The Status of Chinese State-owned Enterprises in International Investment Arbitration: Much Ado about Nothing?

Ming Du*

Abstract

Chinese State-owned enterprises (SOEs) play a key role not only in China' domestic market, but also in implementing the Government of China (GOC)'s ambitious Belt and Road Initiative. Accordingly, Chinese SOEs have increasingly fallen back on investor-State investment arbitration to protect their investments in host States. A recurrent issue arising in arbitral proceedings concerns whether Chinese SOEs should be allowed access to investor-State dispute settlement mechanisms in view of the close links between Chinese SOEs and the GOC. This article sets forth two arguments. First, applying the relevant ILC Articles to Chinese SOEs, the article makes a legal argument that it is highly unlikely for a Chinese SOE to be denied standing as a qualified claimant in investor-State arbitration. Second, notwithstanding concerns about Chinese SOEs in the global investment landscape, the article makes a policy argument that the denial of Chinese SOEs' standing before arbitral tribunals is not only unhelpful in addressing those concerns, but also undermines the rule of law in international investment.

I. Introduction

1. Despite three decades of extensive State reform and privatization, State-owned, State-controlled or otherwise State-influenced enterprises remain an important economic force in the global economy. They are increasingly competing with private firms in global markets for market shares, resources, ideas and intermediate inputs.[1] State-owned enterprises (SOEs) hold a

* Professor, Durham Law School, UK. Email: ming.du@durham.ac.uk. This paper was completed on 24 November 2021.

[1] UNCTAD, World Investment Report 2021: Investing in Sustainable Economy (2021), at 28; Przemyslaw Kowalski and Kateryna Perepechay, International Trade and Investment by State Enterprises, OECD Trade Policy Papers No. 184 (OECD Publishing, 2015), at 7.

prominent position in China's socialist market economy system.[2] Even market oriented reforms have led to a rapid expansion of the private sector, there are still more than 150,000 SOEs in China today. They contributed to 28% of China's GDP and 16% of employment in 2017.[3] In 2021, 143 Chinese firms appeared on the list of Fortune Global 500, among which 82 are SOEs.[4] It is undisputable that SOEs are, and will be, a hallmark of China's unique economic model, rather than a transitional phenomenon leading to liberal capitalism as many critics of SOEs expected, although the percentage of SOEs' contribution to China's GDP and employment is not as big as commonly believed.[5]

2. Chinese SOEs not only play a key role in China's domestic market, they are also a major force in implementing the Government of China (GOC)'s ambitious Belt and Road Initiative ("BRI") and "Made in China 2025" plan, both reinforcing the earlier "Going Out" strategy adopted in 2000.[6] In 2020, global foreign direct investment fell by 42% due to the Covid-19 pandemic, whilst China's outbound foreign direct investment (OFDI) posted a year-on-year increase of 3.3 percent, reaching US$130 billion.[7] UNCTAD ranked China 3rd in the world in term of OFDI in 2020, after the United States and Japan.[8] This steady growth trend is expected to

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2 There is no uniform definition of SOEs. The OECD defines it as "any corporate entity recognized by national law as an enterprise, and in which the state exercises ownership". Ownership is understood to imply control, either by the State holding full or majority of voting shares or otherwise exercising an equivalent degree of control. Entities in which the government holds equity stakes of less than ten percent that do not confer control are excluded. See OECD, Guidelines on Corporate Governance of State-Owned Enterprises (2015 Edition), 14-15. The OECD definition of SOEs is adopted for the purpose of this article.

3 Chunlin Zhang, How Much Do State-owned Enterprises Contribute to China's GDP and Employment?, The World Bank Working Paper (July 15, 2019).

4 https://fortune.com/global500/2021/search/?fg500_country=China

5 Alberto Gabriele, The Role of the State in China's Industrial Development: A Reassessment, 52 (2) Comparative Economic Studies 325 (2010), at 348.

6 Laura-Anca Parepa, The Belt and Road Initiative as Continuity in Chinese Foreign Policy, 9(2) Journal of Contemporary East Asia Studies (2020), 175 at 181.

7 Chinese Ministry of Commerce, Regular Press Conference (January 24, 2021), http://www.mofcom.gov.cn/xwfbh/20210121.shtml.

8 UNCTAD, World Investment Report 2020: International Production

continue as Chinese companies increasingly realize that overseas investment is an effective strategy for them to upgrade, transform and become more competitive. Earlier statistics show that at least 80 percent of all Chinese OFDI was funded by SOEs.[9] With the growing strength of Chinese private enterprises, however, a smaller proportion of China's OFDI is coming from SOEs.[10] Still, evidence shows that of 650 Chinese investments in Europe since 2010 to 2020, roughly 40 percent have moderate to high involvement by SOEs.[11] As of October 2018, Chinese SOEs contracted about half of BRI projects by number and more than 70 percent by project value.[12]

3. Despite the rhetoric, China's BRI represents an inherently risky endeavour given the severe political instability and the lack of rule of law in many BRI countries.[13] Given the volume of their OFDI, it is no surprise that Chinese SOEs have increasingly fallen back on investor-State dispute settlement (ISDS) mechanisms contained in international investment agreements (IIAs), which promise to provide them with an enforceable remedy against infringing host States.[14] But in view of the close links between Chinese SOEs and the GOC, should Chinese SOEs be considered as qualified "investors" and allowed access to ISDS against a host State? The status of Chinese SOEs is particularly complicated in the ICSID context. As reflected in its preamble, the Convention for the Settlement of

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beyond the Pandemic (2020), at 15.

9 Adrian Wooldridge, The Visible Hand, The Economist (January 2012) 15.

10 Ministry of Commerce of the PRC, Report on Development of China's Outward Investment and Economic Cooperation 2020 (February 2021), 6-7.

11 Daniel Michaels, Behind China's Decade of European Deals, State Investors Evade Notice, Wall Street Journal (30 May 2020).

12 Rafiq Dossani et al, Demystifying the Belt and Road Initiative, Rand Working Paper WR-1338 (May 2020), at 13-15.

13 Xiaojun Li and Ke Zeng, Beijing is Counting on its Massive Belt and Road Initiative, But are Chinese Firms on Board?, Washington Post (14 May 2019).

14 Beijing Urban Construction Group Co., Ltd. (BUCG) v. Republic of Yemen, ICSID Case NO. ARB/14/3, Decision on Jurisdiction (31 May 2017); China Heilongjiang International Economic & Technical Cooperative Corp et al v Mongolia, Award, PCA Case No. 2010-20, Award (30 June 2017); Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. Government of Belgium, ICSID Case No ARB/12/29, Award (30 April 2015). Wuxi T. Hertz Technologies and Jetion Solar v. Greece (UNITRAL arbitration, 2019).

Investment Disputes Between States and Nationals of Other States (ICSID Convention) was developed by the World Bank in significant part to encourage private international investment, as distinguished from the sovereign/government investment, for economic development purposes. Article 25(1) of the ICSID Convention provides that the jurisdiction of the ICSID is confined to dispute "between a Contracting State and a national of another Contracting State". In other words, the ICSID has no jurisdiction to arbitrate disputes between two States, nor does it have jurisdiction to arbitrate disputes between two private entities. Thus, even if Chinese SOEs are covered in the definition of "investors" in Chinese IIAs, the question whether Chinese SOEs have standing as "a national of another Contracting State" to bring ICSID proceedings must be independently answered.[15]

4. In determining whether a SOE has standing in ISDS, both ICSID and non-ICSID tribunals have consistently applied Articles 5 and 8 of the International Law Commission's Draft Articles on State Responsibility (the ILC Articles).[16] However, this body of jurisprudence has been subject to criticism both in academic writings[17] and in arbitral practice[18]. Moreover, only two arbitral tribunals have addressed the question of whether Chinese

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15 Paul Blyschak, State Owned Enterprises and International Investment Treaties, 6 J of IL & IR (2011), 1, at 27.

16 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, in Report of the International Law Commission on the Work of its Fifty-third Session, UN Doc A/56/10 (2001), at 39 and 120.

