STATE ENTERPRISES IN INTERNATIONAL INVESTMENT DISPUTES: FOCUS ON ACTOR OR ACTION?

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Abstract

The hybrid roles of state enterprises (SEs) in international investment disputes have puzzled international arbitrators and commentators, resulting in conflicting decisions on whether SEs should be considered private corporations or agents of states. This Article contributes to resolving this puzzle by providing the most updated and systematic case studies of investor-state disputes involving SEs. It identifies two competing methodologies developed by international tribunals to determine the roles of SEs: one is an "actor-focused analysis," which emphasizes the general characteristics of the SEs; and the other an "action-focused analysis," which targets their specific conduct. The methodological differences among tribunals result in competing decisions, creating tensions in international law, also present challenges to domestic regulatory frameworks concerning SEs' internationalization.

The Article evaluates and compares the two competing legal methodologies from both doctrinal and policy perspectives. Responding to criticisms of the action-focused methodology in existing literature, this Article argues that the action-focused methodology is supported by authoritative international law sources, including the text, history, and commentaries of international treaties and customary international law. The action-focused approach is also more sensible as a policy matter, because it creates a more effective and responsive arbitral procedure, ensures the consistency of international investment arbitration, and increases the coherence of international law. It also better serves domestic policy goals among national security, fair competition, and economic development.

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I. Introduction

The acceleration of state participation in international investment has generated world-wide policy confusion and disputes. Unfortunately, international investor-state dispute settlement (ISDS) has not yet formed a clear rule concerning the legal standing of state enterprises (SEs) in these disputes: when should a SE be treated as representing a sovereign state, and when should it be regarded as a business investor? To answer the critical question, this Article conducts a systematic review of publicized investment arbitrations involving SEs. It finds that arbitrators, the quasi-judges of ISDS, have formed two competing legal methodologies concerning the roles of SEs in investment disputes.

One methodology is what this Article will call the "actor-focused analysis." It examines mainly, if not exclusively, the general and fixed characteristics of an entity, including its ownership and institutional purpose, to determine whether the enterprise should be treated as a governmental agency. The actor-focused analysis shares the popular assumption that SEs are the alter egos of states if they are publicly owned or controlled, and fulfill public purposes.

Yet some other tribunals adopt what this Article will categorize as the "action-focused analysis." Unlike the former analysis that asks the "who they are" kind of questions, it places greater emphasis on the "what they do" aspect, the nature of the specific conduct of a SE in a dispute. This approach began with the landmark case *CSOB*. In *CSOB*, after considering the nature of a SE's conduct, the tribunal concluded that the specific wrongful acts of the SE were not governmental, even though the SE was established for public purposes and was wholly state-controlled.[1] The approach taken in *CSOB* thus departs from the previous actor-focused orientation. It scrutinizes the particular actions of SEs rather than their general characteristics. The *CSOB* tribunal has been questioned and criticized by many professionals and scholars, though nevertheless been followed in more recent cases.[2]

1. Československa Obchodní Banka AS v. Slovak Republic, ICSID Case No. ARB/97/4, Objections to Jurisdiction (May 24, 1999), 14 ICSID Rev.–Foreign Inv. L. J. 251 (1999).

2. *See* Gavrilović and Gavrilović d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39, Award (July 26, 2018); *see also* Beijing Urban Construction Group Co. v. Republic of Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction (May 31, 2017). In *Gavrilović* case, the plaintiffs sued Croatia at ICSID claiming that a Croatian Fund in charge of privatization of Croatian SOEs and a Croatian SOE have harmed their investment, thus the state should compensate the investors. The SOE is on the respondent side. In *Beijing Urban Construction Group Co.* case, the SOE is the claimant. Beijing Urban Construction Group Company Limited (BUCG) is a Chinese state-owned enterprise. It entered into a construction contract with the Yemen Civil Aviation and Meteorology Authority through an international tender process for a new

Debates now surround these two conflicting methodologies for understanding the roles of SEs and regulating their global investment. The legal identity issue of a SE is practically acute because it will determine the jurisdiction of disputes, the qualified parties' standing in the proceedings, and the scope of liability. An international tribunal has a pressing need to decide whether a SE involved is a governmental agent or a business entity.

The underlying tension of policy implications is also significant. Regulation of SEs' international investment is now at crossroads. Recent mega-treaties have started to include provisions dealing with transnational investment of SEs, including the Comprehensive and Progressive Trans-Pacific Partnership and the Trans-Atlantic Trade and Investment Partnership, which the United States had been actively promoting. Yet under the Trump Administration, the United States gave up its leadership in both fora.[3] More pernicious, it recently amended its investment rules and ditched a fundamental principle that investors and firms should be treated equally regardless of their identity.[4] The geopolitical rivalry hurts investors, SEs, and private firms alike, and the global value of cross-border investment sank by about twenty percent in 2018 suffering drawbacks of identity politics in international businesses.[5]

It remains unclear whether future international investment treaties would be actor-focused or action-focused. In the current global context of rising populist nationalism and protectionist backlash, a proper international policy should strike a balance: on the one hand, keeping domestic markets open to international capital for more business

international terminal building in Yemen. The SE alleged that the Yemen government unlawfully deprived BUCG of its investment in Yemen. Later, the Yemen authority terminated the contract. BUCG filed the case to the ICSID.

3. Ylan Q. Mui, *Withdrawal from Trans-Pacific Partnership Shifts U.S. Role in World Economy*, WASH. POST (Jan. 23, 2017), https://www.washingtonpost.com/business/economy/withdrawal-from-trans-pacific-partnership-shifts-us-role-in-world-economy/2017/01/23/05720df6-e1a6-11e6-a453-19ec4b3d09ba_story.html.

4. Foreign Investment Risk Review Modernization Act (FIRRMA) of 2018, Pub. L. No. 115–232, § 1701, 132 Stat. 2174 (2018). The initially proposed FIRRMA 2017 draft defines such countries as "a country that poses a significant threat to the national security interests of the United States." However, it does not require CFIUS to maintain such a list, at least for the public. *See* Foreign Investment Risk Review Modernization Act of 2017, H.R. 4311, 115th Cong. § 3(4) (2017) (for the definition of "Country of Special Concern"); *see id.* § 15(17) (for the definition of "Factors to be Considered"). The final version of FIRRMA in 2018, however, still includes the expression of "country of special concern".

5. *The Steam Has Gone Out of Globalisation*, ECONOMIST (Jan. 24, 2019), https://www.economist.com/leaders/2019/01/24/the-steam-has-gone-out-of-globalisation.

opportunities and domestic development; on the other, addressing the domestic concerns of national security, fair competition, and good corporate governance.[6] Such a policy balance should be controlled and realized by the rule of law, which requires due procedure, consistency, predictability, and comprehensiveness.

Against this backdrop, this Article aims to contribute to the current literature in two ways. First, it explains that over time ISDS tribunals produced conflicting decisions on the roles of SEs because they adopt different legal methodologies. It thus provides a unified theoretical framework to categorize the existing cases.

Second, this Article checks these two competing legal methodologies with treaty law and also with policy discussions. From a legal perspective, this article questions the popular presumption of the actor-focused methodology that SEs are agents of governments due to their public ownership and purposes. Instead, it finds that the action-focused methodology is actually supported by various sources of international law. As for policy concerns, the preoccupation of investors' identity based primarily on their general characteristics has also clashed with the need for a more deliberative discourse of SE global investment whereas the action-focused analysis increases the efficiency of procedures, consistency of case law, coherence among international regimes, and flexibility of domestic policy considerations. The action-focused methodology is not only legally valid, but also a sound policy.

The Article proceeds as follows. Part II provides a summarized description of international investment dispute resolution mechanisms and explains why the unsettled role of SEs becomes a compelling issue. Parts III and VI turn to arbitral cases that discuss the roles of SEs. These two parts will highlight key cases and depict how the actor-focused and action-focused legal analysis have been created and developed. Part V examines the two competing approaches with treaty law and customary international law. Although no specific rules detail the status of SEs in international investment arbitrations, the commonly-referenced rules distinguish SEs from states by their conduct, which justifies the action-focused methodology. Part VI uses the two approaches as a framework to pivot into a broader policy discussion on SEs' international practices. This part finds that the action-focused approach is also desirable through policy considerations. The final section concludes and discusses the policy implications of this study.

6. OECD, *State-Owned Enterprises in the Development Process*, OECD-ILIBRARY.ORG (Apr. 23, 2015), http://dx.doi.org/10.1787/9789264229617-en.

II. The Issue in a Nutshell: The Roles of State Enterprise in Investment Disputes

The past decades have witnessed a greater mixture of private and public capital around the world. One such blending is the privatization of SEs, where private capital is invested in public companies that were initially wholly-owned and controlled by governments.[7] Another example of this private-public intermarriage is the increased purchase by SEs of assets from foreign private companies, and these SEs have learned from their private competitors to improve corporate governance and business performance in an effort to attract more investors from the public market. Even state-controlled enterprises are thus sometimes practically indistinguishable from entirely privately-owned enterprises.[8]

The intermarriage of private and public capital raises challenges for international dispute resolution mechanisms, which used to draw a clear line between private legal persons and public states. Specifically, if an investment dispute is between two private companies, it is a *contract* dispute and the parties should resolve their dispute according to the dispute resolution clause in the investment contract. If a dispute occurs between two public states, it is a *state-state* dispute and the two states can either negotiate or go to international judicial bodies to resolve their conflicts. If disputes arise between an investor and a state, they usually go to *investor-state* dispute settlement (ISDS). International investor-state arbitration is the principal dispute resolution method with the International Centre for Settlement of Investment Disputes (ICSID) as the major forum.[9]

The critical legal issue for all the SE-involved investment disputes is: when should the SE in question be regarded as a private corporation, and when as a public state entity? Uncertainty about this question would threaten the long-term stability and workability of international dispute resolution mechanisms since the roles of SEs determine the key issues in the dispute resolution proceedings, including the

7. U.N. Conf. on Trade & Dev., *World Investment Report 2019 Special Economic Zones*, unctad.org 6, 15 (2019), https://unctad.org/en/PublicationsLibrary/wir2019_overview_en.pdf.

8. *See generally* OECD, *Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices*, oecd.org 23–35 (2018), http://www.oecd.org/corporate/Ownership-and-Governance-of-State-Owned-Enterprises-A-Compendium-of-National-Practices.pdf.

9. The International Centre for Settlement of Investment Disputes (ICSID) was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (The ICSID Convention). It was established as a part of the World Bank Group after the World War II, in promoting the settlement of investment disputes between state members and foreign investors. ICSID, https://icsid.worldbank.org/en/ (last visited Feb. 26, 2020). *See generally* Antonio R. Parra, The History of ICSID 1–2 (1st ed. 2012).

jurisdiction of the case ("Who should judge the case?"), the proper parties ("Who should pay the compensation?" and "Who should be compensated?"), and the scope of the liability ("What should be compensated?").

For instance, imagine a private investor *i* planning to invest in a highway construction project in a foreign country *S*. A SE called *s* of country *S* participates as *i*'s joint venture partner to build certain parts of the project. However, for some reason, *s* stops working and, even worse, takes away all the machines that *i* has invested. Now that its investment is sunk, the foreign investor *i* has two choices to solve the problem, as shown in the table below: (1) it can sue *s* as a private company under the dispute resolution clause in their contract, or; (2) it can argue that the SE *s* is an agent of the state and thus sue the state *S* in an international investor-state arbitration and ask the state *S* to compensate for the wrongdoings of *s* according to the treaty. The role of the SE is therefore crucial to determine the forum, the parties to the dispute resolution, and the scope of liability.

In another scenario, suppose a SE *s* plans to invest in an airport terminal project in a foreign country *C*. However, the local government for some reason stops the SE *s* from working on the construction site and takes away all the machines that it has invested. Now the project is terminated and the SE *s* suffers a huge loss on its investment. It also has two choices as shown at the bottom of the table: (3) *s* can either sue the government of state *C* in investor-state arbitration as a foreign investor, or; (4) the SE *s* can claim to represent the government of State *S* and settle with the government of the host State *C* through state-state dispute resolution.

TABLE 1: THE ROLES OF SEs IN INVESTMENT DISPUTE RESOLUTION MECHANISMS

	SE as business entity "s"	**SE as governmental agent "S"**
SE as Respondent	(1) Contract dispute *i-s*	(2) Investor-State dispute *i-S*
SE as Claimant	(3) Investor-State dispute *s-C*	(4) State-State dispute *S-C*

The above table is a simplified version of the complex reality where the hybrid role of SEs is more and more frequently debated by parties in investment disputes. Consequently, the role of SEs becomes an acute

legal problem that needs to be solved by international tribunals when determining their jurisdiction over disputes, the proper parties' standing in the disputes, and the scope of the investment compensation.

The following case studies show that investment arbitration tribunals have developed two different methodologies to analyze the problematic roles of SEs in ISDS: some tribunals generally examine the ownership and purpose of SEs while others specifically emphasize their particular conduct in the disputes. The next two sections of this Article will summarize the cases falling under the "actor-focused methodology" and the "action-focused methodology" respectively and describe how these two approaches resulted in conflicting decisions by different ISDS tribunals.

III. The Actor-Focused Methodology: Ownership and Purpose

When ISDS tribunals analyze the role of SEs, one approach is to look at their general characteristics, mainly focusing on the ownership structure and the domestic purpose of a SE in question.

