observed that the conduct of governments and public bodies fell within the scope of the SCM Agreement in the same terms, which were different from the terms under which the conduct of private bodies fell within the scope of the same treaty.[152] This suggested a commonality between 'governments' and 'public bodies' in the context of the Agreement; in the Appellate Body's view, this commonality consisted in the performance of governmental functions.[153] The Appellate Body thus concluded that ownership or control by the government (in the sense of the financial concept of a 'controlling interest' in an entity) did not suffice to render an entity a 'public body', within the meaning of Article 1 of the SCM Agreement, because it did not demonstrate that the entity is bestowed with governmental authority.[154] As the Appellate Body observed, however, 'evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions.'[155]

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148 *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R (22 October 2010) and WT/DS379/AB/R (11 March 2011).

149 *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R (22 October 2010), para 8.68.

150 *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R (22 October 2010), para 8.73.

151 *Korea — Measures affecting Trade in Commercial Vessels,* WT/DS273/R (7 March 2005), paras 7.44–7.45.

152 *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China,* WT/DS379/AB/R (11 March 2011), para 284.

153 *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China,* WT/DS379/AB/R (11 March 2011), para 290.

154 *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China,* WT/DS379/AB/R (11 March 2011), para 320.

155 *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China,* WT/DS379/AB/R (11 March 2011), para 318.

This approach has been adopted in subsequent reports, which affirm that 'the critical consideration in identifying a public body is the question of authority to perform governmental functions.'[156] For that reason, simple ownership or control by a government of an entity is not sufficient to establish that the entity is a public body,[157] although it may constitute a factor to be taken into account for that determination.[158] As a subsequent Appellate Body report explained, elements such as the ownership interest of the government in the entity in question or the power to appoint and nominate its directors constitute 'formal indicia of control' which, while relevant, do not suffice for a finding that the entity in question constitutes a public body.[159] Rather, further analysis is required, 'with due regard being had to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates.'[160]

While not strictly required, the Appellate Body in *US — Anti-dumping and countervailing duties* sought to compare its analysis of the SCM Agreement, as well as the structure of the provision under interpretation, with the principles of attribution reflected in the ARSIWA. It asserted that its interpretation of public body under Article 1 of the SCM Agreement 'coincide[d] with the essence of Article 5' in that it rejected State ownership as a decisive criterion for attribution of conduct of an entity to the State. In the Appellate Body's view, under both general international law and the SCM Agreement, State ownership may merely serve as evidence indicating, in conjunction with other elements, the delegation of governmental authority, the latter being the key feature for attribution of conduct of an entity to the State.[161]

As it set out the criteria for attribution under the SCM Agreement, the Appellate Body expressly rejected the argument of the complainant, China, according to which there exists a presumption that State-owned entities are private bodies. For the Appellate Body, the provision under interpretation did not establish any presumption

156 *United States — Countervailing Duty Measures on Certain Products from China,* WT/DS437/R (14 July 2014), para 7.66; *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India,* WS/DS436/R (14 July 2014), para 7.80; see also *United States — Countervailing Duty Measures on Certain Products from China,* WT/DS437/AB/R (18 December 2014), para 4.42; *United States — Countervailing Duty Measures on Certain Products from China,* WT/DS437/RW (21 March 2018), para 7.351.

157 *United States — Countervailing Duty Measures on Certain Products from China,* WT/DS437/R (14 July 2014), paras 7.71–7.72.

158 *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India,* WS/DS436/R (14 July 2014), para 7.80.

159 *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India,* WS/DS436/AB/R (8 December 2014), para 4.43.

160 *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India,* WS/DS436/AB/R (8 December 2014), para 4.43.

