OSIPP Discussion Paper: DP-2023-E-003

Piercing the 'National' Veil of State-Backed Investors in ICSID Arbitration: Beyond Broches Test and ARSIWA

24 October, 2023

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Keywords: International investment law; Investor-State arbitration; ICSID; State-backed investors; Broches test; ARSIWA; Attribution; Piercing the veil

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Abstract

Amidst the rising influence of State-owned enterprises and sovereign wealth funds, the eligibility of State-backed investors to claim standing as a claimant before an ICSID tribunal emerges as a significant point of contention. The established 'Broches test' suggests that State-ownership per se does not disqualify an entity from being a 'national' under Article 25 of the ICSID Convention. However, the ambiguities inherent in its content and legal authority have yielded varied interpretations. A newer perspective suggests relying on attribution standards reflected in the Articles on Responsibility of States for Internationally Wrongful Act (ARSIWA) for guidance. This article examines critically these prevalent approaches and obstacles to the transplantation of ARSIWA's attribution rules to this specific context. Instead, it proposes a method for piercing the 'national' veil of State-backed investors in accordance with the general principle of law of abuse of legal personality and process. This proposed framework strikes a proper balance between safeguarding the integrity of the ICSID system and ensuring State-backed investors' access to ICSID. Moreover, this article paves the way for future tribunals by drawing inspiration from the parallel practice of the European Court of Human Rights.

I. Introduction

In an era marked by the growing influence of State-owned enterprises (SOEs) and sovereign wealth funds (SWFs), the eligibility of State-backed investors[1] to claim standing before an ICSID tribunal has become a contentious issue. Article 25 of the ICSID Convention restricts the jurisdiction *ratione personae* of ICSID to investment disputes between ICSID Member States and a '*national* of another Contracting State'.[2] For corporate

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[1] This article uses the term 'State-backed' to refer to a variety of connections between an investor and a State, such as State ownership, control, funding, or other influence. This is a descriptive concept that does not require a precise definition for the purpose of our discussion.

[2] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) art 25 (1)

investors, it defines the term 'national of another Contracting State' as 'any juridical person which had the nationality of a Contracting State other than the State party to the dispute' on the specified dates.[3] However, it does not expressly address whether and how State-backing affects the status as a 'national', and varying approaches have been considered.

Traditionally, the so-called 'Broches test' has been referenced as a guide on this issue. From the drafting history, the drafters of the Convention clearly did not intend to close the door of ICSID to investors simply because of their State-ownership.[4] Based on this 'consensus', Aron Broches, a principal architect of the Convention,[5] famously stated at the Hague Academy of 1972 that a State-owned investor should not be disqualified as a 'national' 'unless it is acting as an agent for the government or is discharging an essentially governmental function'.[6] This test is regarded as the 'best guidance' even today.[7] However, the ambiguity surrounding what constitutes 'an agent for the government' or 'essentially governmental function', coupled with the informal nature of the 'test' as a drafter's

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(emphasis added).

[3] Ibid art 25 (2) (b).

[4] See Dini Sejko, 'Sovereign Investors as ICSID Claimants: Lessons from the Drafting Documents and the Case Law' (2023) 56 Vand J Transnat'l L 853 860–864 for a recent historical overview. See, *inter alia*, Broches' comment to Article X of the First Preliminary Draft of 9 August 1963 ('the term "national" is not restricted to privately owned companies, thus permitting a wholly or partially government-owned company to be a party to proceedings brought by or against a foreign State'.) ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, vol II-1 (ICSID 1968) 170. This expansive understanding was maintained throughout the drafting process. C.F. Amerasinghe, 'Jurisdiction *Ratione Personae* under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1977) 47 British Ybk Intl L 227, 242–43.

[5] Broches was a former Dutch diplomat who attended the Bretton Woods Conference and was a member of the International Monetary Fund (IMF) and International Bank for Reconstruction and Development (IBRD). He joined the IBRD Legal Bureau in 1946; from 1959 to 1971, he served as General Counsel. On Broches' biography, see, Antonio R. Parra, 'Remembering Aron Broches' (*Investment Claims*, 14 October 2016) <https://oxia.ouplaw.com/page/546> accessed 21 August 2023; Antonio R. Parra, *The History of ICSID* (OUP 2012) 25, n 94.

[6] Aron Broches 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1973) 136 *Recueil des Cours de l'Académie de Droit International* 331, 354-55.

[7] Stephan W. Schill (ed) *Schreuer's Commentary on the ICSID Convention* (3rd edn, CUP 2022) 291. For other authorities in favour of the test, see, See also, C.F. Amerasinghe 'Jurisdiction *Ratione Personae* Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' (1974) 48 BYBIL 227 242-243; P.F. Sutherland 'The World Bank Convention on the Settlement of Investment Disputes' (1979) 28 ICLQ 367 385; Ibrahim F.I. Shihata and Antonio R. Parra 'The Experience of the International Centre for Settlement of Investment Disputes' (1999)14 ICSID Rev-FILJ 299 316; Julien Fouret and others (ed) *The ICSID Convention, Regulations and Rules: A Practical Commentary* (Edward Elgar 2019) 144.

personal opinion expressed retrospectively, have led to varied interpretations.[8]

Against this backdrop, an alternative perspective has been suggested. The supporters rely on the standards of attribution of conduct as reflected in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Act (ARSIWA)[9] to determine whether a State-investor qualifies as a 'national'. They argue that this approach can offer clarity and consistency in determining the 'national' status and the potential to better address modern concerns about State-policy-driven foreign investment. However, whether the reliance on the State attribution rules in a different legal environment is legally justified and provides the desired guidance has been hardly examined.

The tightening restrictions on State-led investment and the corresponding risks of investment disputes also makes the question of State-backed investors' eligibility crucial. In the United States (US), certain investments to the US conducted by a foreign government or an entity controlled by a foreign government are subject to mandatory review by the Committee on Foreign Investment in the United States.[10] Similar requirements are increasing in other countries. Japan amended its foreign direct investment (FDI) screening instrument in 2019, mandating SOEs to file advance declarations for investment in critical sectors with no exemptions.[11] The FDI screening regulation of the European Union (EU) adopted in 2019 also expressly stipulates that the EU member States and Commission may consider foreign governmental control in determining whether an FDI poses security risks.[12] The potential risks of State-backed investment dispute has been proved to be real in November 2022, when the Canadian government ordered three Chinese companies, albeit not State-owned, to sell their

[8] For a study on the test, see Reza Mohtashami and Farouk El-Hosseny 'State-Owned Enterprises as Claimants before ICSID: Is the Broches Test on the Ebb?' in Nassib Ziadé (ed) *BDCR International Arbitration Review*, Volume 3, Issue 2 (Kluwer Law International 2016) 371.

[9] ILC, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries' UN GAOR 56th Session Supp 10, ch 4, UN Doc A/56/10 (2001) 81, para. 4 (ARSIWA with Commentaries).

[10] 50 U.S.C. s 4565 (b) (2) (B) (II).

[11] Article 27 bis (1) of Foreign Exchange and Foreign Trade Act (Act No. 228 of 1949, amended 29 November 2019) provides exemptions from the advance declaration requirements, except for a 'foreign investor specified by Cabinet Order as one highly requiring the examination'. In this regard, Cabinet Order on Inward Direct Investment (Cabinet Order No. 261 of 11 October 1980, amended 30 April 2020) specified that investment by entities substantially controlled by a foreign State government as falling under this category.

[12] European Parliament and Council Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L 79I/1 art 4 (2) (a).

holdings in Canadian mineral companies,[13] which the Chinese government denounced as going 'against the principle of market economy and international economic and trading rules'.[14]

This issue also entails a policy repercussion regarding how best balance the systemic interest of ICSID to maintain its 'depoliticised' nature and the claimant's legitimate interest in the ICSID arbitration. This article critically analyses the existing approaches to this question and evaluates the theoretical soundness and practical utility of such approaches. Moreover, this article explores whether there are alternative solutions that are more convincing. It contributes to the ongoing debate by providing answers to these questions and proposing a novel analytical framework for piercing the 'national' veil of State-backed investors on a solid legal basis.