This methodology has a relatively long history. ISDS, by definition, deals with disputes between investors and states, which means that an investor needs to provide evidence that a state is involved in his case in order to go to ICSID for dispute settlement. When the dispute arises not directly between the investor and the state, but between an investor and a local SE of that state, the state usually argues that the dispute is between two corporations to avoid involving itself in a contract dispute. However, in early investment cases involving SEs, the tribunals did not discuss the role of SEs with substantial detail.[10] They established the jurisdiction so long as the claim was against states and there was prima facie evidence of state culpability.[11] Without analyzing the role of SEs and their relationship to states, however, the tribunals bear the risk that they are intervening in a contract dispute between investors and SEs where they do not have jurisdiction in the first place. This problem was discussed at length by the *Maffezini* tribunal, which eventually developed a two-part evaluation of the role of the SE in question.[12] Since then, more cases followed *Maffezini*'s approach, which understands SE

10. *See, e.g.*, Amco Asia Co. v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction (Sept. 25, 1993); Tradex Hellas SA v Albania, Decision on Jurisdiction, ICSID Case No. ARB/94/2, Decision on Jurisdiction (Dec. 24, 1996); Wena Hotels Ltd. v. Egypt, ICSID Case No. ARB/98/4, Decision on Jurisdiction (May 25, 1999).

11. *See* cases cited *supra* note 10.

12. *See* discussion *infra* Section III.A.

identities by their fixed characteristics, including ownership and domestic purpose.[13]

A. *The* Maffezini *Two-Part Test*

In 1989, Mr. Maffezini from Argentina and a Spanish SE planned to establish a joint company, "EAMSA," to produce and distribute chemical products in Spain.[14] During the preparation for the establishment of EAMSA, the parties faced some financial difficulties.[15] In early 1992, Maffezini ordered the construction to stop and dismissed the EAMSA employees.[16] Later, his attorney approached the SE and invited it to cancel all outstanding debts owed to it by the joint company and Maffezini in exchange for EAMSA's assets.[17] The SE accepted the offer only years later.[18] However, Maffezini did not follow up on the SE's delayed acceptance.[19] Instead, he filed an ICSID arbitration claiming that the misconduct and the delayed acceptance of the SE amounted to an expropriation attributable to Spain.[20]

The tribunal asserted a two-part evaluation of the ownership structure and the function of the SE to determine whether the SE stood as a state entity in this dispute. First, the tribunal examined the creation and capital ownership of the SE: "[the fact that] the entity is owned by the State, directly or indirectly, gives rise to a rebuttable presumption that it is a State entity."[21] Besides the ownership test, the tribunal also looked into the domestic motivations of establishing the entity. The tribunal presumed that "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," then this entity should be regarded as a state in international investment.[22] Specifically, the SE in the dispute was established by Spain to promote regional

13. *See* discussion *infra* Section III.B.

14. Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award, ¶¶ 39–41 (Nov. 13, 2000), 5 ICSID Rep. 419 (2002).

15. *Id.* ¶ 42.

16. *Id.* ¶ 43.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* ¶ 44.

21. Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, ¶ 77 (Jan. 25, 2000), 5 ICSID Rep. 396 (2002).

22. *Id.*

development.[23] The tribunal pointed out that many other countries have created regional development organizations, including state entities and regional agencies.[24] Thus, the SE, in this case, was presumed to be a state entity for regional development because its objectives and tasks are not usually carried out by private entities.

By examining the ownership structure and the domestic purposes of the SE while avoiding analyzing the alleged wrongful acts that caused the disputes, the tribunal was satisfied that the claimant had successfully made out a case where the SE in question was a state entity.[25]

B. Maffezini *Followers*

The *Maffezini* two-part test has been repeatedly cited and applied with minor variation by later tribunals to determine the legal status of SEs in investment disputes.

In *Consortium RFCC v. Morocco (2001)*, a consortium of five Italian companies (RFCC), won a bid from a Moroccan SE responsible for the construction and operation of highways. The parties entered into a contract in 1995. Due to issues with the performance of the contract, RFCC negotiated an amendment that extended the construction deadlines with the Morocco Ministry of Equipment. After the performance deadline passed, the parties had different understandings of the accounting: the SE sent out a detailed accounting to RFCC with financial penalties for RFCC's delayed performance, but RFCC refused to sign the accounting statements. Instead, it sent back a memorandum outlining the amounts that it believed the SE was owed. The Moroccan SE did not respond to RFCC and proceeded to enforce credit guarantees of RFCC secured previously in a Moroccan bank. RFCC then filed a request for arbitration at ICSID seeking damages resulting from the financial penalties imposed by the SE, the enforcement of the credit guarantees, and other discriminatory treatment by the Moroccan government.[26]

23. *Id.* ¶¶ 83–87.

24. *Id.* ¶ 88.

25. The *Maffezini* tribunal also made it clear that "[w]hether SODIGA is responsible for the specific acts and omissions complained of, whether they are wrongful, whether all these acts or omissions always were governmental rather than commercial in character, and, hence, whether they can be attributed to the Spanish State, are questions to be decided during the proceedings on the merits of the case." *Id.* ¶ 89.

26. Consortium R.F.C.C. v. Kingdom of Morocco, ICSID Case No. ARB/00/6, Award, ¶¶ 3–10 (Dec. 22, 2003), 20 ICSID Rev.–Foreign Inv. L. J. 391 (2005).

The tribunal cited the *Maffezini* two-part test in its legal analysis of the SE in question. First, under the capital structure test, the tribunal examined the capital sources and the structure of the corporate operation, especially how directors were selected. As for the domestic purpose test, the tribunal examined the articles of incorporation of the SE and concluded that since the company was established for public purposes, the SE in question was acting on behalf of Morocco.[27]

In *Helnan Hotels vs. Egypt (2006)*,[28] Helnan International Hotels signed a contract with an Egyptian SE to operate Shepheard Hotel in Egypt. After disputes arose between parties about the implementation of the contract, Helnan Hotels filed an investor-state arbitration in ICSID. The *Helnan Hotels* tribunal specifically considered several features of the SE under the *Meffezini* two-part test, including the memorandum and articles of association, the structure of its general assembly and board of directors, its initial empowerment and funding, and its general function in the domestic industry.[29]

Similarly, in *Saipem vs. Bangladesh (2007)*, Saipem, an Italian company, entered into a contract with a Bangaladesh SE, Petrobangla, to build a pipeline in Bangladesh. Yet, years later, Saipem submitted a claim against its contract partner that an expropriation took place as a result of the combined actions by a Bangladesh SE and Bangladesh

27. Consortium R.F.C.C. v Kingdom of Morocco, ICSID Case No. ARB/00/6, Decision on Jurisdiction, ¶¶ 35–37, 40 (July 16, 2001), 20 ICSID Rev.–Foreign Inv. L.J. 391 (2005). Interestingly, the decision on jurisdiction rendered in Salini v. Morocco is similar to the decision on jurisdiction rendered the same day in the case of Consortium R.F.C.C. v. Morocco, which involved the same respondent, similar facts, similar submissions substantiated by the same rules, and identical findings by the arbitral tribunal made up of the same persons.

28. The detailed facts can be summarized as follows. On October 15, 2002, an annex to the Contract was signed between EGOTH, an Egyptian SE, and Helnan International Hotels for the operation of the Shepheard Hotel in Egypt. The annex indicated that, as part of the privatization program of Egypt, the Shepheard Hotel could be sold by EGOTH under the Contract or its right to receive appropriate compensation. On October 2, 2003, EGOTH initiated an arbitration procedure against Helnan pursuant to the arbitration clause included in the Contract providing for arbitration under the aegis of the Cairo Regional Centre for International Commercial Arbitration. On December 4, 2004, an award was issued which terminated the Contract, ordered Helnan to hand over to EGOTH the Shepheard Hotel, and condemned EGOTH to pay Helnan the amount of EGP 12.5 million. Helnan's request to set aside the award was dismissed by the Cairo Court of Appeal on June 7, 2005. On March 23, 2006, EGOTH took over the Shepheard Hotel. *See* Helnan International Hotels A/S v. Arab Republic of Egypt, Case No. ARB/05/19, Objections to Jurisdiction, ¶¶ 1–7 (Oct. 17, 2006), Oxford Rep. Int'l L.–Int'l Inv. Claims (I.I.C.) 130 (2006).

29. *Id.* ¶ 92.

courts.[30] Bangladesh did not dispute that the courts were part of the state but argued that the tribunal had limited jurisdiction because the acts of the SE could not be attributed to the state.[31] The tribunal inspected the purpose of the SE in domestic decrees and found no reason why the tribunal should not find the SE "qualif[ied] as a state organ at least de facto".[32]

The tribunals of the above *Maffezini*-like cases focus on the general and relatively fixed characteristics of SEs, their ownership, and the domestic purpose. They do not examine their specific acts in the disputes and how the disputing acts are related to the state. Neither do they require the tests of ownership structure and domestic purposes to be satisfied cumulatively or at a certain level.[33] The underlying methodology of the above cases remains consistent: SEs are often, if not always, presumed to be agents of states so long as there is evidence showing that the entities are publicly owned and for domestic public purposes.

IV. The Action-Focused Methodology: The Nature of Conduct

Unlike some tribunals adopting the above actor-focused approach that identifies SEs by their general characteristics, other tribunals chose to analyze the alleged conduct of SEs in the specific context at hand to understand their role. This action-focused methodology was first applied in the case of *CSOB v. Slovak*.[34]

Part IV will begin with the details of this landmark case, especially its legal reasoning, which focuses on the specific disputed acts of the SE involved, despite the fact that the SE involved is wholly controlled by the state and operated for public purposes. After *CSOB* established this

30. Saipem S.p.A. v. People's Republic of Bangladesh, Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 42 (Mar. 21, 2007), 22 ICSID Rev.–Foreign Inv. L. J. 100 (2007). The facts of the case can be summarized as follows: Saipem SpA was an Italian company which contracted with Bangladesh and its SE Bangladesh Oil Gas and Mineral Corporation (Petrobangla) on February 14, 1990 to build a gas pipeline in northeast Bangladesh. The completion of the project was subsequently delayed with the parties disagreeing over the reason for the delay. Subsequently, a dispute arose between the parties in negotiations regarding the amount of compensation due to Saipem on account of the delays. Saipem initiated an investor-state arbitration in ICC, while Petrobangla filed an action in a local court to revoke the decisions of the ICC. Saipem later filed a request for arbitration in ICSID arguing that the combined actions of Petrobangla and the court were attributable to Bangladesh. *See id.* ¶¶ 1–36.

31. *See id.* ¶¶ 1–36.

32. *Id.* ¶149.

33. Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, ¶ 81 (Jan. 25, 2000), 5 ICSID Rep. 396 (2002).

34. Československa Obchodní Banka A.S. v. Slovak Republic, ICSID Case No. ARB/97/4, Objections to Jurisdiction (May 24, 1999), 14 ICSID Rev.–Foreign Inv. L. J. 251 (1999).

new framework, many other tribunals adopted similar methodologies, thus forming a competing approach to the actor-focused one. However, the *CSOB* approach has also received much criticism, as will be summarized at the end of this part.

A. *The* CSOB *Transition*

The story goes back to the early 1990s when banks in Central and Eastern Europe had great difficulty remaining solvent and competitive as the countries in that region transformed from state-run economies to private-market economies.[35] Most state-owned banks became the subjects of privatization in their own countries. Ceskoslovenska Obchodni Banka (CSOB) was one such bank.[36] After the privatization and restructuring process, CSOB eventually became a commercial bank under Czech law, and it was partially owned by both the Czech Republic and Slovakia.[37]

During the restructuring process, CSOB and both states came into a package of consolidation agreements, under which CSOB established one collection company in each state, and the non-performing loan portfolio receivables of CSOB were assigned to the two collection companies.[38] To help the collection companies better collect the receivables, CSOB transferred necessary funds to both companies by way of loans to enable them to finance the assigned receivables and to pay their nominal value back to CSOB.[39] Both the Czech Republic and the Slovak Republic had agreed with CSOB on a provision in the contracts that they would "cover any losses" of their collection companies respectively.[40] Unfortunately, the Slovak collection company stopped all the activities and went bankrupt. CSOB then filed a case with ICSID requiring Slovakia to compensate for investment damages.[41]

35. Československa Obchodní Banka A.S. v. Slovak Republic, ICSID Case No. ARB/97/4, Award, ¶ 18 (Dec. 29, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0146_0.pdf.

36. At the same time, political changes also took place in these countries. After the dissolution of Czechoslovakia at the end of 1992, the succeeding Czech and Slovak Republics were involved in the restructuring of CSOB.

37. Československa Obchodní Banka A.S. v. Slovak Republic, ICSID Case No. ARB/97/4, Award, ¶ 21 (Dec. 29, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0146_0.pdf.

38. *Id.* ¶ 27.

39. *Id.* ¶¶ 28–30.

40. *Id.* ¶¶ 35–37.

41. *Id.* ¶¶ 43–46.

The first issue before the CSOB tribunal was whether it had jurisdiction at all over the case. Respondent Slovakia, citing the cases that adopted the actor-focused methodology, pointed out that Claimant CSOB was publicly-owned and operated for public purposes, thus it was an agent of the Czech Republic and could not initiate an ICSID arbitration as an investor.[42] Slovakia further argued that since the "real party in interest" was the Czech Republic, the tribunal had no jurisdiction over the dispute between the two states.[43] According to the respondent, the claimant was "disqualified . . . from stepping into CSOB's shoes."[44] The tribunal, however, denied respondent's claim after developing a new test to determine the role of the SE in question, whether CSOB was acting as a private investor or as an agent for the government.