17 Carlo de Stefano, Attribution in International Law and Arbitration (Oxford: Oxford University Press, 2020) 119-135; Mark Feldman, State-owned Enterprises as Claimants in International Investment Arbitration, 31(1) ICSID Review 24 (2016), at 32-33; Blyschak, above n.15, at 30-34; Bianca Nalbandian, State Capitalists as Claimants in International Investor-State Arbitration, 81 Questions of International Law, Zoom Out (2021), 5, 17-18; Mikko Rajavuori, Making International Legal Persons in Investment Treaty Arbitration: State-owned Enterprises along the Person/Thing Distinction, 18(5) German LJ (2017), 1183, at 1226; Jaemin Lee, State Responsibility and Government-Affiliated Entities in International Economic Law, 49(1) Journal of World Trade (2015), 117, at 121;

18 Tulip Real Estate Investment and Development Netherlands B.V. v Republic of Turkey, ICSID Case No. ARB/11/28 (10 March 2014), Award, para. 289 (the tribunal disagrees with the Decisions in Mazzefini and Salini) and separate Opinion of Michael Evan Jaffe on the Questions of Attribution under Article 8 ILC Articles. 5

SOEs are qualified "investors" eligible to launch investment arbitration against host States to date.[19] Although both tribunals rejected the respondent State's claim that Chinese SOEs are not qualified investors, it remains uncertain to what extent the tribunals' conclusion in the two cases will be followed, as the tribunals' analyses are brief and case-specific.[20]

5. This article provides the first detailed analysis of applying the ILC Articles to Chinese SOEs. It sets forth two arguments. First, it is highly unlikely that Chinese SOEs would be denied standing as qualified claimants in ISDS. Second, notwithstanding genuine concerns about SOEs in global investment landscape, the denial of Chinese SOEs' standing before arbitral tribunals will not only be ineffective in addressing those concerns but also undermine the rule of law in international investment.

6. The article is organized as follows. Part II takes stock of the jurisprudence on SOEs' standing in investor State arbitration. Part III applies the analytical framework summarized in Part II to Chinese SOEs, arguing that it is highly unlikely for Chinese SOEs to be disqualified from being a claimant in ISDS. Part IV examines the issue from a policy perspective, showing that even if there are concerns about Chinese SOEs, denying them access to ISDS is a bad policy choice to address such concerns. Part V concludes the article.

II. Taking Stock: The Standing of SOEs in Investor State Investment Arbitration

7. On the standing of SOEs in investment arbitration, the definition of "investor" in the applicable IIAs can provide substantial guidance. An

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[19] The two cases are BUCG v. Republic of Yemen and Heilongjiang International Economic & Technical Cooperative Corp et al v. Mongolia, above n.14. Anran Zhang, The Standing of Chinese State-owned Enterprises in Investor-State Arbitration: The First Two Cases, 17(4) Chinese JIL (2018), 1147, at 1152.

[20] In BUCG v. Yemen, the tribunal skipped over entirely the analysis of whether BUCG, as a State-owned entity, may be an agent of the GOC or exercises any governmental function. Instead, the tribunal only focused on the context-specific analysis of the commercial function of the investment. See BUCG v. Yemen, above n.14, paras.35, 39 and 42. Similarly, in China Heilongjiang International Economic & Technical Cooperative Corp et al v. Mongolia, the tribunal simply dismissed Mongolia's allegation that the claimants are instrumentalities of the Chinese government as unfounded. See China Heilongjiang International Economic & Technical Cooperative Corp et al v. Mongolia, above n.14, para.418.

empirical research of the definition of "investor" and ISDS clauses in 851 IIAs reveals that with extremely limited exceptions, SOEs have equivalent standing to their private counterparts as "investor" in IIAs. The definition of "investor" is normally not based on the nature of ownership but rather on whether a legal person is duly constituted in accordance with the law of a contracting party.[21] Therefore, as a general matter, IIAs are available to SOE claimants.

8. The same conclusion holds true in the ICSID context. SOEs have frequently acted as claimants and their standing to bring ICISD proceedings against a host State has never been declined.[22] When determining whether an SOE is "a national of another Contracting State", ICSID case law has consistently applied the famous Broches test, as it was first proposed by Aron Broches, the first secretary-general of the ICSID and the principal architect of the ICSID Convention. Broches observed in 1972 that the classical distinction between private and public investment, based on the source of the capital, was no longer meaningful since many SOEs were practically indistinguishable from the completely privately-owned enterprise both in their legal characteristics and in their business activities. He then concluded:

> …for purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' *unless it is acting as an agent for the government or is discharging an essentially governmental function*.[23]

9. The Broches test is a functional test rather than an ownership test as it does not pass on any preconceived judgement on SOEs.[24] Specifically, the

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21 Jo En Low, State-controlled Entities as "Investors" under International Investment Agreements, 80 Columbia FDI Perspectives (2012), at 1-2.

22 Claudia Annacker, Protection and Admission of Sovereign Investment under Investment Treaties, 10 Chinese JIL (2011), 531, at 552-553; Masdar Solar & Wind Coopetertief U.A. v Kingdom of Spain, ICSID Case No. ARB/14/1, Award (16 May 2018), para. 157. On the most recent investment disputes in which a State-owned entity acts as a claimant, see Qatar National Bank v The Republic of South Sudan and Bank of South Sudan, ICSID Case No. ARB/20/40 (6 October 2020).

23 Aron Broches, Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International law (Martinus Nijhoff Publishers 1995), at 202.

24 Bin Gu and Chengjin Xu, 'Treatment Standards of State-owned

Broches test addresses two situations: conduct by a SOE acting under State control, i.e., acting as an agent, and conduct by a SOE exercising delegated governmental authority. However, the Broches test does not prescribe *how* to determine whether a SOE is acting as an agent for the government or discharging an essentially governmental function or not.

10. The Broches test was first applied in *CSOB v. Slovakia* in 1999. The complainant CSOB was a State-owned bank with more than 65% of its shares owned by the Czech Republic and some 24% by the Slovak Republic. Following the 1989 "Velvet Revolution", Czech began to transform its command economy into a market economy and CSOB took measures to enable it to function as an independent commercial bank. These measures included the removal from CSOB's books non-performing loan receivables grown out of CSOB's earlier lending activities during the non-market economy period, and the ultimate goal of the privatization of CSOB. Later when CSOB claimed that Slovak had breached contractual obligations before an ICSID tribunal, Slovak contended that CSOB did not fulfil the requirement of a "national of another Contracting State" under Article 25(1) of the ICSID Convention because CSOB served as a government agent or representative of the State which has been discharging essentially governmental functions throughout its existence and that its subsequent reorganization has not changed its status.[25]

11. The CSOB tribunal's sole focus on the nature of CSOB's acts at issue was criticized as a misapplication of the Broches test. It was suggested that further guidance on how to apply the Broches test should be drawn from the attribution rules in Articles 5 and 8 of the ILC Articles.[26] As will be discussed below, compared with *CSOB v. Slovakia*, one particularly noteworthy aspect of the ILC Articles is the possibility to consider not only the nature of a SOE's acts but also other factors, including ownership, control, nature, purposes and objectives of the SOE whose actions are under scrutiny, when determining whether the SOE's acts should be attributed to the State.[27]

Enterprises as Public Entities: A Clash or Convergence across International Economic Laws?', 50 Hong Kong LJ (2020), 1025, at 1035.

25 CSOB v. Slovakia, ICSID Case NO. ARB/97/4, Decision on Jurisdiction (24 May 1999), para.19.

26 Feldman, above n.17, at 32-33; Blyschak, above n.15, at 30-34.

27 Emilio Agustín Maffezini v The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, para.76.

12. The CSOB tribunal made several key findings which have had a profound influence on ensuing case law. First, the legislative history of the ISCID Convention indicated that the term "juridical persons" as used in Article 25 and, hence, the concept of "national" was not intended to be limited to privately-owned companies, but to embrace also wholly or partially government-owned companies. Thus, the Czech's majority ownership of and absolute control over CSOB alone would not disqualify it from filing a claim with ICSID.[28] Second, and most significantly, the tribunal applied a nature test, which looked at the nature of CSOB's acts at issue, rather than motive or purpose, in determining whether CSOB exercised any governmental functions. As the tribunal famously articulated:

> [I]t cannot be denied that for much of its existence, CSOB acted on behalf of the State … and that the State's control of CSOB required it to do the State's bidding in that regard. But in determining whether CSOB, in discharging these functions, exercised governmental functions, *the focus must be on the nature of these activities and not their purpose*. While it cannot be doubted that in performing the above-mentioned activities, CSOB was promoting the governmental policies or purposes of the State, the activities themselves were essentially commercial rather than governmental in nature.[29]

13. In determining the nature of CSOB's activities at issue, the tribunal compared them with what a private entity would do in normal business transactions. The tribunal found that since the steps taken by CSOB to solidify its financial position in order to attract private capital for its restructured banking enterprise did not differ in their nature from measures a private bank might take to strengthen its financial position, they were commercial in nature.[30]

14. One criticism of the *CSOB v. Slovakia* award was that the tribunal failed to decide separately each possible ground of attribution under the Broches test.[31] CSOB may not exercise any governmental functions under

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28 CSOB v Slovakia, above n.25, para.16.

