Doctoral Thesis Proposal

The Characterization of State Economic Activities in International Economic Law

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I. Introduction

The practice of State Capitalism has famously undergone a process of rapid expansion and internationalization in the last twenty years.[1] As part of this process, States have innovated their practices, for example through the diversification of governance structures beyond mere ownership[2] or the harnessing of traditional free market forces and professionalization within State commercial entities (SCEs).[3] These changes have increasingly posed a variety of governance challenges[4] to the international economic law (IEL) regime.[5] One of the most pervasive issues confronting IEL in this regard is how to identify and characterize ostensibly private economic activities undertaken with significant State involvement. This issue of characterization permeates various areas of IEL, arising most notably in discrete questions regarding the scope of States' primary obligations in connection with their commercial activities and the attribution of conduct to the State for purposes of State responsibility, as well as the standing of State entities to bring claims as a private commercial actor. The relevant rules, standards, and concepts employed in characterizing SCEs and their activities are derived from customary international law (CIL) and an increasing number of special rules contained in different types of treaty provisions, resulting in complex and underappreciated interactions. Such special rules are increasingly being formulated in bilateral or regional IEL agreements, further contributing to variances in the rules. The result is an ever denser and more variegated web of rules governing the characterization of SCEs and

[1] See, eg, Kurlantzick J, *State Capitalism: How the Return of Statism Is Transforming the World* (Oxford University Press 2016); Bremmer I, *The End of the Free Market: Who Wins the War between States and Corporations?* (Penguin 2010).

[2] See, eg, Milhaupt CJ & Zheng W, 'Beyond Ownership: State Capitalism and the Chinese Firm' (2015) 103 Georgetown Law Journal 666; Musacchio A & Lazzarini SG, 'Chinese Exceptionalism or New Global Varieties of State Capitalism' in Liebman BL & Milhaupt CJ (eds), *Regulating the Visible Hand? The Institutional Implications of Chinese State Capitalism* (Oxford University Press 2016).

[3] SCE is used throughout to refer generally to entities such as State-owned enterprises (SOEs), State-owned banks, State-influenced enterprises, and sovereign wealth funds, unless specifically indicated otherwise.

[4] See Balbuena SS, 'Concerns Related to the Internationalisation of State-Owned Enterprises: Perspectives from Regulators, Government Owners and the Broader Business Community', OECD Corporate Governance Working Papers no 19 (OECD 2016).

[5] IEL is used here to refer collectively to international trade and investment law (ITL & IIL, respectively).

their activities in disparate legal contexts within IEL, with overlapping concepts governing distinct legal questions and competing tests sometimes governing the same legal issues within a particular regime.

The purpose of this thesis is to examine the methods by which IEL characterizes SCEs and their activities. The main emphasis will be on how the special rules are formulated on the basis of CIL concepts and the relationship between the special rules and the underlying CIL. Answering this question will first involve a detailed analysis of the rationales and contexts of the various rules and concepts contained in CIL and then a detailed analysis of how the special rules derive from, derogate from, and/or supplement the CIL. Given the complex and unsettled nature of this issue, it is hoped that a thoroughly mapped out comparative analysis establishing the interrelations and rationales of the various IEL approaches will be of practical interest to treaty drafters, policy makers, market participants, and adjudicators.

II. Research Question and Methodology

How does IEL characterize State economic activities?

1. What is the relevant CIL on the characterization of State economic activities and how is it applied in IEL?
2. How do IEL special rules supplement and/or derogate from this CIL and what is the relationship of such special rules to the CIL?

The thesis will take a doctrinal qualitative approach to the question of how IEL characterizes SCEs and their activities. It will use classic doctrinal methods of comparative analysis in its examination of relevant CIL, the special rules contained in IEL instruments, and case law applying such law. A larger portion of the research may concern IIL than ITL, reflecting the reality that the issue of characterization of SCEs arises in a wider variety of legal contexts in IIL and that there is a greater amount of treaty and case law in IIL. It must be stressed, however, that the issue is of great import in the ITL context and that IIL and ITL increasingly address the issue together in the same instruments, rendering it worthwhile to research both subareas of IEL regardless

of the ultimate relative coverage. As a starting point, the research will therefore address both ITL and IIL.

Specific sources will predominantly comprise bilateral investment treaties (BITs), WTO instruments, preferential trade and investment agreements (PTIAs), codifications of CIL, particularly the International Law Commission Articles of Responsibility of States for Internationally Wrongful Acts (ARSIWA), the decisions of investment treaty tribunals, WTO Reports, international soft law instruments, reports of international organizations, and scholarly commentary. It will proceed by first examining the background subject, *ie* the modern practice of State capitalism that is creating new concerns and legal issues regarding the characterization of SCEs and related activities. It will then identify and analyze the relevant CIL regarding the issue. This will furnish the necessary inventory of concepts that are routinely adopted and applied in IEL. Next, the IEL application of the CIL tests and concepts will be examined to clearly map out their source, functioning, and rationale. Understanding the problems created by inconsistent (mis)applications of the various rules and concepts will be a necessary predicate to evaluating how special rules are formulated and how they relate to the underlying CIL. The special rules contained in IEL instruments will then be examined, notably how they deviate from the CIL, how they adopt CIL concepts, and how they interact with the CIL. Finally, a synthesis section will tie the analysis on the methods of characterization of SCEs together and draw conclusions from a cross-sectional comparative analysis. It will also seek to determine the extent of an underlying doctrinal rationale and establish principled explanations for variations in approaches within IEL in characterizing SCEs.