The tribunal started its analysis with the evidence of the entity. It examined the motivations in the establishing process of CSOB, the control of shares and capital structure of the company, and its corporation decree. With this evidence, the tribunal concluded that "CSOB acted on behalf of the State in facilitating or executing the international banking transactions and foreign commercial operations the State wished to support and that the State's control of CSOB required it to do the State's bidding in that regard."[45] The reasoning thus far was similar to the actor-focused approach that looks at the general domestic functions of the SE. However, the CSOB tribunal continued to examine the actions of CSOB in the particular dispute, finding that the governmental characteristics of CSOB under the actor-focused analysis do not necessarily mean that all the acts of CSOB were also governmental.

The tribunal thus introduced a novel test: "in determining whether CSOB . . . exercised governmental functions, the focus must be on the nature of these activities and not their purpose."[46] After looking into the specific activities of CSOB in the dispute, the tribunal found that "[w]hile 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."[47] Consequently, CSOB was regarded by the tribunal as a private investor, not as an agent of the state.

42. Československa Obchodní Banka A.S. v. Slovak Republic, ICSID Case No ARB/97/4, Objections to Jurisdiction, ¶ 15 (May 24, 1999), 14 ICSID Rev.–Foreign Inv. L. J. 251 (1999).

43. *Id.* ¶¶ 28–32.

44. *Id.* ¶ 28.

45. *Id.* ¶ 20.

46. *Id.*

47. *Id.*

The significance of CSOB is that, when the tribunal identified the role of the SE, it explicitly gave priority to the specific conduct of the SE while admitting that the entity had public characteristics, including its public ownership and domestic regulatory purposes, and thus departed from the actor-focused methodology.

B. CSOB *Followers*

The action-focused approach was not only adopted when SEs stand as claimants. In cases where SEs were alleged as agents of respondent states, some tribunals also followed the *CSOB* reasoning and emphasized the examination of the acts of SEs rather than their general characteristics to determine whether the SE in question should be regarded as a state.

Impregilo vs. Pakistan (2005) is one such example. On December 19, 1995, Impregilo, an Italian investor who owned part of a local joint venture in Pakistan, concluded two contracts with a Pakistani state-owned entity.[48] Under the contracts, the joint venture was supposed to finish certain hydro-electric constructions within a time frame, and the Pakistani SE would pay approximately $500 million to the joint venture.[49] However, the construction was much delayed due to, as the Italian investor claimed, obstacles created by the local authority.[50] What was worse, Italy changed its security policy after 9/11, forcing the key managers of the joint venture to leave the construction site.[51] The joint venture then asked the SE to suspend the construction, but the local engineers and the employees refused to quit their jobs. Later, the Italian investor brought the dispute to the ICSID.[52]

The tribunal followed the methodology created in *CSOB* without explicitly quoting it. The tribunal first scrutinized the general characteristics of the SE, including the provisions of the legislation by which it was established, as well as the control of its board and the employees. The tribunal decided that the Pakistani SE should be properly characterized as "an autonomous corporate body, legally and financially distinct from

48. Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction, ¶ 13 (Apr. 22, 2005), Oxford Rep. Int'l L.–Int'l Inv. Claims (I.I.C.) 133 (2005).

49. *Id.* ¶¶ 13–14.

50. *Id.* ¶¶ 15–22.

51. *Id.* ¶¶ 23–24.

52. Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction, ¶ 25 (Apr. 22, 2005), Oxford Rep. Int'l L.–Int'l Inv. Claims (I.I.C.) 133 (2005).

Pakistan," notwithstanding the fact that the government of Pakistan exercised strict control over this SE.[53]

Then the tribunal drew a clear distinction between the acts of a public entity that violated international law and the conduct by a legal entity that breached a municipal law contract. The tribunal held that if the alleged activity of the SE in the dispute was an act breaching a contract, the international rules of state responsibility and attribution should not apply. In other words, "only the State in the exercise of its sovereign authority . . . and not as a contracting party, may breach the obligations assumed . . . under the treaty."[54]

With the same action-focused approach, in *Toto v. Lebanon (2009)* the tribunal found that an SE, though enjoying independent legal status under domestic law and operating autonomously, acted de facto in the dispute on behalf of the state and thus should be regarded as an agent of the state in that particular context.[55] The dispute arose from a construction contract entered into between a Lebanese entity and Toto as the investor. Under the contract, Toto undertook to build a section of a highway in Lebanon.[56] Toto alleged later that the Lebanese entity and its successor, acting on behalf of the Lebanese government, created numerous problems for Toto and refused to take adequate corrective measures.[57] These actions and omissions, according to Toto, caused material damage to the construction of the highway and eventually jeopardized Toto's investment in Lebanon.[58]

The tribunal examined the public control and the funding source of the SE in question and found that it had a distinct legal personality and enjoyed administrative and financial autonomy under Lebanese law.[59] However, the tribunal reasoned that since the "acts and/or omissions [of the SE are] in the exercise of governmental authority," they would still be attributable to Lebanon under the International Law Commission (ILC) articles.[60] The tribunal did not solely focus on the domestic functions of the SE, but analyzed its specific activities in the investment project and whether these activities involve certain public

53. *Id.* ¶¶ 199–209.

54. *Id.* ¶ 260.

55. Toto Costruzioni Generali S.p.A. v. Lebanese Republic, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶¶ 51–60 (Sept. 11, 2009), Oxford Rep. Int'l L.–Int'l Inv. Claims (I.I.C.) 391 (2009).

56. *Id.* ¶ 16.

57. *Id.* ¶¶ 17–25.

58. *Id.* ¶ 26.

59. *Id.* ¶ 46.

60. *Id.* ¶ 47.

functions in that particular context. As the tribunal highlighted in the reasoning, the SE "exercised Lebanese governmental authority when it entered into the [investment] Contract with Toto."[61] Thus, the conduct of this entity, although independent in domestic law, had to be considered as an act of the Lebanese state.

A more recent case is *BUCG vs. Yemen (2017)*, in which a Chinese provincial SE, Beijing Urban Construction Group Company (BUCG), entered into a construction contract with the Yemen Civil Aviation and Meteorology Authority in 2006 after BUCG won a bid to construct a new international terminal building in Yemen.[62] BUCG filed a claim at ICSID, arguing that the Yemeni authority unlawfully deprived BUCG of its investment in Yemen by employing military forces and a security apparatus to assault and detain BUCG's employees and forcibly deny BUCG's access to the project site and thus its ability to perform its contractual obligations.[63] BUCG insisted that it would have completed the project and earned a profit if it had not been prevented from performing the contract by the Yemeni government.[64]

The Yemeni authority, however, copied the actor-focused reasoning in *Maffezini* and challenged the jurisdiction of the tribunal, arguing that BUCG acted as an agent of the Chinese Government and discharged governmental functions in its "ostensible commercial undertakings."[65] Accordingly, BUCG did not qualify as a "national of another Contracting State," and its claims against Yemen should be dismissed, as the tribunal lacked jurisdiction under the ICSID Convention, Article 25.[66]

In response, the tribunal rejected the actor-focused methodology in *Maffezini* and held that "[t]hese corporate controls and mechanisms are not surprising in the context of PRC [People's Republic of China] State-owned corporations. However . . . 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."[67]

To determine the nature of BUCG, the tribunal then scrutinized the acts of BUCG during the tender-bidding and contract-dealing processes. While the tribunal accepted that BUCG was a publicly-funded

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61. *Id.* ¶¶ 51–60.

62. Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No ARB/14/30, Decision on Jurisdiction, ¶¶ 22–23 (May 31, 2017).

63. *Id.* ¶¶ 23–25.

64. *Id.* ¶ 26.

65. *Id.* ¶ 29.

66. *Id.* ¶ 29.

67. *Id.* ¶ 39.

and wholly state-owned entity established by the Chinese Government, it concluded that BUCG was acting in a commercial capacity in relation to the investment contract.[68] In other words, BUCG, regardless of its ownership and domestic functions, did not act as an agent of the government or discharge any governmental functions in making its international investment related to the disputed construction project.

The above *CSOB*-like cases all adopted an action-focused approach: they emphasize the nature of the specific conduct of the SE involved in the international investment dispute when analyzing its role in the case, regardless of the ownership or the motivation of the SE under domestic legislation. If a particular act of an SE is an exercise of governmental authority, the SE is deemed to be a public entity representing the state government, and its liability can be attributed to the state accordingly. In contrast, if the act of an SE is commercial in nature, it is not a public entity and stands as a private party in the arbitration proceedings.

TABLE 2: DIFFERENCES BETWEEN ACTOR-FOCUSED METHODOLOGY AND ACTION-FOCUSED METHODOLOGY WHEN ANALYZING THE ROLE OF SE

	Actor-focused Methodology	**Action-focused Methodology**
Primary focus	General and rather fixed characteristics	Nature of specific conduct
Determinants	Ownership structure, domestic purposes of the entity (often refer to domestic legal documents or examine SEs' status in the domestic industry)	Activities of the SE in a particular international investment transaction

C. *Objections to the* CSOB *Approach*

Challenging the actor-focused tradition, the *CSOB* approach, focusing on the activities of SEs, has triggered a debate among academics. Critics frown upon the *CSOB* decision for several reasons.

The first criticism is that the *CSOB* tribunal departs too far from the ICSID Convention and the purposes of ISDS. Scholars argue that the motives of the World Bank that eventually led to the establishment of the ICSID indicate that the mechanism was supposed to be adopted

68. *Id.* ¶¶ 37–44.

only in disputes between private foreign investors and host states.[69] The preamble of the ICSID Convention, and, more specifically, Articles 25 and 27 of the Convention, show that the institution was established to fill a gap between state-to-state dispute resolution and dispute resolution between private parties.[70] Therefore, tribunals shall dig deeper into the underlying purposes behind the SEs. Otherwise, the door would be opened too wide for foreign investment disputes between the states, which are not covered in the Convention and would violate the purpose of the Convention to protect the private investment.[71]

The second category of criticism concerns the developing policy of the broader international law in SE-related practices. For instance, some critics cite Article 2(2) of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which provides that "[i]n determining whether a contract or transaction is a 'commercial transaction' . . . reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract have so agreed, or if, in the practice of the state of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction."[72] These comments argue that, because the *CSOB* tribunal devalued the purpose of SEs, its methodology is inconsistent with the current development of the broader international policy.

Furthermore, some scholars argue that current domestic concerns related to foreign SE investment are not reflected in the *action-focused* methodology. As they point out, the main concern nowadays surrounding SEs' foreign investment is that they may engage in behavior motivated by political rather than strictly commercial motivations. In other words, states may use the form of private enterprise to disguise political objectives. These domestic policy concerns are not related to the type

69. *See, e.g.*, Mark Feldman, *The Standing of State-Controlled Entities under the ICSID Convention: Two Key Considerations*, 65 COLUM. FDI PERSP. (2012).

70. *Id.*

71. *Id.*

72. G.A. Res. 59/38, annex, U.N. Convention on Jurisdictional Immunities of States and Their Property, art. 2(2) (Dec. 2, 2004); *see* HAZEL FOX, THE LAW OF STATE IMMUNITY 167 (2008) (regarding the Convention as an "authoritative written codification of the international law relating to State immunity" that "represents a coherent statement of the current international law based on State practice"); *see also* David Gaukrodger, *Foreign State Immunity and Foreign Government Controlled Investors*, OECD.ORG 12 (2010) (citing Jones v. Ministry of Interior of Saudi Arabia [2006] UKHL 26, [2007] 1 AC (HL) 270 ("Despite its embryonic status, this Convention is the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases . . . .")).

or nature of activities that SEs may engage in; they are related to the purposes and objectives behind the activities. Since the *CSOB* tribunal did not address these domestic concerns in its legal analysis, these scholars believe that its decision is unlikely to sit well with countries interested in closely policing the activities of SEs within their borders.[73]

The last category of criticism claims that the *CSOB* legal analysis had a unique political background, and it failed to establish an integrated roadmap, both of which would make it difficult to apply for future tribunals.[74] This type of refutation emphasizes that the *CSOB* dispute arose in unique circumstances of political context after the cold war that may not be relevant for future disputes.[75] Even if similar situations happen again in future cases, the outright dismissal of the relevance of "purpose" when examining SE activities lacks comprehensiveness.[76] The critics are not satisfied with the fact that the *CSOB* decision produced "only twelve paragraphs and referenced only a single source," whereas other arbitral decisions consistently result in "lengthy awards numbering hundreds of pages and citing large numbers of [existing] authorities and legal instruments."[77] Thus, according to this class of critics, *CSOB* was decided without the benefit of the avalanche of investment arbitration awards and associated academic discussions.[78] Since the *CSOB* approach does not identify a clear methodology to distinguish public entities from private corporations, the critics urge arbitrators to feel free not to adopt the inadequate reasoning in *CSOB* since it lacks comprehensiveness.[79]

To summarize the existing literature and the debates about the role of SEs in ISDS, major criticisms of *CSOB*'s action-focused methodology include: (1) it departs from the purposes of the investor-state arbitration, especially the purposes of the ICSID Convention; (2) it is inconsistent with the policy of broader international law that concerns SEs global presence; (3) it does not consider the developing policy in domestic regulations concerning SE foreign investment, and; (4) it

73. *See* Paul Blyschak, *State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protected?* 6 J. INT'L L. & INT'L REL. 1, 31 (2011).

74. *Id.* at 30–32.

75. *Id.*

76. *Id.* at 32.

77. *Id.*

78. *See* Sonia Yeashou Chen, *Positioning Sovereign Wealth Funds as Claimants in Investor-State Arbitration*, 6 CONTEMP. ASIA ARB. J. 299, 316–17 (2013).