Section II reviews arbitral practice and identifies how tribunals have approached the present legal question. Consequently, we will identify two branches of case law: The Broches test approach and the ARSIWA approach. Section III critically examines how each approach can be theoretically grounded. It shows that existing approaches have a weak legal-theoretical ground and do not provide practical guidance. Meanwhile, Section IV proposes an alternative framework for piercing the 'national' veil based on the doctrine of abuse of legal personality and abuse of process in accordance with general principles of law. This permits tribunals to conduct a comprehensive analysis that takes into account the totality of the circumstances while striking a balance between the competing interests. In order to substantiate our claim, the practice of the European Court of Human Rights (ECtHR) on an analogous issue is introduced as a source of inspiration. Finally, Section V summarises the arguments.

II. Existing Practice: Two Approaches to One Problem

It is not uncommon for investors backed by a State to appear as claimants before ICSID tribunals. In 1999, Ibrahim Shihata and Antonio Parra reported that the three cases initiated in 1997 and 1998 involved 'enterprises substantially owned, directly or indirectly,

[13] Government of Canada Press Release, 'Government of Canada orders the divestiture of investments by foreign companies in Canadian critical minerals companies' (2 November 2022) https://www.canada.ca/en/innovation-science-economic-development/news/2022/10/government-of-canada-orders-the-divestiture-of-investments-by-foreign-companies-in-canadian-critical-mineral-companies.html accessed 21 August 2023.

[14] Ministry of Foreign Affairs of the People's Republic of China Press Release, 'Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference on November 3, 2022' (3 November 2022) https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/202211/t20221103_10800030.html accessed 21 August 2023.

by their home States'.[15] In 2023, based on online databases, newspapers, and company websites, Sejko identified at least 27 cases involving sovereign investors, the earliest dating back to 1977.[16] However, in the majority of the time, the issue of State-backed status is not substantially addressed by tribunals, either due to the fact that respondent did not raise the issue, the jurisdiction was denied on a different ground,[17] or tribunals dealt with the question only succinctly.[18] Currently, five published cases specifically address the present question, which will be reviewed in this section.

A. Broches Test Approach

The first case in which our issue was discussed was *Cekoslovenska obchodni banka, a.s. (CSOB) v The Slovak Republic* (1999). The Claimant was a Czech bank undergoing privatisation, and the Slovak Republic argued that the bank was a 'state agency of the Czech Republic' and lacked standing.[19] After finding from the *travaux préparatoires* that the term 'national' in Article 25 could encompass SOEs, the Tribunal noted that the Broches test was an 'accepted test', which was also recognised by the parties as 'determinative'.[20]

The Tribunal considered both the control and operation of the bank. Regarding the control, CSOB was a 'public sector' entity owned by the Czech Republic (65%) and the Slovak Republic (24%). However, for the Tribunal, this level of control alone was not sufficient to deny the bank's standing.[21] On the operation of the bank, on the other, the Respondent argued that CSOB was a 'government agency' that was 'discharging essentially governmental functions' both in general and specifically in the present dispute.[22] The Tribunal acknowledged that 'for much of its existence,' the bank 'acted on behalf of the

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15 Shihata and Parra (n 7) 316.

16 Sejko (n 4) 867–68.

17 *Telenor Mobile Communications a.s. v Hungary*, ICSID Case No. ARB/04/15, Award (13 September 2006); *Hrvatska v the Slovak Republic*, ICSID Case No. ARB/05/24, Decision on the Treaty Interpretation Issue (12 June 2009) para 1; *PNG Sustainable Development Program Ltd v Papua New Guinea*, ICSID Case No. ARB/13/33, Award (5 May 2015) paras 74- 82; *State General Reserve Fund of Oman v Bulgaria*, ICSID Case No. ARB/15/43, Award (13 August 2019) para 55. Additionally, there are unpublished decisions. For example, *ČEZ, a.s. v Bulgaria*, ICSID Case No. ARB/16/24, Decision on Jurisdiction (2 March 2021).

18 *CDC Group Plc v Seychelles*, ICSID Case No. ARB/02/14, Award (17 December 2003) paras 1 and 6, cf para. 17 and Decision on the Application for Annulment (29 June 2005) para 2.

19 *Ceskoslovenska Obchodni Banka, A.S. v The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (24 May 1999) para 15.

20 Ibid paras 16-17.

21 Ibid para 18.

22 Ibid para 19.

State' in promoting the policies of the State in its international financial activities.[23] However, the relevant test was the 'nature' of the activities and not the 'purpose,' and the CSOB's transaction activities were deemed 'essentially commercial' in nature.[24] The Tribunal also rejected the Respondent's argument that the bank was performing State functions by taking advantage of its privatisation policies.[25] The fact that the Consolidation and Loan Agreements were executed by State entities for a governmental purpose did not alter the conclusion either.[26] As a result, the Tribunal held that CSOB was not 'acting as an agent of the State or discharging essentially governmental activities as far as this dispute [was] concerned'.[27]

The Broches test was also key in *Flughafen Zürich A.G. and Gestiòn e Ingenería v Venezuela* (2014).[28] Flughafen Zürich is a Swiss limited company that constructs and operates transportation infrastructure.[29] Venezuela challenged the company's standing due to its partial State-ownership, with the Canton of Zürich holding one-third of the shares plus one and the City of Zürich holding 5%, and the Canton's appointment of up to half of the directors.[30]

The Tribunal found that the Claimant was *prima facie* a 'national' under Article 25 and then applied the Broches test,[31] on whose application both parties were in agreement.[32] Regarding the 'agent' limb, the Tribunal concluded that the Claimant '[did] not act on behalf of and for the benefit of the Swiss State' but 'its objective [was] to create value for its shareholders, not to defend the public interest of the Swiss State'. The majority of the company's shares were privately held and its stock was listed on the Swiss stock exchange.[33] As to its functions, the Tribunal observed that airport management was 'not essentially governmental', as it could be outsourced to the private and did not constitute 'the core of the nondelegable public activities'.[34] Accordingly, The objection was dismissed.

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[23] Ibid para 20.

[24] Ibid paras 20 and 24.

[25] Ibid para 23.

[26] Ibid paras 24-26.

[27] Ibid para 27.

[28] *Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Laudo (18 November 2014).

[29] Ibid para 264.

[30] Ibid para 263.

[31] Ibid paras 280 and 282.

[32] Ibid para 274.

[33] Ibid para 284.

[34] Ibid para 286.

Although Venezuela requested annulment of the Award, the *ad hoc* Committee found that the Tribunal's conclusion on the Claimant's status 'did not exceed the boundaries of plausibility'.[35]

Both Tribunals determined the Claimant's standing on the basis of the Broches test in conjunction with Article 25. However, its concrete application showed interesting differences. First, the *CSOB* Tribunal did not draw a clear line between the two components of the test,[36] whereas the *Flughafen Zürich* Tribunal assessed each element distinctly. Second, the emphasis placed by each Tribunal varied. The critical factor for the *CSOB* Tribunal was the nature of the business activities, not their purposes or State-ownership. In this sense, its approach to the Broches test was 'objective' and 'formalistic'.[37] In contrast, in rejecting the State agent requirement, the *Flughafen Zürich* Tribunal also considered the ownership structure and the overall business objective. In this regard, the *Flughafen Zürich* Tribunal was more holistic than the *CSOB* Tribunal.

B. ARSIWA Approach

In contrast, the subsequent three Tribunals invoked the ARSIWA attribution standards.[38] A departure begins with *Beijing Urban Constructing Group Co. Ltd. (BUCG) v Yemen* (2017).[39] The Claimant was a wholly Chinese SOE[40] that was involved in an international airport construction project in Sana'a, Yemen, where the Yemeni military raided. Due to the State-ownership, the parties disputed the Claimant's standing under the Broches test.[41] Unlike the previous cases, however, the Respondent invoked Article 5 of

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[35] *Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Decisión de annulación (15 April 2019) para 186.

[36] Paul Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and their Investments Protected?' (2011) 6 J Int'l L & Rel 1, 34-35; Bianca Nalbandian, 'State Capitalists as Claimants in International Investor-State Arbitration' (2021) 81 *QIL, Zoom-out* 5, 17.