161 *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China,* WT/DS379/AB/R (11 March 2011), para 310.

with respect to the conduct of State-owned enterprises but instead required an enquiry as to whether the entity is either a public body (namely, whether it exercises governmental authority) or it is entrusted or directed by the government or a public body.[162]

Naturally, the fact that an SOE may not constitute a 'public body' within the meaning of the SCM Agreement does not mean that its conduct may not be attributed to the State or, even less so, that its conduct is not relevant for the application of the provisions of the treaty more broadly. As the Appellate Body repeatedly emphasised in US — *Anti-dumping and countervailing duties*, the conduct of an entity (whether an SOE or not) which is not a public body might still fall within the provisions of the treaty if it is entrusted or directed by a government or public body.[163] The Appellate Body has had the opportunity to interpret the concepts of 'entrustment' and 'direction' of a private body on a different occasion, where it held that '"entrustment" occurs where a government gives responsibility to a private body, and "direction" refers to situations where the government exercises its authority over a private body'.[164] In this connection, 'direction' is broader than 'command' because 'some of the[] means [by which a government may exercise authority] may be more subtle than a "command" or may not involve the same degree of compulsion.'[165] Moreover, in the assessment of the existence of a price distortion in the market within the meaning of the SCM Agreement, State authorities may take account of the conduct of SOEs, even when the latter are not found to constitute public bodies, with a view to ascertaining whether a foreign State seeks to exert market power and distort in-country prices.[166]

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162 *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China,* WT/DS379/AB/R (11 March 2011), para 326; in doing so, the Appellate Body distanced itself (albeit implicitly) from an earlier Appellate Body report, which had noted in passing that there exists a presumption that the conduct of private bodies is not attributable to the State: *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea,* WT/DS296/AB/R (27 June 2005), para 112 (fn 179).

163 *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China,* WT/DS379/AB/R (11 March 2011), paras 302–03.

164 *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea,* WT/DS296/AB/R (27 June 2005), para 116.

165 *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea,* WT/DS296/AB/R (27 June 2005), para 111; see also *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (11 March 2011), para 294.

166 *United States — Countervailing Duty Measures on Certain Products from China,* WT/DS437/AB/R (18 December 2014), para 4.63.

5. Attribution in human rights adjudication

Similar to international investment law, issues of attribution in human rights adjudication arise in the context of standing as well as establishing international responsibility for wrongful acts.

5.1 Attribution in the context of standing

Leaving aside inter-State disputes,[167] access to the regional human rights dispute settlement mechanisms under the European and American conventions on human rights bears some similarities to that under the ICSID, in the sense that the jurisdiction of the dispute settlement mechanism is confined to disputes between the State and a non-State actor.[168] The European Convention on Human Rights provides that the Court 'may receive applications from any person, non-governmental organisation or group of individuals',[169] while the American Convention limits the right to lodge petitions with the Commission to '[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization [of American States]'.[170] As the ECtHR has observed, 'the idea behind this principle is to prevent a Contracting Party acting as both an applicant and a respondent party before the Court'.[171] Unsurprisingly, then, the jurisprudence of the ECtHR concerning the attribution of SOE conduct to the State did not originally develop for the purposes of establishing the responsibility of the respondent State. Much like the awards in *CSOB* and other investment law cases under ICSID, historically the first judgments of the ECtHR examining the relationship between an SOE and the State did so with a view to ascertaining whether the SOE is entitled to bring a claim against the State with which it shares ties.

In this connection, the Court has affirmed that 'governmental organisations' are not only the central organs of the State but also any decentralised authority exercising 'public functions', regardless of the extent of their autonomy vis-à-vis the central organs, or whether they act in a private capacity in the context of the specific

167 Art 33 of the Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950; entered into force 2 September 1953), 213 UNTS 221, as supplemented by Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, restructuring the control machinery established thereby (signed 11 May 1994, entered into force 1 November 1998), 2061 UNTS 7; Art 45 of the American Convention on Human Rights 'Pact of San José, Costa Rica' (signed 22 November 1969, entered into force 18 July 1978), 1144 UNTS 123.

168 cf Art 25(1) ICSID: 'The jurisdiction of the Centre shall extend to any legal dispute … 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…'.