III. Main Issues and State of Research

A. <u>Analysis of Relevant CIL</u>

IEL generally characterizes State economic activities through a combination of relevant CIL and special rules, which nonetheless heavily rely on CIL concepts even when the CIL itself is not directly applicable. To provide the appropriate background understanding to pursue the Research Question, the thesis will first identify and analyze the CIL concepts relevant to characterizing SCEs and their activities. The rules of attribution of the law of State responsibility are directly applicable in many instances

and furthermore constitute a rich source of concepts drawn upon in special rules. The law of foreign sovereign immunities is also relevant as a source of concepts and often serves as a reference point in the formulation and interpretation of special rules.[6] The thesis will accordingly analyze relevant concepts of these two areas of CIL as they relate to the characterization of State economic activities.

The first main issue will consider how IEL applies CIL in situations where CIL is directly applicable and how CIL concepts are referred to in characterizing SCEs and their activities for purposes other than State responsibility. The relevant CIL contains many overlapping tests and concepts, the application and relationship of which are often not well understood or appreciated. This part of the analysis will therefore explore the content, application, and rationale of these tests and concepts to better understand their application *per se* and interrelations, as well as to critically assess their adoption by analogy in other areas where the CIL is not directly applicable. Existing research has highlighted the fact of the existence of varied approaches to characterizing SCEs in different contexts. However, it is generally limited to narrow legal questions and/or specific subsections of IEL without broader considerations of the overall interactions amongst the approaches.[7] To the extent that it does identify broader conceptual inconsistencies it generally stops there without seeking to understand the underlying doctrinal reasons for such differences.[8] The thesis will seek to contribute to the research

[6] See, eg, Petrochilos G, 'Attribution: State Organs and Entities Exercising Elements of Governmental Authority' in Yannaca-Small K (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (2nd edn, Oxford University Press 2018), FN 80 citing the 1961 Harvard Draft Convention on the responsibility of States for Injuries to Aliens and its exclusion from the definition of 'States' any commercial State-owned enterprises where such enterprises neither enjoy immunity in its own courts nor seek immunity in foreign courts.

[7] See, eg, Kim M, 'Regulating the Visible Hands: Development of Rules on State-Owned Enterprises in Trade Agreements' (2017) 58:1 Harvard International Law Journal 225; Feldman M, 'The Standing of State-Owned Entities under Investment Treaties' in Sauvant KP (ed), *Yearbook on International Investment Law & Policy 2010-2011* (Oxford University Press 2012); Riblett P, 'A Legal Regime for State-Owned Companies in the Modern Era' (2008) 18 Journal of Transnational Law and Policy 1.

[8] See, eg, Hu S, 'Clash of Identifications: State Enterprises in International Law' (2019) 19:2 UC Davis Business Law Journal 17; McLaughlin M, 'Defining a State-Owned Enterprise in International Investment Agreements' (2019) 34:3 ICSID Review 595; Bismuth R, 'Les fonds souverains face au droit international — Panorama des

in this regard by examining these approaches in light of their specific legal contexts, establishing their rationales, and tracing their adoption and application across disparate legal issues.

Relevance of CIL of State Responsibility

An important preliminary question concerns the content and application of CIL rules of attribution. While it is widely accepted that the CIL rules of attribution for purposes of State responsibility as reflected in the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)[9] are generally applicable in IEL,[10] the practical application of these rules presents a variety of problems when it comes to assimilating an ostensibly private commercial act or entity to the State. How the various bases of attribution function and interact has important consequences for the formulation and functioning of relevant special rules yet remains unclear and therefore will be analyzed as an important preliminary issue.

To illustrate, the conduct of private parties is by default not attributable to the State, while, as reflected in Article 4 of the ARSIWA, all acts of a State organ are attributable to the State, regardless of the commercial or governmental nature of the act.[11] Thus purely commercial activities, such as the entering into and performance of a contract, are considered acts undertaken by the State where the relevant entity is considered an organ of the State. The extent to which a commercial entity with separate legal personality may be considered an organ of the State, however, is not clear and has given rise to debate as to how to make such a determination, if at all. ARSIWA Article 4(2) and its Commentary arguably provide for the possibility of *de facto* State organs, *ie* entities with separate legal personality not classified as organs under domestic law but which may nonetheless be considered organs on account of their powers and relations

problèmes juridiques posés par des investisseurs peu ordinaires' (2010) 56 Annuaire français de droit international 567.