79. *See* Walid Ben Hamida, *Sovereign FDI and International Investment Agreements: Questions Relating to the Qualification of Sovereign Entities and the Admission of Their Investments under Investment Agreements*, 9 L. PRAC. INT'L. CTS. TRIB. 17, 17–36 (2010).

lacks comprehensiveness because it creates a new framework without providing a clear and detailed roadmap for future tribunals.

The above critiques need to be discussed separately since some of them erred in legal interpretations while others raise legitimate policy concerns that deserve a closer look. Part V examines the international rules related to the SE investment and concludes that far from departing from the ICSID Convention, the action-focused analysis is actually supported by the provenance and purpose of the treaty and customary international law, especially the ILC Articles on State Responsibility, which identify the differences between private entities and public states on the basis of actions. Part VI then observes these two legal methodologies through the prism of policies, demonstrating that the action-focused approach not only is legally valid, but also could lead to better policy ends.

V. Revisiting the Rules

Tribunals of international investment arbitration often cite the ICSID Convention and the ILC Articles on State Responsibility to determine the role of the SE in ISDS. The ICSID Convention was signed by 163 states[80] in order to establish the International Centre for Settlement of Investment Disputes as a part of the U.N. system. Article 25 of the Convention identifies the jurisdiction of investor-state disputes, differentiating ICSID from state-state dispute resolution mechanisms and private settlements. The ILC Articles on State Responsibility were drafted by the International Law Commission as a codification of customary international law.[81] They cover situations where the liability of a private entity is attributable to a public state. This part will demonstrate that the above frequently quoted sources of international law, both treaty law and customary international law, actually support an action-focused legal analysis for determining the roles of SEs in investment disputes.

A. *The ICSID Convention*

Article 25(1) of the ICSID Convention lays down the general parameters of the jurisdiction of the investor-state arbitration. It includes substantive requirements of jurisdiction that only investment disputes

80. *Member States*, ICSID, https://icsid.worldbank.org/en/Pages/about/Member-States.aspx (last visited Feb. 26, 2020).

81. *See generally* James Crawford, The International Law Commission's articles on state responsibility: introduction, text, and commentaries (James Crawford ed., 2002).

between investors and states can go to ICSID, a forum specially established to deal with investor-state disputes:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, 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, which the parties to the dispute consent in writing to the Centre.[82]

The parameters laid down in Article 25 establish limitations on the cases that can be filed with ICSID: one party to the dispute must be "a Contracting State" of the Convention and the other party "a national of another Contracting State."[83] Since SEs have the characteristics of both public states and private corporations, their roles can potentially be identified as either an agent of the contracting state or a national of a contracting state in different investor-state dispute scenarios.[84] The following paragraphs will demonstrate respectively that in either scenario, the ICSID Convention requires international tribunals to focus on the conduct of the SE in question to determine its role and function.

1. SE as an Agent of the State

When a foreign private investor *i* and a local SE *s* cooperate in a foreign investment project in the host state *S*, the damages caused by the local SE *s* can be attributed to the state *S* if the SE exercises public functions in the disputed project. The private investor can go to international arbitration for compensation arguing that the SE is an alter ego of the state.

The parentheses in Article 25 of the ICSID Convention include certain types of SEs in the scope of agents of their states while excluding others as common corporations.[85] SEs acting on behalf of states may become agents of respondent states in ICSID proceedings, which gives foreign investors access to the ICSID mechanism to seek remedies. At the same time, the text within the parentheses also imposes certain requirements on such a possibility to avoid treating all SEs or subdivisions of states alike as agents of governments. The qualifications

82. Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 25, Oct. 17, 1966, 575 U.N.T.S. 159 [hereinafter The ICSID Convention].

83. *Id.*

84. *See supra* Table 1, Scenario (2) and (3).

85. CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 149–50 (2d ed. 2009).

especially require states to designate the SE to the center, and the parties in dispute to consent to the jurisdiction of the tribunal. The parentheses in Article 25 keep the gate of ICSID open narrowly to some, but not all, possible situations of investor-state disputes involving SEs.

The official records of the negotiations of this article, the *traveaux preparatoire*, reflect the intentions of the states to distinguish between different types of SEs according to their specific activities.[86] The claimant investor cannot bring an SE to ICSID arguing that the SE is an alter ego of the state merely based on the SE's public ownership. Instead, the claimant needs to show that the SE in question has approval from the public authority and acts according to this allocated authority in the dispute. The *traveaux* supports the action-focused analysis of SEs' roles, which requires a tribunal to analyze the alleged conduct of the SE in question on a case-by-case basis.[87]

More specifically, this case-specific approach was discussed during a legal committee meeting, as the *traveaux* records, where the delegate of the United Kingdom raised the question of whether the states' designation and authorization of their subdivisions or agents to the ICSID should be case-by-case or in general.[88] The delegate of the United States supported the case-by-case designation and suggested that states need to approve their subdivisions in ICSID proceedings for specific disputes.[89] In a show of hands, the majority of the delegates at the meeting supported this approach.[90] The Chairman of the Committee thus concluded that "it would place a burden on the investor who has to inquire whether an agency [e.g., a local SE] with which it wanted to deal had the required approvals"[91] in a specific dispute.

The above record of treaty negotiation reflects states' preference of separation between the general role of an SE in the domestic system and its specific role in an international investment case. While the former one can be determined by looking at the general purpose of the entity, the latter one inevitably requires tribunals to look into the specific activities of SEs in the context of a particular dispute, asking questions like "does an SE act as a governmental agency when making a deal with a foreign investor?" or "does the performance or the non-

86. WBG, *History of the ICSID Convention*, Vol. II, SID/LC/SR/19, 288–89, 321, 366, 393, 396–97, 446–47, 507 (Jan. 4, 1965).

87. *Id.* at 857–58; *see also* Chittharanjan Felix Amerasinghe, *The Jurisdiction of the International Centre for the Settlement of Investment Disputes*, 19 INDIAN J. OF INT'L L. 166, 185–86 (1979).

88. WBG, *supra* note 86, at 667, 702.

89. *Id.* at 858.

90. *Id.* at 859–60.

91. *Id.* at 858.

performance of the contract have any link with sovereign functions?" In other words, whether and to what extent an entity is state-owned and whether it has a separate legal personality in domestic law are of secondary importance in a particular international dispute.[92] The inquiry turns on whether the SE is performing certain public functions on behalf of a contracting state in the course of dealing with foreign investors in that specific dispute setting.

2. SE as an Investor/National

In a different situation, when an SE *s* invests abroad, it could claim remedies against the local government *C* in international investor-state arbitration if the host government expropriates the SE's investment and breaches its treaty obligation to protect foreign investment. Yet it remains unclear whether the SE can stand as an investor and resolve the dispute at ICSID because the ICSID Convention clearly applies to *private investment*, but it does not specify whether the Convention applies only to *private investors*.[93]

The issue of whether SEs shall have access to ICSID proceedings as an investor was raised during the discussions in preparation for the first draft of the Convention. One proposal broadly drew the notion of "nationals" and suggested that it should not be restricted to privately-owned companies, thus permitting a wholly or partially government-owned company to be a party in proceedings brought by or against a foreign state.[94] This proposal was debated, refuted, re-proposed, and re-discussed in the later process of the treaty negotiations.[95] In the final draft of the Convention, however, the concept of "national" remains unfortunately unclear and the question of whether SEs have access to the ICSID is left open.

This gap of the final text of the Convention was later filled by Aaron Broches, then Secretary of ICSID and the drafter of the Convention, who is regarded as the founding father of ICSID. He provided his comments regarding the Convention in 1972, which is well perceived by many scholars and arbitrators as the best guideline to determine

92. Chittharanjan Felix Amerasinghe, *Jurisdiction Ratione Personae under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 47 Brit. Y.B. Int'l L. 231, 233–34; SCHREUER, *supra* note 85, at 151.

93. *See* The ICSID Convention, *supra* note 82, Preamble. The first sentence in the Preamble of the ICSID Convention states explicitly: "[c]onsidering the need for international cooperation for economic development, and the role or private international investment therein . . . ."

94. WBG, *supra* note 86, at 230.

95. *Id.* at 307, 324, 401, 564.

whether an SE can stand as "a national" when it has investment dispute against a host state:"[i]t would seem [. . .] that 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."[96]

This "Broches Test" does not emphasize distinctions in the ownership of the investor at all. Instead, it recognizes the separation between the SEs and their shareholder states, treating SEs as nationals by default unless an SE acts as a governmental agency or discharges certain governmental functions.

Broches' comment supports the action-focused analysis of the SE in a specific context. Not only because he used the word "acting," but more importantly because he stated "is acting" rather than *acts* or *acted*.[97] This subtle difference with regard to language tenses suggests that the acts to be considered by an international tribunal in a particular case should not include previous or general activities unrelated to the specific dispute. In other words, whether an SE acts previously or generally for domestic public purposes shall not be the central concern in international arbitration; the key issue is the specific activity related to the dispute in question.

Broches also explained his reasons for this act-by-act analysis in his comments on the Convention. He wrote, "[t]here are many companies which combine capital from private and governmental sources and corporations all of whose shares are owned by the government, but who are practically indistinguishable from the completely privately owned enterprise both in their legal characteristics and in their activities."[98] His reasoning supports the view that the protection of foreign private investment does not necessarily exclude the investment from public-owned entities. Quite the opposite, he explicitly expressed that "[I]n today's world the classical distinction between private and public investment, based on the source of the capital, is no longer meaningful, if not outdated."[99] He interpreted the ICSID Convention to mean that ISDS has been designed to include private investments by SEs. The Convention requires tribunals to focus on the nature of the activities,

96. Aaron Broches, *Jurisdiction of the Centre*, 136 RECUEIL DES COURS 351, 354–55 (1972); *see also* SCHREUER, *supra* note 85, at 160 (emphasis added).

97. Broches, *supra* note 96, at 354–55.

98. *Id.* at 354.

99. *Id.*

rather than the characteristics of the actor when considering the role of the SE in question.

B. *The ILC Articles on State Responsibility*

The actor-focused methodology that presumes SEs as states because of their public purposes and ownership also conflicts with the International Law Commission Articles on State Responsibility (ILC Articles). The ILC Articles, published in 2001 after decades of discussion, are widely considered to be a codification of customary international law, peremptory norms, and obligations of states to the international community as a whole.[100] The ILC Articles establish the fundamental principle of "objective responsibility" of states[101] that does not focus on the purpose or the intent of the wrongdoer. Instead, the Articles specify the conditions under which certain conduct of non-state actors can be attributed to the state under international law and thus give rise to state responsibility.[102] The application of the ILC rules in investment arbitration calls for a focus on the nature of the acts of SEs, rather than their domestic purpose or general characteristics. The action-focused analysis is embedded in the general principles of the ILC Articles as well as the specific languages of Article 5 and Article 8, which discuss the roles of SEs under international law and their relationship with the states.

1. The General Principle of Objective Responsibility

One of the central provisions in the ILC Articles is Article 2[103] which requires two – and only two – elements to define an internationally wrongful act of a state: (1) conduct that can be attributed to the state, and (2) a breach of an international obligation by the conduct.[104] There is no distinct or separate requirement of fault or wrongful intent for an internationally wrongful act here.[105] As a general principle, the

100. In 1948, the United Nations General Assembly established the International Law Commission ("ILC") as a step towards fulfilling the U.N. Charter mandate of "encouraging the progressive development of international law and its codification." ILC established several work programs and selected fourteen topics, including state responsibility. The preparation for the ILC Articles started in 1956, yet it took 40 years until the first draft finally came out in 1996.

101. CRAWFORD, *supra* note 81, at 12.

102. *Id.* at 91–93.

103. *Id.* at 4.

104. *Id.* The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

105. *Id.* at 12.

evaluation of the state responsibility focuses on the conduct and the obligation, not the purpose or the intent.[106]

It follows, then, that when investor-state arbitration tribunals apply this principle of objective responsibility in investment disputes involving SE wrongdoings, the focus of their legal deliberation should be on the SEs' conduct and how that relates to state obligation under international law. If the alleged wrongful conduct of an SE can be attributed to the state, the states should take international responsibility, regardless of the SE's motivations.

2. Listed Acts Attributable to States

Another principle of the ILC Articles is that only the acts listed in Chapter II may be attributed to the state unless the state guarantees otherwise.[107] In the SEs' investment cases, SEs shall be regarded as the agents of public states only if their acts fall into the categories provided in Chapter II or recognized by the states.[108] Hence, a tribunal needs to determine the nature of the conduct of the SE covered in this list to conclude whether the shareholder state is liable for the wrongdoings of its agent.

By creating a list in the chapter, the ILC Articles include only certain activities of non-state actors as governmental conduct. This list has two purposes: first, "to [limit the] responsibility to conduct which engages the State as an organization"; and second, "to recognize the autonomy of persons [or entities] acting on their own account and not at the instigation of a public authority."[109] In theory, the conduct of any person, entity, corporation, or collectivities linked to a state could be attributed to the state; however, "such an approach is [explicitly] avoided. . .[i]n international law,"[110] which recognizes the separation between entities, including the separation between corporation and government in domestic law.[111] Basically, the structure of a state and the functions of its organs are not, in general, governed by international law.[112]

106. This general principle is not absolute. The commentaries on Article 2 also point out that special international rules, or *lex specialis*, may require examination on the motivations for certain states responsibility. Therefore, the establishing purpose or domestic motivations of SEs can only be considered when determining their role in international investments and when there are special arrangements made by parties.

107. CRAWFORD, *supra* note 81, at 93.

108. *Id.* ch. II.

