A Comparative Analysis of The Status of SOEs in Investor-State Dispute Settlement (ISDS), State Immunity, and WTO Anti-Dumping and Countervailing Duties

Xi Wang

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School of Law

College of Social Science

University of Glasgow

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Abstract

This thesis discusses how the status of state-owned enterprises is identified in the fields of investor-state dispute settlement (ISDS), state immunity, and WTO anti-dumping and countervailing duties, and whether there is a need for a unified rule. The aim is to clarify under which circumstances state-owned enterprises in international activities may be considered to represent state proxies. Accordingly, the thesis analyses the existing rules in these three fields and discusses the question of whether the status of state-owned enterprises is determined by their structure or by their behaviour. In addressing the differences in rules across these three fields, the thesis then explores the issue of whether international law needs to apply a uniform rule in determining the status of state-owned enterprises.

This analysis goes beyond previous approaches which only examined rules within a single field, by providing a comparative discussion of rules in determining the status of an entity in international law across three different fields. The key point of the thesis is that there are both commonalities and differences in the rules governing the status of state-owned enterprises in these three fields, which arise from their distinct legislative objectives. In addition, due to the fragmentation of international law and the subjectivity of interpretation of international law, creating a uniform rule is not deemed necessary. According to the comparative study conducted across the three areas, this thesis suggests that rules from the state immunity field can be selectively applied to the other two areas. However, it is essential to consider their adaptability to the specific rules of each area.

Key Words: State-owned Enterprises (SOE), State, Structure, Conduct, Unified Rule

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Author's Declaration

"I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution."

Printed Name: _____Xi Wang_____

Signature: _____Xi Wang_____

Date: _____17/10/2024_____

Abbreviations

AB - Appellate Body

AIBO - National Company Bucharest Otopeni International Airport

APAPS - Authority for the Privatisation and Management of the State Ownership

BUCG - Beijing Urban Construction Group Co., LTD

COFIDES - Compafiia espafiola de Financiacion del Desarrollo S.A

CSOB - Ceskoslovenska Obchodni Banka, A.S.

CWP - Circular Welded Carbon Quality Steel Pipe

DSB - Dispute Settlement Body

EAMSA - Emilio A. Maffezini S. A.

EC - European Community

EU - European Union

FSIA - US Foreign Sovereign Immunities Act

GATS - General Agreement on Trade in Services

GATT - General Agreement on Tariffs and Trade

ICA - Iraqi Airways Corporation

ICJ - International Court of Justice

ICSID - International Centre for Settlement of Investment Disputes

ILC Articles - Draft Articles on Responsibility of States for Internationally Wrongful Acts

ISDS - Investor-State Dispute Settlement

LWR - Light–Walled Rectangular Pipe and Tube

LWS - Laminated Woven Sacks

JFTC - Jiangyin Foreign Trade Corporation

KAC - Kuwait Airways Corporation

KEXIM - Korea National Bank

NHA - National Highway Administration

NMDC - National Mineral Development Corporation

OECD - The Organisation for Economic Co-operation and Development

OTR - Certain New Pneumatic Off-the-Road Tires

SCA - Suez Canal Authority

SCM Agreement - Agreement for Subsidies and Countervailing Measures

SIA - UK State Immunity Act

SOCBs - Chinese State-owned Commercial Banks

SODIGA - Sociedad para el Desarrollo Industrial de Galicia Sociedad Anonima

SOEs - State-owned Enterprises

SOF – State Owned Fund (in Romanian)

TAROM - Spangfei Company for Air Transportation

UK – United Kingdom

UN – United Nations

URAA - Uruguay Round Agreements Act

US – United States of America

USDOC - United States Department of Commerce

WTO - World Trade Organization

Chapter 1 Introduction

State-owned enterprises (SOEs) play an important role in international trade in the 21st century, and wield undeniable influence and power across numerous important industries.[1] Nowadays, 22 of the world's 100 largest companies are SOEs. This is the highest number in recent decades.[2] There are various concerns about SOEs, which mainly include the issue of their independence as companies, and the special privileges that SOEs enjoy.[3] These concerns generally revolve around the issue of state intervention in SOEs as a result of the special relationship between SOEs and the state.

How to regulate SOEs and how to ensure their consistent legal identification are widely discussed topics in the international economic arena. SOEs are often criticised as manifestations of state capitalism.[4] The use of SOEs by governments to manipulate markets creates significant risks for economic activity around the world.[5] It is argued that the role of SOEs in foreign activities may be closely aligned with those of their national government.[6] SOEs usually have economic objectives as well as non-

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[1] Ines Willemyns, 'Disciplines on state-owned enterprises in international economic law: Are we moving in the right direction?' (2016) 19 Journal of International Economic Law 657.

[2] OECD, *State-Owned Enterprises as Global Competitors: A Challenge or an Opportunity?* (OECD Publishing 2016) 11, Available at <https://doi.org/10.1787/9789264262096-en> 11.

[3] Ibid, 13.

[4] State capitalism broadly refers to configurations of capitalism where the state plays a particularly strong role in organising the economy and society, in supervising and administering capital accumulation, or in directly owning and controlling capital. Ilias Alami, Adam D Dixon and Emma Mawdsley, 'State capitalism and the new global D/development regime' (2021) 53 Antipode 1294, 1297; State capitalism is often used by the western countries as a tool for castigating emerging economies such as China and Russia. Ilias Alami and Adam D. Dixon, 'The strange geographies of the 'new' state capitalism' (2020) 82 Political Geography 102237, 6-8.

[5] Xuehong Liu, 'On the Identification of Private Investors in SOEs and Implications - A Perspective on the Eligibility of Claimants in ICSID Arbitration' (论国有企业私人投资者身份认定及启示 ——以 ICSID 仲裁申请人资格为视角) (2017) 24(03) Journal of Shanghai University of International Business and Economics 5, 5.

[6] Knutsen and others believe that the relationship between the owners and managers of SOEs is complex, and that the state may implement political intervention in SOEs. See further details in Carl Henrik Knutsen, Asmund Rygh and Helge Hveen, 'Does state ownership matter? Institutions' effect on foreign direct investment revisited' (2001) 13 Business and Politics 1, 4. Also, Watanabe proposed that the state will have more obvious preferences for SOEs, which will affect the fair competition environment in terms of foreign investment. See Mariko Watanabe, 'Competitive Neutrality of State-owned Enterprises in China's Steel Industry: A Causal Inference on the Impacts of Subsidies' [2020] Available at SSRN 3538075 7. Furthermore, Blyschak pointed out that due to the special relationship between SOEs and the state, their investment raises different considerations among regulators than for private enterprises. See Paul Blyschak, 'State-owned enterprises and international investment treaties: When are state-owned entities and their investments protection' (2010-2011) 6(1) J Int'l L & Int'l Rel 1, 7.

economic objectives, which is one of the most obvious differences between them and private enterprises.[7] In foreign activities, non-economic objectives usually include diplomatic policy and national development objectives.[8] The government may invest abroad and provide various forms of support and subsidies to enable SOEs to gain a competitive advantage and obtain energy and mineral resources for their country.[9] The government will also use SOEs to carry out international business to achieve its desired foreign policy objectives and other goals.[10] The close relationship between the government and SOEs may lead to a discussion on whether the foreign activities of SOEs is based on an independent will to carry out those activities, whether the behaviour of SOEs is purely commercial, and so on.

Some scholars believe that most of the above situations existed in the initial establishment of SOEs, but not widely after the independent reform of SOEs under the modern enterprise system.[11] SOEs are likely to engage in political activity only if the government has a significant impact on their business.[12] Countries that have carried out reforms to establish a modern corporate system usually reform the SOEs system to reduce the direct intervention of the state in such enterprises. For example, China began to establish its current enterprise system and carry out the joint-stock reform of SOEs in 1993. SOEs adopted modern management principles, and the government reduced

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[7] Shirley and Walsh pointed out in their article that state-owned enterprises are often assigned multiple objectives, including non-economic goals such as social and economic development. Mary M. Shirley and Partick Walsh, 'Public vs. Private Ownership: The Current State of the Debate' (January 2001), Available at SSRN: https://ssrn.com/abstract=261854, 1-67. State-owned enterprises simultaneously undertake the tasks of production and providing social welfare. Bai, Chong-En and others, 'A Multitask Theory of State Enterprise Reform' (2000)28(4) Journal of Comparative Economics 716, 736. Private enterprises also have certain objectives that are not strictly economic. Modern companies are expected not only to pursue economic goals but also to engage in broader social activities and contribute to human well-being. Joshua D. Margolis and James P. Walsh, 'Misery Loves Companies: Rethinking Social Initiatives by Business' (2003)48(2) Administrative Science Quarterly, 268, 270. Even though there are calls to promote the social responsibility of private enterprises, the ultimate goal of private companies remains value maximization. Economist Milton Friedman argued that the only social responsibility of a business is to increase profits for its shareholders. Social responsibilities such as improving the environment and addressing poverty do not fall within the scope of a business's obligations.Milton Friedman, 'The social responsibility of business is to increase its profits' in Zimmerli, W.C., Holzinger, M., Richter, K.(eds), *Corporate Ethics and Corporate Governance* (Springer, Berlin, Heidelberg 2007) 173, 173-178.

[8] Knutsen, Rygh and Hveen (n 6) 1.

[9] Ibid 6.

[10] Jean-Pierre Anastassopoulos, Georges Blanc and Pierre Dussauge, State-owned multinationals (Wiley 1987).

[11] Carole Rentsch and Matthias Finger, 'Yes, no, maybe: The ambiguous relationships between state-owned enterprises and the state' (2015) 86 Annals of Public and Cooperative Economics 617, 619.

[12] Jean-Philippe Bonardi, Amy J Hillman and Gerald D Keim, 'The attractiveness of political markets: Implications for firm strategy' (2005) 30 Academy of Management Review 397, 397.

its control over those enterprises.[13] At the same time, the government also showed that it does not interfere in companies' investment and decision-making, and SOEs adopted the independent operation mode.[14]

The status of SOEs in international activities has been widely discussed, and the question of whether SOEs are to be regarded as independent parties or agents of the state has been regulated in different areas of international law. There are relevant rules and practices in the fields of Investor-State Dispute Settlement (ISDS), state immunity, and WTO (World Trade Organization) Countervailing and Anti-dumping Duties. In light of these different rules for the determination of the relationship between SOEs and the state in different areas of law, this thesis will discuss the differences in the rules pertaining to the identification of SOE status in the areas of ISDS, state immunity, and WTO anti-dumping and countervailing duties, as well as the question of whether a uniform rule for determining the status of SOEs should be established.

1.1 Key concepts

a. State-owned enterprises

The International Court of Justice explained the company concept in the case of Certain Iranian Assets (*Islamic Republic of Iran v. United States of America*). It stated that an entity called a "company" must have an independent legal personality,[15] and entities wholly or partly owned by the state and capable of command and control are not excluded from the scope of "company"[16] - but an entity that exclusively engages in sovereign activities related to national sovereign functions is not a "company".[17] This is the latest summary of the concept of a company.

The 1995 World Bank Policy Research Report defined SOEs as follows: "SOEs are

[13] HoiKi Ho and Angus Young, 'China's experience in reforming its SOEs: Something new, something old and something Chinese?' (2013) 2(4) International Journal of Economy, Management and Social Sciences 84, 85.
[14] See Committee on Subsidies and Countervailing Measures - Subsidies - Replies to questions posed by the United States regarding the new and full notification of China, G/SCM/Q2/CHN/72, World Trade Organization, 24 April 2017, Reply to Question 10, 17.
[15] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America),* Preliminary Objections, Judgment, ICJ [2019] Rep 7, para 87.
[16] Ibid 88.
[17] Ibid 91.

defined here as government owned or controlled economic entities that generate the bulk of their revenue from selling goods and services. This definition limits the SOE set to commercial activities in which the government is able to control management decisions by virtue of its ownership stake alone. However, it still encompasses enterprises directly operated by a government department and those in which the government holds a majority of the shares, directly or indirectly, through its SOEs. It also encompasses enterprises in which the state holds a minority of the shares if the distribution of the remaining shares would leave the government with effective control."[18] This definition emphasises that SOEs contain two elements: one is state ownership or control, and the other is that they must engage in commercial activities. If the entity does not engage in commercial activities, it is not an SOE. In the latter case, a body such as a state agency only engages in the work of state functions. This is also consistent with the opinion in the International Tribunal above.

In addition, the OECD (The Organisation for Economic Co-operation and Development) Guidelines on the Corporate Governance of State-Owned Enterprises in 2015 also defined SOEs: "any corporate entity recognised by national law as an enterprise, and in which the state exercises ownership, should be considered as an SOE. This includes joint stock companies, limited liability companies and partnerships limited by shares"[19]

b. Control

Control in the OECD's "Competitive Neutrality Guidelines" means: "Enterprises that are under the control of the state, either by the state being the ultimate beneficiary owner of the majority of voting shares or otherwise exercising an equivalent degree of control."[20] Furthermore, "An equivalent degree of control would include, or instance, cases where legal stipulations or corporate articles of association ensure continued state control over an enterprise or its board of directors in which it holds a minority stake".[21]

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[18] *Bureaucrats in business: the economics and politics of government ownership (English).* A World Bank policy research report Washington, D.C. : World Bank Group 263, available at < http://documents.worldbank.org/curated/en/197611468336015835/Bureaucrats-in-business-the-economics-and-politics-of-government-ownership> 263.

[19] OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition* (2015) 14.

[20] Ibid 15.

[21] Ibid.

Additionally, even if the state holds only a minority stake in an enterprise, it will still be considered as having control over it if the corporate structure or shareholding arrangements (through means like shareholders' agreements) grant the state effective control.[22] The notion of state control discussed in this thesis takes the form of the OECD's 2015 update to the corporate governance guidelines for SOEs, where the state ownership of an SOE implies state control over that SOE.[23] Some forms of state involvement in the structure of SOEs, including the government's appointment of board members, the independence of SOE assets, and other connections between the state and SOEs, will not be considered as state control over SOEs. A detailed analysis of this will be conducted in Chapter 3.

c. Commercial activity

Scholars Hazel Fox and Philippa Webb define commercial transactions as involving three components: engagement in business and trade activities; participation in transactions willingly conducted between two parties; and the transaction being explicitly or implicitly governed by the private law of a specific national jurisdiction.[24]

The United Nations Convention on Jurisdictional Immunities of States and Their Property Art. 2(c) defines a “commercial transaction” as: (i) any commercial contract or transaction for the sale of goods or supply of services; (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.[25]

The OECD’s "Competitive Neutrality Guidelines", note regarding the definition of "commercial activities" that: "In the remainder of this report the term "commercial activities" denotes activities in the marketplace that do not constitute public policy

[22] Ibid.
[23] Ibid 14.
[24] Hazel Fox and Philippa Webb, *The law of state immunity* (Oxford International Law Libra 2013), 403.
[25] UNGA ‘United Nations Convention on Jurisdictional Immunities of States and Their Property Established by UNGA Res 59/38’ 59th Session (2004) UN Doc Supp No 49 (A/59/49) art. 2(c).

functions. Likewise, "Commercial entities" means entities not tasked by the public authorities with carrying out public policy functions."[26] In addition, "For the purpose of these Guidelines, an economic activity is one that involves offering goods or services on a given market and which could, at least in principle, be carried out by a private operator in order to make profits."[27] So, commercial activities should also be profit-making.

d. Fragmentation of international law

The traditional concept of the fragmentation of international law arises from the increasing number of branches that have emerged alongside the evident specialization of various fields of international law. These branches and sectors cannot be identified by a uniform hierarchy, and there is a potential for overlap between the various branches and sectors. This has led to inconsistencies and conflicts in the application of legal principles in the field of international law, and is known as the phenomenon of the fragmentation of international law.[28]

The 2006 International Law Commission (ILC) Report on the Fragmentation of International Law (A/CN.4/L.702) provides an in-depth analysis of this issue. The report acknowledges that the fragmentation of international law is an inevitable consequence of globalization and the increasing complexity of international law. The ILC report seeks to offer frameworks to resolve conflicts between different branches of international law and proposes addressing fragmentation through harmonious interpretation, systematic integration, and coordination in the application of legal rules.[29]

Different scholars have adopted different approaches in addressing the phenomenon of the fragmentation of international law, and Professor Hafner argues that the fragmentation of international law reflects a specialisation of international regulations

[26] OECD (n 19) 20.
[27] Ibid 15.
[28] Shiqian Mo, 'Fragmentation of international law and the effectiveness of the international law system' (国际法碎片化和国际法体系的效力) (2015) 4 Law Review 117, 124.
[29] UNGA, ‘FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW Report of the Study Group of the International Law Commission’ (18 July 2006) 58th Session UN Doc A/CN.4/L.702.

and regimes that is more in accordance with the needs of states. The position of the state is better respected in a special regime in a separate field than in a unified global regime.[30] Judge Buergenthal argued that the proliferation of international tribunals has been beneficial overall because the increasing number of interstate tribunals with specialised and regional jurisdiction has allowed governments to test and observe the impact of international decisions involving states and their acceptance of the jurisdiction of international tribunals. This adds relevance to contemporary international connections, which is a positive development.[31]

However, Martti Koskenniemi and Päivi Leino mentioned in their article that a landscape of "proliferating tribunals, overlapping jurisdictions and "fragmenting" normative orders" represents the context of "the pathology of the international normative system" explored by Professor Weil[32] And, this situation can reduce the normative nature of international law.[33] Judge Guillaume also suggested that international law needs to take into account the unique problems of a particular region or area, while taking care that international law does not develop "in such a way as to jeopardise its unity. Otherwise, the judicial confusion caused by an increasing number of international courts could lead to a loss of trust in international law on the part of governments and the public."[34]

As can be seen, one of the main focuses of concern in the discussion of the negative effects of the fragmentation of international law is the issue of coherence. Judge Charney argued that the coherence of the international legal system is at risk. A situation where similar cases are not treated equally could lead to a loss of the essence of the normative legal system. Continued developments in this direction would lead to a grave risk to the legitimacy of international law.[35] In other words, the proliferation of

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[30] Gerhard Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law Diversity or Cacophony: New Sources of Norms in International Law Symposium' (2003) 25 Mich J Int'l L 849, 859.
[31] Thomas Buergenthal, 'Proliferation of international courts and tribunals: is it good or bad?' (2001) 14 Leiden Journal of International Law 272, 272.
[32] Martti Koskenniemi and Päivi Leino, 'Fragmentation of international law? Postmodern anxieties' (2002) 15 Leiden Journal of International Law 553, 553.
[33] Prosper Weil, 'Towards Relative Normativity in International Law' (1983) 77 Am J Int'l L 413, 413.
[34] Gilbert Guillaume, 'The Future of International Judicial Institutions' (1995) 44 International & Comparative Law Quarterly 848, 862.
[35] Jonathan I. Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' (1999) 31 NYU J Int'l L & Pol 697, 698.

international tribunals threatens the coherence of the international legal system. Not only may a cacophony of views on the norms of international law undermine the perception that an international legal system exists, but if similar cases are not treated alike, then the very essence of a normative system of law will be lost. In fact, the basic principles of general international law should remain the same regardless of which tribunal is making a decision in which field.[36] The same is true of the issue discussed in this thesis regarding the rules determining the status of SOEs. If the status of SOEs is not treated equally in cases in different areas, the same questions will be raised, hence the discussion of the need for a uniform approach. This thesis's question of whether a uniform approach is needed to determine the status of SOEs has a similar focus to that of the fragmentation discussion.

This thesis is about the debate on what has been called fragmentation, although the way I use the concept is not the traditional one found in the contemporary literature. But, it is also a debate about whether we need a unified approach, across different areas of international law. Through a discussion of the fragmentation of international law, this thesis argues that the current way, in which each field is identified individually, may be more efficient. This is because in the state of fragmentation, the current law in each field is self-sufficient. Fragmentation has occurred due to the expansion of sectoral laws, which are created to help solve more specialised problems, and so are correspondingly more specialised, and it will generally be more efficient for cases to go into specialised areas and still draw on previous case decisions.

e. Legislation in the field of state immunity

In discussing issues related to the field of state immunity, this thesis will primarily focus on the UN Convention on State Immunity, the UK State Immunity Act (SIA), and the US Foreign Sovereign Immunities Act (FSIA). The UN Convention on State Immunity is an international immunity law finalized by the International Law Commission after approximately 20 years of work.[37] Prior to the drafting of the Convention, immunity rules relied heavily on the involvement of national laws.[38] The introduction of the

[36] Ibid 699.
[37] Fox and Webb (n 24) 2.
[38] Ibid 17-18.

Convention has had a significant impact on countries without their own domestic laws on immunity, as they can use the rules of the Convention as a model for new legislation.[39] Although the Convention has not yet come into force, once it does, it will strengthen the international legal content of immunity rules and reduce the reliance on domestic law.[40] The UN Convention on State Immunity establishes state immunity rules in the form of an international treaty, providing a unified and clear reference to a certain extent.[41]

In addition to the UN Convention on State Immunity as an international framework for immunity rules, this thesis will also discuss relevant legislation and practices in the UK. The UK SIA aligns with the latest developments in common law and is a highly technical piece of legislation.[42] The US FSIA is a codified law based on the principle of restrictive immunity, which also provides a precise and comprehensive explanation of the general state practice in the area of sovereign immunity.[43] In fact, state practices regarding sovereign immunity are not entirely uniform across countries. However, this thesis does not aim to trace the specific approaches of each country regarding state immunity. Instead, it selects the relevant rules from the UK, US, and UN Convention for representative discussion. Other scholars' articles also highlight the importance of these statutes and the convention, indicating that they are well-researched and representative in this field.[44]

f. ISDS and ICSID

The ISDS mechanism includes the resolution of international disputes through investment courts, arbitration, and conciliation, etc. The role of domestic courts is limited, and their impartiality has been questioned.[45] Conciliation is non-binding and

[39] Joanne Foakes, Elizabeth Wilmshurst, 'State Immunity: The United Nations Convention and its effect' (2005) 2 (5), Transnational Dispute Management (TDM) 1, 10.
[40] Fox and Webb (n 24) 18
[41] Ibid.
[42] Robin C. A. White, 'The State Immunity Act 1978' (1979) 42 (1) Modern Law Review 72, 72-79.
[43] Fox and Webb (n 24) 146.
[44] Ibid. Andrew Dickinson, 'State Immunity and State-Owned Enterprises' (2009) 10 (2) Business Law International, 97. Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008).
[45] Rudolf Dolzer and Christoph Schreuer, *Principles of international investment law* (2nd edn, Oxford University Press 2019) 191-192.

is used far less frequently than arbitration.[46] Arbitration results in binding decisions, and as the mainstream method within the ISDS mechanism, some scholars also equate investment arbitration with the ISDS mechanism.

The platforms for the operation of the ISDS mechanism include the International Centre for Settlement of Investment Disputes (ICSID), ad hoc tribunals under the United Nations Commission on International Trade Law (UNCITRAL), the International Chamber of Commerce (ICC) Arbitration Court, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the London Court of International Arbitration (LCIA) China International Economic and Trade Arbitration Commission (CIETAC). etc. Over 80% of dispute cases are handled by ICSID.[47] As of October 2024, the total known number of ISDS cases globally is 1,332.[48] As of December 31, 2023, ICSID had registered 967 cases.[49]

Since its establishment in 1966 under the ICSID Convention, ICSID has played an active role in maintaining a favourable international investment environment. The ICSID Convention provides a comprehensive ISDS arbitration system. Article 53(1) of the Convention states that awards "shall not be subject to any appeal or to any other remedy except those provided for in this Convention."[50]

Certainly, ICSID is the primary institution for dispute resolution, but it is not the only one. ICSID remains the leading forum for institutionally supported investor-state arbitration. Other institutions primarily handle cases that are more national or regional in nature, rather than international.[51] Considering its status as an international organization, ICSID is the most suitable institution for resolving various forms of

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[46] Ibid, 193.
[47] Bin Sheng, Ran Duan, 'The Development of the Investor-State Dispute Settlement Mechanism and Its Impact on Chin' (投资者—东道国争端解决机制的发展及对中国的影响) Journal of International Corporations 60, 61-62.
[48] UN Trade and Development, Investment Dispute Settlement Navigator, available at <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed in 1st October 2024.
[49] ICSID, *The ICSID Caseload – Statistics*, Issue 2024-1, p.1.
[50] ICSID, 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) ('ICSID Convention') art 53(1).
[51] Katia Yannaca-Small, *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 64.

investor-state disputes.[52]

Arbitration procedures across institutions share some common features.[53] International arbitration law and practice, as well as the provisions of international arbitration rules, are also becoming increasingly harmonized.[54] It is argued that the main distinction between ICSID and non-ICSID arbitration lies in the annulment and enforcement of awards.[55] Regarding the determination of the status of SOEs will be discussed in this thesis, there is no significant conflict. The issue of state responsibility concerning state-owned enterprises generally relies on the provisions of customary international law.[56] This thesis focuses on the differences between the rules governing SOEs within the ISDS framework and those in other international legal fields. To emphasize the comparison of systems, this focus will not emphasize the differences between various arbitration institutions within the ISDS framework. Considering the significant role of ICSID in the ISDS system, this thesis will primarily rely on the ICSID Convention and ICSID arbitration practices in discussing ISDS-related provisions.

1.2 Research questions – the legal problem of SOEs as state proxies

The extent to which SOEs constitute a stand-alone issue needs to be determined and clarified.[57] The most significant difference between SOEs and other private enterprises is the inability of SOEs to explicitly maximise profits over the long term, due to the "public policy objectives" of SOEs.[58] As a result, SOEs may not act in the same way as private firms in their international operations, and SOEs' behaviour may not be driven purely by commercial objectives and potential economic value creation, as certain governmental objectives and commercial motives may also be at play.[59] A key point of concern is that the activities of SOEs pursue either commercial or public policy

[52] Ibid 88.
[53] Dolzer and Schreuer (n 45) 196.
[54] Eric Schwartz and Yves Derains, *Guide to the ICC Rules of Arbitration* (2nd edn, Kluwer Law International 2005) 5.
[55] Gaëtan Verhoosel, 'Annulment and Enforcement Review of Treaty Awards: To ICSID Or Not to ICSID' (2008) 23 (1) 119, 119-154,
[56] Dolzer and Schreuer (n 45) 183.
[57] OECD (n 2) 18.
[58] Ibid 27.
[59] Alvaro Cuervo-Cazurra and others, 'Governments as owners: State-owned multinational companies' (2014) 45 Journal of International Business Studies 919, 919.

objectives, and the division between the two is not always clear.[60]

SOEs are enterprises in which a government has invested, or is involved in controlling, and they are sometimes agencies and manifestations of the economic activity of governments in international trade activities. The issue of the international regulation of SOEs has attracted the attention of scholars for a long time.[61] The relationship between SOEs and the state is an argument that is often discussed in relation to SOEs' international trade activities**.**

It is argued that the current trend of anti-globalisation and trade protectionism in the international community and the mixed political and economic attributes of SOEs will lead to a more challenging international environment for SOEs in their overseas activities.[62] Countries may hinder the access of SOEs by raising security standards and anti-monopoly reviews, taking advantage of the unclear relationship between SOEs and the state to take certain restrictive measures, and also by implementing measures such as expropriation against SOEs in their investment activities. So, the risks faced by SOEs in their overseas activities are becoming greater.[63] In this context, the current vague understanding of the legal nature of SOEs and inconsistent practice in various fields is likely to make the rules determining the status of SOEs more open to interpretation, meaning it will be more difficult for SOEs to achieve relief.

SOEs have a specific relationship with the state and have the attribute of being "state-owned", which leads to their identity being questioned in relation to some of their international activities. The rules governing the status of SOEs vary in different fields, with the field of international investment arbitration emphasising that the "investor" is acting as an agent for the government, or is discharging an essentially governmental function.[64] In the area of state immunity, a state-owned enterprise qualifies as a "state" only when it is entitled to exercise and exercises the sovereign powers of the state.[65] In

[60] OECD (n 2) 27.
[61] Raymond Vernon, 'The international aspects of state-owned enterprises' (1979) 10 Journal of International Business Studies 7, 7.
[62] Liu (n 5) 15.
[63] Ibid.
[64] Aron Broches, *Selected Essays: World Bank, ICSID and Other Subjects of Public and Private International Law* (Martinus Nijhoff Publishers 1995) 355.
[65] UNGA (n 24) art. 2(1).

the area of WTO anti-dumping and countervailing duties, the instructive *US - Anti-Dumping and Countervailing Duties (China)* case specifies the three criteria of "possesses, exercises or is vested with governmental authority".[66] These criteria are not systematic in each field, but have emerged in practice and have been used in various cases, with the effect that they have become the dominant criteria in the field.

In response to the different standards in different fields, this thesis will discuss the rules in a comparative discussion of three areas. In each area, should the identification of SOEs depend on the structure or conduct of the SOEs? Looking at the structure, does the determination of the structure of SOEs depend on control, or does it go beyond that, to consider effective control and meaningful control? Looking at conduct, do we define conduct by nature or purpose?

The different regulations on the identification of the status of SOEs used in various fields have led to discussion on the possible formation of unified identification standards. One view is that unified standards can be established; for example, according to Yixin Liang, the international community does not have a unified standard for defining SOEs in the three fields, and a situation of fragmentation thus arises, which means it is necessary to promote a harmonious interpretation of the 'governmental power' of SOEs and to establish a unified position.[67]

In addition, it is argued that the different provisions in current international investment arbitration and anti-dumping and countervailing duty laws will undermine the interests of SOEs investing abroad.[68] The vague understanding of the legal nature of SOEs and inconsistent practice across various fields cast doubt over whether the outcome of disputes over SOE status will be accepted by all parties.[69] However, the reason for the existence of these special regimes is to strengthen the law on a specific subject, protect specific interests more effectively, or establish more detailed regulations on a matter

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[66] *United States — Definitive Anti ─Dumping and Countervailing Duties on Certain Products from China* (11 March 2011) WT/DS379/AB/R, para 317.

[67] Yixin Liang, 'On the Eligibility of SOEs for Arbitration in ICSID' (论国有企业在 ICSID 的仲裁申请资格) (2017) 38(10) Law Science Magazine 103, 109.

[68] Wei Shen, 'The State-owned Enterprise Identity Dilemma in International Economic Activity --An analysis of international rules' (国际经济活动中的国有企业身份困境 ———国际规则的分析) (2021) 4 Journal of Huaqiao University (Philosophy & Social Sciences) 103, 104.

[69] Liu (n 5) 6.

compared to general law.[70] This also brings up the observation by the International Law Commission that while fragmentation allows for specialization, it also raises discussions on the potential to undermine the coherence of international law as a whole.[71]

As a result of such discussions and controversies, this thesis will attempt to address the issue of whether there a need for uniformity and harmonization across different international law regimes when it comes to identifying SOEs as state proxies. Thus, this thesis will draw on the 2006 ILC Report to explore whether current fragmentation in SOE regulations can be resolved through harmonious interpretation or whether sector-specific approaches remain preferable in the evolving international legal system.

This thesis will also examine the practical implications of such identification, including the potential consequences for SOEs and states. For instance, classifying an SOE as a state proxy could lead to state responsibility for the SOE's behaviours, potentially resulting in legal accountability in international law. This could affect investment arbitration, where states might be liable for SOEs' conducts, or influence sovereign immunity, potentially exposing SOEs to legal risks in foreign courts. These practical considerations make the question of whether to harmonize the rules governing SOEs across different regimes a critical issue in the current global legal environment.

1.3 Outline of the thesis

1.3.1 Descriptive research – a comparative discussion of identification rules in three areas

Following the introductory chapter, the thesis begins its analysis in Chapter 2 by outlining the legal framework of the identification rules regarding the status of SOEs. This chapter will set out the relevant elements which will be examined in relation to the

[70] UNGA, 'FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi' (13 April 2006) 58th Session UN Doc A/CN.4/L.682, p.97, para 186.
[71] UNGA (n 29) para 7.

rules in each area, the provisions of the rules in each area in legislation, and their application in typical cases. A detailed comparative analysis will be provided in the next three chapters.

The first issue in identifying SOEs is consideration of the context in which they operate, and whether the identification process examines their relationship with the state in the usual sense or their behavioural performance in specific cases.[72] Whether the structure of SOEs should be taken into account when determining their status has been approached differently. For example, in the WTO *US - Anti-Dumping and Countervailing Duties (China)* case, the US and the panel determined the status of Chinese SOEs as public bodies through the Chinese governmental control of SOEs. This is also a classic case of the 'government control theory'.[73] In contrast, in the international investment dispute arbitration case *CSOB v. Slovakia*, the arbitral tribunal explicitly did not rely on capital contributions to determine whether an SOE was a "national".[74] Similarly, in *Islamic Republic of Iran v. United States of America*, the tribunal stated that the fact that the state has control over the entity does not affect the entity's status as a corporation.[75] Different approaches are thus taken to address the structure in cases across different areas, which will be compared and analysed in detail in Chapter 3. In this chapter, it is first necessary to discuss whether the structure depends on control, and then to analyse whether the structure of SOEs is the standard for identifying their status. Ultimately, the chapter will conclude that structure should not be the focus.

Chapter 4 will discuss the question of whether the identification of SOEs should focus on conducts, and will conclude that it should. In the case *Emilio Agustin Maffezini V. The Kingdom of Spain* in ICSID, the arbitral tribunal found that the conduct of SODIGA (*Sociedad para el Desarrollo Industrial de Galicia Sociedad Anonima,* an SOE) in instructing the bank to make the transfer of funds was an exercise of a governmental

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[72] Danyan Chen, Studies on the Issues of State Responsibility in "Investor-State Dispute Settlement" (“投资者—国家争端解决”中的国家责任问题研究)，(PhD thesis, Graduate School of Xiamen University 2017) 35.

[73] *United States — Definitive Anti ―Dumping and Countervailing Duties on Certain Products from China* (22 October 2010) WT/DS379/R-01, paras 8.80, 8.94.

[74] *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) paras 16-18.

[75] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* (n 15) para 88.

function, leading to the conclusion that responsibility for SODIGA's conduct should be attributed to the Spanish government.[76] Similarly, in the *Animal Sci. Prods., Inc. v. China Minmetals Corp* case in the area of state immunity, the court ruled that the company could not invoke state immunity by confirming that specific acts were the result of commercial conduct.[77] However, in the WTO anti-dumping and countervailing duties area, although some cases have focused on conducts,[78] the *US — Countervailing Measures (China)* case does not emphasise the conduct element in its determination of public bodies, but rather focuses on whether the body engaging in the conduct has governmental attributes.[79] It follows that there are also different approaches in practice in different fields as to whether the identification of the status of SOEs should focus on conducts. According to the analysis in this chapter, the role of conduct in the identification of SOEs has been accepted in both the ISDS field and in the field of state immunity, with a different view in the WTO anti-dumping and countervailing duties field. In the final part of this chapter, the idea that conducts should also be used for the identification of SOEs in WTO anti-dumping and countervailing duties will be discussed.

Determining the status of an SOE requires that attention is paid to the conduct of the SOE, and the decision on whether the specific conduct is a governmental or commercial act may affect the identification of the SOE's status. Commercial activity is an issue that is explicitly raised in the field of state immunity and the commercial activity exception is key to determining whether state immunity can be invoked. There is a major division between the nature of the act criterion and the purpose of the act criterion in terms of how to determine whether a contract or transaction is a commercial activity. The focus on the nature of the conduct and the purpose of the conduct varies across the

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[76] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No ARB/97/7, Award (13 November 2000) para 83.

[77] *Animal Sci. Prods., Inc. v. China Minmetals Corp*., 702 F. Supp. 2d 464 (D.N.J. 2010) 464.

[78] As in the case of *US — Anti-Dumping and Countervailing Duties (China)*, the Appellate Body has performed a review of substantive acts as a key criterion for determining "whether an agency has authority to exercise governmental functions". *United States — Definitive Anti ―Dumping and Countervailing Duties on Certain Products from China* (n 66) para. 318.

[79] "Central focus of a public body inquiry under Article 1.1(a)(1) is not… whether the conduct that is alleged to give rise to a financial contribution… i.e. the particular transaction at issue – is logically connected to an identified "government function" "the relevant inquiry hinges on the entity engaging in that conduct, its core characteristics, and its relationship with government." *United States – Countervailing Duty Measures on Certain Products from China*, (16 July 2019) WT/DS437/AB/RW, para 5.100.

fields. The provisions in the area of state immunity indicate that both the nature and the purpose of the conduct need to be considered.[80] In the area of ISDS, however, the focus on the nature of the conduct has been more prevalent in cases.[81] In the WTO anti-dumping and countervailing duties area, the purpose criterion is favoured in the determination of the public body status (or otherwise) of SOEs. This chapter will argue that it may be more effective to consider both the nature and the purpose of the conduct in identifying the status of SOEs. This analysis is explained in detail in Chapter 5.

In summary, this thesis will primarily analyse in Chapters 2 to 5 whether the identification of SOEs depends on the structure of SOEs or their conduct. A comparative analysis will be conducted in each chapter which will cover the relevant rules in the fields of ISDS, state immunity, and the WTO anti-dumping and countervailing duties respectively, followed by a summary of these discussions. Each of these descriptions of different regimes for resolving SOE problems can be traced to the existence of a degree of fragmentation. In describing each of the different regimes that addresses the question of SOEs, it is possible to trace the degree of legal fragmentation. This will also set the scene for the specific and appropriate reforms that will be proposed later in the thesis.

1.3.2 Normative research – assessing the necessity of a uniform legal regime based on consequentialism

After discussing the differences in identification rules in the three legal areas, Chapter

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[80] "In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account…" UNGA (n 24) art. 2(2).

[81] In the case of CSOB v. Slovak, the tribunal emphasised that the nature of the CSOB's conduct, rather than the purpose of the conduct, constituted the "performance of an essential function of government" element of the judgment. *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, (n 74). In the case *CDC v. Seychelles*, the tribunal stressed the commercial nature of the CDC's conduct. *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Award (17 December 2003). In the case of *Rumeli Telekom v. Kazakhstan*, the tribunal clarified the important role of the "nature of the act" element in determining the investor's standing to bring the claim. *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No ARB/05/16, Awatd (29 July 2008). In the case of *Abengoa and COFIDES (Compafiia espafiola de Financiacion del Desarrollo S.A) v. Mexico*, the tribunal also noted that the nature of COFIDES' activities was commercial. *Abengoa S.A. y COFIDES S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award (18 April 2013). It was generally accepted in each of these cases that the 'nature of the act' criterion of the SOE investor in a given situation constitutes an important basis for determining whether it is performing essential governmental functions.

6 will focus on the question of whether a uniform rule of identification is required in cases where the relevant rules are identified differently in each area of international law. The cases presented in this thesis where a uniform rule of identification is not required will be examined in the context of the three main legal areas. However, although a uniform rule is not argued in this thesis to be required, the thesis concludes with the suggestion that an appropriate study of the rules in the area of state immunity may be appropriate, following the discussion in Chapters 3 to 5 on whether the identification of SOEs depends on the structure or conduct of SOE in each area.

The question of whether a uniform legal regime is needed will be analysed in this thesis using a consequentialist evaluation, mainly focusing on meeting social demand. In the meantime, as has been mentioned above, the thesis will also discuss the issue of international law fragmentation, suggesting that such fragmentation is difficult to avoid and that it may actually play a certain role in maintaining efficiency. In addition, the thesis will address other considerations, including the inevitably political nature of the regulation of SOEs and the issue of the subjective nature of international law interpretation. Through the analysis of these three points, the conclusion that there is no need to create uniform rules for the identification of SOEs will be reached.