[9] ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries', Yearbook of the International Law Commission, vol II, Part II (2001).

[10] See generally Gazzini T, 'The Role of Customary International Law in the Field of Foreign Investment' (2007) 8:5 Journal of World Investment and Trade 691.

[11] ILC ARSIWA Commentary, Article 4, para 6.

to other bodies under internal law.[12] This uncertainty is reflected in the unsettled practice of investment treaty tribunals in this regard. Some tribunals have reasoned that commercial entities with separate legal personality may be considered organs of the State whose commercial conduct is attributable to the State.[13] The Commentary to the ARSIWA also recognizes that States may be subdivided into a series of distinct legal entities, including corporations with distinct legal personality and separate accounts and liabilities, but that the State nonetheless remains responsible for their conduct regardless of separate legal personality under internal law.[14] Nonetheless, others have flatly refused to consider State entities as organs where they have separate legal personality. The tribunal in *Bayindir v Pakistan*, for instance, found the separate legal personality of the National Highway Authority of the Government of Pakistan to be dispositive and accordingly discarded the possibility of treating it as an organ, despite evidence of statutory control by the Prime Minister and Minister of Finance, as well as of its statutorily defined governmental purpose and duties.[15] Other tribunals have likewise determined separate legal personality to be dispositive of the issue.[16]

Even where the possibility of assimilating SCEs with separate legal personality to the State is accepted in principle, there is much inconsistency in the application of the factors to be considered in order to overcome such separate legal personality. Some focus on the degree of institutional separateness of an entity from the State, considering factors such as the manner in which it was created, the source of its funding, the degree to which it enjoys freedom of contract, the degree of government control or oversight over its activities, and whether it exercises governmental powers that private entities

[12] ARSIWA Article 4(2) and ARSIWA Commentary, Article 4, para 11. See also Crawford J & Mertenskötter P, 'The Use of the ILC's Attribution Rules in Investment Arbitration' in Kinnear MN, Fischer GR, et al (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2015).
[13] *Eureko BV v Republic of Poland*, (Ad hoc) Partial Award, paras 128-134 (August 19, 2005) (Polish State Treasury with separate legal personality determined to be *de facto* State organ, where the Council of Ministers had officially instructed the Treasury Minister to take measures in conformity with the privatization policy of the State).
[14] ARSIWA Commentary to Chapter II, para 7.
[15] *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, paras 118-119 (August 27, 2009).
[16] See, eg, *Tulip Real EState Investment and Development Netherlands BV v Republic of Turkey*, ICSID Case No ARB/11/28, Award, para 289 (March 10, 2014); *EDF Services Limited v Romania*, ICSID Case No ARB/05/13, Award, para 190 (October 8, 2009).

generally cannot.[17] The reasoning of the tribunal in *Deutsche Bank v Sri Lanka* exemplifies this approach. The claim concerned the failure by a State-owned entity, CPC, to make payments under a hedging contract. On the basis that CPC was a 100% State-owned entity established by statute, its entire board of directors was appointed by the Minister of Petroleum, its income and expenditures were controlled by the government, it enjoyed immunity from suit, its actions were subject to government instructions even where these were against its commercial interests, and that its purpose was to conduct oil policy in the national interest, the tribunal found CPC to be a State organ whose commercial acts would be attributable to the State despite its separate legal personality.[18] Similarly, other tribunals have found separate entities to not constitute State organs where the totality of such factors did not indicate a lack of true separateness from the State.[19] Nonetheless, while many tribunals have conducted analogous analysis using these factors, there is a lack of consistency in their application, with different tribunals according more or less weight to various factors. The tribunal in *Jan de Nul v Egypt*, for example, denied organ status to the Egyptian Suez Canal Authority, focusing entirely on the fact that the statute establishing it as a public entity granted it an independent budget and prescribed it private business management methods.[20] The tribunal found this factor more compelling than the fact that the entity was established as a public authority under Egyptian law, that its Board of Directors, Managing

[17] Petrochilos G, 'Attribution: State Organs and Entities Exercising Elements of Governmental Authority' in Yannaca-Small K (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (2nd edn, Oxford University Press 2018) at 342.

[18] *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/09/02, Award, para 405 (October 31, 2012). See also *Nykomb Synergetics Technology Holding AB v Republic of Latvia*, SCC Case No 118/2003, Award, para 4.2 (December 16, 2003) (attributing commercial conduct of SOE in electric power sector to the State on the basis that it did not have commercial freedom, was bound by government determinations of purchase prices to be paid, was wholly government owned, and that the Ministry of Economy was charged with supervision of the company by order of the Cabinet of Ministers).