[37] Blyschak (n 36) 33; Ji Li, 'State-Owned Enterprises in the Current Regime of Investor-State Arbitration' in Shaheeza Lalani and Rodrigo Polanco (eds), *The Role of the State in Investor-State Arbitration* (Brill 2014) 380, 400. See also, Sonia Yeashou Chen, 'Positioning Sovereign Wealth Funds as Claimants in Investor-State Arbitration' (2013) 6 Contemp Asia Arb J 299, 316

[38] Cf *State Development Corporation Veb.RF v Ukraine*, SCC Case No. 2019/113 and V2019/088, Partial Award on Preliminary Objections (Case No. V2019/088) (31 January 2021) para 148 (relying on Benvenisti's expert report to the effect that all cases where ARSIWA was applied were related to the issue of attribution for State responsibility purposes).

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

[40] Ibid para 32.

[41] Ibid paras 29-30.

ARSIWA, which the Claimant seemed to have accepted as relevant.[42]

The Tribunal characterised the Broches test as 'the mirror image of the attribution rules in Articles 5 and 8' of ARSIWA, which serves as 'markers for the non-attribution of State status'.[43] In response to the Respondent's contention that the *CSOB* Tribunal had 'misapplied' the Broches test,[44] the *BUCG* Tribunal bypassed this issue by stating that the focus of the *CSOB* case was on a 'context-specific analysis of the commercial function of the investment'.[45] Namely, the question for the present Tribunal was 'not the corporate framework' of the company, but 'whether it *function[ed]* as an agent of the State in the fact-specific context' of building an airport terminal in Yemen.[46] The Tribunal, referring to the text of Article 5,[47] noted that the evaluation of the 'essentially governmental function' must also consider the function 'in the particular instance', in this case, the international airport project.[48]

The Tribunal analysed the two components of the Broches test in turn. Regarding the 'agent' limb, it examined the BUCG's Articles of Association, which stipulated the company's independent status. The Tribunal then analysed the precise nature of the company's participation in the construction of the terminal building. The Tribunal determined that BUCG was engaged in the project as an ordinary contractor chosen on the basis of its commercial merits. Furthermore, the Respondent itself acknowledged that the dispute was of commercial nature rather than a treaty case, since the Yemeni agency terminated the contract in question due to the alleged poor commercial performance. [49] Based on these considerations, the Tribunal concluded that BUCG was not acting as an agent of China 'on the airport site'.[50]

Concerning the 'essentially governmental function' element, the Tribunal held that the Respondent's contention that the Chinese Government was the 'ultimate decision maker' for BUCG was 'too remote' from the project at the site, where BUCG was not performing governmental functions on behalf of China. Additionally, the target of Yemen's

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[42] Ibid para 31. The Claimant argued that the emphasis should be placed on the phrase 'in the particular instance' in Article 5 but does not appear to have challenged the applicability of the instrument as a whole.

[43] Ibid para 34.

[44] Ibid para 35.

[45] Ibid.

[46] Ibid para 39.

[47] Ibid para 31.

[48] Ibid para 42.

[49] Ibid para 40.

[50] Ibid para 41.

'military aggression' was BUCG as a commercial contractor rather than China as a State,[51] so the Tribunal dismissed the Respondent's objection.

In this case, the parties agreed on the use of the Broches test and ARSIWA, which the Tribunal adhered to. However, the Tribunal did not apply the conditions stipulated in Articles 5 and 8 of ARSIWA as such. Instead, it maintained the Broches test as a relevant gauge,[52] to which an element of Article 5, that is, the exercise of governmental authority 'in that particular instance', was incorporated. This emphasised that the focus should be on activities related to the specific investment project rather than the broader status as an SOE or its ultimate control by the government. As a result, the Tribunal's interpretation of the Broches test was circumscribed in scope.

A more broad application was made in *Masdar v Spain* (2018),[53] which involved a claim brought by a Dutch private company[54] whose majority ownership was held by Abu Dhabi Future Energy Company (ADFEC), a wholly-owned subsidiary of the Abu Dhabi SWF, Mubadala Development Company, which is ultimately controlled by the Government of Abu Dhabi.[55] To deny the Claimant's standing, the Respondent argued that the actions of Masdar could be attributed to the UAE under Article 8 of ARSIWA because the company is an SOE.[56] The Claimant contested the applicable standard and argued that the *CSOB* test, not the control test, should be applied, and that even if the control test were applied, the required level of governmental control had not been demonstrated.[57]

The Tribunal rejected the objection with 'little hesitation'. In contrast to previous tribunals, however, the Tribunal relied solely on ARSIWA and did not mention the Broches test. It held that ARSIWA reflected customary international law on 'the question of attribution for purposes of asserting the responsibility of a State towards another State, which is *applicable by analogy* to the responsibility of States towards private parties'.[58] To that end, the Tribunal determined that attribution requires the establishment of a 'close link to the State', including those outlined in Articles 4, 5, or 8.[59] Then, it held that:

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[51] Ibid para 43.

[52] Jorge E. Viñuales, 'Attribution of Conduct to States in Investment Arbitration' (2022) 20 ICSID Rep 13, 31, para 41.

[53] *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, ICSID Case No. ARB/14/1, Award (16 May 2018).

[54] Ibid para 2.

[55] Ibid paras 82-83.

[56] Ibid paras 145-53.

[57] Ibid paras 157-63.

[58] Ibid para 167 (emphasis added).

[59] Ibid para 168.

> The question is therefore to examine whether the acts of Claimant, as a separate entity, can be attributed to the State of Abu Dhabi, either because it *exercises governmental authority ("prérogatives de puissance publique")* or because it is under *the effective control of the State* in its investment activities. [60]

The Tribunal seems to have applied each test in turn. First, it relied on the *CSOB* decision that quoted the Broches test and declared that Masdar was 'plainly' not disqualified under the test.[61] Second, in relation to the element of 'effective control', it found no evidence of 'general control' over Masdar or 'control of its investment decisions', reinforcing the conclusion that Masdar was a commercial company.[62]

Although the parties disagreed on what the applicable standard should be, the Tribunal opted for ARSIWA. However, it did not apply the instrument *verbatim*. Although the Tribunal referred to Articles 4, 5, and 8 of ARSIWA, it ultimately reduced them to a dual test comprising the exercise of 'governmental authority' and 'effective control', blurring the distinction between Articles 4 and 5. In addition, it failed to mention the conditions contained in Article 5, such as the delegation of governmental authority and the exercise of that authority 'in the particular instance'. These are in contrast to the *BUCG* Tribunal, which viewed the Broches test as a 'mirror image' of Articles 5 and 8 and incorporated the strict conditions of Article 5 to the Broches test.

ARSIWA was also chosen as the sole yardstick in *Landesbank Baden-Württemberg (LBW) v Spain* (2019). [63] The Claimant was a commercial bank established as *Anstalt des öffentlichen Rechts* (*AöR*) by German *Länder*.[64] The Respondent posited that the bank, being owned by *Länder*, was 'equated to Germany', thus transforming the dispute into one between States.[65] The Tribunal briefly dismissed this argument, finding that the conduct of the Claimant had not been shown to be attributable to Germany in accordance with the principles of international law as reflected in ARSIWA.[66] It also noted that Germany itself had not asserted that the Claimant was a State

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60 Ibid para 169.

61 Ibid para 170.

62 Ibid paras 171 and 173.

63 *Landesbank Baden-Württemberg and others v Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the Intra-EU Jurisdictional Objection (25 February 2019).

64 Ibid para 1.

65 Ibid para 97.

66 Ibid para 112.

equivalent.[67] Here again, there was no mention of the Broches test. However, the reasoning provided by the Tribunal was brief and lacked clarity, making it difficult to determine the approach taken by the Tribunal.

III. Theoretical Grounds for the Two Approaches

The preceding section highlighted the diverse approaches adopted by tribunals. Our comparative analysis reveals two primary camps: Tribunals that exclusively apply the Broches test (*CSOB* and *Flughafen Zürich*) and those that exclusively apply ARSIWA (*Masdar* and *LWB*). One tribunal straddled the boundary, applying both tests (*BUCG*). We also observed the nuanced positions of each tribunal; different tribunals, even when ostensibly in the same camp, emphasised different factors in their analyses, as shown in Table 1. In this context, a crucial question arises: Is either the Broches test or the ARSIWA approach based on a robust legal-theoretical framework? This section explores the two approaches' theoretical justifications critically.