29 Ibid., para.20.

30 Ibid., para.25.

31 Luca Schicho, Attribution and State Entities: Diverging Approaches in Investment Arbitration, 12 J of Int'l Investment and Trade (2011), 283, at 289.

the second limb of the Broches test. However, this does not mean that CSOB's conduct couldn't be attributable to the Czech Republic under the first limb of the Broches test. Whether CSOB might act on the instructions of, or under the direction or control of the Czech Republic in carrying out the activities as an agent appears to have been largely by-passed by the tribunal. To address this criticism, the case law has evolved since *CSOB v. Slovakia*. While there were few instances where arbitral tribunals failed to distinguish between various grounds of attribution, most arbitral tribunals now examine the activities of an SOE on each separate ground for attribution.[32]

15. The Broches test is the "mirror image" of Arts 5 and 8 of the ILC Articles.[33] The ILC Articles are considered as a statement of customary international law on the question of attribution for purposes of asserting the responsibility of a State towards another State, which is applicable by analogy to the responsibility of States towards private parties.[34] After *CSOB v. Slovakia*, Articles 5 and 8 of the ILC Articles have been widely applied in investment arbitration, both to ascertain whether a SOE was a "national of another Contracting State",[35] and the analogous issue of whether the conduct of a SOE should be attributed to the Contracting State so that the proper respondent was the Contracting State.[36] As the arbitral tribunal observed in *Maffezini v. Spain*, there are sufficient similarities between the two scenarios which would allow it to utilize jurisprudence developed for one definition in the context of the other.[37]

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32 E.g., EDF (Services) Limited v Romania, ICSID Case No ARB/05/13 (8 October 2009), paras.191-193; Jan de Nul and Dredging International v Egypt, ICSID Case No. ARB/04/13, Award (6 November 2008), para.166.

33 BUCG v. Yemen, above n.14, para.34.

34 Masdar v. Spain, above n.22, para.167.

35 Ibid., para.168; BUCG v. Yemen, above n.14, para.34.

36 Maffezini v Spain, above n.27, para.78; Jan de Nul v Egypt, above n.32, para.156; EDF v Romania, above n.32, para.191; Toto Costruzioni Generali S.P.A v The Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 September 2009), para.44; Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award (18 June 2010), para.171; Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28 (10 March 2014), Award, para.281.

37 Maffezini v. Spain, above n.27, para.79.

A. The Test for Attribution under Article 5 of the ILC Articles

16. Article 5 of the ILC Articles prescribes that the conduct of an entity is attributable to the State if the entity is empowered by law to exercise elements of governmental authority and is acting in that capacity in the particular instance. The key term "governmental authority" is not defined because what is regarded as "governmental" depends on the particular society, its history and traditions. The elements that would go in its definition in particular cases would be a mixture of fact, law and practice.[38] An activity is usually seen as an excise of governmental authority if it falls within the sovereign's exclusive competence, such as legislative activities, administrative action, or public policy development. In the context of investment arbitration, this would entail activities such as granting licenses, approve or block commercial transactions, impose quotas, fees or expropriate companies.[39] According to the ILC commentary, to apply Article 5 to varied circumstances, important elements to be considered include the content of the powers, the way such powers are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. By contrast, how the entity is classified in a given legal system, the existence of a greater or lesser State participation in the entity's capital and the fact that the entity is not subject to executive control are not decisive criteria for the purpose of attribution of the entity's conduct to the State.[40]

17. Article 5 of the ILC Articles was first applied in *Maffezini v. Spain*, in which the respondent Spain contended that the contractual dispute was not between Spain and the claimant, but between the claimant and the private corporation SODIGA.[41] The legal issue was whether the acts or omissions of SODIGA, a State-owned and State-controlled entity, could be attributed to Spain. The tribunal engaged in a two-step analysis. First, whether SODIGA was a "State entity" empowered by law to exercise

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38 F-W Oil Interests, Inc v. The Republic of Trinidad and Tobago, ICSID Case No ARB/01/14, Award (3 March 2006), para.203.

39 Reza Mohtashami & Farouk El-Hosseny, State-owned Enterprises as Claimants before ICSID: Is the Broches Test on the Ebb?, 2016(3) BCDR International Arbitration Review 371, at 381.

40 The ILC Draft Articles with Commentaries, above n.16, at 43.

41 The award was rendered before the formal adoption of the ILC Draft Articles in 2001. However, the tribunal referred to Art 7 of the older draft (now article 5). Maffezini v. Spain, above n.27. para 78.

elements of governmental authority. Second, whether SODIGA's actions and omissions complained of by the claimant were an exercise of governmental authority and therefore imputable to Spain.[42] To determine whether an entity is a "State entity", the tribunal suggested that the entity must be examined first from a formal or *structural* point of view. If an entity is State-owned or controlled, directly or indirectly, by the State or if an entity's purpose or objectives is the carrying out of governmental functions which by their nature are not usually carried out by private businesses, it gives rise to a rebuttable presumption that it is a State entity.[43] The structural test by itself may not always be a conclusive determination and it must be complemented by an additional *functional* test, which looks to the functions of or role to be performed by the entity.[44]

18. Applying first the structural test, the tribunal found that SODIGA was created, and majority-owned by the Spanish government. Recognizing that structural test was not conclusive, the tribunal also applied the functional test. The intent of the Government of Spain in establishing SODIGA was to create an entity to carry out governmental functions, including the promotion of regional industrial development of the autonomous region of Galicia. Many of the functions that SODIGA undertook, such as seeking and soliciting new industries to invest in Galicia, were by their very nature typically governmental tasks, not usually carried out by private entities.[45] The tribunal concluded that the claimant had made out a *prima facie* case that SODIGA was a "State entity". Being a "State entity" does not mean that the Spanish Government is responsible for all the actions and omission of SODIGA. The question whether specific actions of SODIGA complained of can be attributed to the Spanish State could only be answered by applying again the functional test. The tribunal must establish whether specific acts or omissions were essentially commercial or governmental in nature. Commercial acts couldn't be attributed to the Spanish State, while governmental acts should be so attributed. Applying the functional test, the tribunal found that while some

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42 Ibid., para.75.

43 Ibid., para.77. By owning a majority of shares or other means of control, the State is at least structurally in a position to request a SOE to carry out governmental functions. Similarly, if the stated purpose of an entity is to carry out certain governmental functions, then a presumption that it is a "State entity" is justified.

44 Ibid., para.79.

45 Ibid., para.86.

of SODIGA's actions were consistent with normal business arrangements and did not involve the discharge of governmental authority, the unauthorized transfer of funds from Mr. Maffezini's account to a local joint venture company by a SODIGA official should be attributed to the Spanish government because it was not purely commercial in nature.[46]

19. The analytical framework outlined in *Maffezini v. Spain* indicates that the attribution test under Article 5 is essentially a functional test based on a structural finding.[47] This analytical approach was later refined in *Jan de Nul v. Egypt*. For an act by a non-State organ to be attributed to a State under Article 5 of the ILC Articles, two cumulative conditions must be fulfilled. First, the act must be performed by an entity empowered by the internal law of the State to exercise elements of governmental authority. Second, the act in question must be performed by the entity in the exercise of the governmental authority.[48] The two-step analytical framework under Article 5 has been followed by other investment arbitral tribunals ever since.