[19] See, eg, *Gustav FH Hamester GmbH & Co KG v Ghana*, ICSID Case No ARB/07/24, Award, paras 183-187 (June 18, 2010) (reasoning that cocoa trading board with separate legal personality was not a *de facto* organ on the basis that its main purpose was to generate a profit for the government, that it could hold its own assets and open bank accounts, and that instructions given by the government were subject to its existing contractual obligations with private parties).

[20] See, eg, *Jan de Nul JV and Dredging International v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, para 161 (November 6, 2008).

Director, and General Manager were all appointed by decree by the President of the Republic of Egypt, that all decisions of the Board of Directors were subject to the approval of the Prime Minister, that its revenues went into the Public Treasury, that its employees were public employees, and that its acts were subject to the administrative courts whose jurisdiction is limited to disputes with the government.[21] In *Ampal v Egypt*, on the contrary, the tribunal found factors very similar to those above to warrant organ status of the Egyptian General Petroleum Corporation despite its separate legal personality.[22] The divergence in approaches of these two tribunals is illustrative of the overall inconsistency in the practice of applying various factors to characterize SCEs as State organs. Academic commentary is also divided on the application of such tests,[23] and indeed some question the very appropriateness of using such concepts to characterize a private commercial entity as a State organ at all.[24] Overall, the relative relevance and rationale of factors like separate legal personality, State ownership,[25]

[21] *Jan de Nul JV and Dredging International v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, para 146 (November 6, 2008).

[22] *Ampal-American Israel Corp, EGI Fund (08-10) Investors LLC, EFI-Series Investments LLC, and BSS-EMG Investors LLC v Arab Republic of Egypt*, ICSID Case No ARB/12/11, Decision on Liability and Heads of Loss, paras 132-147 (February 21, 2017).

[23] See, eg, Crawford J & Mertenskötter P, 'The Use of the ILC's Attribution Rules in Investment Arbitration' in Kinnear MN, Fischer GR, et al (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2015); Petrochilos G, '*Bosh International Inc and B&P Ltd Foreign Investments Enterprise v Ukraine*: When Is Conduct by a University Attributable to the State?' (2013) 28:2 ICSID Review 262; Schicho L, 'Attribution and State Entities: Divergent Approaches in Investment Arbitration' (2011) 12 Journal of World Investment and Trade 283; Gallus N, 'State Enterprises as Organs of the State and BIT Claims' (2006) 7 Journal of World Investment and Trade 761.

[24] See, eg, Lee J, 'State Responsibility and Government-Affiliated Entities in International Economic Law: The Dangers of Blurring the Chinese Wall between "State Organ" and "Non-State Organ" as Designed in the ILC Draft Articles' (2015) 49:1 Journal of World Trade 117.

[25] See, eg, *Tulip Real EState Investment and Development Netherlands BV v Republic of Turkey*, ICSID Case No ARB/11/28, Award, para 289 (March 10, 2014) (finding that ownership of corporate entity by the State does not indicate Statehood); Waste Management, Inc v United Mexican States, ICSID Case No ARB(AF)/00/3, Award (April 30, 2003). See Kovács C, *Attribution in International Investment Law* (Kluwer Law International 2018) at 50.

independence of budget and liabilities,[26] commercial freedom,[27] and public purpose of the entity[28] needs to be thoroughly examined and clarified, as such factors appear repeatedly in different contexts within IEL in characterizing SCEs. As discussed below, further concepts such as the nature of an act as an exercise of *puissance publique* or private law act and the level of control exercised by the State over an entity, for instance, are often invoked or directly incorporated into treaties in different contexts when it comes to characterizing SCEs and their acts. The thesis will therefore seek to clarify the use and rationale of these concepts in the context of the CIL of State responsibility and their adoption in special rules. In so doing, it will build upon the existing literature on CIL attribution in the IEL context.[29] Where it will differ will be its particular focus on the application of CIL attribution rules in the types of problematic factual situations concerning modern State capitalism that special rules increasingly seek to address. This identification and analysis of the gaps in the existing theory and practice regarding CIL attribution rules as applicable to evolving practices of SCEs will serve both to further the research in this area and as a necessary predicate issue to the larger research concerning the special rules and their interactions with the CIL. As discussed below, this latter issue is particularly underappreciated and of growing import in the context of PTIAs.

Incongruous Adoption of CIL Rules: The Example of Standing

It is particularly important to establish and appreciate the rationale of the tests in different legal contexts to avoid incongruous applications and formulations in the special rules. For instance, CIL attribution tests are increasingly relied on in