Case	Applicable standard	Factors taken into account
CSOB (1999) *	Broches test	Shareholdings; Nature of general business activities; Nature of specific transactions
FZ (2014) *	Broches test	Shareholdings; Designation of directors; General business activities; Non-delegable nature of the activities
BUCG (2017) *	Broches test; ARSIWA arts 5 and 8	Articles of Association; Way of participation in the project; Nature of on-site activities; Control over the on-site activities
Masdar (2018)	ARSIWA arts 4, 5, and 8	Exercise of governmental authority; Effective control over investment decisions
LBW (2019)	ARSIWA	N/A

Note: Cases marked with an asterisk (*) indicate the agreement of the parties on the application of the Broches test

Table 1. Comparison of ICSID Cases – Standards Applied and Factors Considered

[67] Ibid para 98.

A. Status of the Broches Test: 'Best guidance' with little practical value

All of the three tribunals invoking the Broches test provided little explanation of why it is justified. Instead, they seem to have accepted the test because both disputing parties invoked it.[68] It was the agreement of the parties, together with consideration of arbitral economy, that prompted these Tribunals to uphold the application of the Broches test without much justification.[69] In contrast, in *Masdar*, where the parties disputed the applicable standard, the Tribunal looked to ARSIWA instead of the Broches test.[70]

In fact, jumping to the Broches test in applying Article 25 of the ICSID Convention is not straightforward as a matter of treaty interpretation. As Christopher Beus correctly cautions, the 'Test' lacks 'any binding effect on the ICSID itself'.[71] First of all, it goes without saying that the test, which was expressed as a personal view of Broches and not ratified by the Contracting States, does not constitute any of the authentic means of interpretation enumerated in Article 31 of the Vienna Convention on the Law of Treaties (VCLT). Neither does the test fall under *travaux préparatoires*, as it emerged after the Convention was adopted. In fact, there is nothing comparable to the Broches test in the negotiating history; aside from the 'consensus' that the term 'national' was not limited to wholly private parties, no other specific 'test' was discussed.[72] At best, the Broches test can only be viewed as a supplementary means of interpretation not explicitly prescribed in Article 32 of the VCLT[73] or 'teachings of the most highly qualified publicists of the various nations', which constitute 'subsidiary means for the determination of rules of law' within the meaning of Article 38 (1) (d) of the ICJ Statute.[74] Either way, being 'supplementary' or 'subsidiary', it cannot replace the primary process of treaty interpretation.

Nonetheless, one would not challenge the general idea as such that an entity equated with a State agency or otherwise discharging an essentially governmental

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[68] *CSOB* (n 19) para 17 ('Both parties to this dispute accept this [Broches'] test as determinative); *Flughafen Zürich* (n 28) para 274(*'ambas partes han invocado como criterio de autoridad la opinión manifestada por Broches en 1972'*); *BUCG* (n 39) para 33 ('Both Parties accept as applicable the functional test formulated in 1972 by Aron Broches').

[69] See, *Flughafen Zürich* (annulment) (n 35) para 183 ('*el Tribunal se fundamenta en un criterio que, según el propio Tribunal, fue invocado por ambas Partes*').

[70] *Masdar* (n 53) paras 146 and 158.

[71] Christopher Beus, 'Sovereign Wealth Funds in the ICSID: A New Approach to Standing' (2014) 1 Indon J Int'l & Comp L 543, 568.

[72] An exception could be a note by Broches dated 19 January 1962, where he stated that an SOE would be eligible 'if it elected to assimilate itself to a private enterprise rather than a government agency'. History, 11, para 29. This, however, is considerably more ambiguous and therefore cannot be considered an early manifestation of the Broches Test.

[73] Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 401.

[74] Sejko (n 4) 863.

function should not be considered as a 'national'. To this extent, the Broches test can be seen as correctly reflecting the 'broad objective' of the ICSID Convention 'to encourage a larger flow of private international investment'.[75] Beyond that, however, one cannot derive any more specific criteria from it.[76] In fact, *CSOB* and *Flughafen Zürich*, while relying on the Broches test, put emphasis on different factual parameters.

B. Analogy from ARSIWA: Putting a square peg in a round hole

The formalistic reading of the Broches test in *CSOB* has also been criticised on a policy ground. Although the *CSOB* approach is sometimes described as 'objective' and 'practical',[77] critics argue that the political motivations of SOEs should also be taken into account.[78] To support their claim, they suggest borrowing from other fields of general international law, specifically the standard of attribution of conduct in the law of State responsibility.[79] For them, ARSIWA could 'offer[] a more developed and flexible

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[75] International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* para 13 (18 March 1965).

[76] Cf Bin Gu and Chengjin Xu, 'Treatment Standards of State-Owned Enterprises as Public entities: A Clash or Convergence across International Economic Law?' (2020) 50 Hong Kong LJ 1025, 1035; Shixue Hu, 'State Enterprises in International Investment Disputes: Focus on Actor or Action?' (2020) 51 Geo J Int'l L 323 347.

[77] Ji Li, 'State-Owned Enterprises in the Current Regime of Investor-State Arbitration' in Shaheeza Lalani and Rodrigo Polanco (eds), *The Role of the State in Investor-State Arbitration* (Brill 2014) 380, 400. For a similarly positive evaluation, see, Sonia Yeashou Chen, 'Positioning Sovereign Wealth Funds as Claimants in Investor-State Arbitration' (2013) 6 Contemp Asia Arb J 299, 316. Cf 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' (2010) 9 LPICT 17, 29 (critiquing that *CSOB* 'did not identify a clear methodology that permits to determine if the entity is public or private'.).

[78] Blyschak (n 36) 30-31; Mark Feldman, 'The Standing of State-Controlled Entities under the ICSID Convention: Two Key Considerations' (2012) 65 *Columbia FDI Perspectives* 2-3 < https://academiccommons.columbia.edu/doi/10.7916/D8VH5WZ5> accessed 21 August 2023.

[79] Another possible candidate is the law of State immunities, according to which, in certain circumstances, the purpose of the transaction may be considered when differentiating *acta jure imperii* from *acta jure gestionis*. United Nations Convention on State Immunities (adopted 2 December 2004) art 2 (2). Blyschak asserts that this analysis is 'in many respects analogous to the Broches test and its "essentially governmental function" limb'. Blyschak (n 36) 30. Similarly, see Hamida (n 77) 30. According to the Swiss Federal Department of Foreign Affairs, the only exceptional circumstance in which public investment is treated differently than private investment is when the investment is 'carried out by a State and stemming from an act of public authority (*jure imperii*), as in this case the State enjoys from immunity'. Département fédéral des affairs étrangères, « Accords de promotion et protection des investissements. Qualité d'investisseur octroyée à un État et traitement à donner à ses investissements – Avis de droit du 20 novembre 2007 » (2008) Jurisprudence des autorités administratives de la Confédération (JAAC) 183, 185 (author's translation). Although this article does not delve into

framework for finding a public action; a framework that could take into account the underlying purpose of a particular activity rather than focusing narrowly on its immediate function in isolation'.[80]

However, how do they justify the ARSIWA analogy *legally*? It is common ground that attribution rules under ARSIWA were designed specifically for establishing State responsibility and 'not for other purposes for which it may be necessary to define the State or its government'.[81] For example, the ICJ famously acknowledged that the attribution standard used for the classification of armed conflict may differ from the State responsibility standard. [82] In the recent *Certain Iranian Assets* case, the Court also held that attribution for the purpose of State responsibility is a 'different question' from whether the Iranian central bank qualified as a 'company' under a commercial treaty and has 'little relevance'.[83] In the investment law area, it has been convincingly argued that ARSIWA is not applicable to the question of whether the host State is obligated under the so-called umbrella clause to respect obligations entered into a distinct State-related entity. [84] This shows that it is far from self-evident that ARSIWA can provide a suitable source of analogy for the current legal issue.[85]

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this issue, we believe that the argument on the distinct conceptions of attribution developed here also applies to the determination of *acta jure imperii/gestionis*, which is primarily concerned with a behaviour ('acta') rather than the status as a sovereign.