169 Art 34 ECHR.

170 Art 44 American Convention on Human Rights.

171 *Transpetrol A.S.* v. *Slovakia* (App No 28502/08), Decision (15 November 2011), para 60.

situation.[172] In support of this conclusion, the Court has observed that the opposite result—namely to consider the local government a non-governmental organisation—is contradicted by the fact that the acts of such a local government engage the responsibility of the State under the ECHR.[173] This is not confined to territorial authorities but extends to 'public-law corporations which perform official duties assigned to them by the Constitution and the legislation', like the General Councils of Professional Associations.[174] Dismissing the application of the Spanish national railway company against Spain in *RENFE*, the ECHR Commission observed that the claimant was a public law corporation whose establishment, structure, and operation was regulated by domestic legislation, whose board of directors was answerable to the government and which enjoyed an operating monopoly in the management of the State railways 'with a certain public-service role in the way it does so.'[175] Conversely, entities that do not exercise governmental powers and are not subjected to the supervision of the State but instead enjoy independence are classified as 'non-governmental' for the purposes of ascertaining their access to the ECtHR as applicants, even if they are owned or financed by the State.[176]

Two alternative criteria serve to characterise an entity as a 'governmental organisation', thus depriving it of legal standing to bring an application against the State: first, the exercise of governmental powers or, second, the operation of a public service under government control.[177] In order to determine whether an entity falls within these categories, the Court has held that 'account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities.'[178] Companies governed essentially by company law, that do not enjoy any powers beyond those conferred by ordinary law

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172 *Danderyds Kommun* v. *Sweden* (App No 52559/99), Decision (7 June 2001); also *Ayuntamiento de Mula* v. *Spain* (App No 55346/00), Decision (1 February 2001).

173 *Danderyds Kommun* v. *Sweden* (App No 52559/99), Decision (7 June 2001).

174 *Consejo General de Colegios Oficiales de Economistas de España* v. *Spain* (App Nos 26114/95 and 26455/95), Decision (28 June 1995).

175 *RENFE (Red Nacional de los Ferrocarriles Españoles)* v. *Spain* (App No 35216/97), Decision (8 September 1997).

176 *Radio France and others* v. *France* (App No 53984/00), Decision (23 September 2003); *Österreichischer Rundfunk* v. *Austria* (App No 35841/02), Judgment (7 December 2006), paras 51–52; see also *The Holy Monasteries* v. *Greece* (App Nos. 13092/87 and 13984/88), Judgment (9 December 1994), para 49; cf *Ljubljansa Baka D.D.* v *Croatia* (App No 29003/07), Decision (12 May 2015), para 54.

177 *Radio France and others* v. *France* (App No 53984/00), Decision (30 March 2004); cf *Österreichischer Rundfunk* v. *Austria* (App No 35841/02), Judgment (7 December 2006), para 49.

178 *State Holding Company Luganksvugillya* v. *Ukraine* (App No 23938/05), Decision (27 January 2009); *Transpetrol A.S.* v. *Slovakia* (App No 28502/08), Decision (15 November 2011), para 63; *Ärztekammer für Wien and Dorner* v *Austria* (App No 8895/10), Judgment (16 February 2016), para 35.

in the exercise of their activities, and that are subject to the jurisdiction of ordinary rather than administrative courts have been held to be non-governmental in character.[179] An important factor in ascertaining the character of an entity as governmental or not is whether it holds a monopoly in a market sector or, instead, whether it is placed in a competitive environment.[180] By contrast, the fact that the State is the sole, or majority, shareholder of an entity is relevant, even if not decisive, in affirming that the entity constitutes a 'governmental organisation' for the purposes of legal standing.[181]

5.2 Attribution in the context of international responsibility

The question of attribution of the conduct of an SOE to the State for the purpose of establishing responsibility under the ECHR seems to have arisen for the first time in *Mykhaylenky*.[182] In that case, the applicants sought recovery of salary arrears and other payments from their former employer, the State-owned company Atomspetsbud, which had carried out construction work at Chernobyl.[183] Having obtained domestic court judgments in their favour, the applicants complained that the State was liable for the company's debts and that it was responsible for having failed to honour the domestic judgments against the company.[184] The respondent State contested the Court's jurisdiction, maintaining that the debtor company, although owned by the State, was a separate legal entity, and thus that the State was not liable for its debts under domestic law.[185] In response, the Court held that the State had not demonstrated that the company enjoyed 'sufficient institutional and operational independence from the State to absolve the latter from responsibility under the Convention for its acts and omissions'; in support of its statement, the Court cited '*mutatis mutandis*' its decision in *Radio France*, which concerned the legal standing

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179 *Islamic Republic of Iran Shipping Lines* v. *Turkey* (App No 40998/98), Judgment (13 December 2007), para 81; *Transpetrol A.S.* v. *Slovakia* (App No 28502/08), Decision (15 November 2011), para 61; *Ärztekammer für Wien and Dorner* v *Austria* (App No 8895/10), Judgment (16 February 2016), para 36.