[26] See,eg, *Ampal-American Israel Corp, EGI Fund (08-10) Investors LLC, EFI-Series Investments LLC, and BSS-EMG Investors LLC v Arab Republic of Egypt*, ICSID Case No ARB/12/11, Decision on Liability and Heads of Loss (February 21, 2017).
[27] See, eg, *Tulip Real Estate Investment and Development Netherlands BV v Republic of Turkey*, ICSID Case No ARB/11/28, Award (March 10, 2014).
[28] See, eg, *Ampal-American Israel Corp, EGI Fund (08-10) Investors LLC, EFI-Series Investments LLC, and BSS-EMG Investors LLC v Arab Republic of Egypt*, ICSID Case No ARB/12/11, Decision on Liability and Heads of Loss (February 21, 2017); *Ulysseas, Inc v The Republic of Ecuador*, UNCITRAL, Final Award (June 12, 2012); *MCI Power Group LC and New Turbine, Inc v Republic of Ecuador*, ICSID Case No ARB/03/6, Award (July 31, 2007); *Nykomb Synergetics Technology Holding AB v Republic of Latvia*, SCC Case No 118/2003, Award (December 16, 2003).
[29] See, eg, Kovács C, Attribution in International Investment Law (Kluwer Law International 2018).

determining the standing of SCEs in investment treaty proceedings,[30] despite the fact that these rules are not meant to resolve issues of standing.[31] IIL is generally considered to be meant to depoliticize foreign investment disputes by protecting private foreign investment from governmental interference,[32] including through the conferral of a direct right of action against the host State through arbitration. Most investment treaties are silent on the issue of whether SCEs are covered investors with such rights, while most treaties that do mention SCEs expressly include them as protected investors with standing to bring claims.[33] Claims brought pursuant to the ICSID Convention, however, must also satisfy the jurisdictional requirements *ratione personae* of the Convention.[34] While the ICSID Convention itself does not make express mention of SCEs, some commentators and tribunals have read into the Convention a restriction on the standing of SCEs where they act as government agents or act in exercise of an essentially governmental function,[35] effectively adopting the CIL bases of attribution reflected in ARSIWA Articles 8 and 5.[36] These cases demonstrate the problems associated with adopting incongruent concepts implicated by other legal issues. In *BUCG v Yemen*, the

[30] See generally, Annacker C, 'Protection and Admission of Sovereign Investment under Investment Treaties' (2011) 10:3 Chinese Journal of International Law 531; Blyschak PM, 'State-Owned Enterprises and International Investment Treaties: When Are State-Owned Entities and their Investments Protected?' (2011) 6:2 Journal of International Law and International Relations 1; Feldman M, 'State-Owned Enterprises as Claimants in International Investment Arbitration' (2016) 31:1 ICSID Review 24.

[31] See ARSIWA Commentary to Chapter II, para 5.

[32] Blyschak PM, 'State-Owned Enterprises and International Investment Treaties: When Are State-Owned Entities and their Investments Protected?' (2011) 6:2 Journal of International Law and International Relations 1, 19.

[33] Shima Y, 'The Policy Landscape for International Investment by Government-Controlled Investors: A Fact Finding Survey', OECD Working Papers on International Investment 2015/1, pp 10-16 (OECD 2015).

[34] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Article 25 (entered into force October 14, 1966).

[35] The so-called Broches Test formulated by the first Secretary General of ICSID, Aron Broches, in 1972 in a Course of the Hague Academy of International Law. See Mohtashami R & El-Hosseny F, 'State-Owned Enterprises as Claimants before ICSID: Is the Broches Test on the Ebb?' (2016) 3:2 BCDR International Arbitration Review 371.

[36] See, eg, *China Heilongjiang International Economic & Technical Cooperative Corp v Mongolia*, PCA Case No 2010-20, Award (June 30, 2017); *Beijing Urban Construction Group, Ltd v Republic of Yemen*, ICSID Case No ARB/14/30, Decision on Jurisdiction (May 31, 2017); *Al-Karafi v Libya*, (Ad Hoc) Final Award (March 22, 2013); *Ceskoslovenska Obchodni Banka, AS v The Slovak Republic*, ICSID Case No ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (May 24, 1999).

tribunal held that the claimant, a publicly funded and wholly State-owned entity established by the government, was not acting as an agent of the State in the construction of an airport terminal on the basis that the activity was commercial in nature; the control exercised by the government over the claimant in carrying out these activities and the governmental purpose of the activities were considered irrelevant.[37] It likewise held that the claimant did not exercise an essentially governmental function in constructing the terminal.[38] The tribunal thus focused entirely on the commercial nature of the activities at issue in its analysis of both branches of the test. Other tribunals have similarly reasoned that the nature of the activity is the relevant touchstone, regardless of evidence of control.[39] In so doing, they have problematically applied the rules of attribution by analogy without considering the different purposes and legal contexts in which they operate. As has been pointed out in the commentary, for example, it is difficult to imagine how an entity making an investment in the territory of another sovereign State would be considered to have been done in exercise of its *puissance publique*.[40] The treaty practice of States is this regard is also interesting to consider, in that treaties that expressly include or exclude SCEs as covered investors do so on the basis of ownership, not the nature of the activity undertaken.[41] This again demonstrates the unexplored issues implicated by the adoption and application of concepts from different legal areas by analogy without consideration for the rationale underlying those concepts. The thesis accordingly will seek to establish and explain