[80] Beus (n 71) 563. Similarly, Mark Feldman, 'State-Owned Enterprises as Claimants in International Investment Arbitration' (2016) 31 ICSID Rev-FILJ 24, 34 ('One particularly noteworthy aspect of customary international law attribution rules is the ability to consider not only the nature, but also the purpose, of an entity's activities'); Sejko (n 4) 902 ('ARSIWA can serve as a tool to supplement the Broches test in an attempt to prevent access to ICSID tribunals by actors that intertwine economic and geopolitical objectives under the demonstrable influence of the state.').

[81] ARSIWA with Commentaries (n 9) 81, para. 4.

[82] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *v* Serbia and Montenegro) [2007] ICJ Rep 43, 210, para 404.

[83] *Certain Iranian Assets* (Islamic Republic of Iran v United States of America), Judgment of ICJ, 30 March 2023 < https://www.icj-cij.org/case/164/judgments> para 53. At the same time, the Court also distinguished the present case from *CSOB* on the ground that the tribunal was asking 'whether a commercial bank should be considered as a national of the State by which it is owned or merely as an agency of that State, for the purposes of the applicable convention'. Ibid. This judgment's relevance to the ICSID arbitration will be discussed elsewhere.

[84] Yves Nouvel, 'Les entités paraétatiques dans la jurisprudence du CIRDI' in Charles Leben (ed), *Le contentieux arbitral transnational relatif à l'investissement* (Anthemis-LGDJ 2006) 25, 51; Shotaro Hamamoto, 'Parties to the "Obligations" in the Obligations Observance ('Umbrella') Clause' (2015) 30 ICSID Rev-FILJ 449, 462-463.

[85] Claudia Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties' (2011) 10 Chinese JIL 531, 564; Mohtashami and El-Hosseny (n 8) 377 ; Arrêt du 29 novembre 2016, Cour d'Appel de Paris, Pôle 1 - Chambre 1 (France) 14/17964, para 18

There are two claimed justifications for analogically invoking the ARSIWA framework. First, the authors assert that the attribution standard is similar to the Broches test.[86] They claim that the two factors in the Broches test – the 'agent' limb and 'governmental function' limb – 'closely resemble'[87] or 'effectively mirror'[88] Articles 4 and 8 of ARSIWA. The second is an analogy from *Maffezini v Spain*,[89] in which ARSIWA was applied to an inverse scenario in which whether Spain could be held as a proper *respondent* for the conduct of an SOE. This analysis, as suggested, 'can be easily transposed' to the opposite situation where arbitrators are 'substantially conducting the same inquiry, and applying the same method for the same purpose'.[90] In addition, it is claimed that a test is required,[91] but the need for a criterion does not directly justify the use of ARSIWA, and the first and second arguments will be examined in turn.

1. 'Closely resemble' and 'effectively mirror'?

As previously noted, international law, or law in general, is 'full of rules of attribution', the rules of State responsibility being merely one of them.[92] Whether a person's statement is attributed to and binds a State under international law is governed by the law of treaties or unilateral acts,[93]and whether an action of an agent is attributable to a State in international adjudication is a matter regulated by the applicable procedural rules.[94] This perspective has recently been highlighted by the 'Fragmentation of Attribution in International Law' of Gabor Kajtar,[95] who distinguishes attribution in a

[86] Eg Hamida (n 77) 29.

[87] Feldman (n 80) 33.

[88] Csaba Kovàcs, *Attribution in International Investment Law* (Wolters Kluwer 2018) 270.

[89] *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decisión del Tribunal sobre Excepciones a la *Juridicción* (25 January 2000).

[90] Giulio Alvaro Cortesi, 'ICSID Jurisdiction with Regard to State-Owned Enterprises – Moving Toward an Approach Based on General International Law' (2017) 16 LPICT 108113. See also Hu (n 76) 374-75 (the 'action-focused methodology' deriving from *Maffezini* should be favoured over the 'actor-based methodology' originating from *CSOB*).

[91] Alvaro Cortesi (n 90) 113-14.

[92] Christina Binder and Stephan Wittich, 'A Comparison of the Rules of Attribution in the Law of State Responsibility, State Immunity, and Custom' in Gabor Kajtàr and others (eds), *Secondary Rules of Primary Importance – Attribution, Causality, Standard of Review and Evidentiary Rules in International Law* (OUP 2022) 242, 242.

[93] ARSIWA with Commentaries (n 9) 82, para 5.

[94] Simon Olleson, 'Attribution in Investment Treaty Arbitration' (2016) 31 ICSID Rev-FILJ 457, 458-59.

[95] Gabor Kajtàr, 'Fragmentation of Attribution in International Law' in Gabor Kajtàr and others (eds), *Secondary Rules of Primary Importance – Attribution, Causality, Standard of Review and Evidentiary Rules in International Law* (OUP 2022) 283.

'narrow sense' reflected in ARSIWA and in a 'broad sense' for a 'variety of legal purposes'.[96] In a similar vein, Marko Milanovic assigns the term 'ascription' to the latter concept.[97]

There are at least two fundamental differences between attribution under the law of State responsibility and attribution of the status of a 'national'. First, attribution under the law of State responsibility pertains to *internationally wrongful* acts, whereas attribution of the status of a 'national' does not. It is true that attribution 'does not involve *ex se* any analysis of the legality of the act' but rather 'focuses only on the links existing between the enterprise and the State'.[98] Indeed, it is not uncommon for conduct attributable to a State not to bring about the State's responsibility because it was legal. However, this should not obscure the point that attribution *stricto sensu* is still a legal operation for establishing State responsibility. It is a legal operation determining who must bear the consequences of an act, and specific standards of attribution are designed in line with relevant principles on risk allocation among social actors.[99] Determining if a State-investor is a 'national' lies outside of such a specific context, and a different rational governs the evaluation.

Second, and relatedly, the concept of attribution has two distinct dimensions in the current context. On the one hand, attribution under the law of State responsibility focuses on attributing particular acts or omissions of an individual to the State.[100] This is the attribution of *conduct*, which by no means affects the status of the person in question: Attribution does not grant her the status of a sovereign State entitled, for example, to recognise a State, conclude a treaty, waive sovereign immunity, or consent to foreign military intervention. On the other hand, whether an SOE qualifies as a 'national' for the purpose of Article 25 of the ICSID Convention depends on its *status* rather than its actions. The issue is whether the claimant can be equated with the State. Due to the distinction

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[96] Ibid.

[97] Marko Milanovic, 'Special Rules of Attribution in International Law' (2020) 96 Int'l L Stud Ser US Naval War Col 295, 303-304.

[98] Alvaro Cortesi (n 90) 114.

[99] See Olleson (n 94) 483 on the inherent connection between attribution rules and the purpose underlying the law of State responsibility ('the rules of State responsibility exist for a particular purpose and are based on a specific rationale which derives from and is intrinsically linked to that purpose') and *Bosnian Genocide Bosnian Genocide* (n 82) para 406 (refusing the overall control test, which had 'the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility'.).

[100] ARSIWA with Commentaries (n 9) 38, para 1; James Crawford, *State Responsibility: The General Part* (CUP 2013) 113; Luigi Condorelli and Claus Kress, 'The Rules on Attribution: General Considerations,' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 221, 221.

between these two attribution dimensions – conduct versus status – the ARSIWA attribution standards are irrelevant to Article 25 of the ICSID Convention.

In practice, this conceptual difference complicates the analogous application of ARSIWA to the different question. Since the attribution in ARSIWA is based on conduct, we must first identify the State-investor's conduct before assessing its attributability. This analysis is quite specific, as it must be shown that the investor is subject to the State's effective control over specific conduct, 'not generally in respect of the overall actions,'[101] or exercises a 'specifically authorize[d]'[102] governmental function 'in the particular instance.'[103] However, the law of State responsibility, being secondary in nature, does not have any standard of selection of such conduct. It is only through the lens of a specific primary rule, such as the one on expropriation, use of force, or genocide, that we can discern which conduct is relevant to attribution for constituting an internationally wrongful act. Such a filter is absent in the case of a 'national' status assessment, where ARSIWA is forced to operate in a legal void.