The normative evaluation of legal rules is a problem in legal philosophy. Consequentialism is one approach by which legal rules can be judged, and it emphasises that legal rules should be evaluated on the basis of the legal consequences they lead to. A set of criteria for the evaluation of consequences can be determined in accordance with some social choice rules, and the legal rule can then be evaluated according to this criterion for the full evaluation of consequences.[82]

There is a basis for evaluating legal rules in terms of consequentialism and determining judgments of legal superiority or inferiority. Legal positivists such as Jeremy Bentham and John Austin advocate the utilitarian goal of 'maximising the well-being of the

[82] Jianfeng Ding, 'Normative evaluation of legal rules - deontology, consequentialism and social evolution' (对法律规则的规范性评价——道义论、后果主义与社会演化) (2014)54(03) Journal of Sun Yat-Sen University (Social Science Edition) 145, 145. In addition to this there is also non-consequentialism, which holds that a legal system should be evaluated not only on the basis of its consequences, but also on whether its processes themselves satisfy certain good qualities. Roger McCain, 'Deontology, consequentialism, and rationality' (1991) 49 Review of Social Economy 168, 178.

greatest number' in normative matters, a clear manifestation of consequentialism.[83] Legal pragmatists are usually also consequentialist theorists, and Holmes's and Posner's pragmatist theories share similarities with elements of multiple consequentialist theories.[84] Utilitarianism is the most typical version of consequentialism. famously proposed by Bentham, who believed that pleasure was the only fundamental human good and thus sought to base morality on this principle.[85] He also proposed 'the greatest happiness' as an attempt to rationalise the law.[86] Utilitarianism was originally established with the intention of providing a normative evaluation of the legal system. Consequentialism is therefore a theory apparently 'tailor-made' for the evaluation and improvement of law.[87]

Holmes argued that the substantive content of law depends on the perceived needs of the times, and that legal principles arise from accurately measured social needs.[88] He suggested that the law has instrumental properties and that it needs to respond to tradition on the one hand, and to contemporary social needs and changes in public policy on the other hand. [89] Social needs are inherent in the logic of legal development. Social Darwinism also argues that social norms that promote the average survival of groups will more easily survive competition.[90] Accordingly, legal rules can be more effectively evaluated by examining their legislative purpose.

The objectives of establishing rules for the identification of SOE status vary from one area to another, with rules on the identification of SOEs in the ISDS area having been established to help to resolve international disputes and promote international private investment activities.[91] The establishment of rules in the field of state immunity has emphasised the preservation of the equal status of activities between sovereign states,

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[83] John Austin, and Robert Campbell, *Lectures on Jurisprudence; Or, the Philosophy of Positive Law* (London, J. Murray, 1920). Jeremy Bentham, *'The Principles of Morals and Legislation'* (Buffalo, N.Y, Prometheus Books, 1988).
[84] Ding (n 82) 146.
[85] Germain Grisez, 'Against consequentialism' (1978) 23 Am J Juris 21, 23.
[86] Ibid 52.
[87] Ding (n 82) 149.
[88] Thomas C Grey, 'Holmes and legal pragmatism' (1988) 41 Stan L Rev 787, 793.
[89] Ibid 807.
[90] Ding (n 82) 150.
[91] "Considering the need for international cooperation for economic development, and the role of private international investment therein…" ICSID (n 50) Preamble.

as well as maintaining respect and comity between states.[92] The WTO rules in the area of anti-dumping and countervailing duties, on the other hand, focus on the sovereign restrictions imposed by one country on another country under the law. By conducting trade remedies, fair trade is guaranteed.[93] The rules in each of these three areas have been established for their own distinct purposes and tendencies to solve problems in the respective area, and the very existence of the rules already expresses the regulatory focus of each regime. In other words, the existence of different rules reflects the most pressing and relevant issues that need to be addressed by the regime in their areas. It may therefore be more satisfactory to maintain the current rules in each area, considering the need to meet specific needs, than to try to unify them. Chapter 6 sets out a more detailed analysis.

In addition, through a discussion of the fragmentation of international law, this thesis will argue that the current way in which each field is identified individually may, in fact, be the most efficient approach, because in the existing fragmented form, the current law in each field is self-sufficient. This fragmentation is due to the expansion of sectoral laws, which are created to help solve more specialised problems, and so are correspondingly more specialised, and it is likely to be more efficient for cases to be judged in specialised areas in which previous case decisions can be drawn upon.

Consequentialism also is concerned with efficiency. North suggests that efficient laws are more likely to prevail in an evolutionary sense.[94] Priest also points out that even if judges themselves do not support the priority of efficiency, inefficient laws lead to more appeals, so are more likely to be challenged and amended, and over a long period of

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[92] The doctrinal basis for state immunity consists mainly of the doctrine of sovereign equality and the doctrine of international comity. The doctrine of sovereign equality, with its emphasis on the "absence of dominion among equals". Renren Gong, *A comparative study of state immunity -- a common topic of contemporary public international law, private international law and international economic law* (*国家豁免问题的比较研究———当代国际公法、国际私法和国际经济法的一个共同课题*) (2nd edn, Beijing University Press 2005) 2; International comity is a form of respect for the sovereignty of other States, and States grant certain immunities to other States on the basis of international comity. Hongyan Lan, ' A Comparative Study between State Immunity and Diplomatic Immunity ' (国家豁免与外交豁免之比较) (2008) 2 Journal of Guizhou University for Ethnic Minorities (Philosophy and social science) 77, 79.

[93] Shengxiang Zhao, *Research on the Trade Remedy System (贸易救济制度研究)* (Law Press. China 2007) 55.

[94] Douglass C North and Robert Paul Thomas, *The rise of the western world: A new economic history* (Cambridge University Press 1973).

time the legal system evolves in a direction that promotes efficiency.[95] Considering the role of the fragmentation of international law in the efficiency of case handling, this thesis proposes the idea of maintaining the fragmented status, as will be explained in more detail in Chapter 6.

In addition to the two points mentioned above, the present thesis will also analyse other considerations, one being the inevitably political nature of the regulation of SOEs, such as the 'state' nature of SOEs, and will also address elements relating to the competitive neutrality of SOEs. It is also suggested that there are additional restrictions on the overseas activities of SOEs because of their inherent state ownership. Moreover, international law has certain characteristics that inevitably affect SOEs as actors in international law, such as the more ambiguous legal language of international law and subjective interpretations of international law. These factors can lead to differences in practice even when the rules in question are uniformly regulated. A more detailed analysis of these factors will also be presented in Chapter 6.

Having established that there is no need for uniform rules to determine the status of SOEs, this thesis will discuss the idea that the ISDS area and the WTO anti-dumping and countervailing duties area could be effectively reformed by learning from the relevant rules in the area of state immunity due to its similar legal environment. This thesis will discuss the other two areas with respect to where the main elements of the rules in the area of state immunity can be studied, including the explicit exclusion of the element of state control, the explicit focus on the specific conduct of SOEs, and the way in which both the nature of the conduct and the purpose of the conduct are considered in the conduct determination rules. Drawing on these three elements of identification, the main reliance is on functionality.

In the specific process of legal borrowing, the necessity and feasibility of borrowing involves an assessment of functionality. This is a more direct expression of utilitarianism. Assessing whether there is a benefit or not will depend on the system's ability to provide measurable benefits and advantages to the borrower in the present.[96]

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[95] George L Priest, 'The common law process and the selection of efficient rules' (1977) 6 The Journal of Legal Studies 65.

[96] Xiaohui Li, 'Rethinking Chinese-style Law Transplantation'(中国式法律移植之反思) (2014) 22(1) Journal of National Prosecutors College 89, 92.

Chinese civil law scholar Zhenying Wei suggests that in general, "The standards for borrowing should be both advanced and applicable to our own needs. Furthermore, it emphasizes that 'borrowing foreign experience is for the purpose of applying it to our own use,' thus requiring a balance between borrowing what is advanced and making it applicable to our specific context."[97] This means that the legal rule being drawn upon should be both progressive and adaptable by the borrower.

Based on the question of functionality, this thesis will discuss some specific elements of the rules in the other two areas that should be borrowed from the area of state immunity, focusing on advancement and their suitability to the rules in the area of state immunity. Although it is determined that uniform rules for the identification of SOE are not required, the other two areas can learn modestly from the area of state immunity in order to reduce the differences between the different sets of rules. Further, the process of drawing on them does not constitute an exact replication of the rules, nor is it a complete alignment of the rules with those of the SOEs; instead, it requires partial learning based on the specific objectives and needs of both areas.

In summary, this thesis will address the specific legal content on the identification of SOEs in the three areas, with regard to SOEs as a particular entity whose status is questioned in international activities. More specifically, the thesis will examine the main differences in the rules governing the status of SOEs in international law in the areas of ISDS, state immunity and WTO anti-dumping and countervailing duties, and will discuss the question of whether there should be a uniform rule for determining the status of SOEs.

1.4 Methodology and contribution

1.4.1 Methodology

The primary methodology of this thesis includes descriptive research and normative research. In terms of descriptive research, this thesis adopts doctrinal analysis of laws,

[97] Zhenying Wei, 'Borrowing from foreign law in China's civil law' (我国民法对外国法的借鉴) (2009)5 Jurists Review 20, 21.

mainly legislation in the three legal areas, which will cover the following: ILC Articles,[98] the ICSID (International Centre for Settlement of Investment Disputes) Convention,[99] the UN Convention on State Immunity,[100] the Agreement for Subsidies and Countervailing Measures (SCM Agreement),[101] and the case law in these areas; some domestic laws such as US Foreign Sovereign Immunities Act (FSIA)[102] and United Kingdom (UK) State Immunity Act; [103] as well as some other relevant literature. This thesis will analyse the relevant legal texts in each field and provide an in-depth description of how the laws in each area are stipulated.

This thesis also uses a comparative description of law to describe different legal rules.[104] And existing cases concerning the status of SOEs in the three areas will be conducted. In particular, the relevant rules for determining the structure and conduct of state-owned enterprises will be compared and discussed to identify commonalities and differences. This is also one of the greatest challenges in this study. [105] Each area has its own specialised terminology. As there are different aspects of the relevant rules and procedures in the three areas, conducting a comparison is a challenging task when it comes to identifying SOEs. In this thesis, a comparison of the three areas requires an analysis of the identification rules for SOEs in each area, in order to identify common focal points among the three areas in their treatment of this issue before making comparisons. For example, the term "public body" is exclusively used in WTO anti-dumping and countervailing duties, and the terms "*Acte Jure Imperii*" and "*Acta Iure Gestionis*" are commonly used in the field of state immunity, but have no relevance in the other areas. Therefore, it is a challenge to differentiate specialised terminology from one area from similar terminology in other areas and to choose suitable terminology for an overarching description in a way that ensures the non-conflicting use of concepts in

[98] ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc A/56/10.
[99] ICSID (n 50).
[100] UNGA (n 25).
[101] WTO, Agreement on Subsidies and Countervailing Measures (15 April 1994). LT/UR/A-1A/9
[102] Foreign Sovereign Immunities Act 1976.
[103] State Immunity Act 1978.
[104] James M. Smits, *The Mind and Method of the Legal Academic* (Edward Elgar 2012) 25-26.
[105] Some scholars have analysed the status of SOEs in international investment, while others have focused on whether SOEs qualify for state immunity. Some scholars have explored the identification of SOEs as public bodies. However, hardly any prior scholars have compared the regulations in these three domains together.

all three areas.

In addition to descriptive research, this thesis also includes a certain level of normative research. The normative voice expresses a clear intent to enhance the performance of legal decision-makers.[106] After comparing the different rules in the three areas, and through identifying and clarifying the existing situations and trends, this thesis suggests that there may not be a need for unified rules regarding the identification of the status of SOEs.

Furthermore, although this thesis argues that there is no need to propose unified rules for identifying the status of SOEs, it acknowledges that each academic field undergoes internal changes, which include contradictions, overlaps, and also new trends, old traditions.[107] This thesis suggests that certain provisions and practices from the area of state immunity could be applied to improve and refine the other two areas. It is understood that normative recommendations must be supported by empirical data, not just theoretical arguments.[108] Therefore, when proposing improvements for other fields, this thesis has taken into account existing practices within those legal areas, as well as the feasibility of implementation. Drawing on relevant rules and practices from the field of state immunity also aligns with the development of the field, helping to make the internal rules of each area more unified and complete.

1.4.2 Contribution

The purpose of this thesis is to clarify the rules used in identifying the status of state enterprises in the relevant sectoral laws of international law, and to discuss the possible need for a uniform identification rule. The relationship of SOEs to the state in their international activities is an important point in determining the attribution of responsibility for conduct. This thesis analyses the uniformity and conflicts in the interpretation of the rules on the status of SOEs in current legal practice, considers the reasons for the conflicts, and identifies solutions to them. A comparative study of the

[106] Edward L. Rubin, 'The Practice and Discourse of Legal Scholarship', (1988) 86 (8) Mich. L. Rev. 1835, 1847.
[107] Ibid, 1891.
[108] Ibid, 1886.

legal problems common to different sectoral laws is more likely to identify equivalent legal mechanisms for solving the same legal problems with greater efficiency and feasibility.

This thesis undertakes a comparative discussion of regulatory regimes in three different international legal areas, which could help to enhance understanding and collaboration within these areas. To the best of the author's knowledge, no prior scholar has compared the different areas of law in this comprehensive way before. Instead, articles typically focus on regimes within a specific field. For instance, in their book, Rudolf Dolzer and Christoph Schreuer concentrate solely on provisions related to the status of SOEs in the field of international investment. They argue in their book that, in principle, the actions of state entities should not be attributed to the state, but they also acknowledge the existence of exceptions and provide an analysis of these exceptions.[109] Yingying Wu primarily explores in her book the advantages that SOEs obtain from the government compared to other enterprises. She also examines the impact of these advantages on international trade and the regulatory rules that should be applied to them.[110] However, her focus is primarily on the regulations imposed by the WTO regarding the advantages of SOEs, without delving into regimes in other areas.

Some articles have ventured beyond a single area for discussion. For instance, Yan Sun's article analysing the identity dilemma faced by Chinese SOEs in trade between China and the United States simultaneously addresses the issue of the United States not identifying Chinese SOEs' commercial activities as eligible for state immunity, while at the same time categorising these SOEs as public entities based on government control standards in anti-subsidy investigations[111] However, the article primarily focuses on analysing the US approach to addressing the issue of SOEs' status and proposes recommendations to alleviate the identity dilemma faced by Chinese SOEs. It does not conduct a comparative study of the systems in both areas, and nor does it offer suggestions for systemic legal improvements.

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[109] Dolzer and Schreuer (n 45) 184.

[110] Yingying Wu, Reforming WTO Rules on State-Owned Enterprises - In the Context of SOEs Receiving Various Advantages (Springer, Singapore 2019).

[111] Yan Sun, 'On the status dilemma of SOEs in Sino US trade and the ways to solve it' (论国有企业在中美贸易中的身份困境与纾解之道) (2019) 33(9) China Business and Market 54, 55.

Wei Shen also analysed the identity dilemma of SOEs in international activities in his article. He discussed the challenges faced by SOEs in international arbitration as applicants, and their status as "public entities." His analysis primarily focused on the regimes in these two areas and proposed improvements within each separate domain.[112] His article, however, did not compare the two areas and did not provide comprehensive recommendations for overall improvements.

It can be observed that while some articles have ventured beyond a particular area to discuss the status of SOEs, the focus of their discussion has not been on performing a comparative analysis of the systems. Furthermore, regarding the question of whether there is a need to establish a unified system, only Yixin Liang has pointed out the negative impacts of the current fragmented status on the identification of SOEs, without putting forth relevant recommendations.[113]

As a supplement to the existing knowledge, this thesis will conduct a comparative analysis of three areas to discuss the different approaches in the three areas of international law within when classifying SOEs as state proxies. To make an obvious general point, some regimes emphasise certain things while others emphasise others. This analytical exploration will be conducted in detail in Chapters 2 to 5. The comparison reveals that functionally this makes sense, and some regimes are perhaps better, or others can learn from them.

The inconsistency in the interpretation of the rules on the identification of governmental acts of SOEs in sectoral law is an important part of the discussion in this thesis. Recognising the plurality of international law and the existence of specific branches of law governing different cases, the study presented in this thesis will also analyse the compatibility and inappropriateness of the inconsistent interpretation of the rules in sectoral law in the context of the "fragmentation of international law". The purpose of such a discussion is to clarify the limits of the theoretical and practical possibilities for a uniform interpretation of legal rules in different branches of law. In addition, the non-uniform interpretation of the rules for the identification of government behaviour of SOEs in different legal areas is an important part of this work. Recognising the

[112] Shen (n 68) 103-118.
[113] Liang (n 67) 109.

diversification of international law and the existence of specific legal areas that adjust different cases, this thesis will also perform a critical analysis of the fit (and issues emerging) between the phenomenon of non-uniform interpretation of identification rules in different departmental laws and the concept of "fragmentation of international law". The purpose of this discussion is to clarify the boundary between the theoretical and practical possibilities of unified legal rule interpretation in different departmental laws.

This thesis focuses on three different sectors in the field of international law, identifying and analysing the rules in each and comparing them. The thesis chooses to compare these different regimes of international law in terms of how they approach the question of SOEs, thus making an original contribution.

This thesis presents the debate on the need for a harmonised approach, although at the moment the topic of a harmonised approach to coordination is not much discussed. However, we know that it is not uncommon when confronted with international law questions to propose some form of unified harmonised approach. The arguments in favour of a unified, harmonised approach in this subject will be similar to the arguments usually made in relation to international laws.[114] Even though there is not much of a debate in favour of a unified harmonised approach, we know that international lawyers tend to advocate a uniform approach. We can anticipate this happening. We can predict that this issue, if it has not yet become typical issue in the field of SOEs, will become topical tomorrow. Therefore, the present thesis anticipates this debate.

The conclusion of this thesis, that there is no need to harmonise the rules used for determining the status of SOEs, is a valid contribution to knowledge in the field. It suggests that there is no need to overturn the current system of rules or to expand political, economic, and cultural resources to pursue radical reforms, as it would be

[114] Emphasising differences can pose a risk by undermining the existence and unity of international law. Mathias Forteau, 'Comparative International Law Within, Not Against, International Law: Lessons from the International Law Commission' (2015) 109 American Journal of International Law 498, 498. Many of the concepts cherished by international lawyers are grounded in universalist ideologies. Bruce G Carruthers and Terence C Halliday, 'Negotiating globalization: Global scripts and intermediation in the construction of Asian insolvency regimes' (2006) 31 Law Social Inquiry 521, 546. International law typically operates under the assumption of uniformity. Anthea Roberts and others, *Comparative international law* (Oxford University Press 2018) 28.

preferable to make appropriate adjustments.

Chapter 2 The state of SOEs in three areas of international legal practice

2.1 Introduction

The aim of the present chapter is to explain the legal frameworks examined by this thesis. The rules used in the identification of SOE status are not completely consistent in different areas, and there are various different expressions in relevant sources of international law that present definitions and methods of identification of SOEs. This chapter will analyse the identification of SOEs in each of the three fields, clarify the specific expression of legal standards in each field, and explain the ways in which clauses are most commonly cited in cases.

This chapter will be divided into three parts, and each part explores the specific characteristics of the identification rules in the field of ISDS, state immunity and WTO anti – dumping and countervailing duties respectively, based on the analysis of legal texts and their application in specific cases. Starting with the legal provisions in each area, the specific rules of identification will be analysed. As well as analysing representative cases, the specific application of the rules in practice and the disputes that have arisen will be discussed.

The three fields researched in this thesis all have detailed provisions on the identification rules of SOEs, which are widely used in cases. The judicial practice of the identification of the relationship between SOEs and the state in each of the three fields discussed in this thesis has attracted extensive attention. This chapter will show that there are different legal bases for the identification of government power of SOEs in the three fields, and that their interpretations of specific rules are also different.

2.2 Rules for the identification of SOE status in ISDS

In the resolution of investment disputes, the definition of whether SOEs have investor status is key to determining whether the arbitration tribunal has jurisdiction over specific cases. In international investment arbitration, the identification of SOEs can be categorised into two scenarios. The first is to determine whether a SOE can initiate arbitration as a private investor. In this circumstance, it is necessary to judge whether the SOE can directly apply for arbitration as an investor when an investment dispute arises, and the host country participates in the arbitration as the respondent.

The second is to determine whether the actions of SOEs can be attributed to the state. When an investor collaborates on investments with a SOE in a host country and an investment dispute arises, there may be instances where the investor disassociates from the SOE, choosing to identify the host country as the opposing party in the dispute. In this case, the identity requirements of ICSID for arbitration participants are met; that is, one party is a private investor, and the other is a state.

Therefore, the issue of the identification of the status of SOEs in ICSID includes two aspects: namely, under what circumstances are SOEs able to initiate arbitration as investors, and under what circumstances can SOEs' behaviour be attributed to the state.

The ICSID arbitral tribunal's determination of the subject qualification of SOEs mainly uses the ICSID Convention, the Broches Test, and state responsibility and attribution doctrines. Analysing relevant cases can help to explore the value of the judgement method in practice and the problems that may arise. This part will discuss the relevant regulations and standards for the identification of SOEs in ICSID, and then move on to analyse the application of these standards.

2.2.1 Study on the qualification of SOEs as claimants in ISDS

a. Provisions in the ICSID Convention

The preamble of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States lays the ground as follows: "Considering the need for international cooperation for economic development… between Contracting States

and nationals of other Contracting States."[115] As can be seen from the preamble, the ICSID was established to resolve disputes regarding private international investment. Therefore, the investor should be an individual or a private organisation, and the state cannot arbitrate as an investor.

In addition, Article 25 (1) of the ICSID Convention states that "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."[116] In this article, the identity of the subject of the arbitration dispute is clearly stipulated, in that one party must be a national and the other party must be the state or its constituent subdivision or agency. This provision excludes disputes between "private to private" and "state to state". In Article 25 (2), the Convention recognises "nationals", which can be either natural or legal persons. However, there are no more detailed regulations covering areas such as which types of legal persons, or restricting the relationship between legal persons and the state.

After the ICSID Convention was established, the issue of jurisdiction was widely discussed, including how to distinguish between foreign private investment and foreign public investment. The ICSID was established to resolve investment disputes between private investors and states, and to promote the development of private investment.[117] The Convention stipulates that investors must be the nationals of a country, but the scope may not be limited to private enterprises.[118] In practice, there may be companies with a mix of private and state-owned capital, or with all their capital state-owned but which operate and invest in completely the same way as private companies and which do not have government functions. Therefore, the problem of whether these types of enterprises belong to the nationals of a country and whether they can enter the dispute

[115] See, “Considering the need for international cooperation for economic development, and the role of private international investment therein; Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States.” ICSID (n 50) Preamble.
[116] Ibid art. 25.
[117] Ibid Preamble.
[118] Ibid art. 25.

settlement centre as investors needs to be resolved.

First of all, states cannot be investors under the ICSID Convention. When the Convention was first concluded, the issue of "national" was not limited to private enterprises. Highlighting the purpose of encouraging private investment, the convention adopted the expression "private international investment".[119] In the negotiation process before the determination of the ICSID Convention, there were claims that the jurisdiction of some special cases of state-to-state disputes should be added to the Convention, but this was opposed.[120]

Mr Deguen, who was one of the drafters of the Convention, proposed that both private investors and contracting states may invest in the host state, in which case they may have a dispute with the host country due to the same situation and investment agreement. Therefore, in order to prevent conflicting arbitration decisions, the convention drafting group recommended that all three parties participate in the arbitration proceedings.[121] But in the end, the chairman of the group decided that the best solution to this situation was to let the two states reach an agreement to comply with the arbitration decision between the host country and the investor. The convention should not introduce exceptions for the state-to-state dispute.[122] Therefore, it can be seen that national investments were considered in the drafting of the Convention, and the relevant discussions were very cautious.[123]

The participation of the state should not be regarded as a factor that prevents SOEs from being qualified as investors. When the ICSID Convention was first concluded, the issue of "national" was not limited to private enterprises. As was mentioned in the previous paragraph, to highlight the purpose of encouraging private investment, the convention adopted the expression "private international investment".[124] However, not all SOEs

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[119] Broches (n 64) 202.
[120] Taylor St. John, *The rise of investor-state arbitration: politics, law, and unintended consequences* (First edn, Oxford University Press 2018).
[121] ICSID, 'Documents concerning the origin and the formulation of the Convention on the Settlement of Investment Disputes between states and nationals of other states', *The History of the ICSID Convention* (ICSID Publication 2009) 401.
[122] Ibid.
[123] Chittharanjan Felix Amerasinghe, 'Jurisdiction Ratione Personae under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1975) 47 (1) British Yearbook of International Law 188, 241.
[124] Broches (n 64) 355.

are identified as "state agents", even though they have a mixed political and economic nature. Blind identification may confuse international economic activities, so it needs to be comprehensively considered in the Convention's content, purpose, and jurisprudence of practice.

Article 25 (1) of the ICSID Convention states that the parties to the arbitration must be an investor and the host country.[125] Article 25 (2) of the Convention recognises "national", which can be either natural or legal persons.[126] It was argued that the relevant provisions of Article 25 of ICSID are too vague, and no further provisions are made to clarify the scope of a case. However, it can also be considered that this ambiguous provision leaves room for some situations that were unforeseeable at the time.[127] Moreover, according to the Comments in the draft convention, "national" in the Convention were not limited to private enterprises, as SOEs could also be included in some circumstances.[128] But, the kind of SOEs which would qualify as "national of another contracting state" under the ICSID to become suitable investors needs to be discussed. The following part of this thesis will discuss this matter in detail.

b. The theory of the Broches Test

Since the Convention does not explicitly define the concept of "national" in detail, it cannot be directly considered that the term refers to private national. Aron Broches, the first secretary general of the ICSID in 1972, put forward his opinions on this issue, which are now known as the Broches Test. He stated that: "For purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function."[129] Therefore, in determining that an SOE can enter the arbitration process as an investor, two conditions need to be met. It must be neither the agent of the government nor

[125] ICSID (n 50) art 25(1).
[126] Ibid.
[127] Liu (n 5) 8.
[128] *See* Comment 1 "…It will be noted that 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 (n 121) 230.
[129] Broches (n 64) 202.

exercising the basic functions of the government. In this case, even if the SOE is not a private national, it is also an eligible investor in the ICSID. The Broches Test was applied in some cases, such as *BUCG* (*Beijing Urban Construction Group Co., LTD*) *v. Yemen,* that will be discussed below in relation to the emphasis on the nature of behaviour criteria for identifying rules, and *CSOB* (*Ceskoslovenska Obchodni Banka, A.S.*) *v. Slovakia,* discussed in Chapter 6 regarding the criteria for the nature and purpose of behaviour for identifying rules, etc.

There are two main reasons why Broches put forward this point of view. First, the interpretation of specific provisions in the ICSID Convention must be consistent with the objectives of the entire convention. The establishment of the ICSID Convention is to promote foreign private investment, so the Broches Test 's interpretation of Article 25 cannot reduce the promotion effect of the provision on private investment.[130] Secondly, the interpretation must take into account the practice. Broches pointed out that "in today's situation, it makes no sense to distinguish between private and public investment based on the source of capital".[131] The government owns shares in companies that combine private capital and government resources, but it is almost impossible to distinguish such companies from private companies in terms of their actual activities.

Whether the legal nature of SOEs can be determined based on their source of capital is controversial.[132] This is a relatively clear method, but it has also been heavily criticised. In the CSOB case mentioned above, the respondent strongly advocated that the source of CSOB funds and the government consider that it is not a foreign investor based on the identity of its capital contributor. However, it was eventually rejected by the arbitral tribunal.[133] In the history of negotiation of the ICSID Convention, the parties to the negotiation believed that companies with mixed ownership should not be completely

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[130] Siqi Zhao, 'The SOEs in front of the ICSID as Claimants – What is the Next Step for Chinese SOEs?' (International Economic law II paper), <https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwj8rf87baCAxWSWUEAHS2_AyMQFnoECBYQAQ&url=https%3A%2F%2Fwww.academia.edu%2F38507215%2FThe_SOEs_in_front_of_the_ICSID_as_Claimants_What_is_the_Next_Step_for_Chinese_SOEs&usg=AOvVaw3hdyjD9MjkS-VvplvDpzfp&opi=89978449> accessed 9 November 2023, p.5.

[131] Broches (n 64) 43.

[132] Liu (n 5) 7.

[133] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic* (n 74) para 16-18.

excluded from the scope of foreign investors.[134] With the development of the company system and the increase in the complexity of investment entities, sources of funding have become less important.[135] This view will be discussed in more detail in Chapter 3.

This opinion that a company's 'investor' status is not determined by the source of its funding is also consistent with the content of the commentary of the ILC Articles, which clarifies that criteria such as the participation of state capital, the ownership of assets, and whether they are under administrative control can be used to judge whether an entity is public or private, but they cannot be used to judge whether the entity 's actions belong to the state.[136] Therefore, the Broches Test does not judge the legal nature of SOEs according to the source of funding; instead, it determines whether a company is a qualified investor by judging whether the company is an agent of the state or discharging an essentially governmental function.

The Broches Test is considered to be perhaps the best means of identification of state-owned entities via national identification.[137] However, it is also argued that compared with the Broches Test, the Commercial Transaction Test developed by domestic courts is more suitable for application in practice.[138] The Commercial Transaction Test is used to determine the jurisdiction of domestic courts in relation to the actions of foreign governments and foreign entities. If their actions are "commercial" and "non-sovereign," the court will have jurisdiction.[139] The difference between the Commercial Transaction Test and the Broches Test is that the former focuses on the purpose of the behaviour in addition to the nature of the behaviour. This has a major impact on the determination of the jurisdiction of the arbitral tribunal. The next chapters of this thesis

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[134] Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2nd edn Cambridge University Press 2009) 161.
[135] Broches (n 64) 354.
[136] See Article 5(3) "The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity's conduct to the State. Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority." ILC (n 98) 43.
[137] Schreuer (n 134) 161.
[138] Blyschak (n 6) 7.
[139] Malcolm N. Shaw, *International Law* (6th edn, Cambridge: Cambridge University Press 2008), 708-714.

will set out a more detailed analysis of the nature and purpose of transactions through examining specific cases.

Broches emphasised the "national qualification of a company with mixed ownership, or a state-owned company should not be directly deprived.[140] The core of his point of view is that if a state entity is not an agent of the government or does not perform the functions of the government, it should be considered a national of the contracting party and meet the provisions of the convention.[141] Although this approach may have certain problems in its application, one of its important contributions is that it does not exclude an SOE from the jurisdiction of the arbitral tribunal based on its ownership. Through the specific analysis of the case using the Broches Test to establish jurisdiction, it may be possible to identify its existing problems. There is a case *Beijing Urban Construction Group Co., LTD (BUCG) v. Republic of Yemen* that involves the comprehensive application of the Broches Test, and this case shows the possible problems with the test.

c. Legal practice of the Broches Test and criticisms

In May 2017, the ICSID arbitral tribunal determined the jurisdiction dispute in the *BUCG v. Republic of Yemen* case. BUCG was recognised by the arbitral tribunal as a private investor which, as such, could participate in arbitration.[142] The cause of the case was that BUCG, a wholly-SOE in China, was contracted for the construction project of Yemen Airport in 2006. In 2014, BUCG filed an application for arbitration with the ICSID, claiming that it had failed to complete the construction of the project because of obstacles from the Yemeni government. Since then, the Yemeni government had filed five jurisdictional objections to the BUCG application. The first objection was that the Yemeni government believed that BUCG as a SOE did not have the "national" status in the jurisdiction of ICSID.

The arbitral tribunal's handling of this case was, first of all, in accordance with Article 25 of the Washington Convention. It is clear that the ICSID does not deal with disputes

[140] Broches (n 64) 201.
[141] Ibid.
[142] *Beijing Urban Construction Group Co., LTD Claimant and Republic of Yemen*, ICSID Case No ARB/14/30, Decision on jurisdiction (31 May 2017), para 47.

between the governments of the two countries, so it was necessary to determine whether BUCG was participating in the project in a private capacity.[143] The determination of BUCG's identity was based on the two branches of the Broches Test: whether it was an agent of the government, and whether it exercised basic government functions. If one of these criteria had been met, then BUCG could not be considered a suitable applicant.

In determining whether BUCG was an agent of the Chinese government, the Yemeni government provided some evidence to prove that the company had pursued policies to promote all aspects of national development and was subject to supervision by China's State-owned Assets Commission. According to the purpose and behaviour of its investment activities, it could be considered to be in the process of preserving state-owned assets, so it should be determined that the company was an agent of the government. The arbitral tribunal held that China 's socialist system determines that the government has certain control over SOEs, and that the assets and development plans of SOEs were not the core issues in this case. The core issue was to determine whether the SOE involved in this contract acted as an agent of the country.[144] In this case, BUCG had obtained the construction contract through an open tender competition, and the respondent also confirmed that the two were in a commercial dispute. Therefore, the arbitral tribunal did not consider BUCG to be a government agent.

In determining whether SOEs exercise government functions, the Yemeni government proposed that the Chinese government was the decision maker behind BUCG's behaviour. The arbitral tribunal held that there was no evidence that BUCG performed functions on behalf of the government in the construction activities in this case, because the nature of the company's actions was that of commercial activities.[145] Therefore, BUCG did not meet the second requirement of the Broches Test. Based on this, the identity of BUCG's private investors could be determined.

In this case, the Broches Test played an important role in determining whether an SOE was a private investor or a state agent. However, although the Broches Test largely provided the arbitral tribunal with the criteria for determining the nature of the SOE's

[143] Ibid, para 31.
[144] Ibid, para 39.
[145] Ibid, para 44.

activities, that is, focusing on whether the activities of the SOE were commercial activities, it ignored the purpose of the activities. The purpose of an SOE's activities may be commercial, political, or both,[146] and the boundaries may be blurred. Therefore, some scholars have disputed the Broches Test, believing that it obscures the purpose of investment and may result in a simple judgment on the identity of an SOE investor. This argument on the nature and purpose of behaviour in relation to rules for identification will be analysed in Chapter 6 in detail. Although the Broches Test has been questioned to some extent, it is undeniable that it has great guiding value in determining the status of private investors in SOEs.

In conclusion, in ICSID cases, the relationship between SOEs and the state is assessed to establish whether SOEs are independent investors. Article 25 of the ICSID Convention and the Broches test are used as an important basis for determination. The status of SOEs as independent investors is generally recognised, unless someone challenging their investor status presents evidence under the Broches Test showing that the SOE in question is exercising government functions or acting as an agent of a government.

The application of the Broches Test in the case shows that if it is applied as a standard for investment cases, then neither the source of funds nor the purposes of the enterprise matter in determining whether an SOE is an investor. The arbitration is more concerned with the nature of the SOE's conduct. However, some scholars have disputed the validity of the Broches Test, on the basis that it obscures the purpose of investment and may result in a simple judgment of the identity of the SOE investor.[147] Therefore, although the Broches Test has been used in ICSID cases and played a great role, it is still controversial.

2.2.2 Qualification of the state as respondent

As above, the identification of the state as a respondent requires identifying whether the SOE is acting as an agent of the state. In addition, determining whether the conduct

[146] Anran Zhang, 'The Standing of Chinese SOEs in Investor-State Arbitration: The First Two Cases' (2018)17(4) Chinese Journal of International Law 1147, 1150.
[147] Blyschak (n 6) 7.

of the SOE is attributable to the state, which leads to the state could be liable for state responsibility, is necessary. In practice, arbitral tribunals apply the rules of attribution, as set out in the ILC Articles, to establish whether the host state is an eligible respondent. Certainly, the attribution of conduct to the state does not automatically result in state responsibility; attribution is only the first step. It is necessary to further assess whether the conduct in question constitutes a breach of international obligations and whether there are other factors that might mitigate or exclude state responsibility. [148]

In fact, the Broches Test also has a connection with the rules on the attribution of state responsibility. The principle of the attribution of state responsibility as customary international law can help to clarify the specific application of the Broches Test. It has been argued that the Broches Test is based on the analogy of the rules on the attribution of state responsibility in ILC Articles.[149] It has also been explicitly argued that the rules on the attribution of state responsibility can be directly applied in determining the eligibility of SOEs as the ICSID "investor".[150]

Accordingly, the principles of attribution of state responsibility attribution will also be analysed in detail in this thesis. In later chapters, the ILC Articles are also shown to be an important legal basis for the discussion of the issue of the state responsibility of SOEs in the context of investor-state dispute settlement regimes. In this thesis, the rules for determining the status of SOEs in ISDS will also include a discussion of the state responsibility of SOEs and will focus on the relevant provisions of the ILC Articles.

a. Provisions in ILC Articles

The Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles) in 2001 plays an important role in international investment disputes. Although it is argued that the ILC Articles has no direct legal binding force, it is more widely

[148] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2002) 81-82.; ILC (n 98) Chapter V.
[149] Blyschak (n 6) 35.
[150] Mark Feldman, 'State-owned enterprises as claimants in international investment arbitration' (2016) 31 ICSID Review-Foreign Investment Law Journal 24, 27-28.

regarded as the codification of international customary law.[151] However, in the arbitral tribunals and panel rulings on related cases, ILC Articles are often cited as general rules of international law for application.[152]

Within the scope of international law, a state is an abstract entity, and it can only act through its agents and representatives. The activities of the state are simply the personal activities of the state entrusted by law.[153] In response to this theory, the degree to which states should be held responsible for conduct involving private actors is a significant issue in the ILC Articles, which is resolved in Articles 4-11.[154] The following part will introduce the relevant provisions on whether the behaviour of SOEs is attributed to the state in the ILC articles.

The International Law Commission officially published the ILC Articles in 2001. Before the release of this draft, the formulation of relevant state responsibility clauses underwent a long process. As early as 1949, the first session of the International Law Commission proposed to codify and discuss the subject of state responsibility. It was not until the 15th session in 1963 that a consensus was reached on the formulation of provisions on state responsibility for violations of various international obligations.[155] Then, over 30 years later at the 48th session in 1996, the committee completed the first reading of the Draft Articles on State Responsibility, and the draft had begun to take shape. In 1997, the International Law Commission established a State Responsibility Working Group to further improve the draft. At this stage, the compilation of the draft had received the attention and support of various countries. Finally, the Draft Articles

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[151] "While those Draft Articles are not binding, they are widely regarded as a codification of customary international law." *Noble Ventures, Inc. v. Romania*, Case No ARB/01/11, Award (12 October 2005) para 69.

[152] For further information, see *El Paso Energy International Company v Argentina*, Award, ICSID Case No. ARB/03/15, 31 October 2011, para.617, "Surely one of those general rules of international law is that codified in Article 25(2) of the ILC's Articles on the Responsibility of States, which provides, in part, that…"; "We observe that Articles 4, 5 and 8 of the ILC Articles are not binding by virtue of being part of an international treaty. However, insofar as they reflect customary international law or general principles of law, these Articles are applicable in the relations between the parties…" *United States — Definitive Anti ―Dumping and Countervailing Duties on Certain Products from China* (n 66) para 307-309.

[153] Dionisio Anzilotti, *Cours de droit international* (LGDJ 1999) 469.

[154] Daniel M. Bodansky and John R. Crook, Symposium on the ILC's State Responsibility Articles: Introduction and Overview (2002), available at< https://digitalcommons.law.uga.edu/fac_artchop/444> 782.

[155] UNGA 'Summary records of the twenty-first session' (1969) UNYB, A/CN.4/SER. A/1969/Add. 1, Volume II, 232.

on State Responsibility were officially adopted in 2001, comprising 4 parts and a total of 55 clauses.[156]

In the drafting stage of Draft Articles on State Responsibility, the Chinese delegation participated by providing its comments and opinions. At the 21st meeting of the Sixth Committee of the United Nations General Assembly concerning the review of Draft Articles on State Responsibility, the Chinese delegation proposed not to delete the content of "under the internal law" in Article 5, "For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law …" in the First Reading Conference.[157] However, although the drafting committee explained that in addition to domestic law, practice and customs should also be included, and proposing domestic law separately may lead to errors, the Chinese delegation believed that practice and customs are included in the meaning of domestic law. Moreover, it claimed that domestic law has a critical role in defining state organs, and only through domestic law can the scope of state organs be determined.[158] However, the Commission did not accept this suggestion. It believed that the statement in the first reading of the draft articles that restricts the subject's judgment standard to domestic law should be revised.[159] In addition to domestic law, practice and conventions were also decisive factors. Finally, the result was that the current Article 4 (formerly Article 5) did not retain the original expression, but separately stipulated it in the second paragraph, stating that: "An organ includes any person or entity which has that status in accordance with the internal law of the State."[160]

The Commentary of the ILC Articles has some explanations for this. First, it affirms the decisive role of domestic law in determining state organs. That is, if the domestic law determines that a certain person or entity is a state organ, then they can certainly be recognised as a state organ in international law. However, it is not enough to use

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156 ILC (n 98).
157 Ibid art. 25.
158 UNGA 'Summary record of the 21st meeting: 6th Committee, held at Headquarters' (1998) A/C.6/53/SR.21, 8.
159 U.N. Association of China, *Compilation of Statements Made by the Chinese Delegation in Relevant UN Conferences: 1998 (中国代表团出席联合国有关会议发言汇编：1998)* (First edn, World Knowledge Publishing House 1999) 36.
160 ILC (n 98) art 4.

domestic law to determine whether an individual or entity is a state agency, because different legal systems may define a state agency differently.[161] As stipulated in the UK's 1978 Act, "references to a State include references to the sovereign or other head of that state in his public capacity, the government of that state and any department."[162] In British domestic law, the police department is not a government organ.[163] However, it should not be exempted from responsibility for its actions in international law. Domestic law should not be the sole basis to determine that the entity does not have the status of a state organ in international law.[164] Therefore, the term "include" used in Article 4(2) means including *but not limited to* domestic laws.