[37] *Beijing Urban Construction Group, Ltd v Republic of Yemen,* ICSID Case No ARB/14/30, Decision on Jurisdiction, paras 37-41 (May 31, 2017).
[38] *Beijing Urban Construction Group, Ltd v Republic of Yemen,* ICSID Case No ARB/14/30, Decision on Jurisdiction, paras 42-44 (May 31, 2017).
[39] See, eg, *Ceskoslovenska Obchodni Banka, AS v The Slovak Republic*, ICSID Case No ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, para 20 (May 24, 1999).
[40] See Mohtashami R & El-Hosseny F, 'State-Owned Enterprises as Claimants before ICSID: Is the Broches Test on the Ebb?' (2016) 3:2 BCDR International Arbitration Review 371. See also id at 387 reviewing the position of the Swiss Foreign Ministry to the effect that public and private investment should only be differentiated for purposes of ICSID jurisdiction when the State acts in its sovereign capacity and that this would only be the case in very unrealistic circumstances.
[41] See, eg, Agreement between the United States of America, the United Mexican States, and Canada, Articles 1.5 and 14.1 (entered into force July 1, 2020); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Panama for the Promotion and Protection of Investments, Article 1(d)(i), (entry into force July 11, 1985).

the rationale for applying different types of tests or standards, depending on the legal context.

Though not directly applicable, the law of foreign sovereign immunities has also been tapped as a source for applicable concepts in assessing SCEs.[42] That States are not immune for their commercial acts[43] has, for instance, been invoked as a reason for allowing States as claimants in investment treaty proceedings.[44] Here as well, though, care must be given to understand the proper role and rationale of concepts applied by analogy. And while States may wish to consider the interaction of issues of State responsibility, sovereign immunities, and standing of SCEs when formulating corresponding treaty provisions, there is nothing compelling these issues to be connected or treated according to the same rules. This again demonstrates the need for a better understanding of the connection between a given rule and its legal context, particularly as states increasingly formulate special rules based to varying degrees on CIL concepts.

B. IEL Special Rules and their Relationship to CIL

The most integral part of the thesis will concern the special rules on SCEs and their relationship to the underlying CIL. As modern State capitalism has gained more attention from policy makers, States have increasingly expanded provisions specifically addressing the characterization of SCEs and their activities. Such provisions, often contained in the form of scope provisions as well as positive obligations, may alternatively create rules where there is no CIL or derogate from relevant CIL rules. In

[42] See, eg, Feldman M, 'State-Owned Enterprises as Claimants in International Investment Arbitration' (2016) 31:1 ICSID Review 24, 30-31.

[43] See generally, Fox H and Webb P, *The Law of State Immunity*, Chapter 7 (3rd edn, Oxford University Press 2015); See also, Annacker C, 'Protection and Admission of Sovereign Investment under Investment Treaties' (2011) 10:3 Chinese Journal of International Law 531, 535; Gaukrodger D, 'Foreign State Immunity and Foreign Government Controlled Investors', OECD Working Papers on International Investment 2010/02 (OECD 2010), 10-20.

[44] See Mohtashami R & El-Hosseny F, 'State-Owned Enterprises as Claimants before ICSID: Is the Broches Test on the Ebb?' (2016) 3:2 BCDR International Arbitration Review 371, 383 (citing 'axiomatic principle' that State's economic activities can be separated from their public activities and that such commercial activities are not covered by sovereign immunity).

both instances, such provisions adopt and implement many of the concepts derived from CIL tests. The thesis will study both the content of special provisions on characterizing SCEs and the interactions between applicable CIL and the special provisions. This issue is generally underappreciated in practice and theory and will form an integral part of the thesis.

Relationship of Special Rules to CIL: The Example of the SCMA

The consideration of a controversial issue from ITL demonstrates the complexities arising out of the adoption of CIL concepts in IEL special rules and the relationship between the two. Traditional ITL as embodied in the WTO system is generally neutral with regard to ownership.[45] It thus addresses the issue of characterization of SCEs obliquely through special provisions on specific entities that to varying degrees overlap with SCEs more generally, for example State trading enterprises in GATT Article XVII.[46] One of the thorniest issues has been the determination of what constitutes a public body, as opposed to the government or a private party under instruction of the government, for purposes of the Subsidies and Countervailing Measures Agreement (SCMA).[47] The Appellate Body (AB) reasoning in US-AD/CVD (China)[48] is illustrative of the complexity of issues that may arise out of the interaction of special rules and CIL in the characterization of SCEs. Faced with a vaguely formulated provision meant to delineate private and public conduct for purposes of the SCMA, the United States adopted an interpretation based on government ownership of the entity, while China argued for an interpretation based on the governmental character of the functions performed by the entity at issue. The AB ultimately adopted a test premised on the exercise of governmental authority, defining public body as an entity that possesses, exercises, or is vested with governmental authority.[49] In so doing, it had to determine the relationship between CIL attribution principles and the special rules contained in the provision. Having determined that the ARSIWA were not directly