In fact, those authors who support the ARSIWA analogy target investors' various conducts for attribution. Some focus on the *submission of claims to arbitration*.[104] However, this question can be rephrased to ask whether the investor is submitting the claim on behalf of or representing the State, which can be analysed more pertinently under the rule governing the power to represent a State in international adjudication[105] rather than the law of State responsibility.[106] Others, including the Tribunals we reviewed above, pay attention to *investment activities*. However, since an FDI project is a long and complex enterprise, it must be clarified specifically which activities are relevant in which phase of the project in which country. This problem was insightfully highlighted by Blyschak, which deserves a quote. [107]

> Should the test be applied to the circumstances of the SOE's initial investment decision and entry and/or establishment? Should the test

[101] *Bosnian Genocide* (n 82) para 400.

[102] ARSIWA with Commentaries (n 9) 43, para 7 (art 5).

[103] Ibid 42 (art 5).

[104] Kovács (n 88) 267-68 (asking whether the act of '*bringing the claims* would be considered as acts of a State'); Feldman (n 80) 27-28 (asking whether 'such a claim' is regarded as a State claim or not.).

[105] Eg ICSID Arbitration Rules (June 2022) r 2.

[106] Sébastien Manciaux, 'The Representation of States before ICSID Tribunals' (2011) 2 J Int Dispute Settlement 87, 87 (cautioning against 'the confusion between two distinct issues: State representation and State responsibility').

[107] Blyschak (n 36) 39.

> be applied to the entirety of the SOE investment's lifecycle in a more general manner? Or, should the test be more selectively applied to certain periods of the SOE's investment or certain important decisions taken by the SOE in relation thereto? The answers are not immediately apparent. It is likely that whichever direction a tribunal takes on these decisions will be at least moderately context-dependent. However, it is also clear that questions such as these do not immediately arise in the context of state attribution, which generally involves sovereign liability for more discrete conduct.

The secondary rules of ARSIWA do not provide an answer to these questions and 'without further guidance they can be more than difficult to follow in practice'.[108] In fact, some confusion has already been manifested in arbitral practice. Although the *BUCG* Tribunal questioned whether China had *specific control* over the activities at the construction site,[109] the *Masdar* Tribunal examined whether the UAE exercised '*general control* over the claimant' and 'control over investment decisions' rather than on-site activities.[110]

To illustrate the significance of the theoretical distinction between conduct-based and status-based attributions, it is instructive to examine the practice of the Appellate Body (AB) of the World Trade Organization with respect to the Agreement on Subsidies and Countervailing Measures (SCM Agreement), which defines the regulated State subsidies as a 'financial contribution by a government or any *public body* within the territory of a Member (referred to in this Agreement as "government")'.[111] A debated question is the relevance of ARSIWA to the interpretation of the term 'public body'. In the *US-Definitive Anti-dumping and Countervailing Duties on Certain Products from China (US-AD/CVD (China))* (2011), China claimed that the term should be interpreted in line with ARSIWA as meaning 'an entity that exercises authority vested in it by a government for the purpose of performing functions of a governmental character'.[112] While the AB interpreted the term as 'an entity that possesses, exercises or is vested with governmental

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[108] Lauge N. Skovgaard Poulsen, 'States as Foreign Investors: Diplomatic Disputes and Legal Fictions' (2016) 31 ICSID Rev-FILJ 12, 18 n 27.

[109] *BUCG* (n 39) para 43.

[110] *Masdar* (n 53) para 171.

[111] Marrakesh Agreement Establishing the World Trade Organization (opened for signature 15 April 1994, entered into force 1 January 1995) Annex 1A (Agreement on Subsidies and Countervailing Measures) ('SCM Agreement') art 1.1 (a) (1).

[112] WTO, *US-Definitive Anti-dumping and Countervailing Duties on Certain Products from China* – Report of the Appellate Body (11 March 2011) WT/DS379/AB/R, para 305.

authority',[113] it declined to determine the customary status of Article 5 of ARSIWA, which the US disputed, [114] on the ground that its interpretation did not turn on ARSIWA.[115]

In addition to criticisms on the merit of this interpretation,[116] which this article does not discuss, some suggest that the AB, in fact, '[drew] heavily on [ARSIWA] in spite of the AB's disclaimers to the contrary.[117] Indeed, the AB acknowledges that Article 5 of ARSIWA 'lends further support' to its own conclusion.[118] However, the analysis of the AB overlaps with that provision only in the 'essence' or 'core principles and function'.[119] Importantly, the AB held that '[t]the connecting factor for attribution pursuant to ARSIWA is the particular *conduct*, whereas, the connecting factors in Article 1.1(a)(1) of the SCM Agreement are *both* the particular *conduct* and the *type of entity*'.[120] This distinction was further articulated in the 2014 AB Report in *the US-Countervailing Duty Measures on Certain Products from China*. Here, China argued that the purpose of the inquiry was to determine whether the specific conduct covered by Article 1.1(a)(1) is that of a public body.[121] The AB disagreed, emphasising that the question is whether 'the *entity itself* possesses the core characteristics and functions that would qualify it as a public body', with the conduct being merely one of the relevant evidence.[122] In this sense, the 'public body' enquiry is 'entity-based'[123] and conceptually distinct from the attribution under ARSIWA.

2. Analogy from Maffezini*?*

Another justification in favour of relying on ARSIWA is that *Maffezini* did so in an inverse similar situation, so why not here? To recall the context, *Maffezini v Spain* involved the conduct of a Spanish State entity, *Sociedad para el Desarrollo Industrial de Galicia (SODIGA)*, and it was disputed whether the dispute could be recognised as arising *vis-à-vis*

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113 Ibid para 317.

114 Ibid para 306.

115 Ibid para 310.

116 Eg Joost Pauwelyn, 'Treaty Interpretation or Activism? Comment on the AB Report on United States – Ads and CVDs on Certain Products from China' (2013) 12 WTR 235, 235-237.

117 Michel Cartland and others, 'Is Something Going Wrong in the WTO Dispute Settlement?' (2012) 46 JWT 979, 996.

118 *US-AD/CVD (China)* (n 112) para 311.

119 Ibid para 310.

120 Ibid para 309.

121 WTO, *US-Countervailing Duty Measures on Certain Products from China* – Report of the Appellate Body (16 July 2019) WT/DS437/AB/RW para 5.99.

122 Ibid para 5.101.

123 Gu and Xu (n 76) 1044.

the 'Contracting State', that is, Spain, or SODIGA.[124]

The Tribunal posed two questions: first, whether SODIGA is a State entity for jurisdictional purposes, and second, whether its conduct can be attributed to Spain. It then 'look[ed] to the applicable rules of international law in deciding whether a particular entity is a state body', as applied in the context of State responsibility.[125] While acknowledging that different approaches might be required in the interpretation of the terms 'national' and 'Contracting State' in Article 25, it saw 'sufficient similarities' to draw on the Broches test and *CSOB* and established the well-known 'structural test' and 'functional test'.[126] Subsequent tribunals have invariably turned to ARSIWA for the same purpose.[127]

However, at a closer look, the two legal questions – whether a State-investor is a 'national' and whether a dispute is arising with a 'Contracting State' – are different and do not form the same coin. While, on the claimant side, it is examined if the State-backed investor qualifies as a 'national', on the respondent side, the question is not whether the respondent, like Spain in *Maffezini*, is a 'Contracting State' but rather whether the respondent is deemed a party to the dispute arising from it. Thus, the two situations involve the conceptually distinct kinds of attribution discussed above.

It follows that, in cases similar to *Maffezini*, in which the relationship between the conduct of State entities and the State is at issue, there is no impediment to invoking ARSIWA, as it is precisely the attribution for the purpose of State responsibility that is at issue.[128] While attribution is strictly a matter of merits, it is frequently analysed using the *prima facie* case standard during the jurisdictional phase.[129] For example, *Saipem v*

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[124] *Maffezini* (n 89).

[125] Ibid paras 75-76.

[126] Ibid paras 79-80. Several additional tribunals appear to view the two issues as two sides of the same coin. Eg *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012) para 272.

[127] Eg *Salini Construttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001) para 31.