180 *Österreichischer Rundfunk* v. *Austria* (App No 35841/02), Judgment (7 December 2006), para 52; *Transpetrol A.S.* v. *Slovakia* (App No 28502/08), Decision (15 November 2011), para 66.

181 *Transpetrol A.S.* v. *Slovakia* (App No 28502/08), Decision (15 November 2011), para 66; see also ibid, para 62.

182 *Mykhaylenky and others* v. *Ukraine* (App Nos 35091/02 and ors), Judgment (30 November 2004).

183 *Mykhaylenky and others* v. *Ukraine* (App Nos 35091/02 and ors), Judgment (30 November 2004), para 5.

184 *Mykhaylenky and others* v. *Ukraine* (App Nos 35091/02 and ors), Judgment (30 November 2004), para 43.

185 *Mykhaylenky and others* v. *Ukraine* (App Nos 35091/02 and ors), Judgment (30 November 2004), para 41.

of companies related to the State as applicants before the Court.[186] Turning to the facts of the specific case, the Court noted that the company in question 'operated in the highly regulated sphere of nuclear energy', conducted its activities in a zone which was 'placed under strict governmental control', and was managed by the Ministry of Energy.[187] In light of these facts, the Court concluded that the company was of a public character, regardless of its formal classification under domestic law, and that the State was therefore liable for its debts to the applicants 'in the special circumstances of the present case'.[188]

In subsequent cases involving debt recovery from SOEs, the Court has reaffirmed that the responsibility of the State is engaged for acts and omissions of legal entities that did not enjoy sufficient institutional and operational independence from the State.[189] In reaching its conclusions, the Court has attached importance to the fact that State organs owned and disposed freely of the company's property, controlled its management, and took the decision that gave rise to the company's debt or inability to service it (often a decision to dissolve and liquidate the company).[190] In addition to these factors, the Court noted in *Hrazdanmash* that the company in question—a State-owned company manufacturing machinery and similar equipment—'was engaged in the fulfilment of a State assignment by a decree of the Government', pursuant to which the company would sell its shares to a private company in return for investment.[191] By contrast, the Court found that the State was not responsible for the acts and omissions of a company that enjoyed complete operational and financial autonomy from the State and was governed by ordinary law

186 *Mykhaylenky and others* v *Ukraine* (App Nos 35091/02 and ors), Judgment (30 November 2004), para 44.

187 *Mykhaylenky and others* v *Ukraine* (App Nos 35091/02 and ors), Judgment (30 November 2004), para 45.

188 *Mykhaylenky and others* v *Ukraine* (App Nos 35091/02 and ors), Judgment (30 November 2004), para 45.

189 *Derkach and Palek* v. *Ukraine* (App No 34297/02) Judgment (21 December 2004) para 31; *Cherorbyvko* v. *Ukraine* (App No 11324/02) [CHECK] Judgment (4 October 2005), para 24; *Lisyanskiy* v. *Ukraine* (App No 17899/02), Judgment (4 April 2006), paras 19–20; *Shafranov* v. *Russia* (App No 24766/04), Judgment (25 September 2008), para 12; *Grigoryev and Kakaurova* v. *Russia* (App No 13820/04), Judgment (12 April 2007), para 35. In another case, the Court held that 'the State is responsible for the debts of the legal entities controlled by it financially or administratively': *Romashov* v. *Ukraine* (App No 67534/01), Judgment (27July 2004), para 41.

190 eg *Lisyanskiy* v. *Ukraine* (App No 17899/02), Judgment (4 April 2006), para 19; *Grigoryev and Kakaurova* v. *Russia* (App No 13820/04), Judgment (12 April 2007), para 35; *Ališić and ors* v. *Bosnia and Herzegovina and ors* (App No 60642/08), Judgment (6 November 2012), para 68; cf *Burmych and ors* v. *Ukraine* (App Nos 46852/13 and ors), Judgment (Grand Chamber, 12 October 2017), para 10, which characterised collectively State entities, State-owned or State-controlled debtors as 'State debtors'.