[45] See Borlini L, 'When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements' (2020) 33:2 Leiden Journal of International Law 313, 316.
[46] See Id, 316-318 (discussing the indirect approaches of the WTO instruments).
[47] Agreement on Subsidies and Countervailing Measures, Article 1.1(a)(1).
[48] *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, Report of the Appellate Body (11 March 2011).
[49] Id, para 317.

applicable, it nonetheless employed the CIL rules of attribution reflected in Article 5 ARSIWA *in its interpretation* of the unclear special rule contained in the provision.[50] In this regard the AB noted that despite differences between the CIL reflected in the ARSIWA and the special provisions of the SCMA, its interpretation of public body 'coincides with the essence of Article 5' of the ARSIWA.[51] Interestingly, though it adopted a test of governmental authority along the lines of ARSIWA Article 5, the principal factors it considered in application of this test were factors that would normally not be relevant in an attribution analysis pursuant to ARSIWA Article 5, notably government ownership and purpose of the activity.[52] It thus adopted a test based on governmental authority in line with ARSIWA Article 5 but applied that test by reference to factors associated with other CIL attribution tests. The AB's approach has been the subject of much debate, including the criticism that it used CIL attribution rules to interpret a term forming part of a *lex specialis* primary obligation with its own applicable logic.[53] The case is demonstrative of the challenges posed by the uncertainties regarding the interactions between various CIL concepts and related special rules in assessing modern types of State economic activities. Such uncertainty is also reflected the commentary, with some conflating the substantive provisions with the CIL rules of attribution rather than viewing them as *lex specialis*.[54] It also demonstrates the importance of understanding these interactions and various concepts involved as States continue to address perceived shortcomings in the IEL regime by formulating ever more detailed and tailored provisions in new PTIAs.

[50] *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, Report of the Appellate Body, para 310 (11 March 2011).
[51] Id.
[52] Id, para 349.
[53] See Pauwelyn J, 'Treaty Interpretation or Activism? Comment on the AB Report on *United States — ADs and CVDs on Certain Products from China*' (2013) 12:2 World Trade Review 235.
[54] See, eg, Lee J, 'State Responsibility and Government-Affiliated Entities in International Economic Law: The Dangers of Blurring the Chinese Wall between "State Organ" and "Non-State Organ" as Designed in the ILC Draft Articles' (2015) 49:1 Journal of World Trade 117. For further commentary, see, eg, Ding R, '"Public Body" or Not: Chinese State-Owned Enterprise' (2014) 48:1 Journal of World Trade 167.

Relevance of Form of Special Rules

Relative to ITL, IIL has traditionally relied more heavily on CIL. There is, however, a discernible trend in modern agreements towards including special provisions on SCEs, particularly in PTIAs. These typically come in the form of scope provisions defining acts or entities for which the State is responsible or in substantive primary obligations. The implications of these rules and their relation to CIL have not been adequately appreciated or studied. The Ukraine-US BIT (an older example of a treaty containing such provisions), for instance, requires that each party ensure that its State enterprises act in a manner consistent with its treaty obligations whenever such enterprises exercise any delegated regulatory, administrative, or other governmental authority.[55] This provision thus seems to adopt a test of attribution as reflected in ARSIWA Article 5, yet it formulates it as a direct obligation of the State. How such a provision relates to the underlying CIL is not clear and has resulted in inconsistent application with significant implications. In *Bosh v Ukraine*, the tribunal reasoned that this same provision does not make conduct of a SOE attributable to the State under the law of State responsibility; rather, it imposes a positive obligation on the part of the State to ensure compliance of its SOEs with its obligations under the BIT.[56] Other tribunals, however, have considered the possibility that such provisions rather constitute *lex specialis* attribution standards in substitution or supplementation of the CIL attribution rules pursuant to ARSIWA Article 55.[57]

The lack of clarity and consistency in this regard is of significant consequence in practice, as the scope of the CIL attribution rules may be either narrowed or widened, depending on how the special provisions are understood to interact with the CIL standards. The tribunal in *Al-Tamini v Oman*, for instance, found the applicability of the CIL attribution rules not relevant where the parties have modified them through *lex specialis* treaty provisions. The relevant provision at issue provided that each Party's investment obligations 'shall apply to a State enterprise or other person when it

[55] Treaty between The United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, Article II.2(b) (entry into force November 16, 1996).
[56] *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine*, ICSID Case No ARB/08/11, Award, para 183 (October 25, 2012).
[57] See, eg, *F-W Oil Interests, Inc v The Republic of Trinidad and Tobago*, ICSID Case No ARB/01/14, Award, para 206 (March 3, 2006).