[128] Olleson (n 94) 467-68 ('the Tribunal [in *Maffezini*] failed adequately to disentangle and distinguish between the character of the various claim put forward by the Claimant. Further, it appears to a large extent substantially to have predetermined the question of attribution of the conduct of SODIGA to the State'.)

[129] *Maffezini* (n 89) para 89 ('the Tribunal concludes that the Claimant has made out a *prima facie* case that SODIGA is a State entity acting on behalf of the Kingdom of Spain'); *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (28 June 2006) para 85 ('it is not for the Tribunal at the jurisdictional stage to examine whether the case is in effect brought against the State and involves the latter's responsibility. An exception is made in the event that it is manifest that the entity involved has

Bangladesh involved an alleged expropriation through the combination of acts of Petrobangla, a Bangladeshi SOE, and the Bangladeshi court.[130] The Tribunal, applying the *prima facie* case test to determine jurisdiction, questioned whether Petrobanla manifestly 'had no link whatsoever with the State'[131] and examined the entity's status under ARSIWA without mentioning the Broches test or *CSOB*.[132] Similarly, in *Helnan International Hotel v Egypt*, the Respondent challenged that the dispute arose between the Claimant and an entity, EGOTH, failing to meet jurisdictional conditions.[133] The Tribunal, noting that EGOTH's action was the exercise of the element of governmental authority and thus attributable, found that the dispute *prima facie* arose in relation to Egypt,[134] which is squarely within the scope of ARSIWA and fundamentally different from the situation where the 'national' status is being questioned. Consequently, the inverse analogy from *Maffezini* also does not ground the invocation of ARSIWA in a distinct legal context.

IV. Alternative Framework: Piercing the 'National' Veil

The preceding section highlighted the limitations of the two existing approaches. On the one hand, although the Broches test accurately reflects the fundamental ethos of the ICSID system, it plays a limited role in the process of treaty interpretation, both theoretically and practically. On the other hand, it has been demonstrated that attribution under ARSIWA is conceptually distinct from the determination of 'national' status under the ICSID Convention and has no bearing on the interpretation of the latter concept. This theoretical distinction complicates the practical application of ARSIWA, frequently compelling tribunals to adopt a subjective and case-by-case analysis under the guise of objectivity and consistency. Furthermore, neither of these frameworks, even if based on solid theoretical foundations, is capable of accounting for the varied approaches adopted by the tribunals in a coherent manner.

How then should we tackle the issue? We submit that these challenges can be

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no link whatsoever with the State.'). See, Olleson (n 94) 469–70; Carlo de Stefano, 'Attribution of Conduct to a State' (2022) 37 ICSID Rev-FILJ 20, 29–30. Regarding the *prima facie* case test in investment arbitration, see Audley Sheppard, 'The Jurisdictional Threshold of a Prima-Facie Case' in Peter T Muchlinski and others (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 932.

130 *Saipem S.p.A. v The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and recommendation on Provisional Measures (21 March 2007) para 143

131 Ibid para 146

132 Ibid para 148.

133 *Helnan International Hotels A/S v The Arab republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction (17 October 2006) para 93.

134 Ibid para 94.

more effectively addressed using the doctrine of abuse of legal personality and abuse of process (A). The pertinence of this approach is further underscored when examining the practice of another international forum facing an analogous question, which provides an inspiring source of guidance (B).

A. Doctrinal Basis: Abuse of Legal Personality and Process

The spirit of the 'national' requirement in Article 25 is to prevent the submission of inter-State disputes to the ICSID, which is designed as a depoliticised forum;[135] its primary objective is to prevent investors from using their 'national' status granted by the Convention to submit an inter-State dispute. This is couched in terms of the abuse of legal personality, which is derived from the well-established general principle of law of good faith. As the ICJ held in *Barcelona Traction*, the doctrine of piercing the corporate veil is 'equally admissible to play a similar role in international law' to 'prevent the misuse of the privileges of legal personality'. [136] Accordingly, when an investor misuses its legal personality as a 'national', it should be 'pierced' of the legal protection attached to that status.

ICSID tribunals have applied the doctrine of abuse of process in various contexts. [137] Emmanuel Gaillard groups abuse of process into three: Manipulation of jurisdiction under IIAs, multiplying proceedings to maximise success, and gaining a benefit inconsistent with the purpose of international arbitration; [138] in the third category, tribunals have rejected claims contradicting the purpose of the ICSID Convention. For instance, *Phoenix Action v The Czech Republic* (2009) ruled that claims based on an investment made in violation of the laws of the host State or obtained through misrepresentations, concealments, or corruption constitute 'an abuse of the international ICSID arbitration system' because 'the purpose of international protection is to protect legal and *bona fide* investments'.[139] For the same reason, insofar as the purpose of ICSID is

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[135] Broches (n 6) 369; Ibrahim Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) ICSID Rev–FILJ 1, 4.

[136] *Barcelona Traction, Light and Power Company, Limited* [1970] ICJ Rep 3, 38–39 paras 56 and 58.

[137] On the abuse of process in investment arbitration, see, Utku Topkan, 'Abuse of the Right to Access ICSID Arbitration' 29 ICSID Rev–FILJ 627; Emanuell Gaillard, 'Abuse of Process in International Arbitration' (2017) ICSID Rev–FILJ 47; Yuka Fukunaga, 'Abuse of Process under International and Investment Arbitration' 33 ICSID Rev–FILJ 181; Duncan Watson and Tom Brebner, 'Nationality Planning and Abuse of Process: A Coherent Framework' (2017) 33 ICSID Rev–FILJ 302; Menalco J Solis, 'Good-Faith Rule against Abusing Process by Multiplying Action' 36 ICSID Rev–FILJ 70.

[138] Gaillard (n 137) 19–27.

[139] *Phoenix Action, Ltd. V The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009)

not to settle inter-State disputes, tribunals should not exercise jurisdiction when faced with a dispute essentially between States.

It should be clarified here if this plea constitutes an objection against jurisdiction or admissibility, which is often unclear in practice.[140] Yuka Fukunaga considers abuse of rights to be a question of admissibility since 'the principle does not negate the court's jurisdiction as such'.[141] This would be the case if a tribunal applies the principle proposed here as such, that is, independently of other jurisdictional requirements. In such a case, the investor remains a 'national' but cannot enjoy legal protection at the ICSID any more due to the inadmissibility of its claims.[142] Meanwhile, if the principle is 'taken into account' in the interpretation of the term 'national', then the prohibition of abuse would constitute a part of the definition of that term, comprising an implicit jurisdictional requirement.[143] Such a construction, however, would mean that the tribunal would 'add other requirements which the [Contracting States] could themselves have added but which they omitted to add',[144] which would be tantamount to an amendment.[145] Consequently, it is more in line with the duties of tribunals to deal with the issue of the standing of State-backed investors at the admissibility level rather than as a jurisdictional question.

By what standard should tribunals identify such abuse of personality and process? The forms of abuse of rights are variable, and the case law holds that clear evidence of abuse must be demonstrated in each case, taking into account all the circumstances.[146] In accordance with this general direction, it is submitted that tribunals

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para 100.

[140] *Pac Rim Cayman v El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012) para 2.10.

[141] Fukunaga (n 137) 184.

[142] See, Jean d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2007) Int'l Org L Rev 91, 105 ('[International organizations] remain international legal persons despite any important dent in their autonomy. If the autonomy turns out to be a sham, it must however be considered that the personality of the organization no longer suffices to shield member states from the consequences of the wrongful act of the organization').

[143] See eg *Phoenix Action* (n 139).

[144] *Saluka Investments BV v The Czech Republic*, PCA Case No. 2001–04, Partial Award (17 March 2006) para 241.

[145] Recall that '[n]o attempt was made […] to reduce this common understanding [on the eligibility of mixed companies] to a legal definition, which would have been a difficult task. Nor was it necessary to do so because of the consensual character of the Convention as a whole'. Broches (n 6) 355.