Similarly, the specific actions of entities that do not have the status of a state agency, such as entities acting in the name of a state agency, or actually doing the work of state organs, may also be attributed to state responsibility. The Commission added that whether these entities had the status of state organs or whether they actually had the functions of state organs should not only be judged by the domestic law of a state, but also by practice and custom.[165]

It can be seen from the International Law Commission's attitude towards domestic law in judging the scope of state agencies that international law prohibits states from using different divisions of internal administrative power to evade international responsibility. The internal organs of a country have an independent legal personality in that country's domestic law, so they can be directly sued and assume responsibility in their independent capacity. But in the field of international law, the actions of state organs must always be attributed to the state for it to be responsible. On this basis, therefore, although state organs have an independent legal personality within the country, the state, as the subject of international law, is responsible for the actions of its organs.[166]

It is argued that since the state cannot itself commit acts of commission or omission,

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[161] Ibid 42.
[162] State Immunity Act 1978, art 14(1).
[163] *R. v. Metropolitan Police Commissioner, ex parte Blackburn,* [1968] 1 All ER 763 (QB) 769.
[164] ILC (n 98) 42.
[165] Jianwen Zhao, 'International Responsibility in International Law-State's Responsibility for Wrongful Acts' (国际法上的国家责任 ——国家对国际不法行为的责任) (PhD thesis, Graduate School of China University of Political Science and Law 2004) 35.
[166] Ibid 36.

the corresponding state responsibility will arise when an individual or entity conducts the behaviour on behalf of the state.[167] The determination of state responsibility in the Draft Articles does not depend on the level of the state organ that made the act, nor there is a need to determine whether an individual or an entity that performed the act is a state organ.[168] Judging the identity of the implementers of the act seems not to be the main basis for judging that the act belongs to the state. However, since the behaviours of some implementers are difficult to separate from the state, such as state organs, the ILC Article stipulates that the state is responsible for any actions of state organs.[169] Therefore, if the identity of the implementers can be recognised as that of a state organ, then its behaviour can be considered to belong to the state. In these circumstances, the determination of the identity of the subject could help to determine the specific connection between the behaviour and the state, and ultimately to determine that the behaviour belongs to the state. However, SOEs are generally not considered part of government organs, so this rule is unlikely to have much impact on the identification of SOEs.

The second chapter of the ILC Articles contains the more relevant provisions on the attribution of behaviour responsibility to the state, of which Article 4, Article 5, and Article 8 are the main attribution clauses. Article 4 sets out clear regulations for state organs. If the actors are determined to be state organs, then responsibility can be attributed to the state.[170] This Article is also referred to as the "structural standard."[171]

The more relevant provisions of SOEs in the ILC Articles are Articles 5 and 8. Article 5 stipulates that the acts of individuals and entities exercising government power are also acts of the state.[172] Article 8 also stipulates that the behaviour of an individual or group under the direction or control of the state is also a state act.[173] These two rules should be used to judge whether the entity behaviour belongs to the state, via the “functional standard” and “control standard” respectively. If it meets any one of the

[167] John O’Brien, *International Law* (Cavendish Publishing Limited 2001) 362.
[168] Zhao (n 165) 34.
[169] ILC (n 98) art 4.
[170] Ibid.
[171] Chen (n 72) 34.
[172] ILC (n 98) art 5.
[173] Ibid art 8.

three standards below, the entity behaviour can be attributed to the state.[174]

Though SOEs are not explicitly mentioned in the Draft Articles, Commentary 1 to Article 5 directly uses the expression "state corporations" to point out that the behaviour of SOEs as non-state organs exercising government power can be attributed to the state.[175] SOEs that actually exercise government power are not *de jure* organs recognised in Article 4(2), they are *de facto*.[176] In other words, when their actions reflect the will of the state, SOEs are *de facto* state organs.

Similarly, according to Article 8 of the ILC Articles, an important criterion in detecting the relationship between SOEs and the state is the degree of state control over the SOE.[177] Therefore, although the general principle of international law is that the responsibility for private acts will not be attributed to the state, in two cases, "acting on the instructions", and "under the direction or control of state", their responsibility will be attributed to the state.[178] Therefore, according to the ILC Draft Articles, specific actions by entities may also be interpreted as falling under state responsibility. These specific actions are performed by implementers who do not have the status of state organs, but who act in the name of state organs or do the work of state organs.

The provisions of Article 5 do not clearly describe which kinds of acts are attributable to government power. However, the commentary of the Draft Articles states that actions belonging to the "government" should be determined according to specific society, history, and tradition.[179] Further, the commentary points out that, in addition to the content of the powers granted, it is also necessary to consider the way in which the government grants the entity power, the purpose of their actions, and the extent to which they are responsible for the government.[180] Although the content of the commentary is only a general standard, the issues listed in the commentary do need to be considered.

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[174] Chen (n 72), 34.
[175] ILC (n 98) 42.
[176] *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. 148, 149.
[177] ILC (n 98) 47.
[178] Ibid art 8.
[179] Ibid art 5(6).
[180] Ibid.

b. Legal practice of ILC Articles and issues

The case of *Noble Ventures, Inc. v. Romania* is a controversial one in which the arbitral tribunal did not distinguish between commercial acts and government acts in practice.[181] The arbitration in this case analysed and interpreted whether Romania was a respondent on the basis of the ILC Articles. The present section will introduce and analyse this case in detail.

In the case in question, Noble Ventures Incorporated filed an arbitration request with ICSID as an investor, with Romania as the respondent. However, the body in dispute with Noble Ventures was the Romanian State Ownership Fund (later changed to the Authority for the Privatisation and Management of the State Ownership). The main task of this Fund is to privatise Romanian SOEs. Noble Ventures signed a privatisation agreement with the State-Owned Fund (SOF) and acquired a Romanian steel plant called Combinatul Siderurgic Resita. The two parties then entered into a dispute over the privatisation agreement.[182] Therefore, the status of Romania as a qualified respondent was required to be confirmed by the arbitral tribunal.

The arbitral tribunal detailed in their case ruling that they believed that the actions of the Authority for the Privatisation and Management of the State Ownership (APAPS) could be attributed to the state, so Romania should participate in the arbitration of the case. First, in Article 69 of the Award, the arbitral tribunal confirmed that SOF/APAPS was an independent legal person and not a national institution.[183] However, according to Articles 5 and 8 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, even if the entity was not an institution of the state, its conduct could be attributed to the state if it met the conditions for exercising government authority. The condition was that an individual or an entity performs a certain behaviour as a state agency under certain conditions.

The Government Ordinance of Romania could be used as a domestic law to help to

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[181] Andrey V Kuznetsov, 'The Perils of Noble Ventures and the Value of Preserving the Distinction between a State Entity's Acts of Commercial and Governmental Character for the Purpose of Attribution in Investment Treaty Arbitration' 19 Currents: Int'l Trade LJ 51, 53.
[182] *Noble Ventures, Inc. v. Romania* (n 151) pp.9-13.
[183] Ibid, para 69.

determine that SOF/APAPS's activities were the implementation of government-led privatisation actions. Article 5 of the Regulations states that SOF is a legal person subordinate to the government and a public interest organisation. Article 4 states: "The privatisation process is within the purview of the government, the Romanian Development Agency and authorised public institutions."[184] In addition, Article 4.1 clearly states that "the government controls public institutions that carry out privatisation activities."[185] And it should also be noted that Article 6.4 stipulates that: "The organisational and operational regulation of the State Ownership Fund shall be approved under Government Resolution."[186]

Thus, according to Romania's Government Ordinance, SOF/APAPS was an organisation authorised by the government to privatise SOEs. Its decisions were controlled by the government. In this case, it was authorised by the government to sign a privatisation agreement with Noble Ventures. Therefore, the behaviour of SOF/APAPS was regarded as "empowered by the law of that State to exercise"[187] and "acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[188] According to the principle of attribution of state conduct, the behaviour of SOF/APAPS was therefore attributed to the state.

In addition, in this case, the arbitral tribunal held that if SOF/APAPS, according to Article 7 of the 2001 ILC Draft, acts as a government representative or body, the responsibility for the behaviour should belong to the government.[189] In SOF/APSPA's activities with Noble Venture, SOF/APSPA always maintained the identity of the government body authorised to privatise SOEs.[190] Therefore, the arbitration filed by Noble Ventures with Romania as the respondent was accepted by the arbitral tribunal.

The arbitral tribunal's application of the state responsibility clause in this case did not focus on distinguishing government actions from commercial actions. It said that

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[184] Romania, Government Emergency Ordinance No. 88/1997 on the privatization of the commercial companies, as amended to date ("GEO No. 88/1997") art 5.
[185] Ibid art 4.
[186] Ibid art 6(4).
[187] ILC (n 98) 43.
[188] Ibid.
[189] *Noble Ventures, Inc. v. Romania* (n 151) 81.
[190] Ibid 82.

according to Articles 5 and 29 of The Government Ordinance of Romania, SOF/APAPS was an authority of the Romanian Government and its actions, whether commercial or governmental, belong to the state.[191] And, it added that it was difficult to think about why business actions should not be attributed to state responsibility and government actions should be attributed to state responsibility.[192] If a situation arose where a commercial activity would definitely not lead to state responsibility, the ILC Articles and International Law Commission would not overlook this point. The ILC Articles made other specific provisions on whether the acts of entities could be attributed to state responsibility, but did not stipulate that commercial acts were not attributable to state responsibility and government acts were attributable to state responsibility.[193] Furthermore, there is a broad consensus in international law that there is no common understanding of what constitutes a government or public act.[194] Accordingly, the arbitral tribunal believed that before making a judgment, they should establish certain specific factual connections between the state and the actors, rather than focusing on whether the behaviour was a commercial behaviour or a government behaviour. Therefore, the arbitral tribunal in this case overturned the respondent's requirement for different imputations for commercial and government actions.

However, focusing only on situations in which the authority is delegated by the government without distinguishing whether the particular act is commercial or governmental ignores the second clause of Article 5, that is, the need to show that the entity empowered with governmental authority was exercising that authority in the particular instance.[195] If the act is attributed to the state for the purpose of international responsibility, then the act by the entity must accordingly involve government activities rather than the other private or commercial activities that the entity may engage in.[196] For example, the behaviour of a railway company to which police powers have been granted could be attributed to the state in accordance with international law if the railway company exercises these powers - but not if it concerns other activities (such

[191] Ibid. Andrey V Kuznetsov (n 181) 53.
[192] *Noble Ventures, Inc. v. Romania,* (n 159) 82.
[193] Ibid.
[194] Ibid.
[195] Andrey V Kuznetsov (n 181) 51.
[196] Ibid 53.

as the sale of tickets or the purchase of vehicles).[197]

Furthermore, because the judgment of whether the responsibility of the entity belongs to the state is relatively complex, it was necessary to combine multiple factors to judge the nature of the behaviour. As explained in commentary 6 to Article 5 of the ILC Articles, the purpose and scope of exercising power is also an important basis for judging whether an entity's acts can be attributed to the state's responsibility.[198] The fact that there is a distinction between government behaviours and commercial activities also underscores the role of identifying the purpose of the conduct.[199] The application of the ILC Articles thus overlooks the difference between government behaviours and commercial activities, potentially leading to certain shortcomings.

In conclusion, the main legal basis for the identification of government actions of SOEs in the field of state responsibility is found in ILC Articles 4, 5, and 8. These clauses make clear that SOEs and private enterprises are not distinguished by the Articles, are not governed by specific rules, and therefore the same rules apply to both. When SOEs engage in government behaviour, the responsibility can be attributed to the state. The determination of whether an SOE's conduct is to be attributed to state according to the ILC Articles mainly includes three tests: whether the entity is a legal part of the state organ, whether the entity is "exercising government power", and whether the act was directed or controlled by the state. In determining the relationship between the SOE and the state, the specific conduct of the SOE will lead to the attribution of liability to the state. In arbitration practice, however, such as in the case of *Noble Ventures, Inc. v. Romania*, arbitral tribunals do not always hold that commercial conduct is entirely free from the attribution of state responsibility.

In summary, in the ISDS field, the identification of SOE status under the ICSID Convention and the ILC Articles focuses on whether the SOE is an agent of the government, and whether that the SOE has exercised governmental functions. More specifically, state control will not be an element in determining the SOE's status, but

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197 Ibid.
198 ILC (n 98) 47.
199 H. Scott Fairley, "Foreign State Immunity. By the Australian Law Reform Commission (Report No. 24). Canberra: Australian Government Publishing Service, 1984. Pp. Xxiv, 168. Index." (1985) 79 (4) American Journal of International Law 1100, 1101.

rather the focus will be on the specific conduct of the SOE, and the nature of the conduct will determine whether the conduct is commercial activity. Responsibility for commercial activities is generally not attributed to the state, as in the cases *BUCG v. Yemen*, *EDF (Service) v. Romania*, and *CDC v. Seychelles*.[200] In some cases, however, tribunals do not entirely reject the possibility that commercial activities may carry state responsibility. This rule also differs from the rules in the field of state immunity.

2.3 Rules for the identification of SOE status in state immunity

2.3.1 Legal framework

According to the theory of state immunity, a state itself and its property enjoy jurisdictional immunity from foreign courts.[201] State immunity mainly centres around the prohibition of court rulings and enforcement against foreign states in judicial jurisdiction. There are two main theories about state and property immunity, including the doctrine of absolute immunity and the doctrine of restrictive immunity. The theory of absolute immunity holds that the state or its property should be protected by judicial immunity in all cases except only if the state waives this right voluntarily.[202] The theory of restrictive immunity emphasises that when a sovereign state engages in non-sovereign acts such as entering commercial and industrial fields, then the sovereign immunity of the state should not apply.[203]

According to the doctrine of absolute immunity, unless the state waives its right voluntarily, the state is not subject to the jurisdiction of foreign courts, and no compulsory measures can be taken against state property.[204] The exemption relates to the exercise of jurisdiction within a set timeframe, which can be of short or extended duration depending on the relative aspects of immunity and whether it is waived or not

[200] *EDF (Service) v. Romania*, ICSID Case No. AKB/05/13, Award (October 9, 2009). *CDC Group plc v. Republic of Seychelles* (n 81).
[201] David Gaukrodger, Foreign State Immunity and Foreign Government Controlled Investors (June 1, 2010). OECD Working Papers on International Investment, 2010/2, Available at SSRN: https://ssrn.com/abstract=1629251 or http://dx.doi.org/10.2139/ssrn.1629251, p.7.
[202] Shaw (n 139) 701.
[203] Michael Singer, 'Abandoning restrictive sovereign immunity: an analysis in terms of jurisdiction to prescribe' (1985) 26 Harv Int'l LJ 1.
[204] Hazel and Webb (n 24) 4.

invoked.[205] If a country needs to be held responsible, the issue can be resolved in accordance with international practices and through diplomatic channels.

The theory of restrictive immunity emphasises that there is no justification for granting special protection to sovereign states when they are explicitly engaged in trade.[206] The doctrine of restrictive immunity has developed rapidly in recent years and has been adopted by many countries. Western developed countries, in particular, have accepted this doctrine for the most part.[207] At present, only some developing countries in Asia, Africa, and Latin America still adhere to the principle of absolute immunity; most other countries have accepted restrictive immunity.[208]

In the field of state immunity, the presence of SOEs stems from the fact that they combine the characteristics of a business entity with those of a government entity. State-owned enterprises are distinct from ordinary businesses due to their close ties to the state and government.[209] Furthermore, the definition of state immunity is complex because state actions are carried out by various entities, including the state itself, sovereign heads of state, and other agencies or instrumentalities of a given state.[210]

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[205] Sompong Sucharitkul, 'Asser Institute Lectures on International Law: Developments and Prospects of the Doctrine of State Immunity – Some Aspects of Codification and Progressive Development' (1982) 29 Netherlands International Law Review 252, 256.

[206] Muthucumaraswamy Sornarajah, 'Problems in Applying the Restrictive Theory of Sovereign Immunity' (1982) 31 International & Comparative Law Quarterly 661, 664.

[207] Xiuwen Zhao, *Principles and Cases of Private International* Law (国际私法学原理与案例教程) (3rd edn Renmin University of China Press 2012) 75.

[208] According to statistics, Asian countries adhere to the principle of absolute immunity include Thailand, Indonesia, Laos, Syria and Kuwait, Latin American countries include Brazil, Venezuela, Chile, Colombia, Ecuador and Trinidad and Tobago, as well as a few African countries such as Sudan and some Western European countries such as Portugal. Yujun Guo and Jintang Xu, 'On the relativity of state immunity' (论国家豁免的相对性) (2003) 1 Wuhan University International Law Review 90, 96. "A survey in response to a UN questionnaire in the 1982 UN Legal Materials showed that the majority of the 31 States which responded, regardless of their position as to doctrine, stated that the subject was governed by international law; in most cases they had no domestic law relating to State immunity. At that time only Brazil, Sudan, Syria, Trinidad and Tobago, the USSR, and Venezuela clearly supported absolute immunity, but even these based the grant of immunity on reciprocity of treatment. Czechoslovakia and Hungary, although stating that they observed the absolute doctrine, admitted limited exceptions, and Hungary stated that judicial practice was likely 'to develop towards the distinction between public and non-public acts in accordance with the demands of life' In reply to the Questionnaire of the ILC Special Rapporteur Mr Ogiso in 1988, Brazil, Bulgaria, Byelorussia, China, the German Democratic Republic, and Venezuela expressed continued support for the rule of absolute immunity." Fox and Webb (n 24) 148.

[209] Hang Cui, 'Study on SOEs in State Immunity ' (国家豁免中的国有企业问题研究) (2015) 42(3) Journal of Henan Normal University (Philosophy and Social Sciences) 61, 62.

[210] Sucharitkul (n 205) 258.

The study of the state immunity of state-owned enterprises primarily revolves around the question of whether SOEs should be considered as recipients of state immunity. According to the traditional absolute immunity doctrine, state-owned enterprises are entitled to assert and enjoy the immunity of the state as long as they possess the status of the state. However, the restrictive immunity doctrine argues that state-owned enterprises' enjoyment of immunity depends on whether they engage in sovereign activities. Courts in countries, whether they are adopting the restrictive or absolute immunity approach, typically treat SOEs differently from foreign states. In general, state-owned enterprises are not recognised as having jurisdictional immunity, and they only enjoy immunity in exceptional circumstances.[211]

This thesis contends that there is not much difference in the role of absolute immunity doctrine and restrictive immunity doctrine in determining the status of SOEs. To invoke state immunity based on the absolute immunity doctrine, an SOE needs to prove its identity as the "state" before invoking state immunity accordingly. According to the restrictive immunity doctrine, the initial step is to prove the SOE's identity as the "state", followed by demonstrating that the SOE engaged in sovereign acts. However, in the first step to prove the SOE's identity as the "state", it has already included the requirement to prove that the SOE engaged in sovereign acts.[212] If an SOE has not engaged in sovereign acts, it will not be recognized as the "state" in the first step. In this sense, invoking sovereign immunity under either doctrine involves the prerequisite of establishing whether the SOE is identified as the state by demonstrating its connection to sovereign activities.[213] Therefore, this thesis argues that it is unnecessary to place significant emphasis on the differences between the absolute immunity and restrictive immunity doctrines. Instead, the focus should be on the circumstances under which an SOE will be identified as the "state". The following discussions in this thesis

[211] Hazel and Webb (n 24) 352-353.
[212] Although in some jurisdictions, mere status as a state organ prescribed by domestic law might suffice to grant immunity, even if the entity is not engaged in sovereign acts. In such cases, the SOE has already been identified as a "state organ" and acts as an agent of the state, rather than being viewed as a "SOE" with an independent legal personality in the traditional sense. This thesis focuses on the status of SOEs. If an SOE has been authorized as a state organ through domestic law, there is no need for further identification in international activities. While there is indeed a distinction regarding whether state organs can invoke state immunity for engaging in non-sovereign activities under absolute or restrictive immunity, this is not the primary focus of this thesis.
[213] Dickinson (n 44) 115-117.

will not emphasize the distinctions between these two theories.

The definition of a “state” in relation to state immunity inherently encompasses the sovereign or head of state, the central government, governmental ministries or departments, and the agencies and instrumentalities of states.[214] It is also clearly stated in the United Nations Convention on Jurisdictional Immunities of States and Their Property. The word "state" here refers not only to the country itself, but also to “i) the State and its various organs of government; (ii) constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity; (iii) agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State; (iv) representatives of the State acting in that capacity.”[215] This Article makes it clear that "states" can be exempted by expanding them into one or more of these four categories. Among them, the third category, namely, agents or instrumentalities of the state or other entities, refers to entities, and whether SOEs belong to this category and are eligible to invoke state immunity needs to be further discussed.

In principle, SOEs are not subjects of state exemption because SOEs are independent legal entities which are distinct from the state or government organs and can bear civil liability alone.[216] However, when SOEs are authorised or exercise sovereign power on behalf of the state, they can become a "state" based on the Convention on State Immunity. From the third category in the definition of the state introduced in the previous paragraph, it can be seen that an entity is a state only when it has the right to exercise, and actually exercises, sovereign power. According to the provisions of Article 10 (3) of the Convention on State Immunity, the responsibility for the commercial activities of SOEs does not belong to the state, and SOEs cannot evade responsibility for their actions by claiming that their assets are state-owned.[217]

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[214] Sucharitkul (n 205) 257-258.
[215] UNGA (n 25) art 2(1) b.
[216] Ibid 65.
[217] Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of: (a) suing or being sued; and (b) acquiring, owning or possessing and disposing of property, including property which that State has authorized it to operate or manage, is

The rules of state immunity are customary international law rules that originate from state practices and customs. However, the extent to which countries grant immunity to one another is not always consistent, leading to legal uncertainty. As a result, the international community has been striving for years to reach a cohesive treaty. [218] Despite multiple attempts to codify international immunity law, there are currently only two conventions including the European Convention on State Immunity and the United Nations Convention on Jurisdictional Immunities of States and Their Property. The former is a regional convention and does not represent the entire international community, having only been ratified by eight countries. While the latter has not yet come into force, it is expected to play a significant role in the future development of international law in the field of immunity.[219] The Convention affirms that "the rules of customary international law continue to govern matters not regulated by the provisions of the present Convention."[220] So even if the Convention has not been ratified, it can still reinforce the customary status of the rules on immunity.[221] Moreover, although it is still in its infancy, it already represents the most authoritative statement among existing international legal rules regarding state immunity.[222] The UN Convention on State Immunity should be welcomed as a step towards countries adhering to legal rules.[223] Therefore, the discussion of this thesis on state immunity primarily references the content of the UN Convention on State Immunity.

The provisions of the Convention on State Immunity on commercial acts agree with the theory of restricted immunity.[224] State immunity can only be invoked when SOEs exercise government acts rather than commercial acts. The following sections will introduce the rules under which commercial activities cannot invoke state immunity.

2.3.2 The exception of commercial behaviours in the field of state immunity

involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected. UNGA (n 25) art 10(3).

[218] Foakes, Wilmshurst (n 39) 3.

[219] Dickinson (n 44) 98.

[220] UNGA (n 25) preamble.

[221] Hazel Fox, 'In Defence of State Immunity: Why the UN: Convention on State Immunity is Important' (2006) 55 (2) The International and Comparative Law Quarterly 309, 405.

[222] *Jones v Ministry of Interior of Saudi Arabia* [2006] UKHL 26, para 26.

[223] Fox (n 221) 403

[224] Ibid 309,402.

In 2004, the UN General Assembly formally adopted the Convention on State Immunity. By March 2022, 28 countries, including China, had signed the Convention.[225] Seven of them have not yet completed the ratification, acceptance, approval, or accession procedures, and the conditions for entry into force set out in Article 30 of the Convention have not been met.[226] However, most of the contents of the Convention are compiled according to customary international law and are still binding on states in practice.[227]

If an entity wishes to invoke immunity, it needs to prove that it is a "state" in the Convention on State Immunity; that is, it exercises government functions like a sovereign state. Part III of the Convention on Immunity established an exception by which state immunity may not be invoked, including commercial transactions.[228] This has the same effect on all entities expecting to invoke state immunity. One of the core points of the commercial activity exception is to determine the criterion of commercial

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[225] UN Secretary-General, United Nations Convention on Jurisdictional Immunities of States and Their Property, (2 December 2004) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&clang=_en> accessed 10 October 2023.
China is a country that adheres to absolute immunity, but it has agreed to sign the Convention because although China maintains a position of absolute immunity, the increasing importance and levels of international trade have made it inevitable for the Chinese government or entities abroad to face the possibility of being sued. Cases like the *Fireworks* case in 1979 [*Scott v. People's Republic of China*, No. CA3-79-0836-d (N. D. Tex. filed 29 June 1979)] and the Railway Bonds case [*Jackson v. People's Republic of China*, 596 F. Supp. 386 (N.D. Ala. 1984)] have demonstrated that China is inevitably drawn into litigation in international activities. Additionally, China has consistently asserted that SOEs are separate legal entities distinct from the government. They can initiate and defend lawsuits and independently bear civil responsibilities. SOEs do not have legal personality under international law, and they are not the subjects of state immunity. However, Western countries do not recognise the independent status of Chinese SOEs. According to the "lifting the corporate veil" principle, they may require the Chinese government to assume unlimited joint liability. This situation, when facing litigation involving state or assets, could harm China's national interests. Accepting the convention might help to safeguard China's national interests by avoiding such circumstances. Ling Zhang, 'On the Legislation and Practice of State Immunity in European Countries' (欧洲的国家豁免立法与实践——兼及对中国相关立场与实践的反思) (2011) 29 (05) China Journal of European Studies 132, 147-148. Furthermore, the convention contains provisions that are favourable to developing countries, such as Article 10(3): "Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of: (a) suing or being sued; and (b) acquiring, owning or possessing and disposing of property, including property which that State has authorized it to operate or manage, is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected." China believes that "this provision is beneficial in preventing one country from exploiting the liability of another country's state-owned enterprises and abusing legal proceedings, which in turn supports the normal development of international relations." Gong (n 92) 2.
[226] UNGA (n 25) art 30.
[227] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, ICJ [2012] Rep 99, 118.
[228] UNGA (n 25) art 10.

behaviour.

The identification of an activity as a commercial activity or a non-commercial activity needs to be discussed. "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act".[229] In deciding whether an entity is performing a sovereign act or a commercial act, one method is to focus on the nature of the act itself rather than the purpose of the act.[230] This view holds that even if a business act is actually for a governmental or public purpose, this fact does not change the nature of the act.[231]

The United States advocates the "nature criteria." It proposed in the 1976 Act that "the commercial character of an activity shall be determined by reference to the nature of the course of Conduct or particular transaction or act, rather than by reference to its purpose."[232] And the Supreme Court, in the case of *McDermott Int'l, Inc. V. Wilander*, clarified their opinion: "We conclude that when a foreign government act, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA."[233]

Another approach is to focus on the purpose rather than the nature of the action. This view suggests that when the state is a special commercial subject, the process of judging the behaviour of the state should focus on whether the behaviour of the state has the public purpose of the government.[234] However, this view has been questioned because the identity of a country is special, and the purpose of its behaviour is mostly to fulfil the national interest. If the "purpose criteria" excludes all acts of public interest from commercial transactions, the scope of commercial activities will be infinitely reduced,

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[229] See 28 U.S. Code § 1603.
[230] Monica S Singh, 'International Law-Jurisdictional Language Clarified under Foreign Sovereign Immunities Act Resolving Long Standing Split among Circuits-Dole Food Company v. Patrickson' (2005) 29 Suffolk Transnat'l L Rev 139, 139.
[231] Haihong Wang, ‘Study on the question of State immunity’ (国家豁免问题研究) (PhD thesis, Graduate School of Government University of China 2006) 90.
[232] 28 U.S. Code § 1603(d).
[233] The Foreign Sovereign Immunities Act (FSIA) of 1976 is a United States law, that establishes the limitations as to whether a foreign sovereign nation (or its political subdivisions, agencies, or instrumentalities) may be sued in U.S. courts—federal or state. Jon Munger, 'Jurisdiction under the Commercial Activities Clause of the Foreign Sovereign Immunities Act of 1976 for Injuries Suffered by American Nationals While Abroad' (1994) 3 J Int'l L & Prac 373, 380.
[234] Wang (n 231) 91.

and the theory of restrictive immunity will lose its significance.[235] Currently, most Western countries have abandoned the purpose test. However, some countries, especially developing nations, still emphasise the significance of purpose test.[236]

The case of *FG Hemisphere Associates LLC v. Democratic Republic of the Congo and ors* is a typical example of the collision of different views on the identification of commercial behaviour. In this case, the view of the judge in Court of First Instance of the High Court of the Hong Kong was to adopt the mixed standard, and the judge expressed the view that various factors such as the nature, purpose, and motivation of the behaviour should be considered, not only the nature of the behaviour.[237] The majority of the judges of the court of Appeal held that, regardless of the motivation or purpose of the SOE's commercial transaction, the relevant consideration was the nature of the transaction.[238] The Immunity Convention takes a compromise approach, combining the nature and purpose criteria. Article 2.2 makes it clear that the nature of the contract or transaction shall be considered in making commercial transaction judgments. But, if the purpose of the contract or transaction is related to the nature, then the purpose should also be considered.[239] This combined approach is the result of coordination between the two standards' supporters during the preparation of the Convention by the International Law Commission of the United Nations.[240] Chapter 4 of this thesis will analyse in detail the nature and purpose of the behaviour, and its role in defining whether the behaviour is commercial or not.

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[235] Kun Yang, 'Analysis of the theory and practice of limitation immunity of state sovereignty' (浅析国家主权限制豁免的理论和实践) (2018)38(10) Journal of Kaifeng Institute of Education 214, 244.

[236] Luli Zhang, Monograph on State immunity (国家豁免的例外), (PhD thesis, Graduate School of China University of Political Science and Law 2005) 134. For example, “Italy considers the “nature test” to be in principle the sole criterion for determining the commercial character of a contract or transaction.” UNGA ‘Report of the Secretary-General On Convention on jurisdictional immunities of States and their property’ (24 October 2001) 56th Session UN Doc A/56/291/Add1, p.3 In the report submitted to the 56th session of the United Nations on August 14, 2001, China emphasised the importance of the purpose test. The report stated: "in determining whether a contract or transaction is a commercial transaction under the Convention, applying only the “nature” test of article 2, paragraph 1 (c), is far from adequate — the purpose of the State for engaging in the transaction must also be considered." UNGA ‘Report of the Secretary-General On Convention on jurisdictional immunities of States and their property’ (14 August 2001) 56th Session UN Doc A/56/291, p.3

[237] *FG Hemisphere Associates LLC v. Democratic Republic of the Congo and Others*, HCMP 928/2008, paras 83-96.

[238] *FG Hemisphere Associates, LLC v. Democratic Republic of Congo, et al*, No. 10-7040 (D.C. Cir. 2011)

[239] UNGA (n 25) art 2(2).

[240] Wang (n 231) 5.

In conclusion, in determining the relationship between SOEs and the state in the field of state immunity according to the provisions of the Convention on State Immunity, SOEs can be considered a "state" in the legal sense when they exercise sovereign power on behalf of the state. State immunity may not be invoked when SOEs engage in commercial transactions. In contrast to the rules in the area of ISDS, the area of state immunity clarifies the role of governmental or commercial acts in determining the relationship between the SOE and the state. Both in the relevant legal conventions and in practice, it is clear that commercial acts cannot invoke state immunity. Although the Convention stipulates the principle of commercial exception, it does not include a clear definition of commercial behaviour. The identification of business behaviour may depend on the purpose criteria, the nature criteria, or a combination of the two. In normal circumstances, the judge will comprehensively consider various factors and make a case judgment in the court.

2.4 Rules for the identification of SOE status in WTO anti-dumping and countervailing duties

In the field of WTO dispute settlement, the importance of identifying whether SOEs are public bodies or not is related to the existence of subsidies and the legality of the collection of countervailing tax. The Agreement on Subsidies and Countervailing Measures (i.e., the SCM Agreement) lacks detailed provisions on the identification of SOEs as public bodies, so there have been significant disputes in confirming whether SOEs can be used as subsidy providers in countervailing cases. In the case of *US — Anti-Dumping and Countervailing Duties (China)*, the differing identification results of the Panel and the Appellate Body (AB) on whether the SOE is a public body have been widely discussed.

2.4.1 Legal framework

In the rules of the WTO Dispute Settlement Body, the identity of a subsidy provider is stated in Article 1.1(a)(1) of the SCM Agreement. Both public bodies and the state can be providers of subsidies. The SCM Agreement 1.1(a)(1) provides that "For the purpose of this Agreement, a subsidy shall be deemed to exist if: (a)(1) there is a financial

contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where…"[241] If the SOE is a public body, it could be a qualified provider of subsidies. If the SOE is not a public body, it can only be a qualified provider after it is proved to be entrusted and authorised by the government to do so.

The SCM Agreement defines governments and public bodies as providers of subsidies, but does not specify what kinds of entities are included as public bodies. The underlying conceptual foundations of the term are therefore inadequate in this regulation,[242] so it is necessary to analyse which entities can constitute public institutions, and what specific conditions they should have to do so, with reference to specific cases of WTO anti-dumping and countervailing.

2.4.2 Legal practice - public body determined in United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (Case WT/DS379)

United States – Definitive Anti-dumping and Countervailing Duties on Certain Products from China is a case that reflects a dispute between the government control standard and the government power standard. This is also one of the main debates about the public body identification standard of SOEs in the WTO. Scholars have expressed different attitudes towards these two explanations, which include both criticism and support.[243] In this case, the Panel identified SOEs as public bodies based on government ownership, while the Appellate Body interpreted public bodies as entities

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[241] WTO (n 101) art 1.1(a)(1).

[242] Gregory Messenger, 'The public–private distinction at the World Trade Organization: Fundamental challenges to determining the meaning of "public body"' (2017) 15(01) *International Journal of Constitutional Law* 60, 60.

[243] Some scholars have criticised the government's control standards; see Shiping Liao, 'Research on the identification of "public institutions" in the "China US double countermeasures case"' ("中美双反措施案"中的"公共机构"认定问题研究) (2011) 6 Legal and Commercial Research 18, 23. Meanwhile, other scholars clearly support the standard of government power; see Thomas J. Prusa, and Edwin Vermulst. 'United States–definitive anti-dumping and countervailing duties on certain products from China: passing the buck on pass-through' (2013)12(2) World Trade Review 197, 232. Some scholars have also questioned the standard of government power; see Michel Cartland, Gérard Depayre, Jan Woznowski, 'Is something going wrong in the WTO dispute settlement?' (2012) 46 (5) Journal of World Trade 979.

that have, and exercise, government power. The following is a detailed introduction to the case.

The four anti-dumping and countervailing duty investigations conducted by the United States Department of Commerce (the "USDOC") in June 2008 determined that four products from China including (i) Circular Welded Carbon Quality Steel Pipe ("CWP"); (ii) Certain New Pneumatic Off-the-Road Tires ("OTR"); (iii) Light–Walled Rectangular Pipe and Tube ("LWR"); and (iv) Laminated Woven Sacks ("LWS") were related to the anti-dumping and countervailing duties determined by the United States.[244] Chinese SOEs provide raw materials to exporters of related products and China's state-owned commercial banks (SOCBs) provided loans to one of the producers. The USDOC recognised that relevant SOEs and state-owned commercial banks were "public bodies" in the SCM Agreement, and that they have implemented subsidies. Therefore, the United States imposed anti-dumping and countervailing duties on the four abovementioned commodities from China.[245]

In January 2009, after China's application, the WTO Dispute Settlement Body (DSB) established a Panel to consider the dispute. With regard to the issue of whether or not particular companies in question constituted "public bodies" for the purpose of the SCM Agreement, the Panel ruled in October 2010 that the SOEs involved in the case were "public bodies". The Panel interpreted the "public bodies" in SCM Agreement 1.1(a)(1) as "any entity controlled by the government", and government ownership is an important basis for determining a public body.[246] Therefore, the Panel accepted that the US Department of Commerce's determination of these companies as public bodies did not violate relevant WTO regulations.[247] In December of the same year, China appealed the Panel's decision, and in March 2011, the Appellate Body eventually rejected the Panel's ruling that Chinese SOEs as suppliers were part of the "public

[244] *United States — Definitive Anti −Dumping and Countervailing Duties on Certain Products from China* (n 66) para 6.
[245] World Trade Organization, *Dispute Settlement Reports 2011*, vol 6 (Cambridge University Press 2013) 3166.
[246] *United States — Definitive Anti −Dumping and Countervailing Duties on Certain Products from China* (n 73) paras 8.134, 8.94.
[247] Ibid, paras 8.133-8.136.

body",[248] while supporting its ruling that China's state-owned banks were "public bodies".[249]

In this case, the United States and the Panel advocated using the "government control" approach, interpreting the concept of public body to include all entities under government control. They determined whether an entity was a public body based on the ownership of the company. [250] In this way, the US Department of Commerce could simply and effectively recognise the provision of raw materials and loans by Chinese SOEs and state-owned banks to the enterprises involved as subsidies. This also led to situations where these companies bought raw materials from Chinese SOEs, purchased goods sold by SOEs to other private companies, and other similar situations which were also regarded as subsidies. However, there are many SOEs in China. Simply focusing on company ownership to determine the scope of public bodies will increase the number of Chinese SOEs seen as subsidy providers.[251] Therefore, China firmly opposed the application of this approach in countervailing investigations.

The "government function" approach that China insisted upon in this case argued that if it could be proved that SOEs are authorised to perform government functions, then it would be possible to infer that they were public bodies.[252] China thought this approach might help to change the disadvantaged position of Chinese SOEs and state-owned banks in countervailing investigations to a certain extent. This was because a SOE can avoid being considered as a subsidy provider by proving that the actual operations of the enterprise are not subject to government interference, and that the enterprise is independently engaged in commercial activities.

In fact, it has been argued that the argument between "government control" and "government function" was an argument between the concept of free competition and the concept of a planned economic system. The United States believed that China is a

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[248] *United States — Definitive Anti −Dumping and Countervailing Duties on Certain Products from China* (n 66) paras 17-19
[249] Ibid para 359.
[250] *United States — Definitive Anti −Dumping and Countervailing Duties on Certain Products from China* (n 73) paras 8.134, 8.80.
[251] Liao (n 243) 18-24.
[252] *United States — Definitive Anti −Dumping and Countervailing Duties on Certain Products from China* (n 73) para 8.6.

non-market economy, and so the ownership relationship between the government and SOEs is sufficient to prove the close connection between the two.[253] The government would interfere with various SOE behaviours, which means that SOEs could not carry out independent business activities in a non-market economy environment. However, China insisted that it had been carrying out systemic economic reforms and had completed the separation of government and enterprises, and that SOEs could carry out business activities independently.[254] Arguably, it is precisely because of the existence of these two different economic philosophies that the approaches to identifying the relationship between SOEs and the state differ.

In this case, the USDOC and the Panel decided that government-owned or government-controlled entities were public bodies, and the standard for judging government control was majority ownership. The reason they gave was that in Article 1.1(a)(1)(iv) of the SCM Agreement, the concept of "private body" was mentioned, which emphasised that private entities were not controlled by the state, so the opposite of a "private body" should be an entity controlled by the state. Ownership was the key factor in determining whether it the body was controlled by the state.[255]

At the same time, the USDOC and the Panel proposed that, based on previous cases, a restrictive interpretation of the SCM Agreement can prevent members from circumventing the agreement to a certain extent. The Chinese government hid trade-distorting subsidies behind these so-called "private entities", which was not in line with the purpose of the SCM Agreement.[256] Therefore, in order to prevent this circumvention of the members, from the perspective of supporting the realisation of the purpose of the SCM Agreement, public bodies should be interpreted as expanded to include any government-controlled entities.[257]

China believed that the United States' interpretation of "public bodies" for the purpose of treaty legislation with "anti-circumvention" was an expanded interpretation which

[253] Liao (n 243) 22.
[254] Ibid.
[255] *United States — Definitive Anti ―Dumping and Countervailing Duties on Certain Products from China* (n 73) para 8.69.
[256] Ibid para 8.82.
[257] Ibid para 8.83.

seriously undermined the correct application of the agreement. Article 1.1(a)(1)(iv) of the SCM Agreement was a widely recognised anti-circumvention clause. Its existence was sufficient to prevent the government from using private entities for subsidy activities. This expanded interpretation of the United States would render the existence of section (iv) meaningless.[258] In addition, China argued that the USDOC did not use the "five-factor test" which had been applied in previous cases in the investigation.[259] In cases where this test was applied, SOEs were not considered public bodies unless they were commissioned by the government.[260] Moreover, in this case, China also stated that the USDOC did not examine whether the SOE had been authorised by the government, and only relied on ownership to conclude that the SOE was a public body. This overlooked Article 1.1(a)(1)(iv). [261]

In this case, China argued that in the interpretation of a "public body", the most important standard should refer to the provisions of SCM Agreement Section 1.1(a). SCM Agreement Section 1.1(a)(1) puts "government" and "public body" in the same place, and abbreviates the two as "government",[262] indicating that they are similar in function, and that both have government functions.[263]

In addition, China argued that according to Article 1.1(a)(1)(iv) of the SCM Agreement, a private body can only provide a financial subsidy if it implements the actions in 1.1(a)(1)(i) to (iii) under the precondition of being entrusted or directed by the government (including government and public body). China also highlighted that the functions of (i) to (iii) usually belonged to the government. Therefore, a public body capable of entrusting and instructing should itself have the function of performing

[258] Ibid para 8.15. "For the purpose of this Agreement, a subsidy shall be deemed to exist if: (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where: (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;" WTO (101) art 1.1.