exercises any regulatory, administrative, or other governmental authority delegated to it by that Party'.[58] The tribunal interpreted this provision to constitute a special rule of attribution applicable to the exclusion of any other basis of attribution not premised on the exercise of governmental power, stating that accordingly 'any broader principles of State responsibility under customary international law or as represented in the ILC Articles cannot be directly relevant'.[59] It thus considered this provision to constitute a narrow basis of attribution largely displacing the general CIL attribution rules. Confusingly, it added that although the conduct of State organs is not addressed in the special attribution provision, CIL attribution principles for such conduct remain applicable.[60] It did not explain its rationale for displacing whole swathes of CIL, while leaving parts of it intact and this aspect of its reasoning has been questioned in the literature.[61] Like the AB in the US-AD/CVD (China) case discussed above, the tribunal relied on the ARSIWA in its interpretation of this special provision though it had found that the CIL did not apply. These cases demonstrate the consequences stemming from the lack of clarity in this issue. For example, the approach taken by the *Bosh v Ukraine* tribunal discussed above might be contrary to what States intended if they meant to limit the circumstances in which they would be responsible for the acts of their SCEs. On the other hand, the approach taken by the *Al-Tamini v Oman* tribunal might be contrary to the intent of States in seeking to strengthen the treaty's investment disciplines through positive obligations relating to SCEs. Though some have noted the interpretive difficulties arising from such provisions,[62] the issue remains unresolved in practice and largely ignored in the literature.

[58] *Adel A Hamadi Al Tamini v Sultanate of Oman*, ICSID Case No ARB/11/33, Award, para 318 (November 3, 2015).
[59] Id, para 321.
[60] Id, para 344.
[61] See, eg, Olleson S, 'Attribution in Investment Treaty Arbitration' (2016) 31:2 ICSID Review 457, 481.
[62] Petrochilos G, 'Attribution: State Organs and Entities Exercising Elements of Governmental Authority' in Yannaca-Small K (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (2nd edn, Oxford University Press 2018) at 348 (noting that the intention to narrow the scope of attribution would be expected to be implemented through clear language to that effect).

Summarizing Case Study: The Example of the USMCA

To appreciate the practical significance of the application of CIL concepts in special rules, it is useful to consider an example of the modern PTIAs which increasingly include several, and often sophisticated, provisions relevant to characterizing SCEs across a variety of issues.[63] The USMCA Agreement, for instance, sets out a general obligation to ensure that any entities with delegated governmental authority act in accordance with the Party's treaty obligations when exercising that authority.[64] In its chapter on SOEs it then elaborates a more specific obligation to ensure that its SOEs act in a manner that is not inconsistent with the Party's obligations under the treaty where they exercise regulatory, administrative, or other governmental authority that the Party has directed or delegated to them to carry out.[65] To determine what types of entities are covered, it sets forth a test based on a mixture of direct and indirect ownership, control, the power to appoint management, and the power to direct commercial operations, such as investments and expenditures, issuances of debt and equity, and the restructuring, merger, or dissolution of the enterprise.[66] The investment chapter, in turn, stipulates that a Party's obligations under that chapter apply to measures adopted or maintained by (a) the government or authorities of the Party, and (b) a person, including a State enterprise or other body, when it exercises any governmental authority delegated to it by the government or authorities of the Party.[67] Interestingly, it clarifies that 'government or authorities' means the organs of the Party as determined by CIL principles of attribution.[68] It thus expressly incorporates CIL attribution rules into part of the special provision but not with respect to entities exercising delegated governmental authority. The latter concept, however, is of course itself derived from CIL attribution rules. Regarding investment protection of SCEs, the Agreement's general definition of enterprise expressly includes government-owned

[63] See, eg, Agreement between the United States of America, the United Mexican States, and Canada (entered into force July 1, 2020); Comprehensive and Progressive Agreement for Tran-Pacific Partnership (entered into force December 30, 2018); Comprehensive Economic and Trade Agreement between the European Union and Canada (provisionally entered into force September 21, 2017); United States-Singapore Free Trade Agreement (entered into force January 1, 2004).
[64] Agreement between the United States of America, the United Mexican States, and Canada, Article 1.4 (entered into force July 1, 2020)
[65] Id, Article 22.3.
[66] Id, Article 22.1.
[67] Id, Article 14.2.
[68] Id, Article 14.2, footnote 4.

entities and the definition of investor afforded investment protections incorporates this definition.[69] These provisions raise the types of difficult questions regarding the applicability of CIL rules, the application of concepts and tests adopted from CIL rules, and the role of CIL concepts in interpreting the special provisions discussed in the above analyses of these issues. As States increasingly formulate special provisions dealing with SCEs in their IEL instruments to manage evolving State capitalistic practices, these and related issues will arise more frequently. The thesis will seek to fill the theoretical gap regarding the relationship of such special rules to the underlying CIL and to clarify the functioning and rationale of the concepts and tests applied to characterize SCEs and thereby be of practical assistance to treaty drafters in employing these types of concepts in formulating special provisions.

[69] Id, paras 1.5 and 14.1.

IV. Preliminary Outline

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