[146] *Mobil Corporation, Venezuela Holdings, B.V. and others v Venezuela*, ICSID Case No ARB/07/27, Decision on Jurisdiction (10 June 2010) para 177; *Tidewater Inc. and others v Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction (8 February 2013) para 147; *Transglobal Green Energy, LLC and Transglobal Green Panama, SA v Republic of Panama*, ICSID

should take a case-by-case approach, taking into account the totality of the situations of the case, to determine whether a State-backed investor is abusing its status as a 'national' to bring an inter-State dispute to ICSID. Therefore, we agree with Mosche Hirsch, who stated as early as 1993 that '[o]nly a conclusion which takes into account all the relevant factors may reliably classify the character of the corporation as private or public'.[147]

This framework has theoretical, practical, and descriptive advantages. First, it provides a theoretical basis for tribunals to evaluate the totality of circumstances surrounding the investor rather than focussing myopically on the nature of specific activities. It also entails the policy implication of safeguarding the integrity of ICSID without inadvertently diminishing the access of State-backed investors to ICSID by demanding clear and convincing evidence to find abuse.[148] Moreover, our claim is consistent with the observed practice of tribunals. As we have seen, tribunals have already resorted to case-by-case investigations that focus on various factual aspects. The fact that *no* ICSID tribunal has ever found that State-investors are ineligible, despite their frequent appearances before ICSID and frequent findings attributing SOE conduct to the respondent State, further supports our claim. Abuse occurs only in an 'extreme case',[149] as predicted by Broches.

B. List of Relevant Elements: Lessons from the ECtHR

Holistic analysis has the risk of being excessively subjective, and some list of potentially relevant circumstances may be useful. However, by its very nature, it is impossible to show such an exhaustive list in the abstract. Hirsch names the structure of capital, corporation, share ownership and control and supervision by governmental bodies over the activities, but emphasises that 'all the existing links' should be investigated.[150] Nevertheless, it is convenient to turn our attention to the practice of ECtHR, another international forum that settles disputes between a private person and the State, which offers practical guidance on the evaluation of the issue.

Like ICSID, the jurisdiction *ratione personae of the ECtHR* in individual

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Case No ARB/13/28, Award (2 June 2016), para 103.

147 Moshe Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes* (Springer 1993) 65. See also, Blyschak (n 36) 33 (concluding that 'the totality of an SOE's operation' should be considered.).

148 *Clorox España S.L. v Venezuela*, PCA Case No. 2015–30, Laudo (17 June 2021) para 416. For the jurisprudence of the ICJ, see *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* [2021] ICJ Rep 9, 36 para 93.

149 Broches (n 6) 355. See also *Barcelona Traction* (n 136) para 58 (holding that lifting the veil is 'exceptional').

150 Hirsch (n 147) 65.

communication is limited to claims from 'any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation'.[151] Accordingly, when a claimant is a State-backed entity, the Court must be satisfied that the claimant is 'nongovernmental' before affirming jurisdiction. Traditionally, the Court explained that the underlying idea of this requirement is 'to prevent a Contracting Party acting as both an applicant and a respondent party before the Court'[152] However, since this condition also applies to foreign State-entities,[153] it is better to consider that 'governmental' organisations are excluded because only private persons listed in Article 34 can enjoy substantive Convention rights.[154] Accordingly, the rationale is similar to the 'national' requirement in ICSID, which is to exclude inter-State disputes.

The ECtHR has interpreted that a 'governmental organisation' includes 'legal entities which participate in the exercise of governmental powers or run a public service under government control'.[155] Various factors are taken into account to determine whether an entity falls under this category, such as 'its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities'.[156] Additionally, when considering a company, the Court has considered whether 'it is governed essentially by company law, does not enjoy any governmental or other powers […] and is subject to the jurisdiction of the ordinary rather than the administrative courts,' or whether it 'carr[ies] out commercial activities and ha[s] neither a public-service role nor a monopoly in a competitive sector'.[157] It is worth noting that the ECtHR has developed these elements of consideration without mentioning the State responsibility rules on attribution.[158]

Based on these considerations, the ECtHR has delineated the scope of entities

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151 Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) art 34.

152 *Islamic Republic of Iran Shipping Lines v Turkey* ECHR 2007-V 327, para 81.

153 Matthew Happold, 'Who Benefits From Human Rights Treaties?' in Isabelle Riassetto, Luc Heuschling and Georges Ravarani (eds), *Liber Amicorum Rusen Ergeç* (Pasicrisie Luxembourgeoise 2017) 124; Milanovic (n 97) 376–77.

154 *Slovenia v Croatia* App no 54155/16 (ECtHR, 16 December 2020) para 66.

155 *Radio France and Others v France* ECHR 2003-X, para 26. On the relevant cases, see, ECtHR, 'Practical Guide on Admissibility Criteria' (2021) 10, paras 13–14 < https://www.echr.coe.int/pages/home.aspx?p=caselaw/analysis/admi_guide> accessed 21 August 2023.

156 *Radio France* (n 155) para 26.

157 *TRANSPETROL, a.s. v Slovakia* App No 28502/08 (ECtHR, 15 November 2011) paras 61–62.

158 Milanovic (n 97) 368 and 371.

that have standing to appear before it. For illustration, the Court granted standing to *Radio France*, which was a wholly State owned and funded but independent public broadcaster.[159] Meanwhile, standing was denied to a Slovakian oil company *TRANSPETROL*, which had both governmental and non-governmental aspects, because in 'the overall procedural and substantive context of the application and [] its underlying facts,' there was 'the unity of interest of the applicant company, if any, and of the Government'.[160]

Indeed, the ECtHR's jurisprudence is not in perfect consistency and coherence. Rather, as Milanovic points out, the Strasbourg Court jurisprudence in this matter is 'highly contextual, and frequently unreasoned'.[161] It is also admitted that the Court's jurisprudence has developed around the specific notion of 'nongovernmental organisations' in the particular convention rather than the general principle of abuse of rights. Still, the underlying idea of excluding inter-State disputes is the same in the two adjudicatory bodies, and the Court's practice indicates that some contextuality is inherent and inevitable in the proposed holistic approach. The Court's approach of considering various governmental links, as well as a wide range of points of should provide a new source of inspiration for ICSID tribunals.

V. Conclusion

The question of whether and when a claimant investor is entitled to claim standing before an ICSID tribunal despite its State-backed status is expected to gain increasing practical significance. The existing approaches to this issue, namely, the Broches test approach and the ARSIWA approach, do not provide beneficial guidance to tribunals. The Broches test, while reflecting the fundamental ethos of ICSID's depoliticised nature, is inherently vague and only plays a secondary or subsidiary role in the process of interpretation of the treaty. In spite of the hope that ARSIWA approach brings more objective and flexible yardsticks, conceptual distinctions between the attribution of conduct and the attribution of status diminish the relevance and practical utility of the ARSIWA rules.

This article presents an alternative analytical framework that effectively addresses these challenges. In particular, it argues that the claimant standing of State-backed investors should be evaluated under the general principle of abuse of legal personality and process. In accordance with this doctrine, an investor, even if it formally

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159 *Radio France* (n 155) para 26.

160 *TRANSPETROL, a.s. v Slovakia* (n 157) paras 67 and 73.

161 Milanovic (n 97) 379.

satisfies the requirements for qualifying as a 'national', is deprived of the legal protection attached to that status if it is misusing that status to bring an inter-State dispute to ICSID in contravention of the purpose of the ICSID Convention. The finding of abuse requires a comprehensive examination of each case's circumstances and clear and convincing evidence to disqualify an investor on this basis.

This architecture offers three benefits. First, it provides a normative foundation for a comprehensive analysis of the entity's characteristics. Second, it has the policy implication of safeguarding the ICSID system's integrity while protecting the legitimate interests of State-backed investors. Third, it provides a coherent description of the existing practices, where tribunals have in fact conducted a case-by-case analysis and rarely, if ever, admitted disqualification of investors due to State-ownership.

'Taking into account all the circumstances' may not seem like a fancy solution, but that is what lawyers often do. Ultimately, it is up to each tribunal to determine the scope of its jurisdiction, subject to a limited review.[162] We have already seen ICSID tribunals develop a unique jurisprudence on the construction of the notion of 'investment' in Article 25 of the ICSID Convention.[163] Nothing prevents them from doing the same in relation to the requirement of 'national', and this article paves the way forward.

[162] ICSID Convention (n 2) arts 41 (1) and 52 (1) (b).

[163] *Salini v Morocco* (n 127) paras 51–52.