20. In *Jan de Nul v. Egypt,* the tribunal first found that Suez Canal Authority (SCA) was a public entity exercising elements of governmental authority because it was empowered to issue the decrees related to the navigation in the canal and to impose and collect charges for passing through the canal.[49] The tribunal then focused on the nature of the SCA's acts at issue, i.e, awarding a contract through a bidding process and the refusal to grant a time of extension, and concluded that these acts were not attributable to Egypt because any private contractors could have acted in a similar manner.[50] In *Hamester v. Ghana*, following the two-step analysis, the tribunal found first that the Ghana Cocoa Board (Cocobod) was entrusted with governmental functions. The primary function of Cocobod was to purchase cocoa beans from Ghanaian cocoa farmers and to market and export them. However, it also had the mission to regulate the marketing and export of cocoa, to encourage the development of all aspects of cocoa production and other functions being essentially governmental in nature. In order to fulfil these functions, Cocobod was granted governmental powers such as making regulations and imposing penalties.[51] Having found that

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46 Maffezini v. Spain, Award (13 November 2000), para.78.

47 Stefano, above n.17, 153.

48 Jan de Nul v. Egypt, above n.32, para.163; EDF v. Romania, above n.32, para.191.

49 Jan de Nul v. Egypt, above n.32, para.166.

50 Ibid., para.170.

51 Gustav v. Ghana, above n.36, para.190.

Cocobod was a public entity empowered with some governmental authority in itself did not resolve the issue of attribution because only the acts of Cocobod utilising State prerogatives were attributable to Ghana. The tribunal proceeded to analyse whether 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.[52] In *Tulip v. Turkey*, Emlak was an SOE possessing legal personality under Turkish law separate and distinctive from that State. Even though it enjoyed certain preferential treatment from the Turkish government with regard to getting construction permit and buying land, the tribunal found that Emlak itself did not exercise elements of governmental authority with respect to any other entity or object.[53]

21. Central to arbitral tribunals' differentiation of commercial acts from acts in exercise of governmental authority was to inquire whether a private commercial entity may perform the same acts in normal business transactions. [54] Some tribunals also mentioned profit motive of the investment. [55] This approach is consistent with the definitions of "governmental authority" and "commercial considerations" provided in mega-regional trade agreements. For example, Article 2 of the EU-China Comprehensive Agreement on Investment (CAI) defines "activities performed in the exercise of governmental authority" as "activities which are performed neither on a commercial basis nor in competition with one or more economic operators" and "commercial considerations" as "… factors that would normally be taken into account in the commercial decisions … are profit-based and disciplined by market forces". [56] Similarly, Article 22.1 of the United States-Mexico-Canada Agreement (USMCA) defines "commercial activities" as "activities that an enterprise undertakes with an orientation toward profit-making and that result in the production of a good or supply of a service… in quantities and at prices determined by the

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52 Ibid., para.193.

53 Tulip v. Republic of Turkey, above n.36, para. 292.

54 CSOB v. Slovakia, above n.25, para.25; Jan de Nul v. Egypt, above n.32, para.169-170; Gustav v. Ghana, above n.36, para.202.

55 EDF v. Romania, above n.32, para.197.

56 The EU and China reached an agreement in principle on 30 December 2020. However, Members of the European Parliament voted overwhelmingly on 20 May 2021 in support of freezing the legislative process for ratifying the CAI. See Jack Ewing, European Lawmakers Block a Pact with China, Citing Human Rights Violations, New York Times (20 May 2021).

enterprise". In addition, "commercial considerations" means "… factors that would normally be taken into account in the commercial decisions of a privately owned enterprise in the relevant business or industry."[57]

22. In summary, the CSOB tribunal focused only on the *nature* of the activities which gave rise to the dispute when evaluating whether CSOB's activities were an exercise of governmental authority. However, as discussed above, it has now become an integral part of analysis for tribunals to examine the link between the entity under inquiry and the home State, including ownership structure, chain of control, and the purpose of the entity (the structural test), in addition to the nature of its activities both in general and in the specific investment (the functional test). This approach coincides with the ILC commentary which suggests that multiple factors should be considered when deciding on attribution under Article 5. Therefore, one may reasonably argue that arbitral tribunals now examine the nature of the specific act being complained of *in the context of* SOEs having a close connection with the home State, and that this new approach is more nuanced than the tribunal's *sole* focus on the nature of conduct in *CSOB v. Slovakia*. Nevertheless, like the tribunal in *CSOB v. Slovakia*, tribunals ultimately focus on whether the SOE exercised governmental authority in the specific investment in dispute. In the final analysis, the outcome would likely be the same if this new approach were adopted in *CSOB v. Slovakia* as the linchpin of both approaches is the nature of an SOE's activities in the specific investment.

B. The Test for Attribution under Article 8 of the ILC Articles

23. Article 8 of the ILC Articles relates to the first limb of the Broches test, i.e., SOEs acting as an agent for the government. Different from Article 5, the conduct could be attributable to the State under Article 8 not because it is the result of the exercise of governmental power, but because the person is "in fact acting on the instructions of, *or* under the direction or control of, that State in carrying out the conduct". Nevertheless, the elements involved in the structural test under Article 5 may be relevant for the application of Article 8 because they may help inform whether the conduct is under the

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57 The USMCA replaced the North American Free Trade Agreement and entered into force on July 1, 2020. See also the identical definitions in Article 17.1 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

direct command or effective control of the State. [58] The words "instructions", "direction" and "control" in Article 8 are to be read disjunctively. A tribunal need only be satisfied that one of those elements is present in order for there to be attribution under Article 8.[59]

24. The ILC commentary on Article 8 explains that although corporate entities are owned by and in that sense subject to the control of the State, they are considered to be separate and their conduct in carrying out their activities is *prima facie* not attributable to the State. In other words, majority ownership or shareholding by the State of a corporate entity is insufficient for the purposes of attribution pursuant to Article 8.[60] However, where there is evidence that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question may be attributed to the State.[61] Several investment tribunals confirmed that the degree of control which must be exercised by the State in order for the conduct of a person or entity to be attributable to the State is "effective control" ,[62] as the ICJ outlined in *Nicaragua v. United States of America.* [63] This is a very demanding standard as it requires not only a general direction or control of the State over the entity but also a specific control of the State over the particular act in question.

25. The finding that an entity performs certain acts under the direction and control of the State within the meaning of Article 8 is an issue of examining the evidence on record.[64] In *EDF v. Romania*, the evidence on record indicates that the Romanian Ministry of Transportation issued

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58 Stefano, above n.17, at 154; BUCG v Yemen, above n.14, paras.37-42.

59 Tulip v. Turkey, above n.36, para.303.

60 Ibid., para.289; UAB E Energija v. Latvia, ICSID Case No ARB/12/33, Award (22 December 2017), para.825.

61 The ILC Articles, above n.16, at 48.

62 Jan de Nul v. Egypt, above n.32, para.173; Tulip v. Turkey, ICSID Case No. ARB/11/28, Decision on Annulment (December 30, 2015), para.189; White Industries Australia v. The Republic of India, UNCITRAL Award (30 November 2011) para 5.2.25.

63 Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, ICJ Judgement of 27 June 1986, para.115. In contrast, international criminal jurisprudence has asserted the "overall control" test for military or para-military groups, see Prosecutor v. Duško Tadić, International Tribunal for the Former Yugoslavia, Case IT-94-1-A, Judgement (15 July 1999), para.117.

64 Masdar v. Spain, above n.22, para.171; Gustav v. Ghana, above n.36, paras.256-267.

instructions and directions to two SOEs regarding the conduct these two companies should adopt in the exercise of their shareholder rights. Further, the evidence indicates that the Romanian State was using its ownership interest in or control of the two SOEs to achieve the particular result of bringing to an end their contractual arrangements with the foreign investor.[65] In the tribunal's view, such conduct fell within the meaning of the commentary to Article 8 of the ILC Articles and was attributable to Romania. In *Tulip v. Turkey*, the majority of Emlak's voting shares and the board at all relevant times were controlled by TOKI, a State organ responsible for Turkey's public housing and operating. Accordingly, the tribunal concluded that TOKI was capable of exerting a degree of control over Emlak to implement elements of a particular State purpose. However, the tribunal stressed that:

> the relevant enquiry remains whether Emlak was being directed, instructed or controlled by TOKI with respect to the *specific activity* of administering the Contract with Tulip JV in the sense of sovereign direction, instruction or control rather than the ordinary control exercised by a majority shareholder acting in the company's perceived commercial best interests.[66]

26. Looking at the evidentiary record, the tribunal concluded that while Emlak was subject to TOKI's corporate and managerial control, Emlak's conduct with respect to the execution, maintenance and termination of the contract was acting in what it perceived to be its commercial best interest. Due to an absence of proof that TOKI used its control of Emlak as a vehicle directed towards achieving a particular result in its sovereign interests, Emlak's conduct was not attributable to the State under Article 8.[67]

27. Non-ICSID tribunals have adopted largely the same approach as ICSID tribunals.[68] In *OAO Tatneft v. Ukraine* before the Permanent Court of

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65 EDF v. Romania, above n.32, para.213. See also Bayindir v. Pakistan, ICISD Case No. ARB/03/29, Award (27 August 2009), paras.125-127.