[259] *United States — Definitive Anti ―Dumping and Countervailing Duties on Certain Products from China* (n 73) para 7.47.

[260] Ibid para 8.18.

[261] Ibid para 8.17.

[262] See "there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government")", WTO (n 101) art 1.1.(a) 1.

[263] *United States — Definitive Anti ―Dumping and Countervailing Duties on Certain Products from China* (n 66) para 24.

government functions, otherwise it could not entrust and instruct the private body.[264] Therefore, China contended that the public body must be an entity authorised by national laws to perform government functions, and its behaviour in a case had to involve the exercise of this function. The behaviour of SOEs should first be presumed to be private, and then reviewed through Article 1.1(a)(1)(iv).[265] If it could be proved that SOEs are authorised to perform government functions, then it was possible to infer that they were public bodies.[266]

Overall, in the field of WTO anti-dumping and countervailing, in the case *US - Anti-Dumping and Countervailing Duties (China)*, the Appellate Body ultimately detailed the criteria for determining whether an entity is a public body in its decision report. It determined that government control could not be used as a standard for entities to have government functions,[267] and that a public entity is one that "possesses, exercises or is vested with governmental authority."[268] The specific standards of evidence include the "statutory delegation of authority, exercising governmental functions, and [that] a government exercises meaningful control over an entity and its conduct."[269]

However, although the Appellate Body of *US - Anti-Dumping and Countervailing Duties (China)* was relatively clear regarding the criteria for finding an entity to be a public body, this has remained controversial in a number of subsequent cases. The government control standard continues to be widely referred to in cases such as *US - Countervailing Measures (China),* where the US and the panel still insisted that a state enterprise was a "public body" because it was controlled by the government. The Appellate Body included state control as part of "meaningful control", which is also considered to be an affirmation of the government control standard.[270] Thus, in the WTO anti-dumping and countervailing area, there has been controversy as to whether

[264] Ibid para 25.
[265] WTO (n 101) art 1.1(a)(1)(iv).
[266] *United States — Definitive Anti ―Dumping and Countervailing Duties on Certain Products from China* (n 73) para 8.6.
[267] *United States — Definitive Anti ―Dumping and Countervailing Duties on Certain Products from China* (n 66) para 317.
[268] Ibid.
[269] Ibid para 318.
[270] *United States — Definitive Anti ―Dumping and Countervailing Duties on Certain Products from China* (n 66) para 310; *United States – Countervailing Duty Measures on Certain Products from China* (n 79) para 5.55.

the element of state control is what determines the "public body" status of an SOE. Despite the explanations and clarifications provided by the Appellate Body in *US - Anti-Dumping and Countervailing Duties (China),* there were still concerns about state control in subsequent practices. This will be explained in more detail in the analysis of the state control element in Chapter 3.

2.5 Conclusion

In conclusion, there are differences in the formulation of the rules of identification in the provisions and practice of each area, which also show different focuses and characteristics in the judgement of cases. For example, the ISDS area and the area of state immunity have different opinions about the nature of the conduct theory and the purpose of the conduct theory. The main points of contention in the WTO's anti-dumping and countervailing duties areas include whether state control is an element in determining the status of an SOE as a "public body".

Since there are disputes in practice regarding these relevant factors, this thesis will analyse the differences in the rules used for determining the status of SOEs in these three different legal areas in detail in the following three chapters. This analysis will primarily focus on three questions: Is the determination of the status of state-owned enterprises based on their structure or their behaviour? Is the structure of state-owned enterprises determined by control, or are other factors involved? Is the behaviour of state-owned enterprises determined by the nature of their actions or their purpose? This analysis will clarify the specific distinctions between the rules applied in each of these three areas in the determination of SOE status, and will provide a basis for the argument that the other two areas can draw on the rules used in the area of state immunity.

Chapter 3 SOE Identification: Does it Depend on Structure?

3.1 Introduction

One of the concerns which has been expressed regarding SOEs is that their trade and investments may be driven by "political" or public policy objectives, rather than solely commercial considerations. In other words, the activities of SOEs need to take into account the political goals and non-commercial motivations of their governmental owners.[271] Companies which were established and are owned by the government sometimes operate differently from private companies.[272] This leads to a debate on whether, when determining the status of SOEs in international activities, it is necessary to consider the relationship between SOEs and the government in the traditional sense, i.e., whether the structure of SOEs can determine their status.

In addressing this issue, this chapter will discuss the idea that structure is not a necessary condition for determining the status of a SOE. The chapter will be divided into three main parts, the first of which will analyse whether an SOE's structure depends on its control. The second part will examine, in each area, whether the structure of SOEs can be used to determine their status. Finally, this chapter will discuss, beyond state control, the role of two specific forms of control: effective control and meaningful control, in the identification of the status of SOEs.

3.2 Does structure depend on control?

Determining the structure of SOEs involves assessing the internal relationship between the state and these enterprises, typically through an analysis of the state's control over the SOEs and their governance arrangements (notably, how closely SOEs are controlled by the general government sector).[273] Governance arrangements including the government's appointment of board members, the independence of SOE assets, and other connections between the state and SOEs. In fact, the state's governance

[271] Cuervo-Cazurra and others (n 59) 919.
[272] OECD (n 2) 26.
[273] Ibid 19.

arrangements are also a result of the exercise of its control over SOEs. In the OECD's guidelines, the role of the state as a shareholder is clearly defined, involving the exercise of shareholder rights, the appointment of the board of directors, setting operational objectives, and ensuring transparency through disclosures, among other aspects.[274]

In the ISDS field, the components of state ownership, the appointment of board members by the government, and other factors related to government involvement in the enterprise are all deemed part of the structure of SOEs. The structure of SOEs emphasises the general relationship between them and the state. Factors such as the appointment of board members by the government, and the inclusion of political and social responsibilities in the company's articles, can also be considered aspects of macro-level control[275] because these rights and obligations are all based on the state's ownership of SOEs as an investor. Ownership is closely related to the power to appoint board members.[276] In addition, due to the issue of the "corporate veil" in modern corporate structures, discussions of the structure of SOEs in this field also involve questions related to effective control in order to lift the corporate veil.

In the field of state immunity, the legal status of the entity, the organisation of the company, its litigation capacity, and the degree of government control are the factors to consider in deciding whether to grant state immunity when taking the structuralist approach.[277] This approach broadly views that whether an entity can enjoy immunity from jurisdiction is decided according to whether it has an independent legal personality. In this field, discussions about the structure of SOEs primarily revolve around the state's control over these enterprises and the separate legal personality of SOEs.

In the WTO anti-dumping and countervailing duty field, the focus on the structure of SOEs is mainly concerned with the state's control over these enterprises. The criterion for determining whether an entity is a public body is based on government ownership

[274] OECD (n 18) 18-19.
[275] The commentary of the ILC Article also states that "an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity's conduct to the State." These facts all pertain to the content of the structure. Therefore, state participation in capital, ownership of assets, and administrative control all constitute elements of state control. ILC (n 98) 43.
[276] Sun (n 111) 56.
[277] Sucharitkul (n 205) 73-88.

of the entity. In SOEs, the government can appoint managers or directors to exercise control over the company.[278]

The government control standard is based on the element of "government control of a majority shareholding", and the *Korea - Commercial Vessels* case is a typical case of government control. The “five-factor test” was adopted by Panel in the *Korea – Commercial Vessels* case. In its deliberations, the Panel applied the “government control” approach to analyse the structure of ownership and management rights. In the *US — Countervailing Duty Investigation on DRAMs* case, the Panel determined that the U.S. Department of Commerce’s determination of the Korean company as a public body with the “five-factor test” did not violate WTO regulations.[279] The “five-factor test” was employed to determine whether an entity is an “authority,” which includes investigation into: “1) government ownership; 2) the government’s presence on the entity’s board of directors; 3) the government’s control over the entity’s activities; 4) the entity’s pursuit of governmental policies or interests; and 5) whether the entity is created by statute.”[280]

Although the five-factor test may consider other criteria besides government ownership, the USDOC stated that in most cases, once the first “government ownership” test was met (i.e., the government's ownership in the enterprise has reached the controlling level, i.e. 50% or above), the other four criteria are usually met too. Therefore, the only actual judgment standard is the government's level of equity in the enterprise.[281] Furthermore, in the case of *US — Anti-Dumping and Countervailing Duties (China)*, despite the Panel referencing evidence of government-appointed managers and directors for various entities, as well as government approval and oversight of the entities' operations, the primary emphasis remained on government ownership of the entities.[282] The

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[278] *United States — Definitive Anti－Dumping and Countervailing Duties on Certain Products from China* (n 73) paras 6.4-8.30.
[279] *United States– Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors（Drams）from Korea* (21 February 2005) WT/DS296/R, para 7.62.
[280] *Certain Fresh Cut Flowers from the Netherlands: Final Affirmative Countervailing Duty Determination*, (3 February 1987) 52 FR 3301.
[281] Jincheng Xu and Bin Gu, 'Legal Characterization of SOEs from the perspective of WTO Law -- Also comments on the relevant position of the US government' (WTO 法视野下的国有企业法律定性问题——兼评美国政府相关立场) (2016) 3 Journal of Shanghai University of International Business and Economics 5.
[282] *United States — Definitive Anti－Dumping and Countervailing Duties on Certain Products from China* (n 73) para 8.30.

discussion in this thesis of the structure of SOEs in the field of WTO anti-dumping and countervailing duties primarily focuses on government control. In addition, the Appellate Body introduced the concept of "meaningful control" when applying the "government function standard," so this thesis will also delve into a discussion of meaningful control.

In conclusion, this thesis's discussion on the structure of SOEs in the three areas will mainly focus on the concept of state control. However, in addition to state control, this chapter will also analyse the issues related to effective control in the ISDS and meaningful control in the WTO anti-dumping and countervailing duties.

3.3 Identification of SOEs: does structure matter?

3.3.1 Structure does not attribute responsibility for SOEs to the state

In the field of ISDS, the question of whether to determine the status of SOEs based on their structure is always discussed.[283] This is a relatively clear method, as in the CSOB case that will be discussed in Chapter 5 in detail, the respondent strongly advocated that the fact that the source of the CSOB's funds were the government led to the conclusion its identity cannot be considered that of a foreign investor. However, this view was eventually rejected by the arbitral tribunal.[284] In the history of the negotiation of the ICSID Convention, the negotiating parties expressed the view that companies with mixed ownership should not be entirely excluded from the definition of foreign investors. [285] As corporate structures evolved and investment entities became increasingly complex, it became clear that determining whether a company qualifies as an investor under the Convention could no longer rely solely on control. [286] The Broches Test does not judge the legal nature of SOEs according to the source of funding. It determines whether a company is a qualified investor by judging whether the company is an agent of the state, or is discharging an essentially governmental function.

[283] Liu (n 5) 5.
[284] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic* (n 74) para 16-18.
[285] Schreuer (n 134) 161.
[286] Broches (n 64) 354.

This opinion that a company's 'investor' status is not determined by the structure is also consistent with the content of the commentary of the ILC Articles, which makes clear that criteria such as the participation of state capital, the ownership of assets, and whether they are under administrative control can be used to judge whether an entity is public or private, but cannot be used to judge whether the entity ’s actions belong to the state.[287] Therefore, the Broches Test does not judge the status of SOEs according to their structure; it determines whether a company is a qualified investor by judging whether the company is an agent of the state or discharging an essentially governmental function.

In addition, the ILC Articles bring within the scope of state responsibility the use of the 'lifting corporate veil' by the state to control SOEs, even though SOEs are individual legal entities. The fact of state control of an SOE is not indicative of the nature and conduct of that SOE.[288] Only when the state's control over the SOE reaches the level of “effective control” can the result of the SOE's conduct be attributed to the state.

The concept of ‘lifting the veil’ was first established in the UK through the Salomon case and is now widely recognized in jurisdictions that practice company law.[289] It denies the company's independent personality and breaks the limited liability of shareholders in specific circumstances in order to prevent the abuse of the independent personality of the company to protect the interests of creditors as well as social and public interests.[290] In the field of international law, ‘lifting the veil’ can be used to resolve investment disputes involving multinational companies, including those related to the nationalisation of companies and the treatment of foreigners’ property.[291]

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[287] See Article 5(3) “The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity’s conduct to the State. Instead, Article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority.” ILC (n 98) 43.

[288] Liyu Han, 'Reform of SOEs in China from the perspective of international law' (国际法视野下的中国国有企业改革) (2019)6(10) Jurisprudence of China 161, 163.

[289] Bhavna Mahadew, 'Piercing the Corporate Veil in Mauritius: A Comparative Study with the United Kingdom' (2024) International Journal of Law and Management.

[290] Alan Dignam, John P. Lowry, *Company Law* (8th edn, Oxford University Press 2014) 31.

[291] Yaobin Zhao, Analysis on the Diplomatic Protection of Shareholders in the Barcelona Company Case (浅析巴塞罗那公司案中对股东的外交保护问题) Doc88.com (6 April 2015) <

The most famous case where the International Court of Justice applied the principle of lifting the corporate veil is the "*Barcelona Traction, Light and Power Company, Limited, Judgment*". This case introduced relevant principles of corporate law from municipal law into international law and ruled on whether a country could exercise diplomatic protection over its nationals who are shareholders in a foreign company. ILC Articles also cited this case to clarify the applicability of the principle of 'lifting the veil' in international law.

In this case, the court noted that international law recognizes companies as entities established within the jurisdiction of individual states. Since international law has yet to establish its own rules regarding the treatment of companies and shareholders, which involves legal issues of state rights, it is necessary to refer to the relevant domestic laws. Therefore, considering the rights that corporate entities and their shareholders enjoy under municipal law are pertinent to this case, the court must consider the nature and interrelationship of these rights. [292]

Although there were some dissenting opinions during the court's ruling, the court provided explanations and clarifications. [293] Since the International Court of Justice had no corresponding international law to refer to, making a ruling that disregarded municipal law would lead to significant legal difficulties. What is referred to here are rules generally accepted by municipal legal systems, which recognize limited liability companies represented by shares, rather than the municipal law of any country.[294]

The extensive practice accumulated in municipal law shows that 'lifting the veil', as a well-established rule, can help resolve disputes between companies and external parties with whom they have business relationships, and prevent the abuse of corporate privileges. The independent existence of a legal entity cannot be absolute.[295] The process of "lifting the veil" is an exception allowed by municipal law for the entities it establishes, and it can similarly play a role in international law. At the international

https://www.doc88.com/p-5426266933804.html > accessed 10 October 2023.

[292] *Barcelona Traction, Light and Power Company, Limited, Judgment, I,C.J. Reports 1970*, p.3, para 38.

[293] Ibid, para 51.

[294] Ibid, para 50.

[295] Ibid, para 56

level, there may also be special circumstances that justify lifting the veil for the benefit of shareholders.[296]

After this case, the ILC Articles clearly state that the principle of 'lifting the veil' of the company can be used to help confirm that the responsibility of the company's actions can be attributed to the state.[297] Article 8 of the ILC Articles stipulates that "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." [298] This regulates the circumstances in which individuals or groups engage in activities that can only be carried out by States or officials. The purpose of this is to prevent states from evading their responsibilities under international law through using individuals or groups.[299]

The official notes accompanying the ILC Article clearly state that the independent status of SOEs is recognised, even though they are owned and controlled by the state. However, the violation of international obligations by a company or enterprise operated and controlled by the state will give rise to a dispute over whether the responsibility belongs to the state. Although all countries emphasise that under the modern corporate system, the company and the government are separate, the responsibility for evasive behaviour from behind a "corporate veil" should be attributed to the state.[300] In this circumstance, the company or enterprise is actually a government in a cloak, and it plays the role of the government.

In addition, there is also attention to 'lifting the veil' in ICSID. The development of international law brought about by ICSID jurisprudence is that tribunals are increasingly willing to try to pierce the corporate veil.[301] The ICSID tribunal needs to lift the veil of the relevant company when determining the existence of foreign control

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[296] Ibid, para 58
[297] ILC (n 98) 48.
[298] ILC (n 98) art 8.
[299] Mengyao Zhang, 'Research on the Application of Cyber Attack in Article 8 of ASR'(网络攻击在《国家责任条款》第 8 条适用问题研究) 2010(6) Journal of Jiangxi Vocational and Technical College of Electricity127.
[300] ILC (n 98) 48.
[301] Yaraslau Kryvoi, 'Piercing the corporate veil in international arbitration' (2010) 1 Global Bus. L. Rev. 169, 178.

factors in order to examine the validity of the nationality agreement and subsequently decide whether it has jurisdiction.[302]

Although there have not yet been ICSID cases that determine whether SOEs are controlled by the state through 'lifting the corporate veil, the purpose of this practice under the ICSID mechanism is to explore whether the investor, as the claimant, meets the jurisdictional requirements of ICSID. This is consistent with the core issue of determining whether SOEs are qualified investors,[303] as both aim to identify the party exercising ultimate control over the company.

In summary, in the field of ISDS, both the Broches Test and the ILC Articles recognise that the structure of an SOE alone does not determine it as a state proxy. However, the independent status of an SOE can disappear when the corporate veil is lifted, subsequently leading to that SOE becoming a state proxy. Moreover, when a state's control over an SOE goes beyond ownership control to reach effective control, this may result in the SOE's conduct being regarded as the state's responsibility. The following sections will provide a more detailed discussion of this issue.

3.3.2 Structure's irrelevance to state immunity invoked by SOEs

According to the structuralist approach, SOEs with independent legal personality are not recognised as able to enjoy state immunity in principle, because SOEs are separate entities established by the state.[304] Structuralism's view of function holds that although the state controls SOEs as the main investor, this does not deny the independent legal corporate status of SOEs. The state's capital or equity control does not lead to the "state" status of SOEs in the exemption. SOEs in the structuralist approach cannot appear as an actor representing the state unless they have been authorised by the state.

The structuralist approach is a "standard of identity", which focuses on the degree of

[302] Antoine Marin, 'International Investment Disputes, Nationality and Corporate Veil: Some Insights from Tokios Tokelés and TSA Spectrum De Argentina' (2001) 8 (1) Transnational Dispute Management 1, 16.
[303] Anil Yilmaz, 'Corporate Personality in ICSID Arbitration' (2012) 15 (5) International Arbitration Review 172, 172.
[304] Foakes, Wilmshurst (n 39) 7.

shared identity between the state and the entity. This draws a distinction between SOEs and state government institutions, which is reasonable to some extent.[305] However, the behaviour of SOEs may be complicated and specific because the state may have a special control position over SOEs beyond that of ownership control.[306] As well as the complicated characteristics of the corporate structure and the difficulties in the investigation of the corporate system stipulated by the domestic law, these may lead to the inapplicability of the structuralist approach in the judgment.[307] The structuralist approach struggles to "pierce the veil of the company" and to attribute the behaviour of SOEs to the state.[308]

The functionalist view differs from that of the structuralists, arguing that the structure cannot determine the status of SOEs, and that the latter should be determined based on their behaviour.[309] The functionalist approach focuses more on the nature of the act and does not take into account the public or private status of the person performing the act.[310] According to the functionalist approach, an SOE cannot be the subject of sovereign immunity if it has a unique corporate personality and engages in private or commercial acts.[311] Therefore, functionalism does not pay attention to the status of SOEs. It only focuses on whether the SOE's behaviour is government or sovereign behaviour.

The functionalist approach is a "standard of behaviour". In contrast to the structuralist approach, which focuses on the relationship between state and entity in terms of identity, the functionalist approach is an external examination of the nature of the conduct to determine the nature of an SOE, and then determine whether state immunity is

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[305] Sitong Liu, 'On the principle of state exemption and SOEs' (浅析国家豁免原则与国有企业) (2008)6 Guangxi Journal of Light Industry 117, 117.
[306] Ling Zhang, 'On the State -owned Enterprises and Principle of State Immunities' (论国有企业与国家豁免原则) (2003) 2 Law of The Times 76, 76.
[307] Stephen McCaffrey, 'State Immunity: Some Recent Developments' (1991) 39 (1) The American Journal of Comparative Law 213, 217.
[308] Ibid.
[309] Christoph H. Schreuer, *Immunity: Some Recent Developments* (Cambridge: Grotius Publications Limited 1988) 10.
[310] Despoina Chatzinekoura, 'State immunity and incapacity of State or State entity to enter into arbitration as obstacles to arbitration' (LLM thesis, School of Economics and Business Administration 2015) 19.
[311] Faizat Badmus-Busari, 'Sovereign Immunity and Enforcement of Awards in International Commercial Arbitration' (25 April 2013). Available at SSRN: https://ssrn.com/abstract=2336664 or http://dx.doi.org/10.2139/ssrn.2336664 17.

applicable.[312] To reiterate, functionalism avoids judgment of the domestic legal status of SOEs and pays more attention to the nature of behaviour of SOEs.

UK is a typical example of a country that adheres to a structuralist approach. State Immunity Act 1978 distinguishes between "separate entities" and the state itself, generally not recognizing that "separate entities" can invoke jurisdictional immunity.[313] Immunity is only granted in exceptional cases involving the exercise of sovereignty. [314] In contrast, the United States supports a functionalist approach. Under the U.S. Foreign Sovereign Immunities Act, state-owned entities are easily classified as foreign agencies or instrumentalities.[315] However, they may not necessarily can invoke immunity, as courts must further consider the nature of the entity's activities.[316]

In conclusion, the structuralist approach does not emphasise the state's control over SOEs, because an SOE's control will not lead to the disappearance of the independent legal personality of an SOE, unless that SOE engages in authorised sovereign acts. The functionalist approach holds that whether SOEs can enjoy jurisdictional immunity is mainly determined according to the nature of their behaviour, regardless of their legal status. Both approaches believe that the control of an SOE is not the correct factor by which to judge its jurisdictional immunity.

According to the UN Convention on State Immunity, the concept of "agencies or instrumentalities of the State or other entities" could theoretically include State

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[312] Cui (n 209) 62.

[313] State Immunity Act stipulates, "The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—… but not to any entity (hereafter referred to as a 'separate entity') which is distinct from the executive organs of the government of the State and capable of suing or being sued." State Immunity Act 1978, Section 14(1).

[314] "A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if— (a)the proceedings relate to anything done by it in the exercise of sovereign authority;" State Immunity Act 1978, Section 14(2).

[315] According to the US FSIA，'an agency or instrumentality of a foreign state', which in turn is defined to mean any entity: '(1)which is a separate legal person, corporate or otherwise; and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof- and (3) which is neither a citizen of a State of the United States ... nor created under the laws of any third country. 28 U.S. Code § 1603(d). And the legislative report on the US FSIA gave the following examples of entities that may constitute 'agencies or instrumentalities': 'A state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.' H.R. Rep. No. 1487, 94th Cong.2d Sess. 15-16.

[316] *Patrickson v. Dole Food Co*., 251 F.3d 795 (9th Cir. 2001) at 807-808.

enterprises or other entities established by the State performing commercial transactions. For the purposes of the present articles, however, such State enterprises or other entities are presumed not to be entitled to perform governmental functions, and accordingly, as a rule, are not entitled to invoke immunity."[317] SOEs seeking immunity bear the burden of proving and are only granted immunity when engaged in the exercise of sovereign authority.[318]

The interpretation of the definition of the company in the judgment published in the *Islamic Republic of Iran v. United States of America* case can help to better understand the structure of SOEs in relation to state immunity. In this judgment, the court pointed out that an entity with independent legal personality which is wholly or partially owned by the state can constitute the identity of a company, and the concept of a company does not distinguish between public and private enterprises.[319] The fact that the state has the power to direct and control the activities of the entity does not affect the identity of the entity as a company.[320] However, an entity that specifically performs sovereign activities related to state sovereign functions cannot be characterised as a company.[321] The activities carried out by the entity at a specific time are used as the basis for identifying the status of the entity.[322]

In fact, the relationship between SOEs and the state overlaps in terms of state immunity and state responsibility. Theoretically, if the conduct of an entity cannot lead to state responsibility, then the question of whether the entity may invoke state immunity does not arise.[323] The main concern about SOEs is whether they are government institutions operating under the veil of enterprises to perform the functions of the government. Both fields take whether to exercise state power as the standard by which to judge the status of SOEs,[324] without considering that an SOE's structure can determine its status. In addition, the United Nations Convention on Immunity clearly states in its annex

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[317] UNGA 'Report of the Commission to the General Assembly on the work of its forty-third session' (29 April-19 July 1991) 43rd Session UN Doc. A/CN.4/SER.A/1991/Add.l (Part 2) Art 2, para 15.
[318] Dickinson (n 44) 115.
[319] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* (n 15) para 87.
[320] Ibid para 88.
[321] Ibid para 91.
[322] Ibid para 97.
[323] Haile Zhao, 'On the same source and different stream of the identification of "government power" of SOEs' (论国有企业"政府权力"认定的同源异流) (2015) 2 NPC Legal Review 348, 353
[324] Han (n 288) 164.

"Certain Interpretations of the Convention" that the principle of “lifting the corporate veil” also applies to the field of state immunity.[325]

In conclusion, the relationship between SOEs and the state in the field of state immunity is that the state may have the power to guide and control the activities of SOEs due to its ownership, but the SOEs themselves have independent legal personality and the ability to participate in litigation and deal with property. The participation of SOEs in litigation does not affect the immunity of the state. Therefore, in the field of state immunity, the structure of SOEs is not an important factor in determining the relationship between SOEs and the state.

3.3.3 The role of structure in determining an entity as a public body

As discussed in Chapter 2, in the case of *US — Anti-Dumping and Countervailing Duties (China)*, the US and the Panel adopted the government control standard, but the Appellate Body adopted the government function standard and introduced the element of "meaningful control". In the subsequent *US — Carbon Steel (India)* and *US — Countervailing Measures (China)* cases, the question of whether "meaningful control" is a substantive criterion for the determination of a public body was also discussed. It can be seen that in the WTO anti-dumping and countervailing cases, the element of "control" received significant attention in the determination of public bodies.

In the case of *US — Anti-Dumping and Countervailing Duties (China),* the USDOC and the Panel believed that government-owned or government-controlled entities were public bodies, and that the standard for judging government control was majority ownership. The reason they gave was that Article 1.1(a)(1)(iv) of the SCM Agreement mentions the concept of a “private body”, emphasising that private entities are not controlled by the state, so the opposite of private body should be “public body" which is an entity controlled by the state. Ownership was thus the key factor in determining

[325] Xinmin Ma, 'A review of the United Nations Convention on Jurisdictional Immunities of States and their property' (《联合国国家及其财产管辖豁免公约》评介) (2005) 6 Jurists Review 1, 4.

whether it was controlled by the state.[326]

At the same time, the USDOC and the Panel proposed that, based on previous cases, a restrictive interpretation of the SCM Agreement can prevent members from circumventing the agreement to a certain extent. The government hid trade-distorting subsidies behind the so-called "private entities", which was not in line with the purpose of the SCM Agreement.[327] Therefore, in order to prevent this circumvention by members, from the perspective of supporting the realisation of the purpose of the SCM Agreement, public bodies should be interpreted as expanded; that is, any government-controlled entities are to be regarded as public bodies.[328]

In relevant cases in the United States, government control is considered to be the decisive factor in determining whether a SOE is a public body, and government control here is widely understood as majority ownership by the state.[329] This definition of "government control" is derived from the corporate law principle that "equity determines control", but it is a jurisprudence that deals with the link between two civil parties and is not appropriate for the relationship between a sovereign state or government and a civil party.[330] Apart from the 'government majority ownership' as a 'control indicator,' most competitive SOEs in China are indistinguishable from ordinary market entities in market transactions. The 'government control' standard overlooks the internal core characteristics of these SOEs.[331]

In the WTO anti-dumping and countervailing duties field, the "government control standard" focuses on the role of control when determining the status of SOEs. The "government function standard" also includes elements related to "meaningful control" (which will be detailed in the following sections of this chapter). However, determining

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[326] *United States — Definitive Anti ―Dumping and Countervailing Duties on Certain Products from China* (n.73) para 8.69.
[327] Ibid para 8.82.
[328] Ibid para 8.83.
[329] Messenger (n 242) 80.
[330] Weidong Chen, 'The dispute between China and the United States over the status of subsidy providers for state-owned enterprises: focusing on WTO related cases' (中美围绕国有企业的补贴提供者身份之争:以 WTO 相关案例为重点)(2017) 31(3) Contemporary Law Review 21, 23.
[331] Huijie Yang, 'Research on the "public institution recognition standard" of the World Trade Organization Law' (世界贸易组织法“公共机构认定标准”研究) (2020) 4 (4) Regional and global development 66, 79.

the status of SOEs based on control has certain limitations. The ownership-based approach to determining government control will result in SOEs being too easily perceived as public entities, and all companies purchasing goods or services from SOEs will be at risk of countervailing investigations for potentially receiving 'upstream subsidies'.[332] This could result in a broadening of the "public body" to include SOEs that are not substantially subsidised, and could lead to an imbalance of rights between the two parties, to the detriment of the interests of the exporters. In addition, even if the government owns a minority or no equity stake in the company, the government may control the company;[333] for example, some companies depend on the government for resources or sell most of their goods to the public sector.[334] Hence, the government control standard for identifying the status of SOEs has obvious shortcomings.

This thesis argues that the identity of a SOE as a "public entity" should not be determined based on its structure. There are limitations to the government control standard, and in many cases, even where the Panel has applied the government control standard, the Appellate Body has later corrected it, preferring to use the government function standard in its determination. The Appellate Body in the *US — Anti-Dumping and Countervailing Duties (China)* case analysed above in Chapter 2.4, explained in its report that the basis for determining whether an SOE has the status of a "public body" is that it "possesses, exercises or is vested with governmental authority.", rather than control of the SOE by the state.

It is simpler and more feasible to consider all types of government-controlled entities, including SOEs, as public bodies,[335] as using government control to identify public bodies does not increase the burden on the investigating body and is feasible and efficient in practice. However, the government control standard makes it easier to identify SOEs as public bodies, and the provision of goods and services by SOEs to other enterprises could be considered financial support. This is to the detriment of the exporting states and could easily lead to an imbalance of rights between the two

[332] Chen (n 330) 24.
[333] While the percentage of state-owned ownership is important, it is not a decisive factor; even a small amount of state-owned ownership could still exert significant state control. Blyschak (n 6) 48.
[334] Venkata Vemuri Ramanadham, *Privatization: a global perspective* (Routledge 1993) 30.
[335] Cartland, Depayre and Woznowski (n 243) 979; Joost Pauwelyn, '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.

parties.[336]

In fact, the divergence between the Appellate Body's criterion of government functions and the criterion of government control,[337] as represented in countries such as the United States, is apparently a conflict between different interpretations, but is essentially a clash of ideas about national economic systems.[338] In general, the number of government companies in developed countries is low and they are mostly located in non-competitive areas and in natural resource monopolies.[339] In contrast, developing countries have more SOEs and they are spread across a wide range of industries. There is a huge difference in the size of SOEs in developed and developing countries.[340]

The US, for example, maintains the public body standard within the framework of the government control standard, arguing that SOEs are subject to relevant regulation due to their equity status characteristics, and therefore SOEs would *ipso facto* constitute a public body status.[341]This would broaden the scope for SOEs to be considered as providers of subsidies. The government control criterion essentially discriminates against the ownership regime of SOEs.[342] The over-emphasis on state control of SOEs acts as a hindrance to the competitiveness of firms from developing countries operating in developed countries. Therefore, due to these limitations in determining the status of SOEs based on control, this thesis argues that in the WTO anti-dumping and countervailing duties field, the status of SOEs should not be determined based on control. The government function theory seems to be more accepted than the government control theory in identifying the status of SOEs, and this will be analysed in the next chapter.

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[336] Chen (n 330) 21-24.
[337] Ibid 21-30.
[338] Fan Liao, 'Research on the legal regulation of government subsidies' (政府补贴的法律规制：国际规则与中国应对) (2017) 12 Political Science and Law 74, 74.
[339] Junjiang Li, Lei Hou, *Junjiang Li and others, Research on the reform of foreign SOEs (外国国有企业改革研究)* (Economic Science Press 2010) 7.
[340] OECD, *The Size and Sectoral Distribution of State-Owned Enterprises* (OECD Publishing 2017), Available at < https://doi.org/10.1787/9789264280663-en >.
[341] Sun (n 111) 57.
[342] Fen Jiang, 'Research on the qualitative problems of SOEs in the context of countervailing' (反补贴语境下的国有企业定性问题研究) (2017) 24 (1) Journal of Shanghai University of International Business and Economics 5.

3.4 Identification of SOEs: do effective control or meaningful control matter?

3.4.1 Effective control in ISDS

As mentioned earlier, in the ISDS field it is generally not believed that the structure of SOEs can be used to determine their status, unless a "lifting of the corporate veil" reveals that the state exercises effective control over SOEs. This aligns with the findings in international law cases within the field of state responsibility. In the case of *Nicaragua v. United States of America*, the International Court of Justice (ICJ) drew a distinction between "general control" and "effective control". Although the case did not involve SOEs, it was about whether the United States was responsible for the human rights violations by the *Contras* controlled by the United States. This section will introduce the distinction between "general control" and "effective control" in the case of *Nicaragua v. United States of America*.

In April 1984, Nicaragua filed a lawsuit with the ICJ accusing the United States of violating the basic principles of international law and demanding that the human rights violations committed by the *Contras* should be attributed to the United States government.[343] Later, in its judgment, the ICJ made it clear that it must prove that the control had reached the level of "effective control", not "general control".[344] The US government's behaviours in financing, organising, training, supplying and equipping the *Contras*, the latter's selection of military or paramilitary targets, and the planning of their whole operation were general control of the *Contras*.[345] Although these grants were preponderant or decisive, there were still not enough to confirm that the actions of the *Contras* could be attributable to the United States.[346] For the attribution of these responsibilities to the United States, in principle, it had to be proved that the United States had effective control of the military or paramilitary operations.[347] The court held that the degree of general control did not mean that the United States directed or

[343] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14, 17.
[344] Ibid, para 86, 283.
[345] Ibid para 115.
[346] Ibid.
[347] Ibid.

enforced human rights violations, as these acts might have been carried out independently by the *Contras* without the control of the United States.[348] Therefore, the United States was not responsible for the violations committed by the *Contras*.

This case defined general control and effective control. According to the judgment of the ICJ, the standard of effective control requires the state to control non-state actors and to give specific directions or carry out specific acts. Other types of control, such as planning, funding, subsidies, and support, only reach the level of general control.

The "effective control" standard determined in this case had a profound impact on subsequent cases. For example, in the case of *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, [349] the arbitration tribunal followed the "effective control" standard of the case of *Nicaragua v. United States of America* and found that there was no obvious evidence that the behaviour of the Suez Canal Authority (SCA) had clearly been instructed by the Egyptian government. Therefore, the request of Jan de Nul N.V. that the behaviour of the SCA was attributable to the government was also inconsistent with ILC Article 8.[350] In addition, in the case of *White Industries Australia Limited v. The Republic of India*, the arbitration tribunal found that the Indian government's control of Coal India did not meet the high threshold standard of "effective control", so the behaviour of Coal India was not attributed to the Indian government.[351] Furthermore, the International Court of Justice reaffirmed the stricter 'effective control' standard in its 2007 ruling in *Bosnia and Herzegovina v. Serbia and Montenegro*, indicating that the judgment in the *Nicaragua* case remains significant in determining state responsibility for non-state actors.[352] Thus, it is clear that the *Nicaragua v. United States* case has significantly influenced the development of the 'effective control' test in international law, especially concerning the attribution

[348] Ibid.
[349] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award (6 November 2008) para 173.
[350] Yuchen Chong, 'The standard and practice of attributing corporate behaviour to the state in International Investment Arbitration -- from the perspective of *White Industries Australia Limited v Republic of India* case' (国际投资仲裁中企业行为归因于国家的认定标准及其实践——以 *White Industries Australia Limited v. Republic of India* 案为视角) (2016) 4 Beijing Arbitration 41, 48.
[351] *White Industries Australia Limited v. The Republic of India*, Final award, IIC 529 (2011) 71, 86, 87.
[352] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, ICJ [2007] Rep 43, paras 391-392.

of responsibility for the actions of state actors.

The findings in these cases are consistent with the provisions of ILC Article 8. Commentary 3 of Article 8 states that, "Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation."[353] Therefore, the attribution of responsibility to the state requires that the relationship between the state and the entity must be close enough, and the state's control must have sufficient influence on the entity's behaviour to achieve the level of effective control, rather than just ownership or capital control. Therefore, in the field of ISDS, the standard for effective control by the state over SOEs leads to the attribution of their actions to the state. State control alone cannot determine the status of SOEs, but effective control can.

3.4.2 Meaningful control in WTO anti-dumping and countervailing duties

In the WTO anti-dumping and countervailing measures field, there is a discussion regarding the identification of the status of SOEs based on "meaningful control." In the case of *United States -- Definitive anti-deflation and Countervailing Duties on Certain Products from China*, the Appellate Body proposed that whether the "government exercises meaningful control over an entity and its conduct" was one of the criteria for judging whether a SOE is a public body.[354] And, according to the Appellate Body's conclusion in the case, "meaningful control" cannot be understood simply as majority ownership by the government.

However, in case of *United States – Countervailing Duty Measures on Certain Products from China* after the case *United States – Definitive Anti-dumping and Countervailing Duties on Certain Products from China*, the United States had reinterpreted "meaningful control", as will be described in detail below.

On May 15, 2012, China sought the help of the WTO Dispute Settlement Mechanism and asked for consultations with the United States regarding 22 countervailing

[353] ILC (n 98) art 8(3).
[354] *United States — Definitive Anti ―Dumping and Countervailing Duties on Certain Products from China*, (n 66) para 318.

measures against China.[355] Due to the failure of two subsequent negotiations between the two parties, after China's application, DSB established a Panel to rule on this case on November 26, 2012. The Panel finally ruled on May 9, 2014 that the USDOC's identification of China's SOE status violated the provisions of the SCM Agreement.[356] In July 2014, China filed an appeal against the Panel's report, including disputes that the relevant Chinese companies identified by the USDOC were deemed to be public bodies in 14 countervailing duties investigations.[357]

US — Countervailing Measures (China) was the latest countervailing duties case involving China. Enforcement of the case is difficult. After the court's judgment in 2014, China filed an enforcement action in 2016, arguing that the United States had abused Section 129 of the Uruguay Round Agreements Act ("URAA") and the Public Bodies Memorandum judgment standards in the implementation process, and it had refused to correct the incorrect countervailing measures implemented against Chinese companies.[358]

In the case of *US — Anti-Dumping and Countervailing Duties (China)*, the Appellate Body clearly stated that government's majority ownership could not be used as a standard for entities to be deemed to have government functions.[359] So, in the case of *US — Countervailing Measures (China)*, China emphasised that judgement of whether a SOE was a public body or not should be based on the final ruling made by the Appellate Body in the *US — Anti-Dumping and Countervailing Duties (China)* case and the explanation in the *Canada-Dairy* case[360] that the "essence of government is that it enjoys the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority".[361]

In this case, the USDOC expressed its respect for the decision of the appellate agency

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[355] *United States – Countervailing Duty Measures on Certain Products from China*, (14 July 2014) WT/DS437/ABR, para 1.1.
[356] Ibid para 1.2-1.8.
[357] Ibid para 1.3.
[358] Ibid para 6.19.
[359] *United States — Definitive Anti ―Dumping and Countervailing Duties on Certain Products from China* (n 66) para 317.
[360] *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products* (13 October 1999) WT/DS103/R, para 93-102.
[361] *United States – Countervailing Duty Measures on Certain Products from China* (n 355) para 7.35.

in *US – Anti-Dumping and Countervailing Duties (China)*, but also its lack of understanding of the expression of "meaningful control". According to the USDOC, the "meaningful control" which should be tested is the economic relationship between the government and the entity. When the government controls the entity, the two are sufficiently connected that the government can use the entity's resources as its own.[362] Therefore, the USDOC interprets "public body" in Article 1.1(a)(1) of the SCM Agreement as an entity controlled by the government, and the government can use the resources of the entity as its own resources.[363] According to the Appellate Body, the USDOC's anti-subsidy investigation was not based on the interpretation proposed by the Appellate body, so it is not necessary to determine whether the interpretation is consistent with the "meaningful control".[364]

Although the USDOC put forward its own interpretation of "meaningful control", in practice it defines the status of SOEs in the form of a Public Bodies Memorandum: "Any enterprise in China in which the government has a full or controlling ownership interest is found to be a public body."[365] So, China believes that the criteria of the US Memorandum of Public Bodies are still in question.