109. *Id.* at 91.

110. *Id.*

111. *Id.* at 92.

112. *Id.*

International law respects state sovereignty and leaves states to decide how its SEs are to be structured and what functions are to be assumed by the government.

The downside of this conduct-specific approach, however, is that a state might escape its international responsibilities through a simple process of internal sub-division. A state can create domestic and legally independent organizations, like SEs, and allege that the conduct of these entities have no connections whatsoever with the state.

To address this potential abuse, the ILC Articles include in Chapter II a list of conditions under which the conduct of a non-state party can be attributed to the State.[113] This "limitative" and somewhat exclusive list of acts strikes a balance between keeping states' freedom of domestic regulation through SEs as policy tools and preventing the states from escaping its international obligations by creating SEs.[114] In other words, the ILC Articles do not hold SEs liable as states for their domestic regulatory or policy motivations. Only the acts of an SE that fall into the categories provided in Chapter II will trigger the state's responsibility under international law.

Articles 5 and 8 of Chapter II in ILC Articles involve the situations where the conduct of SEs can be attributed to the state. They are often cited by international investment tribunals and disputing parties when the role of the SE in question remains unclear. As the following paragraphs demonstrate in detail, both articles require an action-focused analysis of the conduct of the SE in a particular dispute.

3. ILC Article 5: Conduct Exercising Governmental Authority

Article 5 of Chapter II deals with the conduct of persons or entities exercising governmental authority:

> 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 governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[115]

113. *Id.* ch. II.
114. *Id.* at 93.
115. *Id.* at 100.

The "entity" in ILC Article 5 includes various forms of institutions that have certain governmental functions, including SEs.[116] For example, a state might have delegated certain powers to airline companies on immigration control, customs, and quarantine. Similarly, oil companies may need to reserve a certain portion of an oil field for military purposes.

The default rule in Article 5 recognizes the separation between a state and its companies, attributing conduct of an SE only when the following conditions are met: (1) the SE exercises elements of "governmental authority" that are typically exercised by the organs of that state, (2) the SE is "empowered by the law of that State" to exercise such functions, and (3) the specific conduct of the SE involved in an investment dispute with foreign counterparties must relate to the exercise of the governmental authority concerned.[117] The test in Article 5 examines only these three elements without inquiring about the purposes of the SE in question.

For the first "governmental authority" element, Article 5 does not attempt to establish a precise definition. Its commentaries suggest that this question depends on a particular society's history and traditions.[118] This country-by-country approach provides flexibility in considering the actual roles played by SEs in diverse geosocial contexts.

Second, entities need to be "empowered by internal law" to exercise the above governmental authority. Article 5 does not require that the entities act under state control; it only looks at whether the governmental authority is granted by some internal law to the SE. Other more general characteristics, including the ownership of the assets and the executive control, are not the decisive criteria.[119] This element turns on the acts: the internal law in question must specifically authorize the conduct in the case as exercising the state authority.[120] In other words, to hold an SE as the alter ego of the state under Article 5, it is not enough for a counterparty to provide prima facie evidence that an SE in question has public purposes. The counterparty must prove that the public purposes of the SE are authorized as governmental functions by internal laws of that state.

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116. *Id.*
117. *Id.*
118. *Id.* at 101.
119. *Id.* at 100.
120. *Id.* at 102.

The third element in Article 5 requires that the alleged wrongful conduct of the SE has a direct relationship to the authorized function.[121] Under this prong in Article 5, tribunals cannot simply look at the ownership structure and general purposes provided in the charter of an SE and conclude that all of its acts are governmental; nor should tribunals examine the past activities of the SE to infer the nature of its current conduct in the dispute. The tribunals need to analyze the alleged wrongdoings of the SE in the context of that particular dispute to determine whether the SE is exercising governmental authority.

In short, the above three conjunctive elements of this Article suggest an action-focused methodology. Under international law, a general delegation of public functions by domestic law is not enough to attribute an SE's acts to a state. It is thus improper to deem an SE as a state agent without looking at its conduct in particular contexts.

As exemplified by *BUCG v. Yemen*, the action-focused methodology has properly applied Article 5. In this case, the Respondent, Yemen, relied on a variety of Chinese governmental publications and directives to demonstrate that the domestic law empowers the Claimant, BUCG, a Chinese SE, with governmental functions.[122] BUCG was subject to the overall direction of a special committee that was the "representative of the state interests and the operation decision making organ, which should be responsible for the value maintenance and increment of the state-owned assets within the scope of authorisation."[123] Also, a People's Republic of China (PRC) document emphasized that BUCG shall "accept the supervision and inspection of Beijing State-owned Assets Supervision and Administration Bureau and Beijing Finance Bureau."[124]

The tribunal, in this case, discussed the three elements in ILC Article 5. The tribunal held that the case satisfied the first two requirements of Article 5, yet it failed to meet the third requirement that focuses on the specific conduct of the SE in the case.[125] After examining BUCG's participation in the airport project as a general contractor following an open international tender in competition with other contractors, the

121. *Id.*

122. Beijing Urban Constr. Grp. Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction, ¶¶ 29, 37–38 (May 31, 2017); Respondent's Mem'l, ¶¶ 33–57, Beijing Urban, ICSID Case No. ARB/14/30; Respondent's Reply, ¶¶ 6–45, Beijing Urban, ICSID Case No. ARB/14/30.

123. Beijing Urban Constr. Grp. Co. Ltd. v. Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction, ¶ 37 (May 31, 2017).

124. *Id.*

125. *Id.* ¶¶ 42–44.

tribunal concluded that Yemen selected BUCG on its commercial merits.[126] The tribunal adopted a case-specific approach and pointed out that the key 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."[127]

4. ILC Article 8: Conduct Directed or Controlled by a State

Article 8 provides another situation where the alleged wrongdoings of SEs may be attributed to states. Compared with Article 5, which specifically requires domestic delegation of governmental authority, Article 8 of the ILC Articles covers a broader range of scenarios: "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."[128]

This Article covers two scenarios. One situation involves SEs acting on the explicit instructions of the state in carrying out the wrongful conduct. For instance, an SE might, under a state's instruction, seize an oil field where it has a joint venture project with a foreign investor in deploying the nation's oil resources. The other scenario deals with a more implicit relationship between the entity and the state, where the entity is acting under the state's direction or control. The latter is often seen in cases involving SEs.

The meaning of "control" has attracted much discussion among tribunals as well as scholars "with respect to the conduct of companies or enterprises which are State-owned and controlled."[129] International law cases have shown that the fact that a state initially established a corporation is not a sufficient basis for the attribution to the state of the subsequent conduct of that corporation. Since "corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate . . . *prima facie* their conduct in carrying out their activities is not attributable to the State . . . ."[130]

Besides the requirement of "control," there should also be a real link between SEs' performance of the act and the state's authorization, because the agent, while carrying out authorized instructions or

126. *Id.* ¶ 40.

127. *Id.* ¶ 39.

128. *See* CRAWFORD, *supra* note 81, at 110.

129. *Id.* at 112; *see also* Hamida, *supra* note 79, at 17–36; Blyschak, *supra* note 73, at 31; Chen, *supra* note 78, at 316–17.

130. CRAWFORD, *supra* note 81 at 112.

directions, may engage in some activities which contravene or fall outside of the scope of authorization. To resolve this agent-principal problem, tribunals must analyze the nature of the conduct in question and inquire whether the alleged wrongful conduct of the SE was really necessary to the authorized task or if the conduct was excessive in scope.[131] As a result, each case will depend on its own facts, in particular, the relationship between the governmental instructions, directions or control imposed on SEs, and the SEs' specific conduct complained of in the dispute.[132]

This case-specific approach focusing on the conduct of SEs is closely followed by the tribunals that adopted the action-focused methodology. For instance, the Respondent in *BUCG v. Yemen* cited ILC Article 8 and claimed that BUCG, the SE in question, was discharging governmental functions in its "ostensible commercial undertakings" because "the Chinese State [was] the ultimate decision maker" of all of its SEs.[133]

The tribunal recognized China's ultimate control over BUCG, yet it pointed out that Article 8 also required the non-state actor to be acting "in the particular instance" under such control.[134] In the case, there was no evidence that BUCG was discharging a governmental function in bidding, signing, and performing an international construction contract.[135] On the contrary, the tribunal found that BUCG was acting in a commercial capacity and did not act under the direction or control of the PRC Government concerning the contract.[136]

This part finds that the action-focused methodology developed by the *CSOB* tribunal does not derive too much from the rules. Rather, it is legally sound if we read the details of the drafting history, attached commentaries, and the well-accepted interpretations of the cited rules of international law. These rules require ISDS tribunals to carefully examine the nature of their specific conduct in a particular context and not to take a quick glimpse of the general characteristics of SEs when determining their legal status in disputes.

131. *Id.* at 113.

132. *Id.*

133. Beijing Urban Constr. Grp. Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction, ¶¶ 29, 43 (May 31, 2017).

134. *Id.* ¶ 31.

135. *Id.* ¶¶ 39–41.

136. *Id.* ¶ 42.

VI. Policy Concerns

Part VI will compare the two methodologies within broader policy discussions. The tensions between the two methodologies developed by international tribunals reflect conflicting regulatory approaches towards SEs' global practice at a more fundamental level: one differentiates entities according to their domestic general backgrounds, the other on their cross-border activities that are constantly changing. This section will further demonstrate that the action-focused approach is justified by the rule of law not only from a doctrinal perspective but also from a policy one. In addition, this section will discuss in detail the policy concerns of procedure, consistency, comprehensiveness and domestic needs in the context of the increasing mixture of public and private capital and the rising pressure of populist nationalism.

A. *Arbitration Procedure*

As mentioned earlier, the role of an SE is a key issue in investment disputes because it will determine the jurisdiction ("Who should decide the case?") and the proper parties ("Who can stand in the proceedings?"). Theoretically, international tribunals have the discretion to determine their own competence.[137] More specifically, when parties dispute the jurisdiction of their investment case, the tribunal can determine whether to deal with the issue first or to join the issue to the merits of the dispute later.[138]

With this discretionary power, many tribunals justified their actor-focused approach by citing *prima facie* standard, treating an SE as an agent of a state *prima facie* so long as the entity in question is public-owned and for public purposes.[139] They reasoned that the analysis of the conduct is substantial and should be resolved in later proceedings when dealing with the merits.[140] However, this approach misunderstands the meaning and the application conditions of the prima facie standard and results in procedural problems.

The phrase "prima facie" is a standard of proof that is "[s]ufficient to establish a fact or to raise a presumption unless disproved or

137. The ICSID Convention, *supra* note 82, art. 41; *see also* Topco & Calasiatic v. Libya, 53 ILR 389, Preliminary Award, 404–511 (Nov. 27, 1975).

138. The ICSID Convention, *supra* note 82, art. 41.

139. *See supra* Section III.

140. *See, e.g.*, Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, ¶¶ 75–89 (Jan. 25, 2000) (holding that the claimant had made out a prima facie case that the respondent was a state entity acting on behalf of Spain following the actor-focused analysis).

rebutted."[141] Applying a prima facie standard in our issue thus at least requires (1) *sufficient evidence* on the relationship between SEs and states, and (2) that the evidence of SEs' role is *without controversy* between the disputing parties.

First, the actor-focused analysis is not *sufficient*. The "public ownership" of a corporation is the easiest evidence that a tribunal could know when determining the role of SEs, yet ownership relation is not enough to prove that the corporation represents the state in a specific dispute. Neither will the general domestic public purposes of SEs give them state status in international law, because Article 25 of the ICSID Convention and customary international law require examination of conduct on a case-by-case basis.[142] The analysis of SEs' roles without inquiring as to their specific conduct is a partial, if not arbitrary, application of the rules. Establishing the agent-principal relationship between the SEs and the states based on mere evidence of public ownership and purposes improperly lowers the standard of proof.

As a result, when SEs are alleged as agents of states that cause the damage, lowering the standard of proof creates a shortcut for the investor-state tribunals to establish jurisdiction because the tribunals can rashly establish the jurisdiction without a proper look at the key issue that may undermine the tribunal's jurisdiction completely. Without adequately analyzing the role of the SE and its relationship to the state in a particular investment transaction, investor-state tribunals carry with them the risk that they are intervening in a non-investor-state dispute where they do not have jurisdiction at all. This improper expansion of the jurisdiction of investor-state arbitration increases the risk of conflicting jurisdictions between different dispute resolution mechanisms of international investment law.[143]

Lowering the standard of proof may also improperly limit the jurisdiction of investor-state arbitration when SEs file a complaint against the host states as investors. By quoting the actor-focused approach, host states can easily prove that SEs are agents of states and thus block their disputes from entering the investor-state dispute mechanism.

Second, the role of SEs is often not *without controversy* between the parties. On the contrary, the above systematic case review shows that the conduct of SEs has been frequently and substantively debated by both parties at the beginning of the arbitral proceedings to determine

141. *Prima Facie*, BLACK'S LAW DICTIONARY, (11th ed. 2019).

142. *See supra* Section V.

143. *See supra* Section II.

the proper scope of the tribunal's jurisdiction.[144] Tribunals following the actor-focused methodology, however, misused the prima facie standard that should not be applied when parties have controversies on an issue. This broad-brush legal reasoning provides an excuse for tribunals to avoid sufficient analysis of SEs even when parties provide detailed evidence on the issue.