191 *Khachatryan* v. *Armenia* (App No 31761/04), Judgment (1 December 2009), para 52.

(the Commercial Code), even though the State retained a minority of the shares in the company.[192]

In *Ališić* the Grand Chamber of the ECtHR attempted to spell out the criteria used to determine whether the State was indeed responsible for debts of separate legal entities. For the Court, the criteria were the following:

> 'the company's legal status (under public or private law); the nature of its activity (a public function or an ordinary commercial business); the context of its operation (such as a monopoly or heavily regulated business); its institutional independence (the extent of State ownership); and its operational independence (the extent of State supervision and control).'[193]

The Court added that it would also take into account in its assessment,

> 'whether the State was directly responsible for the company's financial difficulties, siphoned the corporate funds to the detriment of the company and its stakeholders, failed to keep an arm's-length relationship with the company or otherwise acted in abuse of the corporate form'.[194]

This standard seems to be in line with the approach taken by the Human Rights Committee, which has attributed to the State acts of a company in which it held a dominant stake of 90 percent and which was placed under specific government control.[195]

It bears noting that non-attribution of the conduct of a legal entity (including an SOE) to the State does not dispose of the enquiry whether the responsibility of the State is engaged under human rights law in general or the ECHR in particular. Specifically, the conduct of an entity, even if not attributable to the State, may 'catalyse'[196] the wrongfulness of the State's conduct when the State fails to abide by the obligations under human rights law that are triggered by the conduct of the legal entity as external event. With respect to the ECHR, States have, broadly speaking, the duty to protect against and respond to breaches of the rights protected under the

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192 *Bennich-Zalewski* v. *Poland* (App No 59857/00), Judgment (22 April 2008), paras 93–94.

193 *Ališić and ors* v. *Bosnia and Herzegovina and ors* (App No 60642/08), Judgment (Grand Chamber, 16 July 2014), para 114.

194 *Ališić and ors* v. *Bosnia and Herzegovina and ors* (App No 60642/08), Judgment (Grand Chamber, 16 July 2014), para 115.

195 *Hertzberg and ors* v. *Finland,* Communication No R. 14/61 (1982), *Official Records of the General Assembly (Thirty-seventh session), Supplement No 40* (UN Doc A/37/40), Annex XIV, para 9.1.

196 For this concept see Roberto Ago (Special Rapporteur), 'Fourth Report on State responsibility: The internationally wrongful act of the State, source of international responsibility (continued)' UN Doc A/CN.4/264, [1972] YbILC, Vol. II(1), 71 para 65.

Convention by third parties.[197] This means that, when the conduct of that third party is not attributable to the State, the State may be held accountable for the acts or omissions of its own organs that failed to respond to such conduct. For this reason, the Court has often found it unnecessary to address the question whether the conduct of an SOE or other legal entity is attributable to the State, preferring instead to focus on whether the State has failed to observe the obligations arising from the conduct of that entity (usually, if not entirely accurately, called 'positive obligations'). In doing so, the Court bypasses difficult questions of attribution, since the failure of the State organs to take the requisite measures under the circumstances is quite evidently attributed to the State.

The case of *Khadija Ismayilova* serves to illustrate the point. The applicant had claimed that her right to private life had been breached by the publication of stories by three newspapers which 'were State-controlled, because they operated as media organs of the ruling party' of the State and were owned either by senior officials of the ruling party or by companies which were themselves State-owned.[198] For the applicant, these entities 'qualified as "public authorities" [within the meaning of the relevant Convention provision] owing to their institutional and operational dependence from the State.'[199] In response, the Court observed that, in the absence of further investigation, it could not establish beyond reasonable doubt that the conduct of these entities was attributable to the State and that the question whether these entities were linked to State agents 'remain[ed] an open one'.[200] The Court then stated that, '[i]n the light of the above considerations … the present complaint must be examined from the standpoint of the State's positive obligations' under the same provision.[201] Similarly, in a case concerning serious bodily harm resulting from a stampede in a local cinema owned by a municipal company, the Court did not investigate whether the State bore responsibility on account of the fact that the municipal company had failed to take measures that could have prevented the

197 Keir Starmer, 'Positive Obligations Under the Convention' in Jeffrey Jowell and Jonathan Cooper (eds), *Understanding Human Rights Principles* (Hart 2001), 146–47; the extent of this duty varies widely depending on the character of the right in question, the source of the breach etc: see generally Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (CUP 2017) 45–130.