In this case, regarding the relationship between SOEs and public bodies, China's main argument was that the "rebuttable presumption" standard established and used by the USDOC when making judgments did not comply with Article 1.1(a)(1) of the SCM Agreement Regulations.[366] The "rebuttable presumption" was a policy determined by the USDOC in July 2009 in the *Kitchen Shelving* investigation on whether an entity was a public body. The content of this policy was to determine that major SOEs are public bodies. It found that it most cases, a company with majority ownership by the government would be considered a state authority, unless it was proven that the government would not control the company because of majority ownership. The burden of proof belongs to the company.[367] In this case, China raised questions about

[362] Ibid para 7.74 citing United States' second written submission, para 37. Ibid para 7.74 citing United States' second oral statement, para 10; Ibid para 7.74 citing response to Panel question No. 87, para 7.
[363] *United States – Countervailing Duty Measures on Certain Products from China* (n 355) para 7.74.
[364] Ibid.
[365] Public Bodies Memorandum (Panel Exhibit CHN-1) 37.
[366] *United States – Countervailing Duty Measures on Certain Products from China* (n 355) para 3.1.a.i.
[367] Ibid para 7.78.

"rebuttable presumption", because according to this standard, the USDOC used the majority ownership of the government as the standard for government-controlled entities, and then used "government control" as the standard criterion for judging SOEs as public institutions. This USDOC policy statement contradicted the Appellate Body's ruling in the *US — Anti-Dumping and Countervailing Duties (China)* case.[368]

The Appellate Body denied that the government had "ownership control " in the case of *US — Anti-Dumping and Countervailing Duties (China) and US — Countervailing Measures (China),* and decided that it could not use state ownership control as the standard to determine the entity as a public body. But, the government control of ownership can be part of the government's "meaningful control" of the entity.[369]

The criteria for determining a public body in the case of *US — Anti-Dumping and Countervailing Duties (China)* was that it "possesses, exercises or is vested with governmental authority", which was considered to be a governmental function criterion. At the same time, the Appellate Body established the standard of "meaningful control," but the uncertainty of the specific content of this standard led to an expanded interpretation of public bodies in anti-dumping and countervailing duties.[370] For example, in the US Memorandum of Public Bodies, government control over the ownership of an entity was used as the main criterion for determining the government's meaningful control over that entity. Another example is the US's emphasis on ownership control in the subsequent disputes in the cases of *US — Countervailing Measures (China)* and *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, hereafter referred to as *US - Carbon Steel (India).* Therefore, in order to reduce confusing interpretations, it is particularly important to clarify the meaning of "meaningful control".

The question of whether "meaningful control" can be directly identified with public bodies was more clearly answered in the case of *US - Carbon Steel (India)*, which

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[368] Ibid para 7.82.

[369] *United States — Definitive Anti ―Dumping and Countervailing Duties on Certain Products from China* (n 66) para 310; *United States – Countervailing Duty Measures on Certain Products from China* (n 355) para 5.55.

[370] Yang Yang, 'On the Qualitative dispute of State-owned Enterprises under SCM Agreement -- Also on the judgment standard of public body' (论国有企业在 SCM 协定下的定性之争——兼论"公共机构"的判断标准) (2020) 22 Collection of Shanghai Legal Studies 235, 239.

specifically clarified the legal nature of "meaningful control". In 2012, India applied to the WTO Dispute Settlement Body for a panel hearing on the imposition of countervailing duties by the United States on certain hot-rolled carbon steel flat products from India.[371] The SOE at issue in this case was the National Mineral Development Corporation ("NMDC"), which supplied iron ore to its downstream companies.

NMDC was an Indian SOE, with 98% of the company's shares held by the government of India.[372] India argued that the US Department of Commerce found NMDC to be a public body only due to the fact that it was 98% owned by the Indian government, without examining whether NMDC actually performed governmental functions or whether the Indian government exercised "meaningful control" over it. The US Department of Commerce's decision was therefore inconsistent with Article 1.1(a)(1) of the SCM Agreement.[373] The United States argued that a public body was a government-controlled entity, and that the government could use the entity's resources as its own.[374]

The Panel supported the US position that the USDOC properly constituted the NMDC as a public body in the investigation of the countervailing duty.[375] The Appellate Body, however, rejected the Panel's decision, finding instead that the Panel's interpretation of a public body as any entity "meaningfully controlled" by government was a substantively incorrect interpretation of Article 1.1(a)(1) of the SCM Agreement.[376] The Appellate Body in the case of *US — Anti-Dumping and Countervailing Duties (China)* established that a public body "possesses, exercises or is vested with governmental authority", which were the substantive criteria for determining a public body. The Appellate Body in the case of *US - Carbon Steel (India)* emphasised that meaningful control was not a criterion in itself, but rather that meaningful control was one of the elements of evidence to prove the criterion of "possesses, exercises or is

[371] *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, (14 July 2014) WT/DS436/R.
[372] Ibid para 7.67.
[373] Ibid para 7.68 - 7.70.
[374] Ibid para 7.71.
[375] Ibid para 7.81 – 7.86.
[376] *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, (8 December 2014) WT/DS436/AB/R para 4.36.

vested with governmental authority" for determining a public body. There should be no confusion between the substantive and evidentiary criteria for identifying a public body in the context of the SCM Agreement.[377] The Panel in this case therefore erred in using the government of India's ability to control the NMDC as the decisive criterion in determining whether the NMDC was a public body.[378]

In addition, the Appellate Body stressed that the Panel used the Indian government's ability to control NMDC as the determining factor in determining whether NMDC was a public body, and did not analyse whether the government actually had exercised control over NMDC's actions[379] Although the Panel determined that the government of India had equity control and control over its involvement in the selection of the company's directors, there was no evidence that NMDC was performing governmental functions on behalf of the government.[380] The Appellate Body found that the Panel had focused only on the formal control of NMDC by the government of India and had not examined the full range of relevant evidence.[381] The Panel did not give proper consideration to the Indian contention that NMDC enjoyed considerable autonomy.[382] The government of India provided evidence that NMDC enjoyed freedom in its normal operations, that all business matters were handled by the company itself, and that there was no government or policy influence on the trading or pricing decisions of the product.[383] Without fully considering this evidence, the Appellate Body found that it could not conclude that the Panel had given due consideration to the relationship between the government of India and NMDC.[384] The Appellate Body therefore reversed the Panel's finding that the USDOC's determination of NMDC as a public body was consistent with the SCM Agreement.

Furthermore, the Appellate Body in this case re-emphasised that determining whether a particular act was an act of a public body, "must be made by evaluating the core features of the entity and its relationship to government" and "must focus on evidence

[377] Ibid para 4.37.
[378] Ibid para 4.36.
[379] Ibid para 4.37.
[380] Ibid para 4.42.
[381] Ibid para 4.54.
[382] Ibid para 4.40.
[383] Ibid.
[384] Ibid para 4.43.

relevant to the question of whether the entity is vested with or exercises governmental authority."[385] This case therefore offers further clarification of the standard of "meaningful control" and reaffirms and clarifies the standard of "governmental function", i.e., “possesses, exercises or is vested with governmental authority”. As explained in the Appellate Body’s report, meaningful control was not a separate criterion for determining whether an entity was a public body, but "meaningful control" was one of the evidentiary criteria for determining a public body.

The case of *US - Carbon Steel (India)* provided further confirmation of the meaningful control, and meaningful control was one of the evidentiary standards for determining public bodies. The Appellate Body in the case of *US — Anti-Dumping and Countervailing Duties (China)* also stated that “statutory delegation of authority, exercising governmental functions, and a government exercises meaningful control over an entity and its conduct.” [386] Therefore, meaningful control is one of the acceptable ways to evidence that SOEs are public bodies.

In conclusion, state control over SOEs has always been used as a basis for determining whether an SOE was a public body in anti-dumping and countervailing duties investigations and cases. Although the Appellate Body in several cases denied that ownership control was a determinative factor in determining public bodies, and stated that meaningful state control over SOEs was an important part of the evidence for determining that SOEs were public bodies.[387] The structure of SOEs thus plays a certain role in determining their status in this field. In addition to state control, the "meaningful control" of the state over SOEs is also evidence identifying them as “public bodies”.

3.5 Conclusion

In both the ISDS and state immunity fields, it is generally accepted that the status of SOEs cannot be determined based on their structure. The state's control of SOEs will

[385] *States — Definitive Anti ―Dumping and Countervailing Duties on Certain Products from China* (n 66) para. 345.
[386] Ibid para 318.
[387] Ibid.

not affect SOEs' independent legal personality and independent responsibility ability. In the field of ISDS, even if SOEs are owned and controlled by the state, they have an independent status. The special status of SOEs lies in the fact that the government controls or owns a stake in them. However, the special status of SOEs does not lead to a different result from that of private entities in terms of invoking state immunity. The structuralist approach argues that SOEs have an independent legal personality, even if they are controlled by the state. The functionalist approach also does not focus on the impact of structure on the status of SOEs, but rather makes judgments based on the actual behaviour of these enterprises.

However, in the field of WTO anti-dumping and countervailing duties, not only have Panels taken the government's ownership control over SOEs as the basis for confirming that SOEs are public bodies in some cases, but the Appellate Body has also confirmed that the government's ownership control constitutes a part of the government's "meaningful control" over SOEs. The emphasis on state control in this field and its application in cases illustrates recognition of the role of state control in determining the status of SOEs in this area.

In addition to control, the discussion of the structure of SOEs also includes the concept of effective control in the ISDS field and meaningful control in the WTO anti-dumping and countervailing measures field. These are considered in practice as factors that can be used to determine the status of SOEs. This chapter has discussed the question of whether the identification of the status of SOEs in various fields depends on their structure. The next chapter will address the issue of whether the identification of the status of SOEs can be based on their behaviours.

Chapter 4 SOE Identification: Does it Depend on Conduct?

4.1 Introduction

The previous chapter discussed whether relying on the structure is a valid way to

determine the status of SOEs. This chapter will further explore the argument of whether the status of SOEs should be determined by examining the conduct of SOEs. Attempts to determine the status of SOEs, starting with the establishment of the Broches Test in ISDS, have in most cases required a focus on the specific conduct of SOEs.[388] The same provisions apply in the area of state immunity. However, in contrast to those other areas, the discussion in the area of WTO anti-dumping and countervailing duties on whether the identification of SOE status should focus on the specific conduct of SOEs is inconclusive.

This chapter will discuss whether a focus on the conduct of SOEs is an effective way of determining their status. The chapter will be divided into three main parts, the first of which will analyse the conduct provisions of the ILC Articles and the cases in which the possession and actual exercise of power by the entity are elements of the attribution of responsibility to the state. The second part will analyse, in the field of state immunity, the provisions of the Convention on State Immunity and the practice of exercising specific acts in the capacity of a "State" to invoke state immunity. In this section, the role of a*cta jure imperii* and *acta iure gestionis* in determining the status of SOEs will also be discussed. The third part will discuss cases in the WTO anti-dumping and countervailing duties areas where the exercise of governmental authority is not required to exist. This part will present the idea that the exercise of governmental authority should be examined to identify a "public body".

4.2 Focus on the conducts - ISDS

4.2.1 Relevant provisions

In the ISDS area, when an SOE is engaged in activities that are essentially governmental in nature, it does not qualify as a "national" under the Broches Test. It is evident that in this context, the determination of the status of SOEs revolves around the question of whether the SOE is engaged in the execution of a governmental function. Engaging in government functions would disqualify the SOE from being an arbitration claimant.

[388] Gu and Xu (n 281) 53.

In addition, Article 5 of the ILC Articles regulates the conduct of persons and entities exercising governmental authority. It states that: “The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”[389] According to Article 5, the entity is authorised to a certain extent or in specific circumstances to enjoy a certain part of governmental authority, and there is evidence of a specific act of the entity in the exercise of public authority, the responsibility for which is attributed to the state. Thus, the delegation of authority and the act of exercising the authority are two parallel and necessary elements.[390]

"A person or entity which is empowered by the law of that State" is the identity requirement for the attribution of an entity's conduct to the rules of the state. The scope of this status is broad; it includes public corporations, semi-public entities, public agencies of various kinds, and even private companies.[391] An entity that is empowered by the law of the state would satisfy this identity requirement. These entities are also referred to in practice as state entities.

However, it is not enough to meet the status requirement, as the provision also imposes a conduct requirement. These entities are required to have exercised the specific governmental authority that has been delegated to them. An important distinction is drawn between a state entity and a state organ in ILC Article 4. When an entity is identified as a state organ, the responsibility for all its acts is attributed to the state.[392] However, the specific acts of a state entity should be analysed separately. Acts exercised by a state entity in relation to the governmental powers delegated to it will have the result of attributing responsibility to the state, and conversely, will not enable the attribution of responsibility to the state.

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[389] ILC (n 98) art 5.
[390] Xiaotong Zhang and Zhengzheng Song, 'Identification of Qualified Investors in Investment Arbitration of SOEs and Its Implications for China's SOEs' (国有企业在投资仲裁中适格投资者身份认定及对中国国企的启示) (2021) 3 Chinese Commerce 162, 163.
[391] ILC (n 98) art 5(2).
[392] Ibid art 4.

4.2.2 Attribution of responsibility to the state based on engagement in specific conducts

a. Government conducts of SOEs leading to state responsibility

Emilio Agustin Maffezini V. The Kingdom of Spain was the first case in which an ICSID tribunal conducted a detailed analysis of the attributability of the conduct of SOEs to the state. The two-step analytical framework of ILC Article 5 used in that case has since been used by subsequent tribunals.[393]

Emilio Agustin Maffezini (EAMSA), a chemical production company, was established in Spain by Argentine businessmen Mr. Maffezini with a domestic Spanish state company called SODIGA.[394] Subsequently, EAMSA suffered operational difficulties and SODIGA authorised bank staff to transfer 30 million Spanish Pesetas from Mr. Maffezini's account as a loan to EAMSA.[395] Eventually EAMSA was unable to continue its operations due to financial difficulties. Mr. Maffezini applied to the ICSID for arbitration against the Spanish government for the damages he had suffered in his investment.[396]

Mr. Maffezini presented several arguments to show that since SODIGA is a state-owned company, all its actions should be attributed to the Spanish government. In addition, Mr. Maffezini claimed that his investment in Spain had failed because SODIGA provided incorrect advice when estimating the cost of the project and the actual cost was much higher than the estimated cost. In addition to this, he argued that SODIGA violated the law by extending a loan of $30 million from Mr. Maffezini's bank account to EAMSA.[397] Mr. Maffezini demanded that the Spanish government be held responsible.

In the process of deciding the case, the arbitral tribunal mainly discussed the circumstances in which SODIGA's responsibility would be equivalent to that of the

[393] Ming Du, 'The Status of Chinese State-owned Enterprises in International Investment Arbitration: Much Ado about Nothing?' (2021) 20 Chinese Journal of International Law 785, 794.
[394] *Emilio Agustín Maffezini v. The Kingdom of Spain* (n 76) para 39.
[395] Ibid para 42.
[396] Ibid para 4.
[397] Ibid para 44.

Spanish government. SODIGA was established to promote industrial policies and was in fact an instrument used to facilitate the implementation of the Spanish government's policies.[398] However, as the economy developed, such state entities gradually transformed their functions. The tribunal considered that SODIGA now had both governmental and commercial functions, to be identified by classification according to specific conducts.[399]

The tribunal therefore examined the main activities of SODIGA, including the act of advising Mr. Maffezini and the act of authorising the bank to transfer funds, and concluded that the act of advising was commercial,[400] and the act of transferring funds was an exercise of public functions. SODIGA was an entity with the capacity to carry out public policies, which are public functions that commercial entities normally lack.[401] The bank also complied with SODIGA's instructions in respect of the transfer of funds. The tribunal therefore considered that responsibility for the transfer of funds by SODIGA should be attributed to the Spanish Government.[402] It can thus be seen that whether the SOE performed a governmental function in its specific conduct was key to determining whether responsibility could be attributed to the state.

Similarly, in other cases, the determination of whether the SOE possessed governmental functions and whether it actually exercised acts with governmental functions have been used as parallel elements in attributing responsibility to the state. For example, in *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, the arbitral tribunal first determined that the Suez Canal Authority (the "SCA") was authorised to exercise elements of governmental authority. But the SCA, in common with other contracting parties, had entered into the contract as an ordinary commercial transaction and not as an exercise of governmental authority. This meant that responsibility for the SCA's actions could not be attributed to the government.[403]

Further, in the case of *Bosh v. Ukraine*, the Tribunal held that in determining whether

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[398] Ibid para 53-54.
[399] Ibid para 57.
[400] Ibid para 64.
[401] Ibid para 78.
[402] Ibid para 83.
[403] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (n 349) paras 165-166, 171.

the conduct of the university was attributable to Ukraine, it had to be established both that the government of Ukraine had conferred on the university the power to exercise governmental functions, and that the university's conduct was related to the exercise of the relevant governmental powers.[404] The tribunal gave an affirmative answer to the first part and a negative answer to the latter part. It therefore concluded that responsibility for the acts of the university could not be attributed to the government of Ukraine.[405]

It follows that in cases where it has been established that an entity possesses governmental powers, the tribunal always looked at whether the entity had carried out acts corresponding to governmental powers. Acts whereby the perpetrator only possesses governmental powers but does not perform governmental functions in the course of its activities will not lead to the attribution of responsibility to the State.

b. State-authorised commercial conducts leading to state responsibility

Unlike in state immunity, where *acta iure gestionis* cannot be invoked, the "commercial nature" of the acts of the SOEs may also lead to the attribution of responsibility to the state.[406] The provisions of ILC Article 4 cover various organs, whether they exercise "legislative, executive, judicial or any other functions". Any other functions here are considered to include commercial acts. Further, the contractual transactional acts of state organs (the conclusion or breach of a contract) are still acts of state.[407] Therefore, the commercial conducts of state organs are also considered to constitute an act of the state, with the result that responsibility is attributed to the state.

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

[405] Georgios Petrochilos, '*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, 266-268.

[406] Lei Zhang, 'On the Basic Principles Constituting the Conduct of States in International Law - Taking a thread from Draft Articles on Responsibility of States for Internationally Wrongful Acts' (论国际法上构成国家行为的基本原则——以联合国《国家对国际不法行为的责任条款草案》为线索) (2016) 18(2) Journal of Tianjin Administration Institute 88, 90.

[407] Article 4 is expressed as follows: "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State." ILC (n 98) 48.

Moreover, the commercial conduct of entities other than state organs under Article 4 may be found to be attributable to the state under certain circumstances. Commercial acts in the common sense may be found to possess governmental authority. For example, there is some controversy as to whether the provision of higher education services is a commercial act. The Bosh case was the first to confirm that the provision of higher education services was within the authority of the state.[408] In this case, the university was deemed to be an independent legal person with an autonomous constitution,[409] but the higher education services it provided were identified as an exercise of governmental authority.[410] In fact, this is not a main authority of the government (the main authority of government is regulatory, executive or adjudicative) and education is generally open to all in other countries.[411]

In addition, private acts can constitute acts of the state when they are directed or entrusted by the state. For example, in *Bayındır v. Pakistan*, the court ultimately held that the act of termination of the contract by the National Highway Administration (NHA) was under the direction of the Pakistan government, so responsibility for NHA's contractual acts should be attributed to the state under the ILC Articles.[412] Another example can be found in *Nykomb v. Latvia*, a case in which Nykomb entered into an electricity contract with Latvenergo (an SOE in Latvia), and later disputed the purchase price of the electricity. The tribunal ultimately found that Latvenergo's conduct was attributable to the state because the pricing of the electricity offered by Latvenergo was controlled by the government.[413] In addition, there have been some other similar cases where responsibility has been attributed to the state under Article 8 of the ILC.

What these cases have in common are that they involve private acts that were directed or controlled by the state, and which were ultimately found to be responsible to the state. In comparison to the rules in the field of state immunity, although these commercial

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[408] Petrochilos (n 405) 267.
[409] *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine* (n 354) para 164.
[410] Abdulkadir Özkal, 'Construction Contracts in International Investment Arbitration' (Master thesis 2019) 37.
[411] Petrochilos (n 405) 267.
[412] Akin Alcitepe, Rona J McHugh, '*Bayindir v. Pakistan* and the decline and fall of investment treaty claims on international construction projects' (2009)6(2) Ankara Law Review 83, 95.
[413] Shaotang Wang, 'The relationship between the state and SOEs - On the Application of the Attribution Rule in International Investment Arbitration' (国家与国有企业关系——论归因规则在国际投资仲裁中的适用) (2019)2 Beijing Arbitration 87, 103.

activities produce the result of the attribution of responsibility to the state, it is challenging for these entities to secure the status of subjects invoking state immunity. As will be evident in *Kuwait Airways Corporation v Iraqi Airways Corporation*, a case which will be analysed in the next section, it is clear that conducts performed by entities on the instructions of the state were not *acta jure imperii,* and that similar commercial acts did not result in the invoking of state immunity. The actors who performed these acts do not themselves have the authority to perform governmental functions, and that would not lead to the exercise of jurisdictional immunity.[414] This debate will be introduced in detail in the next part.

In summary, commercial activities carried out by an entity under the authority of the state could have the result of being attributed to the state in the field of ISDS. Therefore, in the field of ISDS, *acta iure gestionis* will not be completely excluded from the exercise of state authority, and whether conduct is commercial or not in nature is not necessarily relevant to whether an actor has governmental authority.[415] A commercial act that is directed and controlled by the government may also lead to the attribution of responsibility for the conduct to the state.

In conclusion, in the area of ISDS, the determination of the status of SOEs requires an examination of both whether the SOE possesses governmental authority, and whether it has in fact exercised the authority delegated to it.[416] Not all SOE's activities exercise governmental functions, and even though it is granted governmental authority, the SOE is in the exercise of governmental authority in some activities and not in others.[417] Therefore, through a specific analysis of the facts of the case, responsibility can only be attributed to the state if the conduct contains a governmental element. State responsibility can arise not only from SOE actions that involve the exercise of government authority but also from commercial activities conducted under state

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[414] ILC, 'Report of the International Law Commission on the Work of its 43rd Session' (29 April -19 July 1991) UN Doc A/46/10, 23.
[415] Zhang (n 406) 91.
[416] Csaba Kovács, '*Staur Eiendom AS and others v Latvia1: From Warsaw to Riga*: The Role of Exceptional Circumstances in the Attribution of the Conduct of State Enterprises to the State under the ILC Articles' (2022) 37 (1-2) ICSID Review - Foreign Investment Law Journal 558, 563.
[417] The *F-W Oil v Trinidad and Tobago* Tribunal noted that in applying the notion of governmental authority 'it is not the case that the same answer would necessarily emerge on every occasion; in some of its activities a state enterprise might fall on one side of the line, in others on the other'. *F-W Oil Interests, Inc v Republic of Trinidad and Tobago*, ICSID Case No ARB/01/14, Award (3 March 2006) para 203.

authorisation.

4.3 Entities exercising state sovereign authority - state immunity

4.3.1 Provisions on specific conducts in the UN Convention on State Immunity

In the field of state immunity, according to Article 2(1)(b)(iii) of the United Nations Convention on Immunity, "state" means “agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State.”[418] According to the formulation of the paragraph, entities possess sovereign authority and are actually performing acts in the exercise of sovereign authority of the state. This is how a "state entity” is defined in the field of state immunity.

Some entities, such as national central banks, national news agencies, and other institutions sometimes act as organs of the state in exercising sovereign powers, and at other times operate as independent legal persons. Such entities, while possessing some of the powers and functions of the state, do not enjoy state immunity in respect of acts in which they do not exercise the sovereign powers of the state.[419] It is therefore the determination of the specific acts performed by the entity in the context of its activities in individual cases that is crucial in asserting and claiming state immunity.

The proposition of the doctrine of restricted immunity is to determine whether immunity can be invoked by distinguishing whether an act was sovereign or not. This is a focus on the specific conduct in an individual case. The doctrine of restricted immunity uses a conduct standard to restrict immunity, changing the original immunity by virtue of status to immunity by virtue of conduct.[420] Not all the acts performed by an entity will be immune; immunity depends on what the act is, as only acts involving sovereignty will be immune.

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[418] UNGA (n 25) art 2(1)(b)(iii).
[419] Jianwen Zhao, 'The Nature, Applicable Standards and Development Trend of State Immunity' (国家豁免的本质、适用标准和发展趋势) (2005) 6 The Jurist 19, 21.
[420] Ibid.

Part 3 of the Convention on State Immunity provides "Proceedings in Which State Immunity Cannot be Invoked", which also proves that the privilege of state immunity for those entities that have the power to exercise sovereignty is determined by the specific acts that they perform.[421] The acts provided for in Part 3 are not acts of the state in the exercise of sovereign power but acts in which the state participates as an equal body in the market. At this point, the state is on an equal footing with private parties. In engaging in these acts, the state may not invoke the privilege of state immunity, to avoid creating an imbalance of rights and interests and to maintain normal market order.[422]

4.3.2 Focus on "*acta jure imperii* " and "*acta iure gestionis* in practice

The core of the Convention on State Immunity's determination of the relationship between an SOE and the state is whether the SOE possesses and actually exercises state power.[423] Whether the conduct of the SOE has an element of governmental authority is the key question. In many cases, courts have determined whether an SOE can invoke state immunity primarily by examining whether its conduct involved the exercise of governmental authority.

The United States and the United Kingdom legislated on state immunity at an early stage and have substantial practice in relation to state immunity. Most Commonwealth countries have based their state immunity legislation on the UK State Immunity Act, and US courts have used the Foreign Sovereign Immunities Act as a basis for deciding a number of cases on the immunity of SOEs in different countries, with wide implications.[424] Some of the US and UK cases which have determined whether state immunity could be invoked by an SOE through specific conduct will be described below.

In the US case of *Animal Sci. Prods., Inc. v. China Minmetals Corp*. the plaintiff American company Animal Science Products filed a suit in The Third Circuit alleging

[421] Fox and Webb (n 24) 4.
[422] Ibid.
[423] Gong (n 92) 156.
[424] Fox and Webb (n 24) 168, 238.

that 16 Chinese companies had violated the Sherman Act. The company claimed that these 16 companies had manipulated and controlled the price and availability of magnesite and magnesite products for export to the United States. The plaintiffs therefore sought injunctive relief.[425] The Court held that although the Chinese companies involved in the case met the requirements to enjoy sovereign immunity, the act of signing a monopoly agreement by the Chinese companies in this case was a commercial activity, and therefore the Chinese companies could not invoke sovereign jurisdictional immunity.[426]

Furthermore, in the US case *Voest-Alpine Trading Co. v. Bank of China*, the plaintiff Voest-Alpine Trading Corporation sold goods to Jiangyin Foreign Trade Corporation (JFTC) in China and the Bank of China issued a letter of credit to the plaintiff as security. Later, when JFTC refused to pay, the Bank of China refused to honour the letter of credit. The plaintiff sued the Bank of China in court for not fulfilling the letter of credit, and claimed damages. The Bank of China claimed that the US court lacked jurisdiction. The US court ultimately determined that the acts and activities of the Bank of China in this case were acts of commerce. Therefore, although the Bank of China was a government agency, it could not invoke state immunity.[427]

There are many similar cases, such as the US case of *Lehman Bros. Commercial v. Minmetals Intern*, in which the court ultimately held that although the defendant had state sovereign immunity status, the acts involved in entering foreign exchange and exchange contracts could be subject to the commercial transaction exception and the defendant could therefore not invoke state immunity.[428] Jurisdiction in this case was determined based on the specific conduct of the defendant rather than the defendant's identity.

Another example is the US case of *Universal Consol. Companies, Inc. v. Bank of China*, where United World Construction Company brought a claim for damages for breach of

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[425] Christine M. Buzzard CM, 'Discovering Civil Antitrust Violations Overseas' (2013) 30 Yale J on Reg 475, 479.
[426] *Animal Sci. Prods., Inc. v. China Minmetals Corp*. (n 77) 464.
[427] *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir. 1998) 896.
[428] *Lehman Bros. Commercial Corp. v. Minmetals Intern. Non-Ferrous Metals Trading Co*., 169 F. Supp. 2d 186 (S.D.N.Y. 2001) 189-192.

contract in respect of the refusal to pay an irrevocable letter of credit issued by the Bank of China. The court held that the Bank of China was a subject of state immunity, but that the act of honouring the letter of credit was a commercial act, and therefore the court had jurisdiction over the case.[429]

In addition to the US jurisdictional immunity cases mentioned above, in the UK case *Trendtex Trading v Bank of Nigeria*, the claimant brought an action for breach and refusal to pay a letter of credit by the Central Bank of Nigeria. The court ultimately held that the Central Bank of Nigeria was not the subject of immunity, that sovereign immunity required an examination of specific conduct, and that sovereign immunity was not available in relation to the bank's conduct of commercial transactions.[430]

In the UK case of *Kuwait Airways Corporation v Iraqi Airways Corporation*, Kuwait Airways Corporation sued Iraqi Airways for compensation due to the seizure and use of its aircraft. The Court of Appeal in that case held that Iraqi Airways was an independent entity in its own right and that its immunity should be judged by its specific conduct. The conduct of Iraqi Airways was judged in two parts, with the seizure and transfer of the aircraft being regarded as sovereign acts that were immune, and the operational acts being commercial acts that were not immune.[431] This case is a classic example of a case where it is clear that the sovereign acts of a state enterprise are immune, and the case will be analysed more closely in the next part.

It is clear from the above cases that the courts have generally first affirmed the sovereign immunity of SOEs as equivalent to that of the state, and then, through the "commercial activity" exception, have excluded SOEs from sovereign immunity in specific cases on the basis that the acts performed by the SOEs were commercial transactions.[432] The courts did not focus on whether the enterprise possessed a privilege, but rather on the determination of conduct. Identifying whether the act was an exercise of governmental authority or an ordinary commercial act was an important factor in

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429 *Universal Consol. Companies v. Bank of China*, 35 F.3d 243 (6th Cir. 1994) 244.
430 *Trendtex Trading v Bank of Nigeria* [1977] 1 QB 529 (QB) 557-558.
431 *Kuwait Airways Corp v Iraqi Airways Co* [1995] 3 All ER 694 (HL) 711.
432 Yixin Liang, 'The Standing of SOEs in Sovereign Immunity: The Comparative Study of US FISA，UK SIA and UN Convention' (论国有企业主权豁免资格———以美国 FSIA、英国 SIA 和 UN 公约为视角) (2017)1 Journal of Comparative Law 82, 90.

determining whether the actor could invoke the sovereign immunity of the state.

The immunity laws established in some common law countries have adopted the theory of restrictive immunity, influenced by the UK SIA, US FSIA, and the UN Convention on State Immunity.[433] In fact, similar approaches exist in civil law countries as well. In 2011, France submitted a proposal to ratify the UN Convention on State Immunity, expanding immunity to entities beyond those exercising governmental or administrative powers. Even entities with separate legal personality may claim immunity if they are performing sovereign functions.[434] Other countries, such as Italy, Spain, and Portugal, have also agreed to the UN Convention on State Immunity and will adopt immunity principles consistent with the Convention. Additionally, although China has traditionally adhered to the principle of absolute immunity, it has decided to make adjustments in its bilateral investment treaties.[435] China has also signed the UN Convention on State Immunity and will act in accordance with the purpose and standards of the Convention it signed.[436] As previously stated in this thesis, the intent is not to trace the specific treatment of state immunity by each country. This section merely provides a brief overview of other jurisdictions to illustrate the importance of the conduct in determining whether immunity can be claimed.

a. The distinction between "*acta jure imperii* " and "*acta Iiure gestionis*"

In the field of state immunity, the distinction between "*acta jure imperii*" and *"acta iure gestionis*" is the basis of the doctrine of restrictive immunity.[437] SOEs engaging in both

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[433] Foreign States Immunities Act 1985 (Australia); State Immunity Act 1982 (Canada); Immunities and Privileges Act 1984 (Malaysia); State Immunity Ordinance 1981 (Pakistan); State Immunity Act 1979 (Singapore); Foreign States Immunities Act 1981 (South Africa); Immunities and Privileges Act 1984 (No 16 of 1984) (Malawi); other small common law jurisdictions have enacted similar legislation, eg St Kitts 1979. Fox and Webb (n 24)146.

[434] Ibid, 155.

[435] In the Annex Art 4 of the treaty of UNION OF SOVIET SOCIALIST REPUBLICS AND PEOPLE'S REPUBLIC OF CHINA, it has been stipulated that disputes involving foreign commercial contracts are subject to jurisdiction. United Nations Legislative Series, Materials on Jurisdictional Immunities of States and their Property (1982) 313 p.135.

[436] As a party to the 1969 Vienna Convention on Treaties in 1999 China, by Art 18, is obliged to refrain from acts which would defeat the object and purpose of a treaty which she has signed; Lijiang Zhu, 'State Immunity from Measures of Constraint for the Property of Foreign Central Banks: The Chinese Perspective' (2007) 4 Chinese J Int Law 67, 76.

[437] Sienho Yee, Foreign Sovereign Immunities, Acta Jure Imperii and Acta Jure Gestionis: A Recent Exposition from the Canadian Supreme Court (2003) 2 (2) Chinese Journey of International Law 649, 651.

types of behaviour can expert different results in determining their status.

The concept of *acta jure imperii* is the notion that a state always acts, at least in some sense, in a sovereign capacity. It cannot act in any other capacity.[438] Acts performed abroad by a government in its name are *acta jure imperii*.[439] An *acta jure imperii* is one which, because of its high degree of autonomy, results in its immunity from judicial interference.[440] An *acta iure gestionis* is an act unrelated to sovereign activity and includes commercial and private acts.[441]

There are certain differences in the identification of *acta jure imperii* and *acta iure gestionis* in the three fields examined here. In the field of state immunity, the doctrine of restrictive immunity divides acts of state into *acta jure imperii* and *acta iure gestionis*, and considers that *acta jure imperii* generally include political, military, and diplomatic acts, while *acta iure gestionis* include economic, commercial, and trade acts.[442] *Acta jure imperii* can be granted state immunity, while *acta iure gestionis* cannot invoke state immunity. [443]

To invoke state immunity, the act of a SOE needs to be shown to be an exercise of sovereign power in order to be on an equal footing with a foreign state.[444] Since an *acta jure imperii* of the state could be immune, it is important to distinguish between "*acta jure imperii* " and *"acta iure gestionis*" in determining whether a particular act may enjoy immunity from the jurisdiction of the courts of another state.[445] The court must apply this distinction before it can exercise jurisdiction.[446] Although it can be

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[438] Derek Asiedu-Akrofi, 'Central Bank Immunity and the Inadequacy of the Restrictive Immunity Approach' (1991) 28 Canadian Yearbook of International Law/Annuaire canadien de droit international 263, 264 citing *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Apr. 9, 1981, at 12:9 (Canada).

[439] Fritz Weinschenk, 'A Note on Sovereign Immunity and Judicial Remedies for Aliens in Courts of the Federal Republic of Germany' (1976) 10 Int'l L 467, 468.

[440] Baixiu Ye, *Theory and Practice of State Compensation Law (国家赔偿法之理论与实务)* (Angle Publishing 2008) 4.

[441] Sangeeta Shah, 'Jurisdictional Immunities of the State: Germany v Italy' (2012) 12 (3) Human Rights Law Review 555, 559; See also "*acta jure gestionis* to be acts "within an area of activity, trading or commercial, or otherwise of a private law character . . ." *Kuwait Airways Corporation v Iraqi Airways Co* [1995] 1 WLR 1147 (HL) 1159.

[442] Zhang (n 236) 123.

[443] Ernest K. Bankas, *The State Immunity Controversy in International Law Private Suits Against Sovereign States in Domestic Courts* (Springer 2005) 100.

[444] Dickinson (n 44) 119.

[445] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (n 227) 125.

[446] Ibid.

difficult to separate "*acta jure imperii*" and *"acta iure gestionis*" in practice;[447] the case of K*uwait Airways Corporation v Iraqi Airways Corporation* provides some guidance and adds clarity on ways of making the distinction.

Iraqi Airways Corporation (IAC) seized ten aircraft belonging to Kuwait Airways Corporation (KAC) during Iraq's invasion of Kuwait in 1990 and made a series of preparations for their commercial use. In 1991, KAC applied to the British courts for compensation from IAC.[448] The UK court first conducted some investigations into the case, arguing that IAC had moved the KAC aircraft into Iraq at the request of the Iraqi government as an act of government authority that could be granted state immunity.[449] However, IAC's subsequent acts of the retention and use of the aircraft were not acts of sovereignty and therefore could not be granted sovereign immunity. As a result, the British court ordered KAC to pay IAC more than $1 billion in damages.[450] In this case, IAC was a public statutory body, and its property was the private property of the state.[451] During the course of the case, IAC claimed that the decree to confiscate the KAC aircraft and transfer them to IAC was an act of government sovereignty by the Iraqi government and that the case should not be admissible in a private proceeding in a British court under the principle of immunity from sovereign acts.[452]

The Court of Appeal discussed the doctrine of non-justiciability. First, the court held that the doctrine of non-justiciability meant avoiding the judicial settlement of disputes over sovereign power, which could only be settled between states. However, although the case arose in the context of a major dispute between states concerning sovereign rights, the issue of compensation brought by KAC was deemed admissible by the court.[453] The transfer of the aircraft by IAC could be considered an exercise of sovereign rights, but after RC369 came into force (the Resolution included Iraq's

[447] Hazel Fox, 'International law and restraints on the exercise of jurisdiction by national courts of States' in Malcolm David Evans (eds), *International Law* (OUP 2003) 345.
[448] Chimene I Keitner, 'Introductory Note to the Supreme Court of Canada: Kuwait Airways Corp. v. Republic of Iraq (Can.)' (2011) 50 Int'l Legal Materials 160, 160.
[449] Martin Davies, 'Kuwait Airways Corp v Iraqi Airways Co: the effect in private international law of a breach of public international law by a state actor' (2001) 2 (2) Melbourne Journal of International Law 523, 523.
[450] *Kuwait Airways Corp* (n 431) 696.
[451] Michael J Holland and Ioana Bala, 'Picking the Sovereign's Pocket: Enforcing Your Judgment Against a Recalcitrant Regime' (2011) 23(4) The Air and Space Lawyer 9, 9.
[452] *Kuwait Airways Corp* (n 431) 704.
[453] Davies (n 449) 525.

announcement of the dissolution of KAC and the transfer of its assets to IAC),[454] the IAC's right to retain and use the aircraft was no longer an exercise of sovereign rights, but an infringement by the defendant against the plaintiff.[455]

It is argued that state's activities may have both sovereign and commercial interests, but the mere existence of government objectives will not lead to the transformation of non-sovereign actions into sovereign ones.[456] The court held that the criterion that could lead to sovereign immunity was whether the act was an act of government rather than an act that could be performed by any citizen.[457] It is not sufficient for entities to perform acts directed only by the state, since such acts do not necessarily have the character of governmental acts.[458] Therefore, it is important to emphasise the distinction between a "private act" and a "sovereign or public act." State immunity applies to acts of government, not acts that can be performed by any ordinary citizen for the purpose of serving the state.[459]

In this case, IAC's transfer of the aircraft could be considered an exercise of sovereign power. Because the behaviour itself was of a governmental nature, IAC could only follow the government's instructions to transfer the aircraft. However, although the subsequent commercial activities were authorised by the government, IAC was only exercising the ownership of aircraft granted by the government, and its commercial activities were not controlled by the government. There was therefore no difference from the normal commercial activities carried out by other SOEs.[460]

Therefore, according to the case, in determining whether an entity can enjoy state immunity, it is necessary to determine whether an act can be performed only by a government or by any private person. The former is the entity exercising power on behalf of the state; that is, the power that the state-owned enterprise itself does not have,

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[454] Li-ann Thio, 'English Public Policy, the Act of State Doctrine and Flagrant Violations of Fundamental International Law: Kuwait Airways Corp. v. Iraqi Airways Co. (2002)' (2002) 18 Conn J Int'l L 585, 586-587.
[455] *Kuwait Airways Corp* (n 431) 710.
[456] Dickinson (n 44) 113.
[457] Iyiola Olatunde Oyedepo, 'State Immunity Act 1978: An Analysis of Issues Arising Therefrom and How It Avails the Nigerian Government and Its Entities' (July 31, 2008) Available at SSRN: https://ssrn.com/abstract=1441165 or http://dx.doi.org/10.2139/ssrn.1441165, p.5-6.
[458] Dickinson (n 44) 113.
[459] *Kuwait Airways Corp* (n 431) 711.
[460] Ibid 695.

but is entrusted by the state, and this behaviour can only be performed directly by the government or via government authorisation. The latter refers to complying with national laws and regulations through the behaviour, and with the government's order to perform that business behaviour. While it may serve national goals, some business behaviours do not exercise government power.

b. Application of the private person test

The doctrine of restrictive immunity holds that immunity does not apply to "private" acts, including acts of industrial, commercial, financial, or any other business enterprises in which private persons may engage, or an act connected with such an enterprise.[461] With regard to how to determine whether conduct is commercial, the United States established the "private person test" for determining the conduct of commercial transactions through the case of *Argentina v. Weltover*, which stated that conduct is *acta iure gestionis* if the state engages in an activity that a private person could also engage in. Subsequent cases such as *Antares Aircraft v. Federal Republic of Nigeria* have also adopted the test used in *Argentina v. Weltover*. Courts have since asserted jurisdiction over more defendants from other countries than before that test arose.[462] The case of *Argentina v. Weltover* will be introduced below.