66 Tulip v. Turkey, above n.36, para.309.

67 Ibid., para.326.

68 E.g., OAO Tatneft v. Ukraine, PCA Case No 2008-8, Partial Award on Jurisdiction (28 September 2010), paras.125-152; Nykomb Synergetics Technology Holding AB v. The Republic of Latvia, Arbitral Award, The Arbitration Institute of the Stockholm Chamber of Commerce (16

Arbitration (PCA), Tatneft was a publicly traded open joint stock company producing 80% of the crude oil in Tatarstan, a constituent republic of the Russian Federation. The Government of the Republic of Tatarstan held 36% of the company's stocks as well as a "golden share" granting the State special veto rights. In addition, the Tatar region's Minister served as Chairman in Tatneft's board of directors.[69] Ukraine argued that Tatneft did not qualify as an "investor" under Russia-Ukraine BIT because for jurisdictional purposes Tatneft's conduct should be attributable to Tatarstan.[70]

28. With reference to Articles 5 and 8 of the ILC Articles, the tribunal analysed whether Tatneft has been empowered to exercise governmental authority or acted as an agent for the Tatarstan Republic. The tribunal found that business decisions characterized Tatneft's activities and the company was subject to legislation on competition, taxation and other aspects that were typical of private entities, just like the nature of such activities was in essence unrelated to the exercise of governmental authority.[71] Likewise, the tribunal dismissed Ukraine's argument that Tatneft was merely an agent for the Tatarstan Republic, rather than a fully independent commercial company.[72] Even if there was some circumstantial evidence of government control, the tribunal concluded that business-related aspects predominated in Tatneft's operations and that it was entitled to claim as a private investor under the Russia-Ukraine BIT.[73]

III. The ILC Articles and Chinese SOEs

29. Similar to the global trend discussed in Part II above, the definition of "investors" in Chinese IIAs is not based on the nature of ownership but on whether a legal person is duly constituted in accordance with the law of a contracting party.[74] Therefore, Chinese SOEs have standing equivalent to their private counterparts as "investor" in Chinese IIAs. Furthermore, a

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December 2003), at 31.

69 OAO Tatneft v. Ukraine, Ibid., para.43.

70 Ibid., para.138.

71 Ibid., para.140.

72 Ibid., para.148.

73 Ibid., paras.149-150.

74 For example, Article 2 of China-Turkey BIT (2015); Article 1(2) of China-Switzerland BIT (2009).

recent trend is that more and more Chinese IIAs expressly provide that any entity, including "government-owned or controlled enterprises" or public institutions, fall within the applicable definition of "investor".[75] Therefore, as a general matter, the ISDS clauses in Chinese IIAs are available to Chinese SOEs.

30. This understanding was confirmed by the arbitral tribunal in *Heilongjiang International Economic & Technical Cooperation Corp et al v. Mongolia* before the PCA. In that case, Mongolia argued that at least two Chinese SOE claimants did not qualify as protected investors under Article 1(2) of the China-Mongolia BIT as Chinese SOEs could not be regarded as "economic entities". In the respondent's view, Chinese SOEs were not "economic" in nature because they were not motivated to make a profit in the sense that an economic entity would ordinarily be thought to be. Chinese SOEs did not function with sufficient independence from the Chinese State. They were quasi-instrumentalities under the direct control of the GOC and they were under express instruction to invest abroad in order to serve China's foreign policy goals.[76] The tribunal took a formalist approach when interpreting "economic entities". As there is no express exclusion of SOEs from "economic entities" in China-Mongolia BIT, the tribunal concluded that the terms "economic entities" referred to any kind of legal entity engaging in economic or business activities, without regard to organizational type, business purpose, ownership, or control.[77] The tribunal then concluded that Chinese SOEs had standing to bring an arbitral claim under the China-Mongolia BIT.

31. In the ICSID context, whether a Chinese SOE is a "national of another Contracting State" under Article 25(1) of the ICSID Convention should be independently assessed. Chinese SOEs are not created equal. Significant variations exist in their organizational structure, management, relations with the State and sectors in which they operate. For example, the State Assets Supervision and Administration Commission (SASAC), a quasi-governmental, ministerial level agency operating directly under the State Council, serves as a unitary holding company for Central SOEs (*yang qi*) that were formerly under control of various government agencies. In view of

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75 For example, Article 10 (1) (f) of RCEP (2020); Article 9 (1) of Australia-China FTA (2015); Article 2 (10) (a) of Canada-China BIT (2012); Article 1 (b) of China-Mexico BIT (2008).

76 China Heilongjiang International Economic & Technical Cooperative Corp, et al., v. Mongolia, above n.14, paras.408 and 415.

77 Ibid., para.412.

their importance to the national economy, Central SOEs are a different beast from local SOEs because they are closer to the political centre. Similarly, though Chinese SOEs currently operate in many industries and sectors, the GOC maintains control only in strategic fields through either sole ownership or an absolute controlling stake. By comparison, the role of the GOC in other non-strategic sectors is significantly smaller. Precisely because of these variations, Chinese SOEs may demonstrate behavioural differences in cross-border investment and dispute resolution.[78]

32. Nevertheless, some general conclusions may be drawn by applying the ILC Articles to Chinese SOEs. First, Article 4 of the ILC Articles establishes that the conduct of any *State organ* shall be considered an act of that State under international law. A State organ is further defined as including "any person or entity which has that status in accordance with the internal law of the State". As State organs participate in the structural setting of the State, all their acts are attributed to the State, whether commercial or not. Therefore, a tribunal must first assess whether the SOE in question is a State organ under the domestic law of China.[79]

33. The structural test is useful to determine whether an entity is a "State organ" under Article 4.[80] After three decades of extensive reforms, Chinese SOEs are corporate entities separate from the GOC. They are incorporated either as limited liabilities companies or joint stock companies under Chinese Company Law and endowed with corporate legal personalities.[81] Both *de jure* and *de facto*, Chinese SOEs are not part of the structure of the GOC and their business activities are subject to the Chinese Civil Code, the capital market regulations and other private law instruments.[82] Therefore, Chinese SOEs are not State organs within the meaning of Article 4 of the ILC Articles, and their acts cannot be attributed to the GOC.

34. Second, for an investment by a Chinese SOE to be attributed to the GOC under Article 5 of the ILC Articles, it must be shown that (1) the Chinese SOE is empowered by the internal law of China to exercise

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78 Ji Li, State-owned Enterprises in the Current Regime of Investor- State Arbitration, in Shaheeza Lalani and Rodrigo Polanco Lazo (eds), The Role of the State in Investor- State Arbitration 380 (Leiden: Brill 2014) at 385.