This problem appeared in several cases. For example, during the early phases of the *Jan de Nul* case, both parties submitted voluminous evidence on the activities of the SE in question.[145] Yet, the tribunal still adopted the actor-focused analysis, treating the SE as a public entity and postponing the examination of the SE's conduct to later stages.[146] Then, after the tribunal examined the conduct of the SE, it concluded in its later award that the SE was not exercising public authority and thus the state was not liable for the alleged wrongdoings of the SE.[147] Ironically, the analysis of the SE conduct in later proceedings used the exact same argument and evidence raised by the respondent and debated by both parties from the beginning of the dispute.[148] If the tribunal discussed the conduct of the SE in question in earlier stages, it would be able to avoid improperly exercising jurisdiction and shorten the arbitral proceedings.

The application of the actor-focused methodology in the *Saipem* case is even more problematic. The *Saipem* tribunal recognized at the outset that the only problem in the case was whether the acts of the SE could be seen as the acts of the state since both the claimant and the respondent argued intensively on this issue from the beginning.[149] The tribunal, however, rashly cited the prima facie evidence and presumed the SE as the state, deliberately deferring the examination of the acts of the SE to a second phase.[150] Yet after a brief analysis of the acts of the SE

144. *See supra* Sections III and IV.

145. Jan de Nul NV & Dredging Int'l NV v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶¶ 57–61, 83–89 (June 16, 2006).

146. *Id.*

147. Jan de Nul NV & Dredging Int'l NV v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, ¶ 174 (Nov. 6, 2008).

148. Jan de Nul NV & Dredging Int'l NV v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶ 59 (June 16, 2006).

149. Saipem S.p.A. v. People's Republic of Bangladesh, Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶¶ 61, 64, 91, 143 (Mar. 21, 2007), 22 ICSID Rev.–Foreign Inv. L.J. 100 (2007).

150. *Id.* ¶¶ 143–49.

during the second phase, the tribunal concluded in the subsequent award that the SE did not relate to the state in the first place.[151]

The above cases illustrate how the actor-focused methodology mistakenly applied the prima facie standard and undermined procedural efficiency, allowing only a quick glimpse of the SE without looking into its particular conduct. This approach collides with the general principle of *ex abundanti cautela*, which requires arbitrators to be responsive to the parties' dispute and to deal with every question and argument submitted to the tribunal and give the reasons therefore.[152] Under this widely-accepted principle, if parties dispute the conduct of the SE and raise ample evidence of the relationship between the SE and its shareholder state, a tribunal should respond to the evidence in a timely fashion, rather than arbitrarily deferring the discussion of the conduct of the SE to later proceedings, unnecessarily prolonging the whole procedure, making the tribunal less responsive, and increasing the risks of improper jurisdiction.

In other words, although tribunals *could* justifiably exercise its discretionary power to adopt the actor-focused methodology in exceptional situations where evidence of the conduct of the SE is very limited, they by no means *should* follow the actor-focused approach by default.[153] The conduct of SEs is crucial not only as a substantial merits issue that influences the liability of parties, but it is also critical as a preliminary question to determining the proper jurisdiction.[154] If the role of the SE is problematic in a dispute, its tribunal should clarify the ambiguity by analyzing its specific actions as early as possible. Compared with the actor-focused methodology, the action-focused analysis more substantially examines the specific conduct where the disputes arise, avoiding potential risks of improperly expanding or limiting jurisdiction. The action-focused methodology also makes tribunals more responsive by

151. Saipem S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Award, ¶ 191 (June 30, 2009).

152. The ICSID Convention, *supra* note 82, art. 48(3); ICSID, *ICSID Convention, Regulations and Rules*, 47(1)(i), ICSID.WORLDBANK.ORG (Apr. 2006), https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf.

153. As one tribunal explains the reason for its adoption of the prima facie evidence, "The question of 'attribution' [of SE's conduct to state] does not, by itself, dictate whether there has been a violation of international law. Rather, it is only a means to ascertain whether the State is involved. As such, the question of attribution looks more like a jurisdictional question. However, in many instances, questions of attribution and questions of legality are closely intermingled; and it is then difficult to desal with the question of attribution without a full inquiry into the merits. Electrabel SA v. Hungary, ICSID Case No. ARB/07/19, Decision on jurisdiction, ¶ 7.61 (2012).

154. *See supra* Section V. All the rules, whether discussing the jurisdiction issue or substantial issue, require the examination of the conduct of SEs.

requiring them to determine the nature of the acts of SEs at an earlier phase of the proceedings where the parties have controversies. In short, it requires a more responsive attitude of the tribunal, which thus enables a more efficient procedure.

B. *Consistency of ISDS*

The actor-focused methodology not only decreases the efficiency by avoiding or postponing sufficient examination of the key issue in investment disputes, the role of SEs, it also results in conflicting reasoning on the issue.

1. Inconsistency in the Same Case

When a tribunal follows the actor-focused approach and skirts the issue of the specific conduct of SEs, it bears the risk that it has to correct itself in later proceedings. A tribunal that adopts the actor-focused approach in the jurisdictional stage can easily conclude that an SE in a dispute is an alter ego of the state and establish jurisdiction. However, when the same tribunal continues to determine the liabilities that can be attributed to the state, it inevitably needs to analyze the nature of the conduct of the SE in question. It may, at this point, discover that the alleged wrongdoings of the SE do not involve public authority at all and need to reverse its earlier conclusion that the SE is an agent of the state, creating unnecessary conflicts and confusion in the arbitral proceedings.

The problem of inconsistency among decisions by the same tribunal has appeared in several cases. For example, *Maffezini* tribunal's decision on objections to jurisdiction, the tribunal adopted "a functional test" that evaluated the characteristics of the entity in question and concluded that the SE stood as the state because it was publicly owned and was initially established for domestic regulatory purposes.[155] In its following award, however, the same tribunal applied the same "functional test" in a completely different way: "the Tribunal must again rely on the functional test, that is, it must establish whether specific acts or omissions are essentially commercial rather than governmental in nature."[156] Here the tribunal applied the same test, as it claimed, in a completely different way by using distinct standards.

155. Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Objections to Jurisdiction, ¶¶ 76, 89 (Jan. 25, 2000), 5 ICSID Rep. 396 (2002).

156. Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award, ¶ 52 (Sept. 30, 2000), 5 ICSID Rep. 419 (2002).

In the *Tradex* case, where an international investor (Tradex) formed a joint venture with an Albanian SE, the tribunal also presumed a relationship between the Albanian SE and the state based on the actor-focused methodology and deliberately avoided discussing the conduct of the Albanian SE, establishing its jurisdiction.[157] However, in its next award, the tribunal overturned its former decision by analyzing the conduct this time and concluded that the Albanian SE was established as a separate entity from the Albanian state in this specific dispute.[158] The alleged wrongdoings of the SE and the joint venture would not give Tradex a direct claim against the Albanian government, therefore.[159]

Similarly, the decisions in *Consortium RFCC* also conflict with each other on the same issue. The tribunal established its jurisdiction based on the actor-focused methodology: the SE in question was an agent of the Moroccan State, so the dispute between RFCC and the SE was a dispute between RFCC and the state.[160] However, when the tribunal later analyzed the alleged wrongful conduct of the SE to determine the liability of the state, and it reached a conflicting conclusion that the SE had not formally or informally exercised any public authority.[161]

The actor-focused approach allows tribunals too hastily to presume the relationship between the SE and the state without examining the specific conduct and context, creating a high risk that the tribunal may reverse its conclusion later. In contrast, the action-focused methodology employs a consistent approach to analyzing the specific conduct of an SE to determine its relationship with the state either as a jurisdictional issue or as an issue joined to the merits, thus avoiding giving conflicting answers to the same question.

2. Inconsistency Among Similar Cases

The two competing methodologies may also result in inconsistencies and conflicting jurisdiction among different tribunals. When an investor argues that an SE in a dispute is an agent of the state and brings an investor-state arbitration, a tribunal that adopts the actor-focused approach can establish its jurisdiction much more easily than a tribunal

157. Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2, Decision on Jurisdiction, ¶¶ 70–73 (Dec. 24, 1996).

158. Tradex Hellas SA v. Republic of Albania, ICSID Case No. ARB/94/2, Award, ¶ 104 (Apr. 29, 1999).

159. *Id.* ¶¶ 182–83.

160. Consortium R.F.C.C. v. Kingdom of Morocco, ICSID Case No. ARB/00/6, Decision on Jurisdiction, ¶¶ 34–40 (July 16, 2001).

161. Consortium R.F.C.C. v. Kingdom of Morocco, ICSID Case No. ARB/00/6, Award, ¶ 86 (Dec. 22, 2003), 20 ICSID Rev.–Foreign Inv. L.J. 391 (2005).

that takes the actor-focused approach, making a more substantial examination of the conduct of the SE. In a different situation where an SE sues the host state in the arbitration, a tribunal following the actor-focused approach will tend to deny the jurisdiction because SEs are alter egos of states under its presumption, while a tribunal conducting the action-focused approach may establish the jurisdiction if the SE in question acts as investors. If tribunals can choose between the two approaches, similar cases will have very different results, which undermines the reliability of international investment arbitration.

This problem may not bother people who value the flexibility of international arbitration; they may find both approaches acceptable and argue that the tribunals' interpretations do not have a *stare decisis* effect and other tribunals are always free to choose different methodologies in their legal reasoning and interpretation.[162]

The flexibility of international arbitration, however, should not undermine the necessary consistency of the system. To be sure, the tribunals' discretion and the flexibility of international arbitration are not without limits. Instead, international tribunals exercise "delegated and restricted power[s]" subject to certain limitations provided in contracts by parties or treaties by states.[163] It is essential to have a system of control that harnesses the flexibility of the international arbitral mechanism and ensures consistency among different tribunals:[164] "[w]ith controls, arbitration remains a delegated and restricted power. Without controls, it may become arbitrary and capricious."[165] Capricious reasoning without sufficient control will certainly increase the legal uncertainty and informational problems of international rules, which will further give rise to violations of international agreements.[166] Greater

162. *See* Catharine Titi, *The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration*, 14(5) J. WORLD INV. & TRADE 829 (2013).

163. W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR 1 (1992); *see* Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT'L ORG. 385, 387 (2000) (stating that in the last decade, scholars have given substantial attention in the literature to the role of dispute resolution mechanism and highlighted the "[delegation of] broad authority to a neutral entity for implementation of the agreed rules" as one of the key dimensions of legalization in international agreements).

164. *See* W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR (1992).

165. W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 743 (1989).

166. *See also* Barbara Koremenos & Timm Betz, *The Design of Dispute Settlement Procedures in International Agreements*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 371 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013) (rephrasing the relationship between the ambiguity of international rules and the

inconsistency increases the uncertainty of disputes and reduces the attractiveness of institutional arbitration for parties, whether nationals or states.

For the benefit of a controlled system, the consistency of the legal application is thus essential in ensuring the reliability and attractiveness of the investor-state dispute resolution system. As noted in Part V, the history of the ICSID Convention and customary international law demonstrate that tribunals should take a case-by-case and action-focused analysis of SEs' role when deciding the jurisdiction instead of presuming the role of SEs based on their ownership and public purposes. The requirements in ICSID Convention, Article 25 were designed to provide "a screening process," allowing governments to withhold their approval where the SEs should not be considered to be a governmental agent, but an ordinary company.[167] The actor-focused methodology departs from the original consent given by the states when they signed the Convention: the SEs are legal entities separate from the states by default, and only when their conduct satisfies certain conditions can the SEs be deemed to be public organs.

C. *Coherence in International Law*

The debate on the legal status of SEs is not limited to investment disputes. There have been similar debates in other areas of international law during the last decades against the background of the increasing intervention of sovereign states into transnational business. A consistent understanding of SEs is thus essential not only within the international investment arbitration system; more broadly, it is also necessary for the international community to develop a coherent regulatory approach if we consider the decisions made by tribunals of international investment arbitration as an integral part of "a global community of law."[168]

The following section discusses the major policies of other areas of international economic law concerning SE global practices in international trade, transactions, and the financial markets. An action-focused methodology as to the roles of SEs has become the preferred approach,

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violations as "informational problems" which arise if agreements contain ambiguous rules). *See generally* Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004) (illustrating how noisy signals and rule ambiguity give rise to violations of international agreements).

167. WBG, *supra* note 86, at 503.

168. *See* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).

which is reflected in the World Trade Organization (WTO) system, the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNSCI), and the Santiago Principle of Sovereign Wealth Funds. Compared with the actor-focused approach, the action-focused approach of international investment law regimes better maintains consistency with other areas of international law.

1. World Trade Organization

Under the WTO framework, Article XVII of the GATT establishes the principle governing state trading enterprises that are involved in international trade, and it deals with the potentially distorting effects on trade caused by the operation of state enterprises.[169] Article XVII requires that commercial considerations shall guide SEs' decisions on imports and exports and that these public entities shall follow the rule of non-discrimination.[170] As explained in the WTO's official legal interpretation, the WTO merely seeks to ensure that the SEs do not act in a manner inconsistent with WTO principles, rather than seeking to prohibit or discourage the establishment or maintenance of SEs.[171] In other words, the policy of the WTO does not treat state trading enterprises differently from private corporations merely because they are publicly owned or endowed with certain public purposes. Regulation of

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169. General Agreement on Tariffs and Trade, art. XVII, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T. S.194, https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm#articleXVII [hereinafter GATT]. The below list summarizes the rules, with emphasis in italics:

> 1(a) Each contracting party undertakes that if it establishes or maintains a State enterprise, [. . .] such enterprise shall [. . .] *act* in a manner consistent with the general principles of nondiscriminatory treatment prescribed in this Agreement for *governmental measures* affecting imports and exports by private traders.
>
> (b) [. . .] such enterprises shall [. . .] make any such purchases or sales solely in accordance with *commercial considerations*,* including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.
>
> (c) No contracting party shall prevent any enterprise [. . .] under its jurisdiction from *acting in accordance* with the principles of subparagraphs (a) and (b) of this paragraph.