In 1982, Argentina and the petitioner bank issued bonds called Bonods, which provided for transfers in multiple markets and repayment in US dollars. However, when the Bonods matured in 1986, the Argentine government unilaterally extended the payment of the Bonods because it lacked sufficient foreign currency to repay them. Accordingly, the plaintiffs in this case, two Panamanian corporations called Weltover, Inc. ("Weltover") and Springdale Enterprises, Inc. ("Springdale"), together with a Swiss banking corporation, Bank Cantrade, A.G. ("Bank Cantrade"), applied for litigation in the United States District Court, seeking full repayment of the Bonods in accordance with the original terms.[463]

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[461] Edward D. Re, Judicial Developments in Sovereign Immunity and Foreign Confiscations, (1995)1 NYLF 160, 167.
[462] Avi Lew, 'Republic of Argentina v. Weltover, Inc.: Interpreting the Foreign Sovereign Immunity Act's Commercial Activity Exception to Jurisdictional Immunity' (1993) 17 Fordham Int'l LJ 726, 758.
[463] *Republic of Argentina v. Weltover, Inc.,* 112 S.Ct.2160, 2165 (1992).

One of the focuses of the case was to discuss whether the Republic of Argentina's extension of the repayment term of certain Bonods was an act "in connection with a commercial activity" in order to confirm that the Republic of Argentina could be sued in a United States court.[464] The US District Court for the Southern District of New York rejected the defendant's motion that the court lacked jurisdiction, asserting that the district court had jurisdiction. Because the actions of the Argentine government were not activities of a sovereign nature, the foreign state could not invoke state immunity.[465] After that, the Court of Appeals also upheld the decision.

In this case, Argentina argued that the Bonods had been issued as a result of the financial crisis that had arisen in Argentina and as part of the implementation of Argentine monetary regulations.[466] However, the court held that even though the Bonods were issued to stabilise the Argentine currency, this did not distinguish them from ordinary debt instruments.[467] The issuance of the Bonods was a commercial activity, and the rescheduling of the maturity of the Bonods was also a relevant activity. The Argentine government was not acting as a regulator of the market, but rather as a private participant in the market, which was a commercial activity.[468] The Court of Appeal of the Second Circuit further explained that an activity was commercial if it was one in which private individuals can participate.[469] The act of issuing Bonods by Argentina, which brought the Bonods into the "stream of international commerce in foreign currency" did not have the significance of a uniquely sovereign act.[470]

The court in this case emphasised that an act was commercial if it was one by which a

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[464] Oyez, "*Republic of Argentina v. Weltover, Inc*." <Republic of Argentina v. Weltover, Inc. | Oyez> accessed 4 November 2023.
[465] *Republic of Argentina v. Weltover, Inc.*,753 F. Supp. 1201, 1205 (1991).
[466] Ibid.
[467] The court's opinion was that whether an action was a commercial activity was determined based on the nature of the action rather than its purpose. Issuing Bonods might have had the initial purpose of stabilising currency, which serves a sovereign goal, but that did not mean that the act of issuing Bonods was not a commercial activity. The reason why Argentina was participating in the bond market as a private actor was not important; what mattered was that it carried out the actions of a private actor participating in the bond market. *Republic of Argentina v. Weltover, Inc.,* 504 U.S. 607, 608(a) (1992). Regarding the discussion of whether the determination of commercial activities is based on the nature of the action or the purpose of the action, this thesis will provide a more detailed analysis in Chapter 5.
[468] Ibid 610–620.
[469] *Republic of Argentina v. Weltover, Inc.*,941 F.2d 145, 149 (1991). (Citing *Texas Trading & Milling Corp. v. Federal Republic of Nigeria,* 647 F.2d 300, 309 (1981). The Court concluded "that when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA.").
[470] *Republic of Argentina v. Weltover, Inc.* (n 469) 151.

private party can engage in "trade and traffic or commerce".[471] The court explained that an activity that cannot be carried on by a private party was a sovereign activity, and in this way, it distinguished sovereign activities from commercial activity[472] Where a foreign government issues regulations regarding foreign exchange, this authoritative control over commerce cannot be exercised by a private party, so it is a sovereign act. But if a sovereign state purchases military materiel or even bullets by contract, this is a commercial activity because private companies can also enter into contracts to make such purchases.[473]

It is clear from this case that the court used a "private person test" in determining whether the conduct was commercial. An act that can be carried out by ordinary private persons at any time is not considered to be a governmental act.[474] It was on this basis that the court held that the issuance of Bonods by Argentina was a commercial act, since the issuance of Bonods is an ordinary debt instrument that is also often used by private parties to achieve financial objectives.[475] Thus, when a foreign government acts not as a regulator of the market but as a private participant within the market, the government's conduct takes on a 'commercial' meaning.

The significant achievement of this case was that it helped the Court to resolve, to some extent, the problem of the ambiguous meaning of the commercial exception rule.[476] Although, after this case, courts asserted jurisdiction over foreign defendants in a greater number of cases using similar criteria, the original Court did not deliberately broaden the definition of commercial activity, nor did it cover all the activities of sovereign states within the category of commercial activity. Rather, it found that the sovereign state engaged in activities that private companies could also engage in as commercial activities.[477] And in doing so, it concluded that acts undertaken by the

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[471] *Republic of Argentina v. Weltover, Inc.* (n 463) 2166. *Republic of Argentina v. Weltover, Inc* (n 414) 614.
[472] Lew (n 462) 754.
[473] Ibid.
[474] Stephen J Leacock, 'The joy of access to the zone of inhibition: Republic of Argentina v. Weltover, Inc. and the commercial activity exception under the Foreign Sovereign Immunities Act of 1976' (1996) 5 Minn J Global Trade 81, 93.
[475] *Republic of Argentina v. Weltover, Inc* (n 465) 607.
[476] Lew (n 462) 766.
[477] Ibid.

government in a personal manner were commercial.[478] The case thus provided clearer guidance for subsequent decisions as well as for the lower courts.

In summary, in the area of state immunity, similar to ISDS, at the core of determining whether an entity can invoke state immunity is the question of whether the entity possesses and actually exercises the powers and functions of the state. Not all acts of SOEs are immune if they meet the status criteria of belonging to the 'State', but it depends on the type of conduct in question. *Acta jure imperii* are considered to be an exercise of sovereign power, and *acta jure imperii* of SOEs can be eligible for immunity.[479] For the determination of what constitutes *acta jure imperii*, the private person test is performed. An *acta jure imperii* is an act that can only be performed by the government; any act that can be performed by a private person at any time is not *acta jure imperii*.[480] A purely *acta iure gestionis* by SOEs cannot grant them the status required to invoke state immunity. This illustrates that in the field of state immunity, determining the status of SOEs depends on paying attention to their specific conducts. The status of SOEs is determined by analysing whether their actions fall under *acta jure imperii* or *acta iure gestionis*.

4.4 No requirement for conducts in practice – WTO anti-dumping and countervailing duties

Article 1.1 (a)(1) regulates the requirement for eligibility as a subsidy provider within the meaning of the SCM Agreement. This provision establishes the condition of status as "a government or any public body that provides financial support".[481] The definition of "public body" has a direct impact on the identification as a subsidy provider, so "public body" is a very important concept.

In the area of WTO anti-dumping and countervailing duties, the US is the most influential country and frequent user of trade remedies. The EU, Canada, and Australia, which identify SOEs as the basis for public bodies, all have practices similar to those

[478] *Republic of Argentina v. Weltover, Inc.* (n 463) 2166. *Republic of Argentina v. Weltover, Inc* (n 465) 614.
[479] Dickinson (n 44) 112.
[480] *Kuwait Airways Corp* (n 431) 1160.
[481] WTO (n 101) art 1.1(a)(1).

of the US.[482] China is the most investigated country in the world for anti-dumping and countervailing measures, and is among the main targets of trade remedies by many countries.[483] This section will focus on the debate over the concept of "public bodies" in WTO anti-dumping and countervailing cases between China and the US. It aims to analyse whether, in practice, the determination of an SOE's "public body" status is based on the conducts of the SOE.

4.4.1 Conflicting interpretations of the criteria for the identification of "conduct-based" in cases

This section continues to explore whether "specific acts in the exercise of governmental authority" is an appropriate criterion for determining the status of a "public entity" by analysing the relevant arguments in two landmark WTO cases. Both cases discussed below found that a public entity is one that "possesses, exercises or is vested with governmental authority". This is the essence of the government function theory.[484] For any entity to be regarded as a public body, the investigating party must present evidence that the entity is authorised to carry out governmental functions. But there were some differences in perspective in the two cases as to whether the conduct of the entity is to be examined as a means of determining the status of a public body.

In *US — Anti-Dumping and Countervailing Duties (China)*, the Appellate Body held that review of substantive acts is a key criterion for determining "whether an agency is entitled to exercise governmental functions".[485] The Appellate Body was clear that "whether the functions or conduct are of a kind that are ordinarily classified as

[482] Yuejiao Zhang, 'Significance and Implications of China's Victory in the WTO Case of Countervailing Measures Against the United States' (中国在 WTO 诉美国反补贴措施案中胜诉的意义及启示) (2022) 3 Chinese Review of International Law 3, 7.
[483] From the establishment of the WTO to 30 June 2023, 1588 anti-dumping investigations and 205 countervailing investigations have been initiated against China worldwide. Of these, the US initiated 57 anti-dumping investigations and 10 countervailing investigations against China; the EU initiated 31 anti-dumping investigations and 3 countervailing investigations against China. WTO, Anti-dumping Initiations: Reporting Member vs Exporter 01/01/1995 - 30/06/2023, available at <AD_InitiationsRepMemVsExp.pdf (wto.org)>. WTO, Countervailing Initiations: Reporting Member vs Exporter 01/01/1995 – 30/06/2023, available at < CV_InitiationsRepMemVsExp.pdf (wto.org)>.
[484] *United States — Definitive Anti ―Dumping and Countervailing Duties on Certain Products from China* (n 66) para 317. *United States – Countervailing Duty Measures on Certain Products from China* (n 79) para 5.95.
[485] *Appellate Body Report, US — Anti-Dumping and Countervailing Duties (China)* (n 66) para 317.

governmental in the legal order of the relevant Member may be a relevant consideration for determining whether or not a specific entity is a public body".[486] A more direct formulation is as follows: "Evidence that an entity is, in fact, exercising governmental functions may serve as evidence that it possesses or has been vested with governmental authority, particularly where such evidence points to a sustained and systematic practice."[487] It can therefore be seen that the Appellate Body in *US — Anti-Dumping and Countervailing Duties (China)* was positive about examining the specific acts undertaken by an entity to help to determine whether that entity was entitled to exercise governmental functions.

However, the *US — Countervailing Measures (China)* case seems to present a different result. The Appellate Body in this case denied the specific conduct element of the public body determination and emphasised that determining whether an entity is a public body should involve examining the entity engaging in the conduct, the core characteristics of the entity, and the entity's relationship with the government.[488] Thus, it seems that whether the SOE's conduct is commercial or public becomes irrelevant in determining the SOE's status as a public body.[489]

A comparison of the two cases shows that the *US — Anti-Dumping and Countervailing Duties (China)* case focused on whether the conduct of the entity had governmental attributes, and the *US — Countervailing Measures (China)* case focused on whether the entity had governmental attributes. The former case emphasises that conduct is an important criterion for examining whether an SOE has governmental functions, and that the exercise of conduct with governmental functions means that the perpetrator of the conduct has, or has been entrusted with, governmental functions.[490] The latter determines whether an SOE has governmental functions in terms of its own identity, rather than through a specific act by the SOE.[491]

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[486] Ibid para 297.
[487] Ibid para 318.
[488] *Appellate Body Report, US — Countervailing Measures (China)* (n 79) para 5.100.
[489] Bin Gu, Chengjin Xu, 'Treatment Standards of State － Owned Enterprises as Public or Private Entities Under International Economic Law' (国际经济法视域下的国有企业公私主体地位认定标准) (2022) 4 Chinese review of international law 53, 69.
[490] *Appellate Body Report, US — Anti-Dumping and Countervailing Duties (China)* (n 66) para 318.
[491] *United States – Countervailing Duty Measures on Certain Products from China* (n 79) para 5.101.

4.4.2 Analysis of the different emphases of the two cases

There is some disagreement between the two cases as to whether to focus on the attitude of the conduct in determining the public body status of the SOE. Determining whether a SOE qualifies as a public body by evaluating its behaviour focuses on examining whether the actions of the SOE involve the exercise of governmental authority. Some acts can be generally identified as exercises of governmental authority, such as the collection of taxes.[492] However, because of the specific social, historical, and traditional differences between countries, there are differences in the specific ways in which different countries identify the elements of governmental authority.[493] In determining whether an act is an exercise of governmental authority, the legal order needs to be specifically examined and analysed.[494]

SOEs are identified as "public bodies" when they engage in two types of conduct. The first type involves the conduct of engaging in the content of government authority. The second type is based on the acknowledgment of "meaningful control" by the government, meaning that commercial activities subject to "meaningful control" by the government are also considered as fulfilling governmental functions. Therefore, SOEs engaged in conducts involving the exercise of government authority and conducting commercial activities under "meaningful control" by the government are regarded as public bodies.

The approach to identification taken in the *US — Countervailing Measures (China)* case emphasises the characteristics of the entity itself and its relationship with the state. This has resulted in an increased role of state ownership in the identification of public bodies. Unlike the *US — Anti-Dumping and Countervailing Duties (China)* case, where the Appellate Body explicitly stated that it was not concerned with state ownership, the *US — Countervailing Measures (China)* case stated that "government ownership, although not a decisive criterion, can be used as evidence".[495]

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[492] WTO (n 101) art 1.1(a)(1).
[493] ILC (n 98) 43.
[494] *Appellate Body Report, US — Anti-Dumping and Countervailing Duties (China)* (n 66) para 297.
[495] *United States – Countervailing Duty Measures on Certain Products from China* (n 79) para 5.97

The Appellate Body considered that there should be no analysis of the specific conduct of the entity because an investigation into the specific conduct of the entity would blur the distinction between an investigation of a public body and a "delegated and directed" investigation of a private body as set out in Article 1.1(a)(1) (iv) of SCM Agreement.[496] All acts of public bodies were acts of members of the SCM,[497] but acts of private bodies were only classified as members if they were “commissioned and directed” to perform the acts. Therefore, the focus on acts was not a factor in determining an entity’s status as a public body. However, this has been challenged to some extent. The EU in this case had argued that the two different areas of activity entities engaged in were separate and distinct from each other. An entity might be a public body in one of these areas, but not in the other.[498] However, the Appellate Body in this case did not ultimately emphasise the role of the different acts.

Indeed, the *US — Countervailing Measures (China)* case, which in essence emphasises the role of state ownership, is considered a new development based on the ownership criterion.[499] In this circumstance, SOEs are more likely to be presumed to be public bodies on the basis of state ownership, to the exclusion of other SOE characteristics. Thus, in comparison to the explicit interpretation by the Appellate Body in the *US — Anti-Dumping and Countervailing Duties (China)* case regarding "examining whether the conduct consists of an element of governmental authority”, the omission of specific conduct in the Appellate Body's decision in the *US — Countervailing Measures (China)* case might pose a challenge to the government function theory.

In summary, unlike the provisions in the areas of ISDS and state immunity, which provide that "the entity possesses and exercises the powers of the State", in the WTO anti-dumping and countervailing area, government function theory identifies state entities as "entities that possess, exercise or are delegated governmental functions". Determining SOEs as public bodies based on their conducts exercising government authority is just one approach, but is not a necessary one. At the same time, the different attitudes towards the examination of the entity's conduct in the two cases show that, in

[496] Ibid para 5.103.
[497] Ibid para 5.100.
[498] Ibid para 5.88.
[499] Gu and Xu (n 489) 68.

practice, there is still disagreement on determining whether SOEs are public bodies based on their conducts. Thus, in the context of WTO anti-dumping and countervailing duties, conducts are not always necessary when identifying a public body.

4.4.3 Suggestion to identify SOEs based on conduct

As can be seen from the above analysis, the identification of SOEs as "public bodies" in the WTO anti-dumping and countervailing duties does not emphasise the need to focus on specific conduct. However, this thesis argues that the conduct of a public body should be determined by focusing on the exercise of governmental authority.

In WTO law, where an entity is deemed to be a public body, all the acts of the entity that constitute financial support are considered to satisfy the conditions of SCM Agreement Article 1.1, and when these acts also satisfy the benefit condition, they will constitute subsidies.[500] The entity is entrusted with certain governmental functions and would thus be considered a public body under the government power theory. It may be the case, however, that a specific act of the entity (e.g., the provision of loans, raw materials, products, etc.) is unrelated to the content of the governmental powers it receives (the content of the powers received by the entity may only include the collection of taxes on behalf of the state). Outside the context of the entity's access to governmental power, these acts of the entity are simply commercial acts in the marketplace.[501] Failure to focus on whether the specific acts are an exercise of governmental power could result in them being identified as subsidies.

Anti-dumping and countervailing duties are tools designed to protect national producers from unfair foreign competition.[502] Actions outside the scope of the governmental authority of public bodies do not lead to unfair competition against the importing country, but to normal market competition by public bodies. If these actions were considered to be subsidies, they would be contrary to the purpose of anti-dumping and

[500] WTO (n 101) art 1.1.
[501] Huijie Yang, 'Research on the "public institution recognition standard" of the World Trade Organization Law' (世界贸易组织法 “公共机构认定标准” 研究) (2020) 4 (4) Regional and global development 66, 79.
[502] Neufeld IN, *Anti-dumping and countervailing procedures: use or abuse?: implications for developing countries* (United Nations Publication 2001) 1.

countervailing duties, which is to compensate for the damage caused by unfair competition in the importing country.[503] While ignoring behavioural factors may increase efficiency and provide better protection for domestic producers, it can lead to countervailing abuse and undermine freedom of trade.[504]

Accordingly, this thesis considers that a specific act constitutes an "act of a public body" only if it is in the exercise of the entity's governmental authority. The determination of whether a specific act constitutes a subsidy should therefore be made by determining whether there is an element of the exercise of governmental authority in the specific act. China made this proposition in *US — Anti-Dumping and Countervailing Duties (China)*, arguing that in investigating, it should be determined that the specific conduct was an exercise of governmental functions.[505] A public body can be identified on the basis of whether the specific conduct was an exercise of governmental authority.

In fact, the SOE to which a particular governmental power has been delegated is a special body that may engage in both commercial and non-commercial conduct.[506] SOEs that have been assigned governmental functions and which are identified as public bodies are only public bodies within the scope of the exercise of acts of governmental authority. Once a SOE engages in conduct that goes beyond the scope of the government authority with which it has been authorised, that entity should no longer be considered as having the status of a public body. For example, an entity with the power to tax is considered to be a public body, and its act of granting a tax concession for exported products is an act within the scope of its powers, which does not affect its status as a public body, and its act constitutes a subsidy. However, when it provides loans to companies in the normal course of business, this is just ordinary commercial behaviour, as the ordinary commercial act of making a loan should not be considered a subsidy. The act of making a loan by an entity is not an exercise of its governmental

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[503] Matthew Kelly, Resolving the Double Remedy Dispute: A Critique of the WTO Appellate Body's Decision in United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (April 4, 2013). Available at SSRN: https://ssrn.com/abstract=2273938 or http://dx.doi.org/10.2139/ssrn.2273938 4.

[504] Xin Xu, 'Regulation of cross-border subsidies for overseas investments by state-owned enterprises' (国有企业海外投资跨境补贴的规制) (2022) 44 (5) Chinese Journal of Law 207, 216.

[505] *United States – Countervailing Duty Measures on Certain Products from China* (n 79) para 5.99.

[506] Jianguo Hu and Qi Liu, 'Generalization and legal regulation of "public bodies" in American countervailing measures against China' (美国对华反补贴中“公共机构”的泛化及法律规制) (2019) 10 Law 62, 70.

authority, and the entity should not be a "public body" in the context of the act of making a loan. In fact, it is the entity providing the loan that is under the control of the state that is the public body. [507]

The ILC Articles may be considered as an element in interpreting the meaning of "public body" in Article 1 of the SCM Agreement.[508] According to the analysis of the ILC Articles above, the powers conferred and exercised to carry out the authority of government are the core characteristics of a public body. Whether or not the conduct has elements of governmental authority is important in understanding what is meant by a public body.[509] This is also consistent with the core elements of the relevant provisions in the area of state immunity.

4.5 Conclusion

In conclusion, this chapter has discussed whether the conduct of SOEs is an important consideration when determining their status. The field of ISDS considers the actual exercise of governmental authority by an entity as a necessary element for conduct to be attributed to the state. In state immunity, invoking immunity also requires an examination of the specific behaviour of SOEs. *Acta jure imperii* can invoke state immunity, whereas *acta iure gestionis* cannot. However, the WTO anti-dumping and countervailing duties area has a different understanding in that it does not require the specific conduct to be an exercise of public authority when identifying a public body.

This chapter has introduced the idea that in determining whether an SOE is a 'public body', attention should be paid to the specific conduct of the SOE. Inconsistency between the specific conduct and the content of the delegated governmental authority deviates from the purpose for which the rules on anti-dumping and countervailing duties were established. With reference to the relevant provisions and practice in the fields of ISDS and state immunity, a focus on the specific conduct of the entity may be more consistent with the general rules of international law that determine the

[507] Chinese state-owned commercial banks (SOCBs) were public bodies on evidence that SOCBs are "Meaningfully controlled by the government in the exercise of their functions", *United States – Countervailing Duty Measures on Certain Products from China* (n 79) para 5.80.
[508] *Appellate Body Report, US — Anti-Dumping and Countervailing Duties (China)* (n 66) para 311.
[509] Chen (n 330) 23.

relationship between the entity and the state.

Chapter 5 Determining Conduct Based on Nature or Purpose: Which Matters?

5.1 Introduction

The previous chapter highlighted how the determination of the status of SOEs relies on the conduct of SOEs. Then, the question of how to determine the conduct of SOEs arose: should it be based on the nature of the conduct or its purpose? In the field of state immunity, in order to invoke state immunity, an SOE needs to prove that it has the same status as the state in carrying out its international activities. In the area of state immunity there is a "commercial activity exception" rule. According to the UN (United Nations) Convention on State Immunity, when an SOE engages in commercial activity, it represents the interests of the SOE, which are materially different from those of the state, and the SOE is independently liable.[510] Therefore, in determining the relationship between the SOE and the state, it is important to determine whether the SOE is engaged in a commercial transaction.

However, there is no general and clear definition of the term "commercial transaction". The definition of a commercial transaction is also unclear in different countries. Article 1603(4) of the US Foreign Sovereign Immunities Act defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act".[511] The UK State Immunity Act and the Convention on State Immunity define commercial transactions by way of enumeration in three situations.[512] As has been seen

[510] UNGA (n 25) art 10(3).

[511] A “commercial activity” means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose, 28 U.S. Code § 1603(d).

[512] In this section. “commercial transaction” means “ (a) any contract for the supply of goods or services; (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority; but

in many cases, it is difficult to distinguish between commercial and non-commercial conduct.[513]

In international trade activities, how best to determine whether a contract or transaction is a commercial act has become an important point of debate. The standard for judging commercial acts has been one of the most central issues in national state immunity laws as well as in international legislation.[514] The most debated issue in theory and practice is judging a commercial transaction by the nature or purpose of the act.

In deciding whether an entity has performed a sovereign act or a commercial act, one method is to focus on the nature of the act itself, rather than the purpose of the act. The public purpose of the behaviour would have no influence on the determination of a commercial behaviour.[515] The nature standard is concerned with the objective nature of the behaviour, whether the behaviour is essentially private law in nature or commercial in character, and whether the activity is carried out for profit.[516] The adoption of this test can be traced back as far as 1928, when, in response to a question in the Competence of the Courts in regard to foreign states, the Committee of Experts for the Progressive Codification of International Law stated that the nature of the conduct should be used as the basis for judging the conduct.[517]

Another approach is to focus on the purpose rather than the nature of the conduct. According to this view, the conduct of state should be judged by focusing on whether the conduct serves a public purpose.[518] The purpose standard is concerned with the purpose behind the conduct, and it considers the state's status as a special kind of

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neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual." See State Immunity Act (n 130) art 3(3); "Commercial transaction" means: "(i) any commercial contract or transaction for the sale of goods or supply of services; (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; (iii) any other contract or transaction of a commercial, industrial, trading or professional, nature, but not including a contract of employment of persons." UNGA (n 25) art 2(1)(c).

513 Linhua Xia, 'The Basis of Determining Commercial Transaction in State Immunity' (论国家及其财产豁免中商业交易的判断依据) (2007) 20 (6) Journal of Yunnan University Law Edition 141, 144.

514 Ibid.

515 Singh (n 230) 139.

516 Helmut Steinberger, 'State Immunity' in Rudolf L. Bindschedler and others (eds), *Encyclopedia of Disputes Installment* 10 (Elsevier 1987) 428, 438-439.

517 William T. R. Fox, 'Competence of Courts in Regard to Non-Sovereign Acts of Foreign States' (1941) 35(4) The American Journal of International Law 632, 632-633.

518 Wang (n 231) 90.

commercial entity. State conduct may be clothed in the garb of ordinary commercial conduct, so this view suggests that the question of whether conduct is commercial should be determined on the basis of the motive or purpose of the conduct, and that conduct carried out to achieve a public interest is not commercial.

Critics of the nature standard argue that focusing only on the nature of the act may ignore the special interests and requirements of the state, ignore the character of the state as a sovereign body, and lead to unjustified judgements of commercial conduct.[519] Meanwhile, critics of the purpose standard argue that it is too subjective and often reduced to a mere value judgement rather than a legal judgement,[520] and that using the purpose standard to determine a commercial conduct defeats the essence of the restriction on immunity doctrine.[521]

As will be discussed in this chapter, the nature and the purpose of the behaviour should be considered together when determining the conduct of a commercial transaction. The distinction between the nature and purpose of the act is fragile, and the two are inevitably intertwined. The use of either the nature or the purpose standards in isolation is somewhat flawed, as purpose is highly subjective; there is always a certain public purpose to the conduct of a state and considering only the purpose of the conduct may narrow the scope of what is determined to be a commercial transaction. In contrast, the contractual acts of states in their international activities all have the appearance of being commercial in nature, which means that only considering the nature of the act may broaden the scope of commercial transactions. Therefore, when engaged in determining commercial transactions, it is beneficial to consider both the nature and purpose of the behaviour.

The discussion of the nature and purpose of the behaviour is equally present in other areas, such as ISDS. ISDS cases have been criticised by scholars for ignoring the purpose of the act when determining whether the behaviour was a government behaviour. Scholars are more supportive of the argument that the Broches Test should be applied to cases by judging the nature and purpose of the action. In addition, in the

[519] Gong (n 92) 286.
[520] Wang (n 231) 92.
[521] Guo and Xu (n 208) 115.

WTO anti-dumping and countervailing duties field, the purpose standard is preferred in determining the public body status of SOEs.

This chapter will be divided into four main parts, the first of which will analyse, the identification of SOE behaviour in the field of ISDS, with attention paid to the nature and purpose of the behaviour. It will also conclude that in this field, the determination of behaviour should not ignore the purpose of the conduct. The second part will examine the standards applied in judging the conduct of commercial transactions in the field of state immunity. It begins with an analysis of the different attitudes and reasons for the use of the nature standard and the purpose standard respectively in developed and developing countries. This is followed by an analysis of the provisions of the US State Immunity Act on the judgement of acts of commercial transactions and their application in cases. The third part will analyse the situation in relation to WTO anti-dumping and countervailing duties where the purpose standard is preferred in determining the conduct of SOEs, highlighting that this raises the suspicion that considering the purpose of the act would be an abuse of trade measure remedies. In the fourth part, following the discussion of the state immunity, ISDS and WTO areas, the chapter will conclude that considering both the nature of the conduct and the purpose of the conduct criteria is the best way to determine the conduct of SOEs.

5.2 Focusing on the nature and ignoring the purpose in practice in ISDS

In ICSID international arbitration cases, arbitral tribunals tend to apply the Broches Test standard. When determining whether a SOE belongs to the “national" under the jurisdiction of the ISDS, it does not take ownership of equity, identity representative, and purpose of activities as the judgment criteria, but uses the nature of the behaviour as the key element of judgment.[522] However, this approach, which ignores the purpose of the act and focuses only on the nature of the act, has been criticised.

5.2.1 Determining conduct based on its nature in the Broches Test

[522] Liu (n 5) 14.

In the ISDS field, at least six cases concerning public entities involved litigation involving enterprises that were substantially owned, directly or indirectly, by the home state. However, only one case discussed it in particular detail.[523] The application of the Broches Test as a judgment on whether a SOE can bring a claim in ICSID arbitration as an investor occurred in the *CSOB v. The Slovak Republic* case in 1997[524] (see Chapter 2). After the Broches Test was explicitly applied in this case, it was officially used in many arbitration cases.[525]

Ceskoslovenska Obchodni Banka, A.S. (CSOB) is a bank in which 65% shares were owned by the Czech government and 24% shares were owned by the Slovak government at the time of the case. CSOB signed the "Agreement on the Basic Principles of a Financial Consolidation of Ceskoslovenska Obchodni Banka, A.S." (Consolidation Agreement) with the Czech and Slovak governments in 2013. The agreement was signed in the context of the collapse of the Soviet Union and the fall of communism in central and eastern Europe, in order to facilitate the privatisation of the CSOB banks under Czech and Slovak holdings and maintain normal operations after their disaggregation. The agreement stipulated that CSOB Bank will transfer part of the non-performing assets to the two companies established by the two governments to complete the agreement and provide loans to the new companies.[526] Later, CSOB signed a loan agreement with the new company in Slovakia, stating that the repayment

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[523] *Compagnie Minière Internationale Or S.A. v. Republic of Peru,* ICSID Case No ARB/98/6, Award (23 February 2001); *Compagnie Française pour le Développement des Fibres Textiles v. Côte d'Ivoire,* ICSID Case No ARB/97/8, Award (4 April 2000*); CDC Group plc v. Republic of Seychelles* (n 81); *Telenor Mobile Communications A.S. v. The Republic of Hungary,* ICSID Case No ARB/04/015, Award (13 September 2006)*; Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (n 81); *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic* (n 74). These cases all involve SOEs, but only in the CSOB case did the arbitral tribunal extensively analyse the issue of the status of SOEs. 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 Law & Prac Int'l Cts & Tribunals 17, 26.

[524] Before 1997, only nine cases entered the arbitral tribunal.

[525] In the *BUCG v. Yemen* case, the tribunal referenced the judgment in the CSOB case, stating that a specific analysis of the commercial function of the investment should be conducted. The tribunal held that each branch of the Broches Test should be examined to determine how it applies to the case. *Beijing Urban Construction Group Co., LTD Claimant and Republic of Yemen* (n 142) paras 35-36. In the case of *Maffezini v. The Kingdom of Spain,* the tribunal pointed out that the Broches Test should be applied in this case, just as it was in the CSOB case. *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Juridiciton (25 January 2000), paras 79-80. In the case *OAO Tatneft v. Ukraine,* the tribunal held that the CSOB case had established the fundamental principles applicable to the determination of investment by state-owned entities in this case. *OAO Tatneft v. Ukraine*, PCA Case No. 2008-8, Partial Award on Jurisdiction (28 September 2010), para 109.

[526] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic* (n 74) para 2.

of the loan was an obligation of the Ministry of Finance.[527] In 1997, CSOB applied for arbitration to the ICSID with the Slovak government as the respondent, claiming that the Slovak government had not fulfilled its loan repayment obligations, thus violating the Consolidation Agreement, and that it therefore demanded compensation.[528] The Slovak government raised an objection to the ICSID's jurisdiction, claiming that CSOB does not have "national" status under the ICSID Convention, and the true stakeholder is the Czech Republic.[529] The arbitral tribunal then ruled on the dispute over jurisdiction.

First, the arbitral tribunal pointed out that whether an enterprise is a "national" under Article 25 of the ICSID Convention should not be determined by its shareholder status. That is, the status of a foreign investor cannot be denied on the basis that it is a state-owned holding. According to the legislative history of the Convention, state-owned companies are also likely to be eligible for "national" status.[530] At the same time, the arbitral tribunal explicitly quoted the rules of the Broches Test in its ruling: "... for purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function."[531] Therefore, the determination of CSOB's investor status needed to pay attention to these two aspects.

Next, the arbitral tribunal also explained the issue that CSOB performed a government function, as posed by Slovakia. The arbitral tribunal held that CSOB's lending activities were of a commercial nature in their own right, and that although it had performed international banking transactions on behalf of the government to some extent, this had not eliminated its commercial nature. In addition, its activities were affected by government policies, and the purpose of the Consolidation Agreement signed by the three parties was to promote the privatisation process of enterprises; this act was done for the purpose of achieving a public interest. However, the decisive factor in determining whether CSOB was performing a government function should be the

[527] Ibid para 3.
[528] Ibid para 1.
[529] Ibid para 10.
[530] Ibid paras 16 - 18.
[531] Broches (n 64) 201.

nature of the action, not its purpose.[532] CSOB's lending activities and the activities of stripping of non-performing accounts in order to attract more assets were no different in nature from those of other commercial banks. Therefore, the arbitral tribunal considered that it could initiate arbitration activities as an investor in this case.

The CSOB case marked the first application of the Broches Test in an arbitration case. The scope of the investor status of the state-owned enterprise was determined in the case by analysing the specific provisions of Article 25 of the ICSID Convention and the legislative history of the Convention, and the Broches Test was then applied to analyse the specific objections raised by the Respondent. The nature of the behaviour of the state-owned enterprise is an important basis for determining the jurisdiction of the case, as it provides a certain reference value for subsequent rulings. In this case, the arbitral tribunal was more concerned about whether the activities of SOEs are of a commercial nature. But, focusing only on the nature of the activity and ignoring the purpose has been questioned, as it risks ignoring the political purpose behind the behaviour of SOEs.[533]

As can be seen from the above case, the Broches Test provided the arbitral tribunal with a framework for assessing the nature of state-owned enterprises' activities, focusing specifically on whether these activities were commercial in nature, without taking into account the purpose behind them. An SOE's activities can have commercial, political, or mixed objectives, and the boundaries between these can sometimes be unclear or overlapping. [534] Therefore, some scholars have criticized the Broches Test, arguing that it overlooks the true purpose behind the investment and risks reducing the assessment to a mere evaluation of the state-owned enterprise's identity as an investor.[535] The next section will provide a detailed discussion of the criticisms levelled against the Broches Test for disregarding the purpose of conduct in determining behaviour.

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[532] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic* (n 74) para 23-25.
[533] Blyschak (n 6) 30-31.
[534] Zhang (n 146) 1150.
[535] Blyschak (n 6) 30.

5.2.2 Criticisms regarding the application of the Broches Test while ignoring the purpose

The argument that it should be applied in a case by judging the nature and purpose of the action is supported by many scholars.[536] First, focusing only on the nature of the act while ignoring the purpose is difficult for the international community to accept. The treatment of investor status by domestic courts is very similar to that of the ICSID tribunal.[537] The "commercial transaction" test[538] applied by domestic courts in many states in cases determining the behaviour of state entities also initially focused on the nature of the conduct and ignored its purpose,[539] but subsequent judicial practice in domestic courts has shown that it is important to examine the purpose of the act too. For instance, in some domestic court rulings, the Australian Law Commission stated that it was impossible to define the nature of an act completely without considering the purpose of the act.[540] The US Court of Appeals for the Fifth Circuit also clearly stated that "unless we can inquire into the purpose of [certain] acts, we cannot determine their nature."[541]

However, there are opposing views on whether the purpose of the act of concern is difficult to establish. It is argued that the method proposed by the arbitral tribunal to determine the status of SOEs in arbitration by judging the nature of the behaviour of SOEs should continue to be used.[542] Its advantage is that it makes the decision more

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[536] Scholar Paul Blyschak believes that "test that considers both nature and purpose is also the approach best suited to analyse the potentially complex operations of today's large and often very powerful SOEs." Blyschak (n 6) 33. Scholar Mark Feldman pointed out in his article that "When distinguishing commercial from governmental conduct…… consideration not only of the nature, but also the purpose, of an SOE's activities." Feldman (n 150) 35. Scholar Xuehong Liu argues in her article that, given the complexity of SOE activities and the need for a unified standard of judgment across different sectors, focusing solely on the nature of actions while ignoring their purpose presents significant issues. Liu (n 5) 14-15.

[537] Liu (n 5).

[538] The "commercial transaction" test restricts court jurisdiction over a state entity to situations where it engages in non-sovereign or commercial activities. See Blyschak (n 6) 29.

[539] Shaw (n 139) 708-714.

[540] Mark E. Plotkin & David N. Fagan, "The Revised National Security Review Process for FDI in the US" (7 January 2009) 2 Columbia FDI Perspectives, online; George Stephanov Georgiev, "The Reformed CFIUS Regulatory Framework- Mediating Between Continued Openness to Foreign Investment and National Security" (2008) 25 Yale J. on Reg. 125.

[541] *De Sanchez v. Banco Central de Nicaragua and Others*, 770 F.2nd 1385 at 1393 (5th Cir. 1985), 88 I.L.R. 75, at 83.

[542] Ji Li, 'SOEs in the Current Regime of Investor - State Arbitration' in Shaheeza Lalani and Rodrigo Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series 2015) 400.

predictable, because the nature of investment behaviour is easier to judge than the purpose.[543] This will help the arbitral tribunal to more easily determine its jurisdiction, and will improve the coherence of the arbitral tribunal's decision on this issue.

When identifying behaviour, it can be challenging to combine consideration of the nature and purpose of that behaviour. First of all, the state-owned enterprise is more complex than the private enterprise. Its existence is greatly influenced by national policies, which will inevitably affect the purpose of its behaviour.[544] For example, Chinese SOEs' private investment in the "The Belt and Road Initiative" [545] will be affected by the Chinese government's policies on facilitating infrastructure construction in countries along the route. If the SOE's behaviour has the sole aim of helping to achieve national policy purposes, and the investment behaviour of Chinese SOEs is determined to perform government functions, it may be the case that many Chinese SOEs are not eligible for arbitration. This, however, runs contrary to the purpose of the ICSID Convention to protect private investment. Because although many companies may be affected by policies, their behaviour is still ordinary commercial behaviour, and the purpose of the behaviour is also commercial, which is not very different from that of private enterprises. In addition, the purpose of state investment by SOEs is often complicated, and the investigation of behavioural purposes requires research into the policies of the investor's home country. It is not easy for an arbitral tribunal to make such a complex decision at the jurisdiction determination stage, which places high demands on the arbitrators. Therefore, it is difficult to distinguish the purpose of the behaviour.