79 Tulip v Turkey, above n.36, para.285.

80 EDF v. Romania, above n.32, paras.188-190.

81 Law of the People's Republic of China on the State-owned Assets of Enterprises (28 October 2008), Arts. 6 & 16.

82 Tulip v. Turkey, above n.36, paras.289-290.

elements of governmental authority, and that (2) the particular investment in question which gives rise to the dispute must be performed by the SOE in the exercise of the governmental authority.[83] Thus far no investment tribunal has examined the issue of whether Chinese SOEs are empowered to exercise elements of governmental authority by the internal law of China. However, this issue was extensively analysed in WTO dispute settlement processes for the purpose of determining whether Chinese SOEs are "public bodies" in the context of the WTO Agreement on Subsidies and Countervailing Measures. According to the WTO Appellate Body (AB), a "public body" is an entity that "possesses, exercises or is vested with governmental authority".[84] To make such a determination, investigating authorities should evaluate core features of the entity concerned and its relationship with government, having regard, in particular, to whether the entity exercises authority on behalf of the government.[85] The 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 and exercises governmental authority. The mere fact that a government is the majority shareholder of an entity is an important element of the analysis, but insufficient in itself to establish the necessary possession of governmental authority.[86]

35. In assessing the role of the GOC in Chinese SOEs, the U.S. Department of Commerce (USDOC) identified the relevant governmental function as China's constitutional mandate to maintain the predominant role the State sector in the economy and upholding the socialist market economy.[87] Moreover, the USDOC found that the GOC exercises meaningful control over certain categories of SOEs in China and uses these SOEs as instrumentalities to effectuate the governmental function. The USDOC grounded the findings that SOEs possess, exercise, or are vested with governmental authority on manifold indicia of meaningful control,

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83 EDF v. Romania, above n.32, paras.191-193.

84 WTO Appellate Body Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China ("US – Antidumping and Countervailing Duties"), WT/DS379/AB/R (11 March 2011), para.317.

85 Ibid., para.319.

86 Ibid., para.318.

87 WTO Appellate Body Report, United States–Countervailing Duty Measures on Certain Products from China, Recourse to Article 21.5 of the DSU by China, WT/DS437/AB/RW (16 July 2019), para.5.56.

including (i) the provision of direct and indirect benefits to SOEs; (ii) governmental incentives and demands for certain firm behaviour in furtherance of certain policy goals; (iii) the GOC's maintenance of ownership levels as a means to maintain control over the State sector; (iv) the GOC's management of market competition and market outcomes through the instrumentality of enterprises in the State sector; (v) the supervision of the SASAC over SOEs; (vi) the GOC's control over all company appointments in the State sector; and (vii) the presence of CCP groups and committees within enterprises.[88]

36. The AB ultimately upheld the USDOC's finding that Chinse SOEs in which the GOC has a full or controlling ownership interest are "public bodies" that "possess, exercise, or are vested with governmental authority". By contrast, Chinese SOEs in which the GOC has significant ownership that are also subject to certain government industrial plans may exercise governmental authority, if indicia show that these enterprises are used as instruments by the GOC to uphold the socialist market economy.[89] In an earlier dispute, the AB also ruled that Chinese State-owned commercial banks are "public bodies", given the scope and extent of control exercised over them by the GOC.[90]

37. The AB's finding that Chinese SOEs exercise governmental authority is striking and not free from criticism. [91] Central to the Chinese SOE reform over the past three decades is the principle of improving the modern enterprise system that is characterized by clear property rights, well-defined powers and responsibilities, separation between government and business, and scientific management.[92] In the new round of SOE reforms, it is stressed that the even the SASAC shall abstain from exercising the public

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88 Ibid.

89 Ibid., para.5.57.

90 Appellate Body Report, US – Antidumping and Countervailing Duties, above n.84, para.355.

91 The main criticism concerns the AB's finding that an investigating authority is not required to inquire into whether an entity is exercising a government function when engaging in the specific conducts being complained of. See Douglas Nelson, How Do You Solve a Problem Like Maria? US – Countervailing Measures (China) (21.5), 20 World Trade Review (2021), 556, at 558.

92 Guiding Opinion of the CPC Central Committee and the State Council on Deepening the Reform of State-owned Enterprises (24 August 2015).

administration function of the government.[93] It is surprising to see that rich evidence suggesting that Chinese SOEs are principally business entities competing with private enterprises are not considered and balanced against the finding that the GOC maintains control over the SOEs. It remains to be seen whether investment tribunals will find it appropriate to borrow the WTO jurisprudence on "public body" in the context of the ILC Article 5 analysis.[94]

38. There is little doubt that the policy directives of the GOC such as the BRI and Made in China 2025 have a significant effect on Chinese SOEs' investment decisions.[95] For example, Chinese investors were less likely to pursue targets in BRI countries before the GOC launched the BRI in 2013. However, Chinese SOEs' investments in BRI countries have substantially increased since the announcement of BRI. By contrast, the BRI fails to encourage acquisitions in BRI countries for Chinese private investors. These results suggest that the BRI influences the location choice of cross-border investments by Chinese SOEs.[96] Likewise, the evidence shows that Chinese SOEs are more likely to invest in industries identified in Made in China 2025 since its announcement in 2015.[97]

39. However, even if some Chinese SOEs, in particular the SOEs in which the GOC has controlling or significant ownership, are found to exercise elements of governmental authority, it will be highly unlikely that Chinese SOEs are found to exercise government authority in a particular investment project, a positive finding of which is essential to attribute the investment to the GOC. In the first place, an investment activity is essentially commercial in nature. Both SOEs and private investors make investments in normal business transactions and compete against other investors in the process. Having examined 1,279 cross-border acquisitions conducted by Chinese SOEs from 2002 to 2017, Fuest and others found that there is no evidence showing that Chinse acquirers pay higher prices than other investors for targets with comparable characteristics. This contradicts the view that government support enables Chinese companies to

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93 Ibid.

94 Jürgen Kurtz, The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents, 20(3) EJIL (2009), 749-771.

95 Randall W. Stone, et al, Chinese Power and the State-Owned Enterprises, International Organization (2021), at 18.

96 Clemens Fuest, et al, What Drives Chinese Overseas M&A Investment? Evidence from Micro Data, Review of IE (2021), at 17.

97 Ibid., at 17.

outbid other investors in the global M&A market. [98] The predominant commercial motivation of Chinese SOEs in their OFDI was also testified by multiple external parties involved in the transactions. Such as international investment banks, law firms, accounting firms, rating agencies, corporate partners, and financiers.[99] Moreover, Chinese SOEs are frequently criticized for their lack of transparency as to the structural and financial organization compared to their private counterparts.[100] If this is true, then as a practical matter the respondent State is likely to face enormous challenges to bear the burden of proof showing that a particular SOE investment is an exercise of governmental authority, rather than a commercial act.

40. The arbitral tribunal's analysis in *BUCG v. Yemen* reflects this approach. Although the tribunal accepted that Yemen's description of BUCG in the broad context of the PRC State-controlled economy was convincing, the tribunal found them largely irrelevant because the issue was *not* the corporate framework of BUCG, but whether it discharged a Chinese governmental function "in the particular instance", namely, the construction of the Sana'a International Terminal project in Yemen. The tribunal concluded that BUCG was not discharging a PRC governmental function in winning a contract through a competitive bidding process and building an airport terminal. [101]

41. Third, a challenge of Chinese SOEs' standing in ISDS may also be based on Article 8 of the ILC Articles.[102] If there were evidence showing that a SOE is under the effective control of the GOC, and that the GOC was using its ownership interest in or control of a SOE specifically in order to achieve a particular result, the investment would be attributed to the GOC. Then the SOE in question would not have standing to bring the

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98 Ibid., at 25.

99 Megan Bowman et al, 'China: Investing in the World', CIFR Research Working Paper Series (September 2013), at 11.

100 Anthony P Cannizzaro and Robert J Weiner, State Ownership and Transparency in Foreign Direct Investment: Loose-Lipped Leviathan?, The George Washington University Institute for International Economic Policy Working Paper 2017-2018, at 31; Yipeng Liu and Michael Woywode, Light-Touch Integration of Chinese Cross-Border M&A: The Influences of Culture and Absorptive Capacity, 55 Thunderbird IBR (2013), 469, at 479.