170. *See* WTO, *Understanding on the Interpretation of Article XVII of General Agreement on Tariffs and Trade 1994*, WTO.ORG (Apr. 15, 1994), https://www.wto.org/english/docs_e/legal_e/08-17.pdf (noting that Article XVII provides for obligations on Members *in respect of the activities* of the state trading enterprises referred to in paragraph 1 of Article XVII, which are required to be consistent with the general principles of non-discriminatory treatment prescribed in GATT 1994) (emphasis added); *see also* WTO, *The regulation of state trading under the WTO system*, WTO.ORG https://www.wto.org/english/tratop_e/statra_e/statrad.htm (last visited Mar. 22, 2020).

171. WTO, *The regulation of state trading under the WTO system*, WTO.ORG, https://www.wto.org/english/tratop_e/statra_e/statrad.htm (last visited Mar. 22, 2020).

SEs under the WTO framework is not based on the actor-focused characteristics of SEs; it focuses on SEs' conduct.

The WTO's action-focused approach to the SE practice is further illustrated in the decisions of the Appellate Body of the WTO dispute resolution mechanism. In the *Canada-Wheat Exports and Grain Imports* case, the Appellate Body interpreted the purpose of Article XVII as being to keep a balance between domestic regulation and international practice.[172] On the one hand, the Appellate Body respects state sovereignty in the domestic market, recognizing that "Members may establish or maintain state enterprises or grant exclusive or special privileges [comparing] to private enterprises."[173] On the other hand, it identifies certain activities that should comply with the WTO principles and be with commercial consideration.[174] The "commercial considerations" test requires that the role of SEs in international trade shall be interpreted "on a case-by-case basis, and must involve careful analysis of the relevant market(s) . . . as well as how those considerations influence the actions of participants."[175] This action-focused methodology is both fact-specific and context-sensitive, which respects the diversity of domestic regulations while maintaining the global trade activities of different types of actors under a unified set of principles.

2. United Nations Convention on Jurisdictional Immunities of States and Their Property

The action-focused approach concerning SE international practices is not only adopted by WTO dispute resolution bodies, but it is also reflected in more recent treaty developments–in particular, on such treaty development reflecting this trend is the UNSCI, which applies to the immunity of a state and its property from the jurisdiction of the courts of another state.[176]

Article 10 of the UNSCI specifically discusses SE businesses and focuses on the actions of SEs when determining their roles in international civil cases.[177] This article distinguishes two different categories of

172. Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, ¶¶ 84–106, WTO Doc. WT/DS276/AB/R (adopted Aug. 30, 2004).

173. *Id.* ¶ 85.

174. *Id.* ¶ 84.

175. *Id.* ¶ 144.

176. G.A. Res. 59/38, annex, U.N. Convention on Jurisdictional Immunities of States and Their Property (Dec. 2, 2004) [hereinafter Immunities Convention]. Note that the Convention is not yet in force.

177. *Id.* art. 10.3. ("Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of: (a) suing or being sued; and (b) acquiring,

SE actions: states are immunized only to the extent that an act is of an inherently sovereign characteristic or the so-called *acta jure imperii*; in contrast, *acta jure gestionis*, the commercial transactions performed by SEs are not protected by state immunity under the UNSCI.[178] In short, whether SEs enjoy state immunity depends on the nature of their particular conduct.

The methodology to decide whether an SE's conduct is a "commercial transaction" is provided in Article 2.2 of UNSCI,[179] which was intensely debated during the drafting of the UNSCI.[180] This article recognizes two approaches, one focusing on the purpose of the transaction and the other on its nature.[181] Article 2.2 does not place them on an equal footing. Notably, it takes the action-focused approach as the default principle, which means that, in determining whether a transaction involving an SE is a commercial transaction, the reference should be made "primarily to the nature of the contract or transaction."[182] The purpose of the transaction can be taken into consideration only under certain conditions, for example, when the parties to the transaction have so agreed.

3. Santiago Principles of Sovereign Wealth Funds (the Santiago Principles)

Sovereign wealth funds (SWFs) are special-purpose investment funds or arrangements that are owned by states.[183] They are treated and regulated differently from SEs because they invest in the international

owning or possessing and disposing of property, including property which that State has authorized it to operate or manage, is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected.").

178. THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY: A COMMENTARY 169 (Roger O'Keefe & Christian J. Tams eds., 2013) [hereinafter A COMMENTARY].

179. Immunities Convention, *supra* note 176, art. 2.2 ("In determining whether a contract or transaction is a 'commercial transaction' under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.").

180. *See generally* A COMMENTARY, *supra* note 178, at 54–72 (discussing article 2).

181. Immunities Convention, *supra* note 176, art. 2.

182. *Id.*

183. *See generally* INT'L WORKING GRP. OF SOVEREIGN WEALTH FUNDS, SOVEREIGN WEALTH FUNDS GENERALLY ACCEPTED PRINCIPLES AND PRACTICES: "SANTIAGO PRINCIPLES" IFSWF.ORG 3 (Oct. 2008), https://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf [hereinafter Santiago Principles].

monetary and financial system, which is regarded as a special investment system different from the international direct investment regime. However, the international regulatory approach of SWFs' investment is a good example that sheds light on the regulation of SEs' investment.

Like SEs, SWFs have attracted questions and concerns from the recipient countries. The International Monetary Fund thus initiated and coordinated a working group of 26 member states with SWFs in 2007. The fruit of this coordination is a published set of principles that are commonly accepted and reflected in the practices of the SWF members, the so-called "Santiago Principles."[184]

The Santiago Principles recognize the importance of SWFs in the domestic macroeconomic environment and especially point out that their public functions enable them to "take a long-term view in their investments and ride out business cycles [and bring] important diversity to the global financial markets."[185] The purpose of establishing these principles is to provide a proper framework to improve proper governance and accountability of these entities, as well as their conduct. The Santiago Principles do not regard SWFs as public states or governments merely because they are publicly owned or endowed with public purposes. On the contrary, the principles require the activities of SWFs to be transparent, accountable, and consistent with domestic authorities/policies, including the purposes related to "other than economic and financial considerations."[186]

The above brief review of international economic law shows that an approach focusing on activities rather than SEs' public ownership or their domestic purposes is widely followed in the broader landscape of the current international law and policies. In this sense, the criticism that the action-focused methodology in *CSOB* is inconsistent with the international policies is unwarranted; quite the opposite, adopting the action-focused approach in international investment law will ensure consistency with the broader system of international law.

D. *Policies in Domestic Laws*

When discussing an issue of international law, it is difficult, if not impossible, to propose a proper legal solution without considering relevant policies in domestic law. This is not merely because it is desirable

184. *Id.*
185. *Id.*
186. *Id.* at 22.

to ensure the consistency between various levels of law;[187] more practically, international arbitral decisions need to be recognized by national courts and implemented by local governments. The following section discusses the two competing approaches in a broader domestic policy context and concludes that the action-focused approach enables domestic regulators to balance various policy goals.

1. Policies in Corporate Law

The actor-focused approach differentiates between public and private entities based on the ownership and purpose of the entities. Yet this test can hardly further distinguish various types of SEs because states are inevitably the shareholders of SEs, and SEs will then almost always have certain public interests in corporate governance. The broad-brush methodology of the actor-focused approach thus ignores diverse domestic backgrounds of SEs and conflicts with several domestic corporate law principles.

First and foremost, differentiating various types of business organizations on the basis of the purpose of the entity is imprecise and unrealistic in today's world. On the one hand, state-ownership may be driven by various motivations, including both profit-driven and non-profit ones. States may invest in companies for profit-maximization goals in order to increase government revenue. They may also hold shares in companies to increase the overall market efficiency.[188] Some economists suggest that SEs are helpful to address market failures, especially in the public utility sectors where economies of scale are significant and the state is the most desirable monopolist.[189] SEs are also believed to be efficient when there is a lack of information or when economic and social

187. The post-World War II American legal scholarship shares an emphasis on the interactions between the domestic law regime and international law regime in securing and maintaining compliance of international law. *See, e.g.*, ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); *see also* Mary Ellen O'Connell, *New International Legal Process*, 36 STUD. TRANSNAT'L. LEGAL POL'Y 79 (2004).

188. One good example is Singapore's national champion, Temasek, which is one hundred percent owned by the department of finance of Singapore. Its corporate charter clearly claims both public purposes and private aims: "Temasek is an active investor and shareholder: [w]e deliver sustainable value over the long term . . . . We own and manage our assets based on commercial principles . . . . We support community programmes that focus on building people, building communities, building capabilities and rebuilding lives in Singapore and beyond." *Our Purpose*, TEMASEK, https://www.temasek.com.sg/en/who-we-are/our-purpose.html (last visited Mar. 22, 2020).

189. *See* Dieter BÖS, PUBLIC ENTERPRISE ECONOMICS: THEORY AND APPLICATION 27 (2d ed.1989).

externalities make market competition ineffective.[190] Compared with private entities that are solely driven by profits, SEs tend to make business decisions on the basis of long-term considerations rather than short-term profit maximization.[191] Finally, SEs may also be preferable in industrial bailouts where a state bails out an industry devastated by a crisis.[192] In short, the motivations of SEs are unstable and often mixed.

On the other hand, private ownership does not necessarily exclude the notion of "purposes for the public." It is hard to imagine that a private company could achieve global success without a good reputation among local communities, which to a large extent requires taking social responsibility into consideration. Contributing to the public community certainly does not lead to the conclusion, as the actor-focused analysis suggests, that such a private company is an agent of the state. In short, it is oversimplified and misleading to draw a clear line between public entities and private corporations on the basis of their ownership and purposes, since public entities may be profit-driven, and private corporations might take on the social responsibility to provide public goods.

Second, the purposes of the entity may be written and remain unchanged, but the motivations of specific transactions could change from time to time. The actor-focused analysis ignores the fact that, while many SEs were initially established or operated by governments for non-commercial purposes, they may later have developed commercial interests in a particular business or investment aiming to increase the value of their capital and assets, like all other types of commercial organizations.[193] The initial or general public purposes and functions of SEs do not prevent them from pursuing profitability later on in specific transactions.

Finally, and more fundamentally, the ownership analysis adopted by international tribunals has serious tensions with the principle of limited liability commonly accepted under domestic business organization laws, which respect the independence of corporations and the

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190. *See* Alexander Nove, *Efficiency Criteria for Nationalized Industries: Some Observations Based upon British Experience*, 20 ACTA OECONOMICA 83 (1978).

191. Nicholas Kaldor, *Public or Private Enterprise—the Issues to be Considered*, *in* PUBLIC AND PRIVATE ENTERPRISE IN A MIXED ECONOMY: PROCEEDINGS OF A CONFERENCE HELD BY THE INTERNATIONAL ECONOMIC ASSOCIATION IN MEXICO CITY 5 (William J. Baumol ed., 1980).

192. THE RISE AND FALL OF STATE-OWNED ENTERPRISE IN THE WESTERN WORLD 8–9 (Pier Angelo Toninelli ed., 2000).

193. Stephany Griffith-Jones & Jose Antonio Ocampo, *Sovereign Wealth Funds: A Developing Country Perspective*, *in* SOVEREIGN INVESTMENT: CONCERNS AND POLICY REACTIONS 57, 70–75 (Karl P. Sauvant, Lisa E. Sachs, & Wouter P. F. Schmit Jongbloed eds., 2012).

separation between principals and agents, as well as shareholders and corporations.

The principle of limited liability is often celebrated as one of the most significant achievements of corporate law. Under this principle, creditors of a corporation do not have recourse to the assets of the owners of that corporation, the rule of "asset partitioning."[194] In other words, the corporation is shielded from claims of its owners' creditors. In the context of SEs, this principle means that the claims against SEs and the claims against their shareholders–the states–are separate. The creditors of SEs cannot directly and automatically claim compensation from the shareholders–public states–merely because of the state ownership.

A concern about this domestic law principle, however, is that states may abuse this principle and use the form of a corporation to escape its international responsibilities. The action-focused approach is better at addressing this problem.

One good example is the *Bridas* case. In February 1993, a private Argentine corporation, Bridas, entered into a joint venture agreement to exploit resources with an SE designated by the government of Turkmenistan.[195] The relationship between Bridas on the one side, and the Turkmen SE and the Turkmen government on the other, soured quickly.[196] The Turkmen government insisted, among other things, on raising its share in future proceeds. The Turkmen government further ordered Bridas to halt operations and to cease imports to and exports from Turkmenistan.[197] An ICC arbitral tribunal held both the Turkmenistan SE and the government liable for repudiating the joint venture agreement.[198] Because the arbitration agreement was signed in Houston, Texas, the case was then moved to a U.S. federal court in Houston when the parties filed cross-motions to modify the arbitration award.[199]

194. Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 390 (2000).

195. Bridas S.A.P.I.C. v. Gov't of Turkm., 447 F.3d 411, 414 (5th Cir. 2006).

196. *Id.* at 415.