Focusing only on the nature of the act may be more convenient and accessible, but may

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[543] Blyschak (n 6) 18.

[544] Arief Budiman, Diaan-Yi Lin, and Seelan Singham, 'Improving performance at state-owned enterprises' (2009) 10 (3) McKinsey Quarterly 22, 23.

[545] The Belt and Road Initiative is a proposal put forward by China to implement high-level opening-up, promote international cooperation, and achieve mutual benefits and win-win outcomes through regional cooperation. Wenhe Zhang, 'Current Status and Risk Analysis of China's Outbound Investment and the Belt and Road Initiative Construction' (我国对外投资及"一带一路"建设现状与风险分析) (2021)3 International Project Contracting & Labour Service 41, 41. This Proposal encourages countries to engage in investment and operational activities, leading to an increase in the overseas activities of state-owned enterprises." Yiqun Ma, Min Ni, Yongwu Li, 'The Belt and Road Initiative, overseas investment risks of state-owned enterprises, and national audit governance.' ("一带一路"倡议、国有企业境外投资风险和国家审计治理) (2020)42(7) Journal of Shanxi University of Finance and Economics 114, 114-115.

also lead to abuse of the arbitration mechanism.[546] When the arbitral tribunal applies the Broches Test, paying attention to the nature of the conduct and ignoring its purpose and motivation is likely to lower the threshold for investor identification and expand the jurisdiction of the arbitral tribunal. Inspection of the purpose of the behaviour can help to identify whether the behaviour of the SOE is politically significant, thereby ensuring that arbitration is only applicable to eligible private investors under Article 25 of the ICSID.[547]

The underlying motivations of SOEs are highly correlated with politics, and they are more likely to perform some actions due to political pressure than ordinary enterprises. The state may establish SOEs, and then adopt the same shell and form of conduct as private enterprises for political purposes.[548] This situation cannot be avoided by only judging the nature of SOE behaviour, as the purpose of activities must also be explored. The judgment of the purpose of the behaviour of SOEs is conducive to the arbitral tribunal determining which are real commercial transactions and which are used to help achieve national political purposes under the cover of commercial transactions, thereby helping to achieve the purpose of protecting the private investment of the ICSID Convention.[549]

With the development of SOEs, defining them has become more complicated than before. In the case of *CSOB v. The Slovak Republic*, the arbitral tribunal held that in the process of the country's transition from a planned economy to a market economy, the transformation of SOEs using government policies should not be considered as performing state functions.[550] The CSOB case occurred in the context of the disintegration of the Soviet Union and the fall of communism across central and eastern Europe. Some countries face changes in their economic systems, so the behaviour of SOEs includes the nature and purpose of privatisation. In this context, it is understandable that the arbitration tribunal chose to overlook the purpose of CSOB's behaviours when assessing whether its behaviours were commercial activities. However, in diverse modern society, after a series of reforms the SOEs in various

[546] Blyschak (n 6) 29.
[547] Ibid 30.
[548] Ibid.
[549] Ibid 29-33.
[550] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic* (n 74) para 21.

countries usually do not have particularly different structures and management forms from those of private enterprises, and the investment behaviour of SOEs is more complicated. It is relatively easy for SOEs and governments to conceal the implementation of national policies by investing in the same way as private companies. Therefore, only judging the nature of the behaviour of SOEs makes it difficult to distinguish whether the SOEs are performing state functions, and the purpose of the behaviour also needs to form part of the evaluation.

In summary, the tribunal's judgement of the conduct of the SOE in applying the Broches Test has been challenged due to its focus on the nature of the conduct while ignoring the purpose of the conduct in some cases. That said, it has also been argued that the investigation of the purpose of behaviour is difficult in practice, and the behavioural nature theory has strong predictive characteristics. However, with the complicated development of state-owned enterprise investment, the judgment of the investor status of SOEs needs to develop in a direction that involves a more comprehensive consideration of relevant factors.

In conclusion, in the field of ISDS, as the ICSID Convention does not specifically provide for "nationals", the Broches Test has been widely used in cases to determine whether the identity of the state is that of the investor. However, in cases where the Broches Test was applied, there has been a tendency to ignore the purpose behind the conducts, which has led to a discussion on whether it has led to an expansion of ICSID jurisdiction. There is an ongoing debate as to whether the purpose of the act should be examined, but in practice the emphasis is still on focusing on the nature of acts.

5.3 Disputes over nature and purpose in the field of state immunity

In the field of state immunity, the determination of whether an SOE is a "state" is key to determining whether that SOE can invoke state immunity. The commercial exception is a core element of the doctrine of restrictive immunity. Commercial acts, as “private” acts, are covered by Part III of the Convention on State Immunity in relation to

situations in which state immunity may not be invoked.[551] State immunity cannot be invoked if the act of a SOE is considered to be a commercial act.

5.3.1 Different attitudes and reasons for the nature and purpose standards

The international community bases its determination of an entity engaging in a commercial act primarily in relation to the "nature standard" and the "purpose standard". The two criteria of the nature of the conduct and the purpose of the conduct are used to determine the conduct of commercial transactions, which can lead to different outcomes. In practice, these two criteria are supported differently by developed and developing countries in the pursuit of their state-specific interests.

The nature standard is generally upheld by developed countries. The FSIA expressly provides that the determination of whether an act is a commercial transaction is based on the nature of the act, not the purpose of the act.[552] In the same vein, the definition of a commercial act in the Canada State Immunity Act also indicates that Canada uses the nature of the act as a criterion for determination.[553]

The UK State Immunity Act 1978 does not specify whether the conduct of business is to be judged on the basis of the nature of the conduct or the purpose of the conduct. However, the Bill contains a clause stating "irrespective of the purposes for which the goods or services are required".[554] In addition, Article 3(3) of the UK State Immunity Act contains an enumerated list of commercial transactions.[555] The formulation of Article 3(3)(c) of the Act states that “any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a

[551] UNGA (n 25) art 10.
[552] 28 U.S. Code § 1603(d).
[553] See Article 2 “commercial activity means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character”, Canada State Immunity Act 1982.
[554] State Immunity Bill [H.L.] HL Deb 15 March 1987 vol 389 cl 1502.
[555] In this section “commercial transaction” means—"(a)any contract for the supply of goods or services;(b)any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and(c)any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority; but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual.” See State Immunity Act, art 3(3).

State enters or in which it engages otherwise than in the exercise of sovereign authority", which has also been taken to imply that the State Immunity Act is in essence an application of the nature standard.[556]

Developed countries thus generally emphasise the nature of the conduct as the criterion for determining whether an SOE has engaged in a commercial act or not.[557] Since the nature of the conduct is the criterion for determining whether it is a commercial act, which requires only a superficial examination of whether the conduct has the appearance and characteristics of a commercial transaction, commercial conduct is more easily identified.[558] The jurisdictional immunity of the state would therefore be more limited, which would help to narrow the scope of state immunity, in turn reducing the risk of private counterparties assuming transactional immunity.[559] In contrast to developing countries, SOEs in developed countries are relatively less directly involved in trade and investment, and private individuals are relatively active in international activities. Developed countries therefore tend to use the nature standard to protect the overseas interests of their domestic investors.[560]

In direct contrast to developed countries, developing countries tend to emphasise the importance of the purpose criterion and believe that the influence of the purpose of the act should not be ignored when making business conduct judgements in practice.[561] Developing countries do not advocate the purpose criterion as the sole standard for judging commercial behaviour, but they believe that whether the behaviour is for commercial purpose or public purpose should be examined.[562] For example, in a report submitted to the Secretary General at the 56th session of the UN General Assembly, China stated that it is not enough to simply use the nature criterion, and that the purpose for which a country is engaged in the transaction should also be taken into account. The

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556 Shaw (n 139) 718-719.
557 For example, Italy regards the "nature test" in principle as the exclusive criterion for assessing the commercial nature of a contract or transaction. UNGA (n 236) 3.
558 Wang (n 231) 91.
559 UNGA, 'Note verbale dated 12 August 1993 from the Permanent Representative of Belgium to the United Nations addressed to the Secretary-General' (12 August 1993) 48th Session UN Doc A/48/313, p.3.
560 Shaoping Zhou, Hongqiang Xia, 'Commercial Actions in Jurisdictional Immunity of State and its Property' (2007) 5 Journal of Changshu Institute of Technology 71, 72.
561 Ibid.
562 Huan Lu, 'A Study on Commercial Activity Exception to State Immunity' (国家豁免的商业例外问题研究), (PhD thesis, Graduate School of Wuhan University 2012) 69.

purpose criterion was not applied to provide commercial protection for the state, but rather to avoid ignoring the special interests of the state in some cases.[563]

In practice, when trade disputes arise between developing and developed countries, it is the developing countries that are most often sued.[564] Unlike developed countries, developing countries are more inclined to choose the purpose standard, because developing countries need the government to participate in some specific areas of regulation and assistance, and it is easier for their governments to participate in relevant transactions and contracts.[565] Using the purpose test is more likely to successfully defend non-commercial conduct and avoid court jurisdiction. If only the nature of the act is considered, the issue may arise that the state cannot invoke state immunity for activities in the exercise of governmental functions. Therefore, to prevent abuse under the doctrine of qualified immunity, developing countries advocate that sufficient consideration be given to the purpose of the state's conduct. This could help to increase the scope of applicability of state immunity by considering that the conducts are motivated by the public interest.

To reconcile the different positions of developed and developing countries, the Convention on State Immunity adopts a compromise approach, using a combination of the nature and purpose standards. This kind of mixed standard, which predominantly uses the nature standard but also includes a form of purpose standard, can help to reach a balance.[566] It reconciles the two opposing standards and avoids conflicts in application through hierarchical processing.

In fact, the nature of the act and the purpose of the act are not always opposed to each other. In practice, it is difficult to determine whether an act is a sovereign or a commercial one purely based on the nature or the purpose standard. The following section will describe the provisions of the US FSIA and review some relevant cases, to reveal that even in the US, where the nature of the act is explicitly applied to commercial transactions, the purpose of the act is not completely abandoned in practice.

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563 UNGA (n 236) 3.
564 Schreuer (n 309) 10.
565 Zhang (n 236) 141.
566 Foakes and Wilmshurst (n 39) 4.

5.3.2 Foreign sovereign immunity act: advocating for the nature, without excluding the purpose

The United States enacted the world's first state immunity act, the Foreign Sovereign Immunities Act (FSIA) in 1976, which established that the commercial activities of states are not immune from the jurisdiction of foreign courts under international law.[567] Three exceptions for commercial activities are set out in section 1605(a)(2) of the FSIA.[568] However, it does not provide detailed guidance on the definition of "commerce"; instead, it merely states that “A “commercial activity” means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”[569] The FSIA does not contain any explicit provisions on the specific types and manifestations of commercial activities, etc., other than setting out the criteria for determining their nature.[570]

The FSIA determined the nature standard, and it was applied properly in *McDonnell Douglas Corporation v. Islamic Republic of Iran*.[571] In this case, the court held that the purchase of aircraft components, no matter whether for a public interest purpose or a commercial purpose, was essentially a commercial act and thus was not immune from the jurisdiction of the US courts.[572] However, in some cases, courts have found that commercial conduct also requires consideration of the purpose of the activity. A classic case in which the purpose of the activity was considered is described below.

In the case of *De Sanchez v. Banco Central de Nicaragua*, the United States Court of Appeals for the Fifth Circuit decided whether the activities of a Nicaraguan bank were

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[567] Margot C Wuebbels, 'Commercial Terrorism: A Commercial Activity Exception under 1605 (a)(2) of the Foreign Sovereign Immunities Act' (1993) 35 Ariz L Rev 1123.
[568] See “in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States”. 28 U.S. Code § 1605(a)(2).
[569] 28 U.S. Code § 1603(d).
[570] Wuebbels (n 567) 1127.
[571] *McDonnell Douglas Corporation v. Islamic Republic of Iran*, 758 F.2d 341 (8th Cir. 1985).
[572] Gregory C. Lehman, 'Mandatory Forum Selection Clauses and Foreign Sovereign Immunity: Iran's Litigation Problems in United States Courts' (1986) 12 Brook J Int'l L 553, 555.

an act of commerce under the FSIA. The plaintiff, Mrs. De Sanchez, purchased certificates of deposit from Banco National de Nicaragua, a private bank in the Republic of Nicaragua, and when the plaintiff made a redemption, Banco National de Nicaragua was unable to exchange the required United States currency due to currency restrictions.[573] The private bank (Banco National de Nicaragua) referred the matter to Banco Central de Nicaragua, which issued a cheque to Citizens and Southern International Bank (C&S Bank), a bank in the United States, for payment on its behalf.[574] However, before the cheque could be cashed, a coup d'état took place in Nicaragua and the new regime, in an effort to manage the country's remaining foreign exchange resources, ordered that payment of all cheques be stopped and audited.[575] This blocked Mrs. De Sanchez's cheques from being cashed.

Mrs. De Sanchez sued in the United States District Court for the Eastern District of Louisiana to require the Central Bank of Nicaragua to honour her cheque.[576] The questions of whether the district court had jurisdiction over the Central Bank, and whether the plaintiff's claim fell within the FSIA 1605(a)(2) exception, turned on whether the Central Bank's conduct was commercial.[577] Therefore, the district court reviewed the Central Bank of Nicaragua for the commercial activities exception to the rule.

The district court ultimately ruled that the commercial activity exception did not apply. During the case, the district court found that "commercial" was not precisely defined in the FSIA. The specific activity involved in the case was that the Central Bank had provided the plaintiff with a cheque addressed to C&S Bank, and that bank was unable to cash the cheque due to exchange controls.[578] The sale of foreign exchange to private individuals was a commercial activity, and the regulation of foreign exchange by the Central Bank was a sovereign activity. Ultimately, the court defined the specific activity, and held that the Central Bank's cessation of foreign exchange was essentially governmental in nature and that it was linked to a coup d'état by the government. This

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[573] *DeSanchez v. Banco Central de Nicaragua*, 770 F.2d 1385 at 1388 (5th Cir 1985), 515 F.Supp.900 at 901 (E.D. La. 1981).
[574] Ibid 901.
[575] Ibid.
[576] *DeSanchez v. Banco Central de Nicaragua*, (n 573) at 1389, 901.
[577] *DeSanchez v. Banco Central de Nicaragua*, (n 573) 903.
[578] *DeSanchez v. Banco Central de Nicaragua*, (n 573) at 1391.

was not the same as a private bank stopping an exchange for commercial reasons.[579] The court, based on the nature of the activities, determined that the activities of Central Bank were sovereign behaviours, and were not constrained by FSIA 1605(a)(2).

In this case, the sale of cheques and the refusal to pay by the Central Bank of Nicaragua would have constituted an act of commerce under the nature standard. However, the Central Bank's conduct was not found to be an act of commerce, given that the purpose behind its conduct was foreign exchange regulation. The court gave its reasoning that, in certain circumstances, the purpose behind a particular act was important, and can in fact determine the nature of the act.[580] The court noted that the purpose behind the act was, in fact, an important basis for determining the nature of the act itself. Commercial acts were usually defined not on the basis of the ethereal essence inherent in the act itself, but usually such acts were performed with the intention of making a profit.[581] So, in many cases, the purpose of the act was not a supporting factor. By considering the purpose behind the Central Bank's conduct, the court was able to conclude that it was acting in the performance of an inherently governmental function.[582] Therefore, the court ultimately confirmed that the Central Bank performed a sovereign act.

This case demonstrated the difficulties encountered by the courts in interpreting and applying the FSIA's "commercial activity exception". The lack of a satisfactory definition of the term "commercial" and the nature standard ignored the legislative purpose behind the "commercial activity exception" provision.[583] In relation to *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, a case with similar facts produced a different result.[584] It was therefore clear that the courts have not developed a clear pattern of decisions under the FSIA.[585] However, according to the US Congress,

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[579] Ibid at 1385.
[580] Ibid 1393-1394.
[581] Ibid 1385.
[582] Ibid 1393.
[583] Goodwin E Benjamin, 'DeSanchez v. Banco Central De Nicaragua: Too Many Exceptions to the Commercial Activities Exception of the Foreign Sovereign Immunities Act of 1976 Comment' (1998)14 Brook J Int'l L 715, 736.
[584] The plaintiff sued the Nigerian government for breach of the cement contract and the letter of credit contract. A subsequent decree by the Nigerian government led to the breach of the letter of credit contract. The Court of Appeal ruled that despite the influence of the governmental purpose, the Nigerian government had entered into a private contract for the purchase of cement, which was a commercial activity. *Texas Trading & Milling Corp. v. Federal Republic of Nigeria* 647 F.2d 300 (2d Cir. 1981).
[585] Troy Daniels, 'An Analysis of the United States Foreign Sovereign Immunities Act' (1995) 4 J Int'l L & Prac 175, 184.

the amorphous standard under the FSIA gave the courts the necessary flexibility,[586] and a case-by-case approach was the best way to determine whether to proceed with sovereign immunity.[587]

The FSIA does not seek to prohibit the court from considering the purpose of different activities. Generally speaking, the nature of the conduct is determined by the purpose of the conduct, and it is difficult to determine the nature of the conduct without considering the purpose of the conduct; as such, the two are intertwined[588] In the case of *De Sanchez v. Banco Central de Nicaragua*, the purpose of the conduct (to regulate the national currency reserves) determined the conduct of the Central Bank, and therefore the key to the case was to consider the purpose of the conduct. But the court in *Seventh Circuit in Sengi v. Commercial Office of Span* also stated that consideration of the purpose of the act should be strictly limited to only go as far as necessary.[589]

In conclusion, in the area of state immunity, the nature of the conduct is the primary criterion for determining whether an entity's conduct constitutes a commercial act, but the purpose of the conduct will also be properly considered. Although the FSIA clearly establishes the nature criterion, the consideration of the purpose of the act is not completely prohibited in the practical operation of cases. In addition, the Convention on State Immunity also states that the nature of the contract and transaction are to be considered when making judgments about commercial transactions, along with the purpose of the transaction in relation to the nature. The nature and purpose criteria are not opposing criteria. Although the nature criterion has been widely applied in cases,[590]

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[586] *Republic of Argentina v. Weltover, Inc.* (n 469) 148.
[587] *Texas Trading & Milling Corp. v. Republic of Nigeria* (n 584) 308.
[588] Wuebbels (n 567) 1130.
[589] 835 F.2d 160 (7th Cir. 1987).
[590] *McDonnell Douglas Corporation v. Islamic Republic of Iran, 758 F.2d 341* (8th Cir. 1985). Lord Denning pointed out in the case that the purchase contract was a governmental act, but the purpose of buying boots for the army should not affect the question of whether immunity applies. Therefore, sovereign immunity should not be granted. *Trendtex Trading v Bank of Nigeria* (n 430) Lord Denning at 558. In determining whether a transaction is a commercial activity or an exercise of sovereign power, Lord Shaw L.JJ. in the case held that the intrinsic nature of the transaction, rather than its purpose, is the important consideration. *Trendtex Trading v Bank of Nigeria* (n 430) Lord Shaw L.JJ. at 579. Lord Wilberforce stated that the key examination should be whether the nature of the act constitutes a governmental action, and the fact that the purpose of the act serves state interests does not justify granting immunity. *Owners of Cargo Lately Laden on Board the Playa Larga v Owners of the I Congreso del Partido* [1983] 1 AC 244, 269. The Hon Mr Justice Gross clearly stated that the test for determining whether an act is a governmental action focuses on the nature of the act, rather than its purpose or motivation. *Tsavliris Salvage (International) Ltd v The Grain Board of Iraq* [2008] EWHC 612 (Comm), para 78.

there are also cases where the purpose of the act was considered, such as *De Sanchez v. Banco Central de Nicaragua*. So, the purpose criterion should not be completely ignored in the field of state immunity.

5.4 Focus on the purpose of behaviour – WTO anti-dumping and countervailing duties

In the field of WTO anti-dumping and countervailing duties, identifying the purpose of conduct is typically a significant method for determining whether it qualifies as a government conduct. In the interpretation of "public entity" in 5 (c)(i) of GATS Annex on Financial Services, it describes an "entity owned or controlled by a member, that was principally engaged in carrying out governmental functions or activities for governmental purposes [...]".[591]

In the practice of anti-dumping and countervailing duties, prior to the panel decision in the case of WT/DS379, there had been no specific analysis by the DSB (Dispute Settlement Body) of a "public body". However, the issue of whether a loan from a commercial bank constitutes a policy loan was discussed in the case of *Korea – Measures Affecting Trade in Commercial Vessels*. This case might be a useful reference for the identification of a "public body".

In the case of *Korea – Measures Affecting Trade in Commercial Vessels*, the European Community (EC) considered that South Korea, through Korea National Bank (KEXIM), provided tax incentives and loans to Korean shipbuilders, to the serious detriment of the Community's interests. The parties argued that KEXIM's status as a public body constituted a subsidy.[592] The EC argued that KEMIX was operated for the purpose of pursuing public policy objectives, and that the Korean government changed the activities of KEMIX to provide export loans, project financing, and other support to Korean exporters and investors. The purpose of these actions was to serve the national interest. In essence, it was a public body.[593] The Republic of Korea stated that the

[591] WTO, GATS-Annex on Financial Services (DS Reports), (1 January 1995) art 5 (c)(i) <gats_annfinancialservices_jur.pdf (wto.org)>.
[592] *Korea — Measures Affecting Trade in Commercial Vessels* (7 March 2005) WT/DS273/R, para 3.1.
[593] Ibid para 7.32-7.36.

nature of KEXIM's actions in providing loans was a commercial act of the bank and KEXIM did not have the status of a *de facto* public institution.[594]

The panel in this case ruled that the point made by Korea that KEMIX was engaged in commercial conduct was not a factor in determining whether KEMIX was a public body. The panel ultimately set out its own criteria for finding that "if an entity is controlled by the government, then that entity constitutes a public body; and any conduct of a controlled entity should be attributable to the government".[595]

The view of the panel in this case that commercial conduct cannot be used as a criterion for judging public bodies in anti-dumping versus countervailing duty cases is justified. The specific nature of subsidies is such that it is not sufficient to determine whether an act is a governmental act only by the nature of the act. According to the definition of a subsidy "a government provides goods or services other than general infrastructure, or purchases goods". The act is considered to be commercial in its nature, but it may also constitute a subsidy in the SCM Agreement.[596] If the conduct of the SOE is judged by its nature, then some commercial conducts of an SOE that has a subsidised purpose, such as the provision of loans, cannot be considered to be a governmental function of SOEs.

However, the question of whether SOEs are the provider of the subsidy based on the purpose of the conduct is also controversial. It is argued that in order to better achieve specific government goals and policies, subsidies are used to serve policy goals.[597] The US Commerce Department said in an analysis of China's SOEs that the Chinese government has adopted five-year plans, industrial plans, and supportive legislation to implement its state industrial policies, and has achieved pre-set economic and industrial development goals through decisions such as controlling investment by SOEs.[598]

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[594] Ibid para 7.37- 7.43.
[595] Ibid para 7.50.
[596] WTO (n 101) art 1.1(a)(1)(iii).
[597] Jesca Nyamwaya, 'Analyzing the Law on Subsidies and Countervailing Measures in Kenya and Its Impact on Development in Kenya' (PhD thesis, Graduate School of University of Nairobi 2019) 49.
[598] USDOC, *Memorandum for Paul Piquado from Shauna Biby, Christopher Cassel, and Timothy Hruby Re :Section 129 Determination of the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe; Light-Walled Rectangular Pipe and Tube; Laminated Woven Sacks; and Off-the Road Tires from the People's Republic of China: An Analysis of Public Bodies in the People's Republic of China in Accordance with the WTO Appellate Body's Finding in WTO DS379* (Public Bodies Memorandum) May 18 2012, pp.17-20.

Identifying the purpose behind the conducts of Chinese SOEs is important, as their activities are frequently closely aligned with state objectives aimed at implementing national industrial policies. Relying solely on the assessment of the nature of conducts is insufficient for this determination.

In addition, the EU had also stated in the document that although the SCM Agreement helped to regulate subsidies by SOEs through the concept of a public body, the narrow interpretation of the Appellate Body had resulted in many SOEs not being regulated by the SCM Agreement. It was therefore important to clarify the term "public body".[599]

The European Commission found that the lending by Chinese Bank to coated paper companies constituted a subsidy, based on a series of Chinese industrial plans.[600] In the meantime, a number of Chinese laws such as the Commercial Bank Law and the Enterprise Income Tax Law, which state that they are subject to national policies and support key national projects, were used by the EU as direct evidence of the existence of subsidies.[601] Relevant economic policies ranging from five-year plans for national economic and social development at the national level to supporting policy documents of local governments at all levels have become important targets of the EU's countervailing review.

Although the Appellate Body in the WT/DS379 clarified that subsidies are essentially governmental actions and that the actions of SOEs are equivalent to governmental actions only if the SOEs possess, exercise, or are granted governmental powers,[602] the US, the EU, Japan, and other countries have argued that the Appellate Body's

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[599] EU Concept Paper, European Commission< https://www.astrid-online.it/static/upload/comm/0000/commue_wto-reform_18_09_18.pdf > accessed in 7 December 2023, at ii.

[600] The Paper Industry Development Policy, promulgated by the National Development and Reform Commission, falls within the scope of the State's industrial plan. Commercial banks have provided preferential loans to coated paper enterprises that have been identified as encouraged enterprises in accordance with Decision No. 40 of the State Council, i.e., "Decision of the State Council on the Issuance and Implementation of the Decision". EU, Council Implementing Regulation (EU) No 452/2011 of 6 May 2011 imposing a definitive anti-subsidy duty on imports of coated fine paper originating in the People's Republic of China, OJ L 128, 14.5.2011, available at < EUR-Lex - 32011R0452 - EN - EUR-Lex (europa.eu)> 18-75.

[601] EU, Coucil Implementing Regulation (EU) 215/2013 of 11 March 2013 imposing a countervailing duty on imports of certain organic coated steel products originating in the People's Republic of China, OJ L 73, 15.3.2013, available at < EUR-Lex - 32013R0215 - EN - EUR-Lex (europa.eu)> 16-97.

[602] *United States — Definitive Anti ―Dumping and Countervailing Duties on Certain Products from China* (n 66) para 318.

interpretation of public body determination undermined the validity of the subsidy rule, so there was no need to make a determination in accordance with the Appellate Body's interpretation.[603] They called for a broader interpretation of public bodies. The Seventh US-Japan-EU Statement noted that since many subsidies were granted through SOEs, discussions should be held to ensure that the term "public bodies" covers these subsidised entities.[604] In order to avoid market disruption by government-influenced enterprises, they argued that SOEs could be placed in the same category as public bodies. For example, the Public Bodies Memorandum described that an enterprise in which the government has a stake may be considered a public body if the USDOC considers that the government exercises meaningful control over it.[605]

In the US and the EU's anti-dumping and countervailing duty reviews, they consider SOEs to be instruments used to achieve national economic policy and to engage in business conduct for government purposes sufficient to be considered as acting in the capacity of a public body. The presumption that SOEs act as public bodies based on national economic policy is a broad interpretation of public bodies and covers a wider range of SOEs.[606] As a result, developed countries and political unions such as the US, the EU, and Japan apply a purposive standard in defining the status of public bodies, emphasising that the purpose of SOEs' behaviours is to achieve their country's economic policies, potentially giving rise to suspicions of trade remedy measure abuse.[607]

In conclusion, in the field of anti-dumping and countervailing duties, the purpose criterion is preferred for the determination of the public body status of SOEs. The panel in the Korean Commercial Vessels case supported the EU's view that the KEXIM had acted to fulfil a public policy purpose. Although the Appellate Body in the DS379 case proposed a governmental function standard determination method, and determined

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603 Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, Washington, D.C., <Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union | United States Trade Representative (ustr.gov)> accessed 5 December 2023.

604 Ibid.

605 USDOC (n 598) 38.

606 Yao Chen, 'Research on the regulation of international trade agreements on SOEs' (国际贸易协定对国有企业的规制研究), (PhD thesis, Graduate School of China University of Political Science and Law 2021) 69.

607 Sun (n 111) 59.

whether a behaviour qualifies as a government behaviour based on the nature of the behaviour, countries still emphasise the purpose of focusing on the actions of SOEs when conducting investigations in anti-dumping and countervailing duty cases. These countries also believed that the actions of the SOEs were public actions based on national economic policy, as well as identifying actions that serve governmental purposes as the exercise of governmental authority by the SOEs.

5.5 Consideration of both the nature and the purpose of the behaviour

Having analysed the differential treatment of the analysis of the nature and the purpose of SOE conduct in the identification of a commercial transaction in the three areas, one possible conclusion is to consider both the nature and purpose of behaviour, as this could help to balance the interests of developed and developing countries and reduce the struggle between them. Moreover, the distinction between the purpose of the conduct and the nature of the conduct is ultimately fragile, since (as has been argued above) the two are inevitably entangled.

5.5.1 Fostering reconciliation of divergent interests between developed and developing countries

As described in section 5.3.1 above, SOEs in developed and developing countries have different levels of involvement in international activities, and the two formations have different views in relation to state immunity in line with the best protection of their interests. Developed countries support the nature of the conduct as the main criterion for determining the conduct of commercial transactions, ignoring the role of the purpose of the conduct. Developing countries, on the other hand, believe that the purpose of the act cannot be ignored. Considering the nature criterion would broaden the scope of what is considered to be a commercial transaction and the purpose criterion would narrow the scope of what is considered to be a commercial transaction. Thus, in the area of state immunity, the nature test would narrow the scope of state immunity and protect the interests of investors, while the purpose criterion would broaden the scope of state immunity and protect developing countries from the greater use of state immunity rules.

In the field of ISDS, the nature test makes it easier for SOEs to be identified as investors, making it more challenging to classify them as SOEs acting as agents of the government or performing governmental functions by assuming responsibilities that should be attributed to the state. This would expand the jurisdiction of arbitration cases by bringing what are essentially 'state-to-state' and 'investor-to-investor' disputes within the jurisdiction of ISDS.[608] It is argued that the ICSID is still dominated by developed countries, and has a close relationship with them[609] In investment dispute arbitration, developed countries have linguistic and cultural advantages, most of the arbitrators appointed are from developed countries, and almost all of the respondents in the ICSID are developing countries.[610] Therefore, the expansion of the ICSID's jurisdiction may be the preference of developed countries.

In the field of WTO anti-dumping and countervailing duties, the US, EU, Japan, and other developed countries have advocated the purpose of the act as a means of determining whether an SOE is a "public body", which allows for a broader interpretation of "public body". More SOEs will be identified as the providers of subsidies, and the state will be able to take more remedies. This is an inevitable choice for the state to pursue trade protection policies.[611] This broad interpretation of "public bodies" is not favourable to developing countries, for whom SOEs are the mainstay of foreign trade. Therefore, there is a dispute btween developed and developing countries.

In summary, developed and developing countries have different preferences regarding the most suitable criteria for determining the conduct of commercial transactions due to their own national interests, and these criteria also differ in different areas of law. Attempts have been made in the Convention on State Immunity to reconcile the interests of the two formulations. The Convention on State Immunity adopts a compromise approach, using a combination of nature and purpose standards. Article

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608 Scholar Blyschak pointed out in his article that, “SOEs and the governments that control them are entirely capable of cloaking politically motivated decisions and strategies in otherwise commercial actions…” “there are numerous reasons why future tribunals may feel free to expand on the inadequate reasoning of the Tribunal in CSOB v. Slovak Republic.”. Plyschak (n 6) 31.

609 Leon E. Trakman, 'The ICSID Under Siege' (2013) 45 Cornell Int'l LJ 603, 608-609.

610 As of 30 November 2014, ICSID had registered 494 cases, of which only 23 were arbitrations against developed countries, with Spain being the most frequent respondent (9 cases), followed by the United States (4 cases). It can be seen that almost all the cases filed in the ICSID have been against developing countries.

611 Sun (n 111) 59.

2.2 of the Convention on State Immunity states that the nature of the contract or transaction shall be considered in making commercial transaction judgments. But if the purpose of the contract or transaction is related to nature, the purpose should also be considered.[612]

In the application of this kind of mixed standard, nature and purpose are usually judged in turn. First, the nature of the contract or transaction has to be determined. If it is non-commercial in nature, there is no need to define the purpose. However, if the contract or transaction is determined to be commercial according to the nature criterion, it also needs to be determined according to the purpose criterion.[613] If the purpose of the contract is also commercial, the transaction is a commercial act and does not enjoy immunity under the Convention. If the purpose of the contract is non-commercial, then the transaction is a sovereign act. The combination of the nature and purpose of act, as adopted in the Convention on State Immunity, therefore helps to identify the pursuit of state policy or political objectives hidden behind commercial transactions.[614] The approach of combining judgement on the nature and purpose of the act in the area of state immunity can therefore be a positive step that satisfies the demands of developed countries while also taking into account the concerns of developing countries.

5.5.2 The inevitable entanglement of the nature and the purpose of conducts

The nature test is now the core criterion for the identification of commercial transactions in the field of state immunity. However, identifying commercial conduct only by the nature of the act would result in "absolute non-immunity", as every transaction may contain formalities of a commercial nature.[615] If the focus is only on the nature of the act, and the attitude "once a trader always a trader" is maintained, then this would ignore the interests of the state in which the conduct was performed and result in an unreasonable determination of relevance.[616]

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612 UNGA (n 25) art 2(2).
613 UNGA 'Yearbook of the International Law Commission' (1983) UNYB, A/CN.4/SER.A/1983/Add. 1 (Part 2) p. 35.
614 Blyschak (n 6) 33.
615 Wang (n 231) 95.
616 Gong (n 92) 286.

The boundaries of state actions are more blurred in certain areas, and it is difficult to determine their nature. In sectors such as transport, healthcare, and education, for example, the state is inevitably involved. However, due to the range of different economic systems across countries, the degree of state involvement varies. The same act will be considered by some countries as a sovereign act and by others as a commercial act. The nature test therefore cannot cover all cases equally. For example, in case of *CDC v. Seychelles*., although the CDC's lending was commercial in nature, the CDC's lending operations had the intended political purpose of the UK to help lift developing countries out of poverty, so the purpose of the act should not be ignored.[617] Therefore, relying solely on the nature of the conduct as the standard of determination is flawed.

It was argued that "there is room for the view that any activity of a state - even if ostensibly of a private law nature – is performed *jure imperii* as aiming at the welfare of the State."[618] SOEs arise from government intervention in the market for the purpose of remedying market failures, which already involves a public purpose.[619] The focus on the purpose of the behaviour may increase the likelihood that the SOE will be deemed to be engaged in 'non-commercial activities'.[620]

The state exists essentially for the public purposes of society, as do SOEs.[621] The behaviours of the state and SOEs, no matter how 'purely' commercial, have a public welfare dimension. Even if the state acts commercially to make a profit, it generally does so to increase tax revenues and so on for the ultimate public good.[622] In the field of state immunity, if the focus is only on the purpose of the behaviour, then there would be no difference between this restriction and an absolute immunity. As was also analysed earlier in the WTO anti-dumping and countervailing duties area, the US, UK, Japan, and other countries prefer the purpose standard, which is also considered to

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[617] Mark Feldman, 'The Standing of State-Owned Entities Under Investment Treaties" (2012) *Yearbook on International Investment Law & Policy 2010-2011* (K. Sauvant, ed.) (OUP) (2012) , Available at SSRN: https://ssrn.com/abstract=2444578 627.
[618] Lassa Oppenheim, Robert Jennings and Arthur Watts, *Oppenheim's International Law: Peace (9th Edition): Volume 1 Peace* (Longman 1992) 362.
[619] Mankiw N. Gregory, *Principles of Economics* (Eighth edn, Boston, MA: Cengage Learning 2018) 18.
[620] Liang (n 67) 108-109.
[621] Wang (n 231) 92.
[622] Xia (n 513) 144.

broaden the scope of SOEs being considered as subsidy providers, and is suspected to be an abuse of remedies. Therefore, the use of the purpose test alone as a method of determining the conduct of commercial transactions is questionable at best.

During the drafting of Convention on State Immunity, Australia, the United Kingdom, and other countries have taken the view that using the purpose of the behaviour as the criterion for judging will introduce some subjective factors, leading to the infinite expansion of the scope of state immunity.[623] Moreover, examining the purpose of an SOE requires a deep investigation of the host country's policies, national laws, etc., which can be a demanding task for a tribunal and can reduce the efficiency of the case.[624]

As has already been identified, there is an entanglement of nature and purpose, and the classification of government behaviour and commercial behaviour is also a kind of confirmation of behaviour purpose.[625] Commercial activities have a claim to a profit-making purpose, while governmental activities are aimed at achieving a public interest.[626] There might be situations where SOEs use commercial activities as a cover for pursuing non-commercial or strategic purposes, such as implementing national policies, pursuing national goals, etc., so it would be inappropriate to directly determine the identity of an SOE based solely on the nature of its conduct. It is therefore impractical to examine the conduct involved in isolation from its purpose. [627]

There is no clear boundary between the nature and purpose criteria, and neither is there a clear boundary between commercial and non-commercial conduct. There are certain drawbacks in adopting either a purely nature standard or a purely purpose standard, as this thesis has already explored. In order to alleviate the controversy arising from the different positions of developed and developing countries and take into consideration the fact that the nature of the act and the purpose of the act are intertwined in a way that

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[623] UNGA 'Convention of Jurisdictional Immunities of States and Their Property Report of the Working Group' (3 November 1992) 47th Session UN Doc. A/C.6/47/L.10, p.11 UNGA ' Report of the United Nations Commission on International Trade Law on the work of its 25th session : draft resolution / Australia, Austria, Brazil, Canada, Czechoslovakia, Denmark, Finland, France, Greece, Guinea, Hungary, Italy, Myanmar, Netherlands, Norway, Russian Federation, Spain, Sweden and Turkey' (13 October 1992) 47th Session UN Doc. A/C.6/47/L.4..

[624] Liang (n 432) 107.

[625] Fairley HS (n 199) 1101.

[626] Jian Fan, Jianwen Wang, *General Theory of Business Law* (Law Press·China 2011) 14. Aristotle and Benjamin Jowett, *Politics*, Anonymous Translator (Blacksburg, VA, Virginia Tech, 2001) 51-52.

[627] Blyschak (n 6) 24-35.

cannot be completely disentangled, one choice may be to consider both the nature of the behaviour and the purpose of the behaviour when determining the conduct of a commercial transaction. In practice, the factors which need to be considered in determining whether an act is commercial may not be limited to nature and purpose, but other facts, such as the location and context of activity, may also be relevant.[628] Therefore, there should not be a single criterion for determining the conduct of a commercial transaction.

5.6 Conclusion

In conclusion, the analysis in this chapter has demonstrated that the nature of the behaviour and the purpose of the behaviour should be considered together when determining the conduct of a commercial transaction. In the current legal remedy, determining whether an act represents a commercial transaction conduct based solely on its nature or purpose is controversial, and there is no uniform and clear answer.

In the area of state immunity, where the issue has been most widely discussed, the purpose test has not been entirely ignored. In the ISDS area, the omission of purpose of conduct has likewise been widely criticised. In addition, the way countries identify public bodies through assessing the purpose of their conduct in the WTO anti-dumping and countervailing duties area has also been suspected of extending the scope of subsidy providers and abusing the remedy. Overall, through its analysis of the relevant provisions and practices, and by noting the controversies and results arising from these three areas, this chapter has proposed the idea that both the nature of the conduct and the purpose of the conduct should be considered. This approach reflects the reality that the nature and the purpose of the conduct are entangled and difficult to distinguish completely, in order to balance the different interests of developed and developing countries.

[628] Shaw (n 139) 710-712.