101 BUCG v. Yemen, above n.14, paras.39-40.

102 Abby Cohen Smutny, State Responsibility and Attribution: When Is a State Responsible for the Acts of State Enterprises?, in: Todd Weiler (ed), International Investment Law and Arbitration (Cameron May 2005), at 17.

arbitration against a host State.[103] Although Article 8 of the ILC Articles is a potential route, it will be challenging for the respondent State to sustain this argument in practice for three reasons. To begin with, the ILC Commentary makes it clear that the attribution under Article 8 is "highly demanding and exceptional".[104] It requires not only a general direction or control of the State over the SOE but also a specific control of the State over the particular investment in question. Even if the GOC has recently tightened the political control of SOEs,[105] there is little evidence that the GOC has intervened into specific investment project made by SOEs. Indeed, one of the core objectives of the new round of SOE reforms is precisely to reduce governmental interference and make SOEs independent market entities.[106]

42. Furthermore, one fundamental transformation to redefine the GOC's relationship to SOEs is not to see the role of the GOC as that of owner and regulator of SOEs, but a core investor.[107] In line with the shift in view from managing enterprises to managing capital, State capital investment companies and State capital operation companies are created to take equity stakes and exercise rights as shareholders in Chinese SOEs. The SASAC would have to convey directives to State capital investment and operation companies rather than directly to operating SOEs. Such a system is seen as putting the SASAC at arm's length and further separating SOEs from government agencies.[108]

43. Finally, whether a Chinese SOE's OFDI was performed under the direction and control of the Chinese State is an issue of examining the evidence on record. As a legal matter, whether the State has exerted the required level of control to achieve a particular result is difficult to prove with prevailing evidence in practice. The finding of attribution under Article 8 in *EDF v. Romania* was straightforward because Romanian Ministry of Transportation issued instructions and directions to its SOEs to undertake

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103 Gustav v. Ghana, above n.36, para.198.

104 EDF v. Romania, above n.32, para.200.

105 Wendy Leutert, Firm Control: Governing the State-owned Economy under Xi Jinping, China Perspectives 27 (2018), at 30-32.

106 The Economist, A Whimper, not a Bang: China's Plan to Reform its Troubled Firms Fails to Impress (19 September 2015).

107 Hao Chen & Meg Righmire, The Rise of the Investor State: State Capital in the Chinese Economy, 55 Studies in Comp I Dev (2020), 257, at 258.

108 The State Council, Implementation Opinions of the State Council on Advancing the Pilot Program of the Reform of State Capital Investment and Operation Companies, Notice No. 23 [2018].

specific actions against the subjective interest of the latter.[109] In most other cases, however, the interests of the State and its SOEs are usually coincident. This may render it difficult to find attribution of conduct to the sovereign pursuant to Article 8. For example, in *Tulip v. Turkey*, in view of the Turkish government agency TOKI's dominant position in relation to the SOE Emlak, whether Emlak's decision to terminate the contract with Tulip JV was made by the Board of Emlak independently in the pursuit of Emlak's commercial interests or as a result of the exercise of sovereign power by TOKI was controversial.[110] Even if there was some limited evidence supporting the claimant's contention that the decision to terminate the investment contract was connected to TOKI, the tribunal ultimately concluded that business-related aspects predominated in Emlak's operations.[111] Similarly, the unique Chinese SOE governance structure, such as the central role of party committee in SOE corporate governance, and various informal channels through which government influence may be exerted do not necessarily mean that a Chinese SOE loses its essential commercial aims in the undertaking of business. At the same time, these features are likely to make it difficult to prove governmental instruction, direction or control in a particular investment.

44. In *BUCG v. Yemen*, the evidentiary record discloses that BUCG participated in the airport project as a general contractor following an open tender in competition with other contractors. Its bid was selected on its commercial merits. Its contract was terminated, not for any reason associated with China's decisions or policies but because of BUCG's alleged failure to perform its commercial services on the airport site to a commercially acceptable standard.[112] Therefore the tribunal concluded that there was no evidence to establish that, in building an airport terminal in Yemen, BUCG was acting as an agent of the GOC. In the same vein, the arbitral tribunal summarily dismissed Government of Mongolian's claim in *Heilongjiang International Economic & Technical Cooperation Corp et al v. Mongolia* because there was no evidence on the record to support the conclusion that the two Chinese SOE claimants acted as "quasi-instrumentalities of the

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109 EDF v. Romania, above n.32, para.210.

110 Separate Opinion of Michael Evan Jaffe on the Questions of Attribution under Article 8, ILC Articles, Tulip v. Turkey, above n.36.

111 Tulip v. Turkey, ICSID Case No. ARB/11/28, Decision on Annulment (December 30, 2015), para.219. See also OAO Tatneft v. Ukraine, above n.68, paras.149-150.

112 BUCG v. Yemen, above n.14, para.40.

Chinese government".[113]

IV. Much Ado about Nothing?

45. The function of Articles 5 and 8 of the ILC Articles, as interpreted by investment tribunals, is grounded on two important assumptions. First, despite the State ownership and State control, SOEs are capable of engaging in economic transactions on a purely commercial basis as are privately-owned enterprises. Absent any express limitation, SOEs should be treated in the same way as private enterprises when they engage in commercial acts. Consequently, the protection afforded by IIAs, including the ISDS clause, should be available to SOEs when they act in their commercial capacity. Second, even though SOEs must meet non-commercial objectives set out by their State shareholder that sometimes go beyond the mere financial and economic returns,[114] it does not automatically lead to the conclusion that SOEs certainly and always do so. The arbitral tribunals are able to separate a SOE's independent business decisions from *de facto* political decisions to achieve a particular outcome.

46. However, as other scholars have pointed out, the formalistic distinction between a commercial act (private) and a sovereign/governmental act (public) may be blurred in practice. [115] Concepts of the public and private are complex, shifting, and reflect political preferences with respect to the level and quality of governmental intrusion. There is no reliable or constant basis for the distinction. As the ILC Articles are based on a liberal conception of the State and market model, it is at least doubtful whether attribution rules in the ILC Articles are

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113 China Heilongjiang International Economic & Technical Cooperative Corp et al v. Mongolia, above n.14, para.418.

114 Malcolm G Bird, State-owned Enterprises: Rising, Falling and Returning? A Brief Overview, in Luc Bernier, et al (eds), The Routledge Handbook of State-owned Enterprises (Routledge 2020), 60, 61-2.

115 Christin Chinkin, A Critique of the Public/Private Dimension, 10(2) European JIL (1999), 387, at 389; Gus Van Harten, The Public/Private Distinction in the International Arbitration of Individual Claims against the State, 56(2) ICLQ (2007), 371, at 373-374; Anne van Aaken, Blurring Boundaries between Sovereign Acts and Commercial Activities: A Functional View on Regulatory Immunity and Immunity from Execution, University of St. Gallen Law School Law and Economics Paper Series, Working Paper No. 2013-17 (March 2013), at 18.

an effective legal device to enhance accountability of States for the acts of their instrumentalities, especially in the context of rather undefined experiences of State-driven economies.[116] Take Chinese SOEs as an example. Operating in the interface of competing dimensions of the public and private, they raise the conceptual and practical difficulty of ascertaining where the sovereign ends and the investor begins, and whether the activity they perform is private or, rather, sovereign.[117]

47. As discussed in Part II of this article, one technique for drawing the distinction is to examine the character of relevant acts of SOEs and ask whether they are acts that a privately-owned enterprise can also carry out. Thus, investment tribunals have relied on an assessment of the *nature* of SOE acts rather than their motive or purpose as a basis for defining the scope of commercial acts. This position is largely consistent with the distinction between *acta jure imperii* and *acta jure gestionis* in order to determine the scope of sovereign immunity.[118] However, as the international economic order is transitioning away from the neoliberal order towards a new geoeconomics order,[119] the extent to which States are entitled to use commercial channels to pursue geopolitical purposes lies at the very heart of the ideological drift between liberal capitalism and State capitalism countries.[120] It is precisely against this background that the standing of SOEs in ISDS has become a markedly controversial issue.

48. It is submitted in Part III of this article that it is highly unlikely that Chinese SOEs would be denied standing as qualified claimants in ISDS. Nevertheless, this may not be a guaranteed outcome. Essentially this is because attribution rules in the ILC Articles are highly flexible.[121] For example, the concept of governmental authority in Article 5 is "not only undefined but elusive when pursued".[122] The ILC commentary to Article 5

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116 Stefano, above n.17, at 58.

117 Nalbandian, above n.17, at 13-14.

118 Rosalyn Higgins, Certain Unresolved Aspects of the Law of State Immunity, 29 Netherlands ILR (1982), 265, 268–72; Christoph H Schreuer, State Immunity: Some Recent Developments (1988), 69–70.

119 Anthea Roberts, et al, Toward a Geoeconomic Order in International Trade and Investment, 22(4) J of I Econ L (2019), 655, at 676.