197. *Id.*

198. *Id.*

199. *Id.* at 416. The district court initially upheld the ICC award, concluding that the Turkmenistan Government was bound by the JVA under principles of agency and estoppel. Yet the case remanded for further consideration as the Court of Appeals found the district court's analysis under the alter ego doctrine incomplete and insufficient. The district court was instructed to take into account all of the aspects of the relationship between the Turkmenistan Government and its SE. The district court on remand then reviewed many of the factors and held

In discussing the issue of whether the Turkmen government, as the shareholder of the SE, should be liable for the SE's breach of contract, the court emphasized the domestic law principle of corporate separateness, which dictates that by default, a parent entity shall not be liable for the actions taken by its subsidiaries.[200] Instead, the court should apply the alter-ego doctrine and pierce the corporate veil only in "exceptional cases" and hold a parent liable only for the actions of its instrumentality when the corporate veil was used as a sham to perpetrate fraud.[201] To determine whether the SE was an alter-ego of the state as a sham, the court examined specific transactions of the SE in the dispute rather than its general operations or characteristics.[202] In other words, the alter-ego doctrine in domestic law is triggered only in exceptional situations; whether the corporate veil of the subsidiary company should be pierced to hold the parent shareholder liable depends on the actual conduct of the parent vis-à-vis its subsidiary in the particular context. Hence the actor-focused approach conflicts with the domestic legal principle of corporate separateness that emphasizes the separation between the shareholder and the corporation, and the right application of alter-ego doctrine that focuses on the nature of specific transactions.[203]

By focusing on the nature of activities rather than purposes of the entity, the action-focused analysis provides a framework under which certain liabilities of the enterprises would be attributed to the shareholder states in the most exceptional of circumstances. The action-focused approach of international tribunals is thus preferable from the perspective of domestic corporate law because it recognizes the mixed or changing purposes of SEs in geosocial context, it is more coherent with the common domestic corporate law principle of separation between entities and their shareholders, and it addresses potential abuse of piercing of the corporate veil adequately.

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that there was "an insufficient showing of complete domination or extensive control so as to warrant a finding that Turkmenneft [the Turkmenistan SE] was the alter ego of the Government of Turkmenistan." Bridas appealed. *See also* Bridas S.A.P.I.C. v. Government of Turkmenistan, 345 F.3d 347 (5th Cir. 2003) (for its previous proceeding).

200. *Bridas S.A.P.I.C.*, 447 F.3d at 416.

201. *Id.*

202. *Id.*

203. More examples take the same approach. The German Federal Constitutional Court in the *Empire of Iran* case rejected to look at domestic purposes criterion to differentiate *jure imperii* and *jure gestionis* because "ultimately, activities of the State, if not wholly then to the widest degree, always serve [certain] sovereign purposes and functions." The court concluded that "one should rather refer to the nature of the State transaction or the resulting legal relationships" to determine the distinction. A COMMENTARY, *supra* note 178, at 68.

2. Domestic Concerns of National Security and Fair Competition

Compared with shareholder states of SEs, the host states where SEs invest have more policy concerns. On the one hand, host states want to attract foreign investment for domestic development; on the other hand, host states may have political concerns about the state that owns the SEs and economic concerns that SEs may harm fair competition due to their close relationship with the shareholder states. This section will explain how the action-focused approach in international law better addresses these concerns and keeps a balance of variant policy goals.

The primary policy concern of the host state is that an SE or its affiliates may have non-commercial purposes that potentially present threats to the national security of the host state. Because an SE's investment strategies are more likely to be influenced by the political objectives of the shareholder government, the host states may correctly be concerned that foreign SE investment in strategic industries like sensitive technologies, natural resources, and key infrastructure, may have a detrimental impact on its national security.[204]

The second category of host countries' concerns relates to the corporate performance of SEs and competition. Because SEs usually have a closer relationship with home governments, they potentially enjoy advantages like state subsidies, financing support, exemption from bankruptcy, and information advantages, etc., as compared with private firms.[205] As a result, preferential treatment granted to SEs is considered to have impacted the playing field.[206]

Certainly, the above concerns are legitimate policy issues, yet the actor-focused approach that differentiates foreign investors simply basing on their general characteristics is not a good solution to address these concerns. To ensure that the foreign investment does not threaten the national security and domestic competition, states that host foreign investment have the sovereignty to regulate inbound foreign capital. In practice, a host state usually addresses national security and antitrust concerns by scrutinizing the investment purposes, general

204. Wouter Schmit Jongbloed et al., *Sovereign investment: an Introduction, in* Griffith-Jones & Ocampo , *supra* note 193, at 11.

205. Antonio Capobianco & Hans Christiansen, *Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options* (OECD Corporate Governance Working Paper No. 1, 2011).

206. Sara Sultan Balbuena, *Concerns Related to the Internationalisation of State-Owned Enterprises: Perspectives from Regulators, Government Owners and the Broader Business Community* (OECD Corporate Governance Working Paper No. 19, 2016).

governance, and corporate performance of potential foreign investors through domestic legal mechanisms before permitting the foreign investors to invest in that state.[207] After a series of domestic screening mechanisms, once an SE, together with its investment project, passes through the *ex ante* examination, the SE is accepted by the host state as a legitimate investor under the domestic law. The investment then should be protected so long as its activities are aligned with the applicable contract and the investment treaties. In short, if a host state grants an SE legitimate investor status under its domestic law *ex ante* the investment, the state cannot deny *ex post* the legitimate status of the SE merely because of SE's public ownership and purposes. Otherwise, it acts against the fundamental international law principle of *acta sunt servanda* ("agreements must be kept").[208]

The actor-focused methodology gives host states a good excuse to easily withdraw previous permission made to SE investors while denying SE investors' access to ISDS to seek a judicial remedy. It thus allows or even encourages arbitrary and unilateral administrative behavior of the host states which would eventually hurt the expectation of SE investors and harm mutually-beneficial international investment. In the long term, it benefits neither the host countries nor the investors.

By contrast, the action-focused analysis would prevent such arbitrary withdrawal because it requires a harder look at the behaviors of SEs. Disputes arise only after there is an investment. When a cross-border investment from an SE passes the administrative checks of a host state, the investment is protected unless the SE has done something that falls outside the scope of the checked investment. An action-focused analysis of international tribunals urges domestic regulators to examine SE

207. Australia, for instance, screens all SE investments, whereas it screens private investments only when they exceed a value threshold. Canada applies different trigger thresholds for the application of its net-benefit test if the investor is state-owned. The United States has established specific rules regarding SEs as part of its national security review mechanism (CFIUS), which requires investigation of all government-controlled investments concerning U.S. businesses. Germany has just strengthened its review mechanism. France, Germany and Italy have called for EU policies to address the issue. Strengthening screening of foreign direct investment (FDI) on national security grounds is also under consideration in the Netherlands, the United Kingdom and the United States. *See* Frédéric Wehrlé & Hans Christiansen, *State-Owned Enterprises, International Investment and National Security: The Way Forward*, OECD INSIGHTS 1 (July 19, 2017), http://oecdinsights.org/2017/07/19/state-owned-enterprises-international-investment-and-national-security-the-way-forward/.

208. *See* Anthony Aust, *Pacta Sunt Servanda*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. (Feb. 2007), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1449; I. I. Lukashuk, *The Principle Pacta Sunt Servanda and the Nature of Obligation under International Law*, 83 AM. J. INT'L L. 513, 513–518 (1989).

investors' specific behaviors, to check whether they properly follow domestic rules. Therefore, it serves the domestic regulatory needs for safety and fair competition.

After the above discussion, it is apparent that the actor-focused approach fails to recognize the diversity of SEs' geosocial backgrounds, whose purposes can be mixed or changing. It also conflicts with domestic corporate law policies that recognize the separation between shareholders and their enterprises. Moreover, the actor-focused approach gives host states a good excuse for arbitrary regulation and deprives a legitimate SE investor of access to ISDS. Compared with the action-focused approach that focuses on specific conduct, the actor-focused approach is oversimplified and incapable of addressing the complex and diverse practices of SEs today.

E. *Comprehensiveness*

The last criticism of the *CSOB* action-focused methodology is that it lacks comprehensiveness because it creates a new framework with just a few paragraphs, without providing a clear roadmap for future tribunals.[209]

This criticism is largely misguided because the comprehensiveness of a methodology is based on its applicability under differing and complex situations, rather than the length of the reasoning. In this sense, several features of the action-focused methodology make it the more comprehensive one between the two approaches.

First, the action-focused methodology is case-specific and provides more flexibility for future tribunals to deal with various types of entities with multiple purposes. Compared to the actor-focused analysis, the action-focused approach does not assume that all SEs are similar *prima facie* due to their common features of domestic public purposes and public ownership. The *CSOB* tribunal did not propose an overgeneralized standard in determining the nature of SE actions precisely because it did not intend to create a one-size-fits-all roadmap to govern the great variety of SEs.

Second, the action-focused methodology is context-sensitive and respects the diversity of domestic regulations and parties' contractual freedom. As is shown in the above case studies, when a tribunal determines whether the alleged wrongdoings of the SE in question have public functions, it should not rely on an oversimplified universal distinction between governmental and business functions, since one

209. *See supra* Section IV.C.

type of governmental activity in one country may be deemed to be commercial in another, and vice versa. The action-focused approach is more sensitive to the specific context of interactions between states, SEs, and their counterparties in disputes.

Third, the action-focused methodology is the more objective approach, as it analyzes the nature of specific activities in the specific transactions. On the other hand, the focus on the purposes of SEs or the analysis of the general "mindset" of their shareholder states can be difficult and subjective because "once we start inquiring into the underlying motives of the State partner to a transaction we will most probably end up with some political purpose somewhere. No matter how genuinely commercial an activity is, it can always be traced to some aspect of public welfare."[210]

To be sure, the action-focused analysis is not saying that SEs are private corporations in international investment. Rather, it is a methodology to decide their ambiguous legal status. It does not answer the legal issue of "when to treat the SE in question as a state agent" and "when as a corporate in international law." Instead, it provides a test to answer these questions. The action-focused approach does not completely ignore the evidence of public ownership and domestic purposes of the entity in question.[211] It well recognizes these facts, but with an emphasis on the real determinant – the nature of an SE's specific activities should be the primary factor in determining its role in an international investment dispute.

VII. Conclusion

This article provides a systematic review of international investment disputes involving state enterprises. These enterprises have both governmental and commercial characteristics, which bring challenges for investor-state dispute settlements that used to differentiate between public and private entities. The existing ISDS cases have contrasting decisions on the role of SEs due to two competing legal methodologies created by different tribunals. The *actor-focused methodology* bases its analysis on the general characteristics of the SE in question – the ownership, control, and domestic purposes of these entities. Following this methodology, a tribunal would identify an SE as an alter-ego of state if

210. Christoph Schreuer, State Immunity: Some Recent Developments 15 (1988).

211. *See* Československa Obchodní Banka A.S. v. Slovak Republic, ICSID Case No. ARB/97/4, Objections to Jurisdiction, ¶¶ 18–20 (May 24, 1999). The *CSOB* tribunal, in fact, included evidence about the ownership and the domestic purpose of the SE before it pointed out the real issue in the case.

it is publicly owned or controlled and for public purposes. The *action-focused methodology*, on the other hand, primarily emphasizes the nature of specific activities of these entities in an international context. Whether or not the entity is public-owned or bears any domestic public purposes is of little importance in its international identity. This article explains how these two competing methodologies result in conflicting decisions on the key issue of SEs' legal status, which further determines the proper jurisdiction and merit on liabilities.

Although the actor-focused methodology is well received by some scholars and the popular belief that SEs should be regarded as state agents due to their public ownership, control, or purposes, this article argues for the other choice. The action-focused analysis is not only legally sound, but also the more adequate methodology to decide the role of SEs in international investment disputes.

Shifting the focus from general identities of SEs to their specific actions could accomplish several policy goals. First, the action-focused methodology is more efficient and responsive in terms of the procedure economy. It examines the conduct of SEs in an earlier stage of dispute proceedings, rather than taking a glimpse of the issue and presuming SEs to be states. It also avoids improperly limiting or expanding jurisdictions because the role of SEs is the key issue determining who can take the case and which party should stand in the proceedings. Second, the action-focused methodology keeps the decisions consistent, while the actor-focused approach may create unnecessary conflicting decisions on the same issue by the same tribunal or among different tribunals. Third, the action-focused methodology is also compatible with the policies in other areas of international economic law concerning SEs' global practices, thus increasing the overall coherence of international law. Forth, an action-focused methodology is case-specific, contextual-sensitive, and relatively objective; therefore, it is comprehensive and can better deal complex situations where differing SEs are involved.

Finally, the distinctions between an actor-oriented regulatory approach and an action-oriented one also have significant implications for domestic policy discussions. Focusing on SEs' specific practices rather than emphasizing their public ownership and domestic purposes are far more compatible with corporate law principles and flexible to address the diverse backgrounds of SEs in today's heterogeneous world. For SEs' home countries, the action-focused approach of international law provides an incentive to integrate these entities into global business and under the existing governance framework. Focusing on the actions rather than on the actors is also a more balanced regulatory policy for

the capital-receiving states that welcome foreign capital and ensure that they compete safely and fairly in the domestic market. The action-focused approach of SEs' regulations- is thus more predictable and balanced for both SE home states and host states.

Borrowing a provocative insight made by Fukuyama discussing domestic politics,[212] it is apparent that identity politics are also behind the debates concerning the legal status of SEs in international disputes. While the actor-focused approach differentiates and divides entities based on their general characteristics, we need to remember that identities of entities are like identities of individuals whose inner-self is neither fixed nor should be presumed. The action-focused approach may or may not solve all the problems brought by SEs in international business, but it is a legally solid and feasible way toward better regulations of SEs so to promote long-term development under the rule of law.

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212. FRANCIS FUKUYAMA, IDENTITY: THE DEMAND FOR DIGNITY AND THE POLITICS OF RESENTMENT 163, 182 (1st ed. 2018).