198 *Khadija Ismayilova* v. *Azerbaijan* (App Nos 65286/13 and 57270/14), Judgment (10 January 2019), para 89.

199 *Khadija Ismayilova* v. *Azerbaijan* (App Nos 65286/13 and 57270/14), Judgment (10 January 2019), para 85.

200 *Khadija Ismayilova* v. *Azerbaijan* (App Nos 65286/13 and 57270/14), Judgment (10 January 2019), paras 111 and 113.

201 *Khadija Ismayilova* v. *Azerbaijan* (App Nos 65286/13 and 57270/14), Judgment (10 January 2019), para 114; following a detailed analysis, the Court found that the State had breached its positive obligations: ibid, para 132.

injurious event[202] but instead focused on whether the State adequately responded to the infringement of the right to life, regardless of the source of that infringement.[203]

In terms of tests of control, the ECHR has demonstrated a "laxer" approach to attribution to the state of the conduct of 'entities' that are "separate from its institutional system of command and control".[204] For example, *Loizidou v. Turkey* concerned the continuous denial of access to the claimant's property in Turkish Republic of Northern Cyprus (TRNC) as a result of Turkish forces in Cyprus.[205] The ECtHR found that the army exercised effective overall control over that part of the island. Such control entails responsibility for the policies and actions of the "TRNC" 'control'.

6. Conclusion

In conclusion, disputes involving SOEs are interesting in their search for balance between realism and respect for State autonomy. In particular, SOEs push the interpretative boundaries of the international rules on attribution of conduct across various fields of international law, including investment, WTO and human rights law, most notably with regard to standing and the establishment of state responsibility for internationally wrongful acts. Cases involving SOEs are on the rise (possibly due to the increasing number of SOEs in existence and the wider access to dispute settlement mechanisms) but existing rules, such as the ILC's ARSIWA were not drafted with SOEs in mind and are applied by analogy outside the context of international responsibility, leaving it up to courts and tribunals to 'fill in the gaps'.

The jurisprudence is divergent, even within subfields of international law. Tribunals under investor-State treaty arbitration have applied the attribution rules in a rather inconsistent manner, oscillating between a very broad and a very narrow interpretation (e.g. *Flemingo v. Poland* as opposed to *Staur et al. v. Latvia*). Similar inconsistencies can be discerned in the jurisprudence of the human rights courts, which display regional tendencies ranging from an almost automatic assumption that SOE conduct can be attributed (IACtHR), to the establishment of a high burden of proof on the claimant (ECtHR). Some tribunals have bypassed the question of attribution of SOE conduct altogether by focusing on the failure of the State to prevent the SOE's injurious actions or omissions.

There is some evidence that new treaties and treaties currently under negotiation are more tailored towards catering for the specific situation of SOEs (e.g.

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202 See *Krivova* v. *Ukraine* (App No 25732/05), Judgment (9 November 2010), para 6.

203 *Krivova* v. *Ukraine* (App No 25732/05), Judgment (9 November 2010), para 46.

204 Carlo de Stefano, 'Attribution in International Law and Arbitration,' *OUP* (2020) 154.

205 *Lozidou v. Turkey*, (App No 15318/89), Judgment, Merits, (18 December 1996), para 56.

CETA and CPTPP) but attempts to establish special rules of attribution for SOEs have not been widely adopted. Specifically, the area of 'conduct directed or controlled by the State' (Article 8 ARSIWA) is an area of caution as the ILC rules have until now been (perhaps too rigidly) followed, with its rather unrealistic insistence on black-on-white instructions, making the pendulum swing too much in the direction of State autonomy at the expense of what is actually happening on the ground. A revisit of attribution rules, either as a general exercise under the auspices of the ILC, or more particularly in the context of treaties currently under negotiation, would therefore seem desirable to bring back balance.