120 Nalbandian, above n.17, at 12.

121 James Crawford, Revising the Draft Articles on State Responsibility, 10(2) EJIL (1999), 435, at 439-440.

122 David D Caron, The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority, 96 AJIL (2002), 857, at 861.

makes it clear that various elements and circumstances surrounding the entity and a given act or transaction, including the purpose of the act, may be taken into account in identifying the scope of governmental authority. It was only developed in the case law that the purpose test is not decisive, and that it has only a secondary role in comparison to the nature test. Furthermore, the WTO AB has already made the finding that Chinse SOEs in which the GOC has a full or controlling ownership interest "possess, exercise, or are vested with governmental authority".[123] If this ruling is transplanted to investment law, then the remaining issue would be whether the Chinese SOE has exercised governmental authority in the particular investment in dispute. Even if the nature test has primary relevance for the purposes of attribution to the State of conduct of SOEs, it was already proposed in the literature that the principle of competitive neutrality may be inserted in the context-based analysis of the nature test. That is, if a SOE could not have made an investment on a rational basis, like any other private competitor in the market arena, without availing itself of its status, then the investment may be attributed to the State.[124]

49. With this caveat in mind, it remains highly unlikely that an investment tribunal would go to great lengths to reject the standing of a Chinese SOE in ISDS proceedings in the future for three reasons. First, SOEs are explicitly covered as qualified investors eligible to initiate ISDS proceedings in recently concluded Chinese IIAs.[125] When the intention of the IIA parties is clear, there are no good reasons for the host State to challenge the standing of Chinses SOEs in ISDS proceedings. Nor are there strong reasons for an investment tribunal to go so far as to ignore the shared intention of the parties. Any limits on the access of SOEs to ICSID in such a scenario may diminish the institutional significance of ICSID. It is

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123 WTO Appellate Body Report, United States–Countervailing Duty Measures on Certain Products from China (Article 21.5), above n.87, para.5.56.

124 Stefano, above n.17, at 164.

125 For example, Article 9.10 (a) of the China-Australia Free Trade Agreement, entered into force on 20 December 2015, defines a claimant in ISDS as an investor of a party. Article 9.1 (e) defines "investor" as a natural person or an enterprise of a party that seeks to make an investment. Article 9.1(b) states: "enterprise means any entity constituted or organised under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled…". Other examples see Article 2 (10) (a) of Canada-China BIT (2012) and Article 1 (b) of China-Mexico BIT (2008).

also possible for SOEs to elect an arbitral institution other than ICSID and arbitral rules other than the ICSID convention.

50. Second, Chinese SOEs' OFDI have caused widespread concerns about national security, fair competition, reciprocity, transparency, and even the function of free market at home.[126] Whether or not these concerns are exaggerated is widely debated in the exiting literature.[127] For the purpose of this article, it is sufficient to say that these concerns are best addressed at the pre-entry stage of investment. Few IIAs grant foreign investors unconstrained rights with respect to cross-border acquisitions and establishment of investments. In any case admission of foreign investment is subject to the laws and regulations of the host State. Thus host States are largely free to exclude investment from SOEs or attach conditions before admission is granted.[128] For example, the proliferation of national security screening mechanisms allow host States almost unlimited discretion to prohibit proposed investment or require foreign investors to undertake onerous commitments to alleviate any regulatory concerns that a host State might have.[129] Some States, such as the United States, Australia and Canada, have imposed special national security scrutiny procedures on foreign SOEs.[130] Additional procedures such as "net benefit assessment" in Canada and "national interest test" in Australia can also be used to ensure that the governance and commercial orientation of SOEs are considered in determining under what conditions investment of SOEs may be admitted.[131]

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126 OECD, State-Owned Enterprises as Global Competitors: A Challenge or an Opportunity? (OECD Publishing 2016), 52-53.

127 Larry Diamond and Orville Schell, China's Influence & American Interests: Promoting Constructive Vigilance, Hoover Institution Press Publication No. 702 (2019), 123-138; Ming Du, When China's National Champions Go Global: Nothing to Fear but Fear itself?, 48(6) J World Trade (2014), 1127, 1154-1158.

128 Annacker, above n.22, at 562-563.

129 Frédéric Wehrlé and Joachim Pohl, Investment Policies Related to National Security – A Survey of Country Practices, OECD Working Papers on International Investment 2016/02, at 25.

130 For example, The Minister of Innovation, Science and Industry of Canada, Guidelines on the National Security Review of Investments (March 24, 2021); Australian Government, Australia's Foreign Investment Policy (1 January 2021), at 7.

131 Government of Canada, Guidelines-Investment by State-owned Enterprises-Net Benefit Assessment (December 19, 2016); Australian Government Foreign Investment Review Board, Protecting the National

More recently, the European Commission proposed a new instrument under which the Commission will have the power to investigate financial contributions granted by public authorities of a non-EU country which benefit companies engaging in an economic activity in the EU and redress their distortive effects.[132]

51. Moreover, once a Chinese SOE's OFDI project is granted market access, it is fully subject to the regulatory framework of the host State. A rigorous enforcement of the laws of the host State is likely to deal with most of the concerns presented by the SOE investment. For example, corporate laws impose robust fiduciary duties on the controlling shareholder and the directors and senior management of the company.[133] The point is whatever concerns a host State may have about Chinese SOEs, these concerns seem to be well addressed by national investment laws and regulations either at the pre-entry stage or on an ongoing basis.

52. By contrast, it is not clear what policy objectives that a denial of Chinese SOEs' standing in ISDS proceedings would achieve. One thing is clear: it would deprive Chinese SOEs of an important, and sometimes may be the sole, remedy when a host State breaches its IIA obligations. Similar to other international economic governance regimes, such as the WTO and the EU,[134] international investment law does not impose any particular obligations with respect to property ownership. Since how capital should be formed is a fundamental choice of domestic policy making, international law cannot, nor should it, prescribe such basic choices if it is to remain effective. In other words, Chinese SOE have no original sins and investment rules shall in no way prejudice SOEs.[135] Moreover, the advantages of ISDS in "delocalizing" investment disputes by affording foreign investors an alternative to domestic courts, and in "depoliticizing" investment disputes by removing them from the realm of diplomatic protection, have long been

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Interest: Guiding Principles for Developing Conditions (17 December 2020).

132 European Commission, Commission Proposes New Regulation to Address Distortions Caused by Foreign Subsidies in the Single Market (5 May 2021).

133 Paul Rose, Sovereigns as Shareholders, 87 North Carolina LR (2008), 83, at 120-122.

134 Article 345 of the Treaty on the Functioning of the European Union (TEFU); Petros Mavroidis and Thomas Cottier, State Trading in the Twenty-First Century: An Overview, in: Thomas Cottier and Petros Mavoidis (eds), State Trading in the Twenty-First Century (1998), 3.

135 Gu & Xu, above n.24, at 1054.

acknowledged.[136] It might be a convenient litigation strategy for the respondent State to persuade investment tribunals to refrain from exercising jurisdiction. For Chinese SOEs, however, disqualification from claiming under IIAs would likely leave their legitimate investment not effectively protected and in turn undermines the rule of law in international investment. This will ultimately deprive host States of access to limited capital and investment, a result that those pushing hard to deny SOEs access to ISDS arbitration should bear in mind.

V. Conclusion

53. The meteoric rise of OFDI by Chinese SOEs presents to host countries a vexing policy dilemma. On the one hand, the influx of foreign direct investment promises to bring much-needed new capital and job growth that would have positive economic and political ramifications to host countries. On the other hand, due to their political ties with the GOC and concentration in strategic sectors, Chinese SOEs' investment may raise fair competition and national security concerns. One recurrent issue concerning Chinese SOEs in international investment law is their standing in ISDS. This article concludes that even though the ILC Articles are flexible, it is highly unlikely that Chinese SOEs would be disqualified as claimants in investor-State arbitration. Furthermore, it is simply a bad policy choice, both economically and politically, to deny Chinese SOEs standing in ISDS. That said, the debate on the nature of Chinese SOEs may serve as an external incentive for the GOC to push forward market oriented SOE reforms. These reform measures will not only reduce suspicion when Chinese SOEs go out, but also help them become truly competitive global champions.

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[136] Sergio Puig, Emergence & Dynamism in International Organizations: ICISD, Investor-State Arbitration & International Investment Law, 44 Georgetown JIL (2013), 531, at 550-552.