Chapter 6 Evaluating the Need for Unified Rules on the Status of SOEs

6.1 Introduction

As discussed in the previous chapters, the status of SOEs varies to some extent in the different areas of regulation. The eligibility of claimants to the ICSID and the determination that the conduct of SOEs is attributable to the state, the sovereign immunity of SOEs, and the definition of public bodies of SOEs in the WTO anti-dumping and countervailing duties are similar in that they all essentially seek to determine whether SOEs are *de facto* agents of states and governments. Although the legal logic behind this is similar, SOEs only have the status of a "state" when they are granted governmental powers, actually exercise governmental powers, or are controlled by the state as state agents.[629] However, as demonstrated in the preceding chapters, there is currently no uniform international standard for defining SOEs in these four areas.[630]

This chapter will discuss the idea that there is, in fact, no need to establish a uniform rule for the identification of SOEs. By discussing the consequentialist evaluation criteria of meeting social needs, the issue of the existence of fragmentation of international law, the 'state' nature of SOEs, and the characteristics of international law, this chapter will argue that there is no need for a uniform regime of international law in relation to SOEs. However, while there is a basis for maintaining the current rules in each area, based on the detailed analysis of the differences in the rules applied for the

[629] According to Broches Test, there are two criteria: "for purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function." Broches (n 64) 355.; SOEs are generally independent of the state and its institutions. Article 10(3) of the United Nations Convention on Immunities provides that "the immunity from jurisdiction enjoyed by a State enterprise or other entity established by the State shall not be affected by the involvement of that State in a proceeding relating to a commercial transaction with which it is engaged", i.e., the "State enterprise" is separate from the "State". UNGA (n 25) art 10(3). This means that "State-owned enterprise" and "State" are separate from each other. SOEs may only be the main body of state immunity if they are authorised to exercise sovereign power or on behalf of the state. Liu (n 305); Cui (n 209); The WTO Appellate Body has defined a "public body" as a body entrusted with the competence of government to perform public administration functions. Liao (n 205) 19–24; A public body must be an entity that has, exercises or is vested with governmental authority. *United States — Definitive Anti ―Dumping and Countervailing Duties on Certain Products from China* (n 66).

[630] Liang (n 45) 109.

identification of SOEs already presented in the previous chapters, it will be argued that other areas could appropriately draw on some of the criteria used for the identification of SOEs in the area of state immunity.

6.2 Reasons against establishing a unified SOE identification rule

The issue that the status of a SOE may be characterised differently in different areas of law has garnered attention. For example, in anti-dumping and countervailing duty investigations, SOEs could be regarded as "public bodies" under the SCM Agreement due to their state ownership. However, SOEs may also be denied state immunity on the grounds that the "conduct in question is commercial rather than governmental," and in such cases, their status is not determined based on their state ownership.[631] This can lead to challenges to the legitimacy of the operations of SOEs. There should be a uniform view on when SOEs are considered to be a proxy of state.

However, while it is true that there are inconsistencies in the status of similar SOEs in different areas of law, it is normal for different regimes to treat the same enterprise differently since these regimes originally had various different aims and objectives. Otherwise, there would be no need to categorise cases into multiple international law domains for specific treatment. International law has developed in such a way where multiple sectoral areas coexist, each highly specialised, with relative autonomy from one another.[632] In disputes involving which case or issue should go to which area to be dealt with, the provisions of other areas can be drawn upon, but the corresponding issues should more appropriately be resolved by the institutions in that area themselves.[633] In addition, the space for SOEs to operate is affected not by the lack of a uniform regime, but by states' concerns about the governmental nature of their

[631] In the case *of US — Anti-Dumping and Countervailing Duties (China)*, the U.S. Department of Commerce, in its countervailing duty investigation, deemed Chinese SOEs as "public bodies" under the SCM Agreement due to their state ownership. *United States — Definitive Anti ─Dumping and Countervailing Duties on Certain Products from China* (n 73) para 8.133-8.136. However, in the case of *Universal Consol. Companies v. Bank of China* case, the court denied state immunity to Bank of China, a Chinese SOE, on the grounds that the conduct was commercial in nature and not a sovereign function. *Universal Consol. Companies v. Bank of China* (n 429) 244-245.

[632] UNGA, 'Report of the International Law Commission Fifty-eighth session' (1 May-9 June and 3 July-11 August 2006)' 61st Session UN Doc A/61/10 para 245.

[633] Ibid.

activities due to the inherent 'state-owned' nature of SOEs.

In this part, it will first be demonstrated that from the perspective of meeting the needs of society, the relevant rules in each field were established for a specific purpose. Therefore, they cannot be changed into a uniform state, as this means they would not meet the specific purpose for which they were designed. I will then argue that the fragmentation of international law is inevitable. From the point of view of efficiency, decentralised rules are better able to bring disputes into specific areas to be efficiently dealt with. Finally, this section will discuss the overseas risks arising from the state-owned nature of SOEs, and argue that the existence of ambiguities in the language of international law and the subjective nature of legal interpretation are not issues that can be resolved by establishing uniform rules.

6.2.1 Meeting the demands of society - different objectives in each area

As was discussed earlier, there are different rules in the identification of the relationship between SOEs and the state in each of the three areas. So, the question arises as to why are there differences in the rules of identification in these areas of international law? This section will discuss the main reason for the differences in the interpretation of the relevant rules in each area. Lawmaking in international law has long been oriented towards specific areas or issues, in order to meet specific demands.[634] Different legislative objectives in various fields can lead to different rules for SOEs. An exploration of the legislative purpose of the legal rules can be used to better evaluate them.

International law has an inherent political nature, with states acting as both its creators and enforcers.[635] The issues addressed by international law are often political in nature. International law is frequently interpreted by policymakers as a set of rules that serve the national interest.[636] The formation of an international legal system stems from the

[634] Ibid, para 186.
[635] Marion Mushkat, 'Politics and International Law' (1961) 14 Revue Hellenique de Droit International 52, 52-59.
[636] Christopher C. Joyner, 'Teaching International Law: Views from An International Relations Political Scientist' (1999) 5 (2) ILSA Journal of International & Comparative Law 377, 377-387.

objectives and interests of the advancing states.[637] International activities bring about different conflicts of interest, and each country takes measures to prevent its own interests from being compromised. The objectives and interests of advancing states are not identical in different areas of law, and the legislative objectives of the resulting legal regulation systems also vary. This is one of the important reasons for the differences in legal rules and standards.

This part will first demonstrate that the ISDS regime was established for the purpose of promoting international investment and settling international disputes. In the area of state immunity, the rules reflect principles of equality between sovereign states and comity and mutual respect for the sovereignty of one state by another. Finally, this part will confirm that the anti-dumping and countervailing duty rules are a matter of complying with the laws established by another country to protect its sovereignty, rather than a matter of comity.

a. ISDS - purpose of promoting international private investment activities

Considering the situation before the establishment of the entire ISDS system, in the absence of an opposing agreement, disputes between investors and the state were typically resolved by the host country's courts. Investors were often concerned that domestic courts might lack impartiality. Due to the limitations of state immunity rules and other judicial theories, litigation in domestic courts could be difficult. [638] Furthermore, in disputes between investors and the state, it was also possible to convert the dispute into a dispute between sovereign states and then seek a solution on that basis. In traditional international law, foreign investors were in most cases required to seek diplomatic protection from their home state, and were unable to resolve international disputes directly by means of international remedies.[639] But this kind of dispute resolution system only recognise the role of sovereign states in the global system, and private investors can only be subordinate to states and cannot enter the global system

[637] Zhao (n 323) 368.
[638] Dolzer and Schreuer (n 45) 192.
[639] Sheng Zhang, 'Diplomacy under the International Investment Treaty System Space for protection' (国际投资条约体系下外交保护的空间) (2017) 29(4) Peking University Law Journal 1091, 1092.

in their own right.[640] In this context, the ISDS system was established to better resolve investor-state disputes.

The Investor-State Dispute Settlement mechanism aims to "depoliticize" investment disputes, thereby effectively eliminating the risk of such disputes escalating into inter-state conflicts. [641] The ISDS regime allows private investors access to arbitration in an independent capacity, giving them the right to bring a dispute directly against a state, which puts them on an equal footing with states and provides a platform for them to protect their interests.[642] The establishment of the ISDS mechanism thus underlines the protection afforded to private investors.

The ISDS mechanism puts private investors on an equal footing with states for arbitration, turning the traditional games between sovereign states into games between investors and states. The home state of the investor is thus removed from the arena of investment disputes. Investors who are able to undertake outward investment activities and bring arbitration claims have strong legal and economic power, and the ISDS mechanism was set up to promote and protect private investment. Therefore, private investors are not necessarily at a disadvantage compared to states.

The ISDS regime was originally created to promote private investment activity. The problem facing private activity at the time was that the interests of investors in developed countries faced the risk of infringement by nationalisation, expropriation, etc. in developing countries, and the traditional dispute settlement system was not effective in addressing this problem. The creation of the ISDS regime was therefore a product of developing countries seeking to compromise with developed countries for the sake of their economic interests.[643]

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[640] Zhen Gao, 'The controversial ISDS mechanism' (2015) 21st Century Business Report <https://m.21jingji.com/article/20151105/73fcdd3816ec5be26b99996dd444de9d.html> accessed 1 January 2023

[641] UNGA 'Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS) Note by the Secretariat' (3-21 July 2017) 50th session UN Doc A/CN.9/917, para 9-10.

[642] Fan Liao, 'New Developments in Investor-State Dispute Resolution Mechanisms' (投资者——国家争端解决机制的新发展) (2017) 10 Jiangxi Social Science 200.

[643] Xander Slaski, 'Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries. by Lauge N. Skovgaard Poulsen' New York: Cambridge University Press, 2015' (2016) 78 (4) The Journal of Politics E32, E32.

In the creation of the ISDS regime, developed and developing countries assessed the costs and benefits of participating in the ICSID regime based on their status as capital exporters and capital importers.[644] In the context of the then bitter conflict between the developed South and the developing North, the two sides debated the boundaries of international law as a framework for dispute settlement.[645] Developing countries argued that compensation for expropriation and nationalisation should be governed solely by the domestic law of the host country, while developed countries argued that it should be based on international law.[646] In this context, the modality of allowing investors to submit investment disputes directly was proposed at the World Bank.

ISDS primarily relies on ICSID, and the Convention that led to the establishment of ICSID requires special discussion. The purpose of the Convention holds a significant position in its interpretation, which "shall be in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The Convention's historical context, preparatory work, the situation of the parties at the time of the Convention's conclusion, changes intended to be made in these situations, actions taken by the parties after the conclusion of the Convention, and the prevailing practice at the time of interpreting the treaty should all be considered in connection with the general purpose of the Convention."[647] Article 31 of the Vienna Convention on the Law of Treaties also stipulates that the "ordinary meaning,"

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644 Guiling Wang, 'Analysis of the Causes of Fuzzy Legislation of ICSID Arbitration Jurisdiction' (ICSID 仲裁管辖权立法模糊动因分析) (2021) 40 (6) Journal of Huaihua University 78, 78.
This has been questioned, as empirical studies suggest that the extensive signing investment treaties by developing countries may not align with their best interests. So why do developing countries still sign such treaties with developed countries? Claire Peacock, 'Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries. by Lauge N. Skovgaard Poulsen' (2016) 92 (3) International Affairs 731, 731. Lauge Poulsen offers some explanations in his book, which include that, developing countries misunderstood the meaning of the arbitration clauses in investment agreements, and the core features of modern investment treaties were overlooked in the early stages. Lauge N. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries*, Anonymous Translator (Cambridge University Press, 2015) 66. Developing countries signed treaties based on intended rationality, rather than traditional comprehensive rationality. Ibid, pp. 16-22. Developing countries believed these treaties were harmless and did not pose significant risks. Ibid, pp.148, 154. Therefore, it can be argued that, considering the context at the time, signing treaties was the result of developing countries weighing the costs and benefits. This helps explain why the signing of agreements that do not align with their interests is not particularly surprising. However, it is undeniable that empirical research has made the situation more complex.

645 Andres Rozental, 'The Charter of Economic Rights and Duties of States and the New International Economic Order' (1976)16(2) VA. J. INT'L L. 309.

646 Stephen M. Schwebel, 'The Story of the UN's Declaration on Permanent Sovereignty over Natural Resources' (1963) 49 (5) A.B.A.J. 463, 464.

647 Haopei Li, *Treaty Law Overview (条约法概论)* (Law Press China 2003) 346.

"context," and "object and purpose" should be considered as a whole. [648] Therefore, when analysing the meaning of "nationals" in Article 25 of the ICSID Convention concerning the status of SOEs, attention should also be paid to the purpose and object of the ICSID Convention.

The ICSID Convention refers in its introduction to "Considering the need for international cooperation for economic development, and the role of private international investment therein".[649] From this, the aim of the ICSID Convention is clearly to facilitate international private investment by creating an enabling environment for investment.[650] The ICSID is an institution designed to facilitate the settlement of disputes between states and foreign investors, enabling countries to form partnerships in economic development and stimulating greater international private capital flows to different countries.[651] These legislative objectives of the ISDS regime have limited the role of the state in investment dispute settlement.

Apart from ICSID, other non-ICSID institutions, such as the International Chamber of Commerce (ICC), were established with the aim of promoting trade and investment, as well as facilitating the free flow of capital. By promoting commercial trade, international peace is further advanced.[652] Similarly, the United Nations Commission on International Trade Law (UNCITRAL) was established with the understanding that international trade cooperation is a factor in promoting friendly relations and maintaining peace. To eliminate legal obstacles that hinder the flow of international trade, it is necessary to promote the harmonization and unification of international trade law. [653] It can be seen that the establishment of these non-ICSID institutions is also, in general, aimed at promoting international investment and fostering international peace.

The ISDS regime gives private investors international legal status and international personality, allowing them to enter arbitration as an independent party. But compared

[648] UN, Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 31.
[649] ICSID (n 91) Preamble.
[650] Schreuer (n 134) 4.
[651] Georges R. Delaume, 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1966) 1 Int'l L 64, 65-66.
[652] Schwartz and Derains (n 54) 1.
[653] UN, General Assembly resolution 2205 (XXI) - Establishment of the United Nations Commission on International Trade Law 99.

to sovereign states, private investors are not constrained by political positions, national identity, etc., and investors are more aggressive in their claims.[654] Private investors will generally be more interested in making a profit in a single case than in the problems with, and improvements to, the system.[655] For example, in the selection of arbitrators, the fact that investors have the exclusive right to initiate arbitration also means that they have some control over the source of the arbitrator's business.[656] In order to gain the favour of the investor, the arbitrator will consider how to be more supportive of the investor's interests within the legal system allowed to the arbitrator.[657] This has led to a small number of arbitrators being repeatedly appointed as both arbitrators and lawyers, and even as witnesses against each other,[658] which has led to discussions about the lack of arbitrator independence. However, this does not prevent investors from continuing to make such appointments in the interests of the outcome of individual cases.

The investor also has the exclusive right to bring an arbitration claim and the state is left to passively participate in the arbitration. The state no longer has the initiative in dispute resolution.[659] The ISDS mechanism has frequently been used by investors to initiate arbitration against the host government solely based on their own commercial interests, which has resulted in the host country being burdened with litigation and in an imbalance of rights and obligations between the investor and the host country. This inequality has resulted in some countries, such as Brazil, India, and South Africa, which are internationally active, not acceding to the ICSID Convention 60 years after its entry into force.[660] Other countries, such as Nicaragua, Venezuela, and Bolivia have gradually withdrawn from the ICSID Convention.[661]

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654 Zhao (n 323) 368.

655 In business, according to Adam Smith, a businessman usually does not intend to promote the public interest, nor does he know to what extent he is promoting that interest; he only calculates his own interest. Adam Smith, *The Wealth of Nations: An inquiry into the nature and causes of the Wealth of Nations* (Modern Library 1937).

656 Tingting Deng and Dan Qu, 'On the changing role of the state in ISDS mechanism' (论国家在投资者−国家争端解决机制中的角色转变) (2021) 27 (2) J. Cent South Univ (Social Sciences) 65, 68.

657 Andreas F. Lowenfeld, 'The Party Appointed Arbitrator in International Controversies: Some Reflections' (1995) 30 Texas International Law Journal 59, 66.

658 Ibid.

659 Deng and Qu (n 598) 65.

660 Wang (n 656) 80.

661 Xinguo Cao, 'Referee's Trust Dilemma and the Trust Shaping of the International Investment Dispute Settlement Mechanism' (裁判者信任困境与国际投资争端解决机制的信任塑造) (2021) 3 Zheng Fa Lun Cong 137.

The withdrawal of the home state of the investor and the loss of initiative on the part of the host state have weakened the role of the state in the ISDS regime. As has been explained, the ISDS regime was originally established to protect investors and promote private investment, and the state has been marginalised in the regime. Both parties are more concerned with gains and losses in cases, making it difficult to further improve the ISDS regime without the promotion of states and the practice of uniform law.

The ISDS area is more focused on the protection of private investment than other areas, and was created for that purpose. The jurisdiction of the ICSID is limited between two specific parties, i.e., a contracting state and a national of the other contracting state, so the home state of the investor cannot exert pressure or other political influence on the consideration of the case. Moreover, the investor cannot be a state or an advocate of a state.[662] The case of a state-owned enterprise as a potential party to the ICSID requires a determination of whether the state-owned enterprise is a "national of the other State".[663] As the ISDS Convention is intended to encourage private investment, the interpretation of "national" in Article 25 of the ISDS Convention requires that the investment by the SOE as an "investor" must have the character of a private investment.

The ISDS regime places emphasis on specific behaviours in the analysis of individual cases rather than on the capital contribution of SOEs.[664] Ownership and control factors do not act as a disincentive for SOEs to act as 'investors', thus avoiding the exclusion of most SOEs from 'investor' status.[665] Without considering the capital contribution of the SOE, it is more likely that the SOE will be considered to have a private character. Moreover, since the objective of ICSID is "to create a conflict resolution framework that carefully balances the interests and requirements of all parties involved, in particular by attempting to 'depoliticize' investment dispute resolution",[666] it is not difficult to understand why the rules on whether an SOE is an investor identification focus on the nature of the conduct and ignore the purpose of the conduct. The purpose

662 Liu (n 5) 7.
663 Gu and Xu (n 489) 58.
664 Broches (n 64) 201.
665 Liu (n 5) 12.
666 Ibrahim F. I. Shihata, *Towards a greater depoliticization of investment disputes: the roles of ICSID and MIGA (English).* Washington, D.C.: World Bank Group. http://documents.worldbank.org/curated/en/335931468315286974/Towards-a-greater-depoliticization-of-investment-disputes-the-roles-of-ICSID-and-MIGA

of the investment may involve the political and diplomatic strategies of the investor's home country, and the host country will also have a relevant *ex ante* national security review interest to determine the purpose of the conduct of the investment in order to protect the interests of the state.[667] Reducing the focus on the purpose of the act can help to ensure a greater degree of 'depoliticisation' and reduce political and diplomatic influence.

The advantage of the nature standard is that it provides more certainty, as the nature of the investment behaviour is usually easier to identify than the purpose of the investment.[668] The examination of behavioural purpose requires extensive and complex research into the home country's investment policies.[669] The ISDS was created to better support the role of private investment in promoting economic development. The nature standard allows for a lower threshold of investor identification for SOEs, making it easier for more SOEs to access ICSID arbitration proceedings.

The ISDS regime, which excludes ownership and focuses on conduct via the 'nature of conduct' standard, is relatively lenient in determining the eligibility of 'investors' in SOEs, which is conducive to the expansion of ICSID jurisdiction. As the commercial nature of the activities of a state enterprise are greater than the political nature, it will generally be recognised as having investor status. The purpose of the Convention does not include the promotion of public investment, and it should avoid dealing with disputes between states.[670] The ISDS regime therefore adopts a lenient determination of eligibility to bring more SOE investments under its jurisdiction, which is in keeping with ICSID's aims and objectives of protecting and promoting cross-border private investment.

In addition, for a long time, the study of state responsibility in international law was mainly concerned with the consequences of a breach by a state of its obligations

[667] Markus Burgstaller, 'Sovereign wealth funds and international investment law' in Chester Brown, Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 180.
[668] Blyschak (n 6) 30.
[669] Liang (n 45) 107.
[670] Broches (n 64) 202.

towards the life of a foreigner and his or her property and treatment.[671] The Hague Conference for the Codification of International Law (1930) defined "State responsibility" as follows: "The State responsibility of a State arises when damage to the person or property of a foreigner is caused in its territory by the failure of an organ of the State to fulfil an international obligation of the State."[672] State responsibility at this point refers to the responsibility of the state for an injury caused to a foreigner, including foreign investors. This concept of state responsibility reflects the circumstances at that time, when developed countries were industrialising and expanding overseas and felt a need to safeguard their investment interests.[673] Developing states were expected to take measures to protect the safety of foreigners' property and persons, or else they could be held liable for the damage caused as a result. The development of rules relating to state responsibility at the time was a legal requirement and claim by capital-exporting countries seeking to protect their investments and the interests of their expatriates abroad.[674]

In response to the demands of the capital-exporting countries for a regime of state responsibility, developing countries confronted them with the Calvo Doctrine,[675] the Drago Doctrine,[676] and so on. Due to these contradictory situations, no unified regime of state responsibility has existed for a long time.

Subsequently, the ILC decided to break away from the traditional notion of state responsibility and comprehensively codify the regime of state responsibility by extending the scope of the study of state responsibility to cover the responsibility of

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671 Canling Lin, 'State Responsibility in International Law' (国际法的 “国家责任”之我见) (2015) 5 Journal of China University of Political Science and Law 145, 145.

672 Xianshu Wang, *International Law (国际法)* (China University of Political Science and Law Press 1995) 117.

673 Xiaoqing Guo and others, 'New developments in the regime of State responsibility in the new international context' (国际新形势下国家责任制度的新发展) (2008) 35 Legal System and Society 216, 216.

674 Lin (n 671) 146.

675 The Calvo Doctrine was proposed Carlos Calvo in his book *Derecho internacional teórico y práctico*, published in 1986, and its basic principle is to emphasise that disputes with foreign nationals must be settled by local courts, avoiding diplomatic intervention by the country of attribution. Francesco Tamburini, 'Historia y destino de la" Doctrina Calvo":¿ Actualidad u obsolescencia del pensamiento de Carlos Calvo?' (2002) Revista de estudios histórico-jurídicos 81.

676 Dr. Luis Drago wrote a letter to the United States regarding the forced collection by foreign countries of public debts owned by their nationals. The core of the letter was the proposition that "a state may not use force against a foreign state in order to collect a debt for its own nationals". Scott GW, 'International Law and the Drago Doctrine' (1906) 183 The North American Review 602, 603.

states for breaches of various international obligations, which was a new development of the rules of the state responsibility regime.[677] Since its adoption in 2001, the ILC Articles have been widely acknowledged as the most important and detailed descriptive text on the law of state responsibility.[678] Much of the Draft has been cited as customary international law.[679] The application of the ILC Articles on State Responsibility implies the progressive establishment of a regime of state responsibility.[680]

The establishment of ILC Articles originally had the aim of caring for the injured party. There are similarities between this purpose and domestic tort law. There is an inherent tendency in legislation to favour the injured party and to give priority to the injured party's access to compensation in accordance with contemporary legal practice and objective requirements.[681] Article 33 of the ILC Articles provides that: "This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State...".[682] According to the ILC Articles, non-state entities and individuals can claim state responsibility. In connection with the relevant international investment rules, the state responsibility regime is applicable to investor-state dispute settlement.

Articles 4, 5, and 8 of the ILC Articles, which relate to the identification of the state responsibility of SOEs, require that the state has "effective control" over SOEs in order to attribute responsibility to the state for the acts of the SOE.[683] The requirement of "effective control" is intended to prevent the state from controlling the SOE under a "corporate veil", which is similar to the civil liability provisions in domestic law.

In summary, the provisions of the ISDS field regarding the identification of SOEs as investors and the attribution of responsibility of SOEs to the state are consistent with the legislative aim of promoting international private investment and the depoliticised character of the regime. This area seeks to weaken the role of the state and to care for

677 Bodansky and Crook (n 154) 773.
678 Chen (n 72) 8.
679 Mincai Yu, Studies in International Law (国际法专论) (1st edn, China CITIC Press 2003) 128.
680 David D. Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 (4) 857, 859.
681 Tongyang Li, 'An Analysis of State Responsibility in International Law and Legislative Recommendations' (国际法国家责任浅析与立法建议) (2016) 1 China Collective Economy 116, 117.
682 ILC (n 98) art 33.
683 Ibid art 8(6).

the injured party, not only by not examining the element of "control" when determining the status of SOEs in the rules, but also by focusing on the analysis of the nature of the specific conduct of SOEs in individual cases while ignoring its purpose, all with the intention of making the "private" status of SOEs more easily identifiable and expanding the jurisdiction of the ICSID. Thus, such rules on the determination of SOE status exist in the ISDS area for the purpose of promoting private investment.

b. State immunity - mutual comity between sovereign states

The establishment of the United Nations Convention on Immunity has seen an increasing number of states support provisions relating to state immunity.[684] State immunity is also a common issue in international civil litigation activities.[685] States are inevitably involved in civil and commercial activities in the context of their international economic activities. Whether the state can be sued and whether property rights, etc., can be enforced in disputes arising out of the relevant activities are issues that need to be addressed.[686]

State immunity in a broad sense covers any situation in which a state (in its various manifestations) enjoys immunity or is not subject to any external authority, whether national or international, legislative, executive, or judicial.[687] State immunity in a

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[684] Although the UN Convention on State Immunity has not yet entered into force, it has been signed by 28 countries, including the UK, China, and France, and 14 countries have submitted their instruments of ratification. See data in United Nations Treaty Collection, available at < https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&clang=_en >. Japan and Switzerland have already enacted legislation providing for the Convention's implementation within their domestic legal systems. Fox and Webb (n 24) 2. During the drafting phase of the Convention, many countries participated extensively in the consultations, indicating widespread interest in the issue, including from developing nations. Chatham House, 'State Immunity and the New UN Convention' Transcripts and Summaries (5 October 2005), available at < https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/ilpstateimmunity.pdf>, Prof Gerhard Hafner, 4. The Convention represents a consolidation of international thinking about immunity. Even in countries that have not ratified or signed the Convention, it is expected to influence their legislation and related practices. Fox and Webb (n 24) 102. The Convention can strengthen the status of immunity rules as customary international law, and once ratified, many countries' constitutions will grant the Convention a status superior to domestic law. Fox (n 221) 344. Although the Convention has not yet entered into force, its codification reflects an existing consensus on the issue. Brownlie (n 44) 344.

[685] Rongzong Chen, 'Legal Aspects of International Civil Litigation' (国际民事诉讼之法律问题) (2019) 36 (3) Law Journal 26, 28.

[686] Mohammed Bedjaoui, *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers 1991) 327.

[687] Xiaodong Yang, *State immunity in international law* (Cambridge University Press 2012) 1.

narrow sense means that a state may not be sued in a national court or tribunal of a foreign state without the consent of that state.[688] It is clear from the meaning of state immunity that it is a privilege that a state enjoys in relation to other natural and legal persons. The state is exempt from the obligations and liabilities associated with a particular matter.[689]

The absolute sovereignty of the state is the logical basis for the creation of state immunity. The exclusive, independent, and absolute sovereignty of the state means that no state can override another state and judge it. The state has absolute sovereignty and there is absolute equality between states.[690] The principle of state immunity is developed from the principal *par in parem non habet imperium*, according to which a state is not subject to the jurisdiction of another state.[691] This is a requirement of the principle of sovereign equality in international law.[692] The activity between sovereign states emphasises the equal status of both parties.

One of the important differences between the field of state immunity and other fields is that the rationale for state immunity includes the doctrine of international comity, which is a rule of courtesy and goodwill observed by states in their international dealings.[693]

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[688] Ibid 3.

[689] Zhipeng He, 'Normative Review and Theoretical Reflection on State Immunity' (对国家豁免的规范审视与理论反思) (2005) 2 The Jurist 108.

[690] Yoram Dinstein, 'Par in Parem Non Habet Imperium' (1966) 1 Isr L Rev 407, 407-410.

[691] Al-Adsani v. the United Kingdom, ECHR 2001-XI, para 54.

[692] UNGA 'Yearbook of the International Law Commission' (1982) UNYB, A/CN.4/SER.A/1982/Add. 1 (Volume II Part One) pp. 203-204.

[693] Aside from doctrine of comity, there are other theories such as the extraterritoriality doctrine, the state dignity doctrine, and sovereign equality doctrine. However, this thesis emphasizes the theory of comity for some reasons. Firstly, comity is considered to have a political nature, (Lan (n 92) 79.) which gives it distinctive features in the reasoning behind state immunity compared to the other two fields. The Justice of the Supreme Court of the United States pointed out that, "Foreign sovereign immunity, ...give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns". (*Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003).) It emphasizes goodwill between states, and the corresponding rules also aim to balance the interests of developing and developed countries. Besides, the theory of comity is more adaptable to modern legal systems compared to other theories. The doctrine of comity allows states to adjust their application of state immunity based on evolving political realities and relationships. Immunity reflects these current dynamics and provides protection to foreign governments and their instrumentalities through comity. ("Immunity reflects current political realities and relationships and aims to give foreign states and their instrumentalities some present protection from the inconvenience of suit as a gesture of comity." Fox and Webb (n 24) 248). In addition, the restrictive theory of immunity reflects the essence of comity. Through comity, states can voluntarily waive jurisdiction over certain acts to maintain harmonious international relations. Restrictive immunity represents a state's waiver of immunity over commercial activities (*jure gestionis*). Jasper Finke, 'Sovereign Immunity: Rule, Comity or Something Else?' (2010) 21(4) European Journal of International Law 853, 864-866. The core idea of restrictive immunity is consistent with comity, as it

The doctrine of comity can be traced back as far as Roman law and has been used largely as a matter of private law, i.e., in establishing whether the contract, tort or property law used in a foreign country can be applied in a domestic court.[694] In the 17th century the Dutch scholar Ulrich Huber developed the 'international comity doctrine' in the sense of the principle of sovereignty. He sought to address the question of how powers acquired in the laws of one country could be given effect in another.[695] The idea was then introduced and developed in the United States, where comity became the basis for the recognition of foreign laws and judgments.[696] As international law has developed over the years comity has taken on a new role in terms of the public interest of preserving sovereignty and friendly relations with other states.[697] Comity has thus been transformed from a private interest of convenience to the public interest of promoting friendly relations between sovereigns.[698]

International comity as a principle of binding force works through the presumption against extraterritoriality.[699] Legal conflicts between states can lead to international discord because "The application of the laws of one state to foreign conduct is an interference with the authority of another sovereign state and can cause other states resent."[700] Comity is the proper basis for immunity under international law, and a state's granting of another state's legitimate immunity is a way for a state to promote comity and friendly relations between states by respecting the sovereignty of another state.[701]

In international activities, states need to exercise comity towards other states in order to avoid interfering with their sovereignty on the one hand, and on the other hand to avoid the commercial practices of other states being unregulated on the basis of sovereignty. To achieve a balance between comity and jurisdiction requires institutional

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suggests that states should demonstrate respect and cooperation towards the legal systems of other countries under specific circumstances. Therefore, this thesis emphasizes the theory of comity to better explain the theoretical basis behind the rules governing the status of SOEs in the context of state immunity.

694 Hessel E Yntema, 'The comity doctrine' (1966) 65 Mich L Rev 9.

695 William S. Dodge, 'International Comity in American Law' (2015) 115 Colum L Rev 2071, 2085.

696 William S. Dodge, 'International Comity in American Law' (2015) 115 Colum L Rev 2085.

697 Ibid.

698 Ibid 2098.

699 Ibid 2103.

700 *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 29 S. Ct. 511 (1909) 356.

701 *Al-Adsani* (n 691) para 545.

arrangements that take full account of the interests of both parties.[702] As a result, the doctrine of restricted immunity was proposed and has been adopted by many countries.[703] The doctrine of restrictive immunity strikes a balance between the two, with a state identifying the conduct of another state and commercial conduct not being sufficient to invoke immunity. This will not prejudice the authority of the other state, and it could preserve the interests of the state.

Compared to other areas, the rules in the field of state immunity place a greater emphasis on the distinction between commercial and governmental acts. It is also clear that the commercial exception is an important circumstance within the sovereign immunity of states.[704] Governmental acts can invoke immunity, while commercial acts cannot. On the basis of *par in parem non habet imperium*, the sovereignty of different states is equal and there can be no jurisdiction over each other, and the courts of one state cannot accept or have jurisdiction over a case in which another state is a defendant.[705] The immunity granted by one state to another is a comity that respects the sovereignty of the other state. A state should be independent and respected in the exercise of its sovereign powers. Commercial acts do not involve elements of the sovereignty of another state, when the state's jurisdiction over them would also not interfere with the sovereignty of another state, and therefore comity is not necessary.

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[702] Zhao (n 323) 369.

[703] The International Law Commission and the Council of Europe have conducted surveys, and from the perspective of state practice, the doctrine of restrictive immunity has gained widespread and increasing support. Fox and Webb (n 24) 131. It is argued that the foundation of the restrictive immunity in common law countries such as the United States and the United Kingdom originates from the reasoning in the case of Schooner *Exchange v. McFaddon*. Ibid, 134. Dellapenna argues that, based on Chief Justice Marshall's opinion, "that the right to immunity is discretionary with the territorial sovereign; and that immunity might be limited to public property or activities of a foreign sovereign" Joseph W. Dellapenna, *Suing Foreign Governments and their Corporations* (2nd edn, Transnational Publishers 1988) 2. In addition to the UK and the US, other common law countries such as Australia, Canada, Malaysia, Pakistan, South Africa, and Singapore have also adopted the principle of restrictive immunity. See above n 433. In addition, Botswana, Kenya, Ireland, New Zealand, Nigeria, and Zimbabwe, while not explicitly adopting the principle of restrictive immunity in their legislation, have accepted it in practice. Fox and Webb (n 24) 147 Compared to common law countries, the landscape in civil law countries is more complex. France, Italy, Belgium, and the mixed courts of Egypt have clearly accepted the principle of restrictive immunity, while Spain and Portugal have not explicitly done so but have ratified the UN Convention on State Immunity. Austria, Germany, and Switzerland have shown hesitation regarding whether to accept restrictive immunity. Other countries with different legal systems, such as Russia and China, still adhere to absolute immunity. However, China has supported the UN Convention on State Immunity, indicating that, like Spain and Portugal, it supports related state immunity rules to some extent. Ibid, 135-164. Thus, it can be seen that many countries support restrictive immunity, and the development trend of state immunity is shifting from the doctrine of absolute immunity to restrictive immunity.

[704] UNGA (n 25) art 10.

[705] Depei Han, *Private International Law (国际私法)* (2nd edn, Higher Education Press 2007) 73.

The principle of exceptions to commercial activity is therefore a balance between comity and jurisdiction, and does not contradict the doctrine of comity in the field of state immunity.

The standard for identifying commercial acts in the UN Convention on Immunity requires consideration of the nature of the act, while also taking into account the purpose of the act. [706] Developing countries advocate a purpose of the act standard, where the commercial act is judged in terms of whether it was based on the public purpose of the state to prevent harm to the public interest of the state.[707] Developed countries, on the other hand, and as explained above, are opposed to this. In the end, the Convention adopted a mixed standard, which to a certain extent considers the interests of both developing and developed countries.[708] This should reduce differences, help to promote friendly relations, and align with the doctrine of comity.

As was mentioned earlier, a "commercial act" by an SOE can be determined by judging whether the act can be performed only by the government or by any private person, in addition to considering the nature and purpose criteria.[709] Only acts of domination which the government can perform would lead to the possibility of invoking state immunity.[710] Acts that can be readily performed by ordinary private individuals are not acts of the state. The field of state immunity is more concerned with the distinction between the identity of the entity as a state or as a private person than with any other areas. For an SOE to invoke state immunity, the SOE must establish that it has the status of a sovereign state. The doctrine of comity between states in the field of state immunity dictates that the SOE invoking immunity needs to have the appearance of being a 'state', as a state will not make comity to a non-state status. Thus, the "private person test" approach to the determination of the conduct of a SOE is also consistent with the doctrine of the comity of states.

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[706] UNGA (n 25) art 2(2).
[707] Jing Qi, *A Study on State Immunity Legislation (国家豁免立法研究)* (People's Publishing House 2016) 171-172.
[708] Zhenyuan Guo, 'The Influence of Restrictive Theory of State Sovereign Immunity on Chinese Enterprises and Countermeasures'(国家主权限制豁免理论对我国企业的影响与应对) (2022) 39(5) Journal of Political Science and Law 121, 124.
[709] Oyedepo (n 457) 5-6.
[710] Dickinson (n 44) 112.

International comity comprises the consideration of national interests, foreign interests, and the common interests of the international community.[711] The state is the real actor of comity, not the court, whose task it is to fulfil the will of the sovereign state.[712] In the modern sense, comity is a policy of goodwill, cooperation, and mutual respect between states.[713] Comity both preserves sovereignty and makes international relations possible.[714] States therefore have a greater incentive than in other areas to improve the relevant rules of immunity for the purposes of upholding national interests and the promotion of friendly international relations.

In summary, in the field of state immunity, the doctrine of restrictive immunity balances international comity with national court jurisdiction. The lawmaking basis for the rules of state immunity is mutual respect and comity between states, and the lawmaking objectives in this area need to take into account the interests of individual states and those of the international community. On the one hand, the focus on the nature of the act and the purpose of the act is a broadening of the scope of the identification of SOEs as "states", while on the other hand, the emphasis that "the act can only be performed by the government" and the "private actor criterion" limit the possibility of SOEs' status as "states" to a certain extent. In order to obtain mutual respect and equal rights between states without infringement, states have a greater incentive compared to the other two areas to develop and improve the rules in this area.

c. WTO anti-dumping and countervailing duties - sovereign regulation by one country over other countries driven by trade interests

In contrast to the emphasis on comity between states in the area of state immunity, anti-dumping and countervailing duty investigations emphasise the lawful regulation of one country's sovereignty over another. The competition between different countries' trade interests determines the relevant legal standards. Due to international trade activities,

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711 *Maxwell Communication Corp. ex rel. Homan v. Societe Generale (In re Maxwell Communication Corp.)*, 93 F.3d 1036 (2d Cir. 1996) 1046-1048.
712 Yanna Liu, 'Proper Status of Sovereignty in Private International Law' (国际私法的适当主权论) (PhD thesis, Graduate School of Jilin University 2012) 136.
713 Jonathan Harris J, 'Recognition of Foreign Judgments at Common Law-The Anti-Suit Injunction Link' (1997) 17 Oxford J Legal Stud 477.
714 Liu (n 712) 136.

domestic industries may be harmed by dumping and subsidised foreign products. Damage to domestic products from international trade is essentially a case of market failure.[715] According to the economist Stiglitz, the government has four major advantages in correcting market failures: the power to tax, the power to prohibit, the power to impose penalties, and the cost of trade.[716] In particular, the government's powers of taxation (e.g. imposing tariffs on imports) and prohibition (e.g. prohibiting the importation of more than a certain amount of goods) are important ways for the government to provide trade relief.

Countries need to resort to trade remedies to eliminate certain types of trade damage and maintain trade equity. Acts such as dumping and subsidies on exported products can harm a country's domestic industries. Such damage may endanger the economic and social order of a country, and the government therefore needs to seek trade remedies to protect against the damage. On this basis, trade remedies are consistent with the idea of maintaining trade equity.[717]

However, if trade remedies are abused, they can also hinder the development of international trade and affect global economic development. Trade remedies are a form of government intervention which can lead to a state of dysfunction due to the limits of government rationality.[718] The imposition of excessive trade remedies can hinder the importation of foreign products, thus undermining the idea of trade liberalisation.[719] This is why the national and international community needs to prevent the abuse of trade remedies, and therefore, the objective pursued by the legislation and practice of trade remedies should be to simultaneously safeguard international fair trade and to promote the liberalisation of international trade.[720] The design and implementation of the trade remedy system should seek to eliminate unfair import competition to the detriment of domestic industries. At the same time, the relief measures implemented should not be able to be implemented in such a way as to cause unfair treatment towards importation. Excessive trade protection that has a negative impact and undermines trade

[715] Zhao (n 93) 2.
[716] Joseph E Stiglitz, *The economic role of the state* (B. Blackwell 1989).
[717] Zhao (n 93) 19.
[718] Changqi Li, *Searching for the Truth of Economic Law (寻求经济法真谛之路)* (Law Press·China 2003) 133-134.
[719] Zhao (n 93) 12.
[720] Ibid 22.

liberalisation should be avoided.

In the WTO framework, countervailing and anti-dumping measures are permitted as legitimate trade remedies. [721] The international rules on anti-dumping and countervailing duties strike a balance between maintaining trade fairness and preventing excessive trade protection. Subsidies undermine trade fairness and countervailing abuse undermines trade liberalisation. Effective legal norms are therefore needed to clarify the limits of subsidies and countervailing duties.

Subsidies and countervailing measures were brought into the realm of international legal regulation in the General Agreement on Tariffs and Trade (GATT) in 1947, and have since been revised and improved, resulting in the current legislation, the Agreement on Subsidies and Countervailing Measures (i.e., the SCM Agreement). The SCM Agreement and the GATT provide WTO members with the right to take countervailing trade remedies to offset the undue competitiveness of subsidised imports.[722]The entry into force and implementation of the SCM Agreement has led to a reduction in the abuse of subsidies and countervailing measures. However, the policy objectives of developed countries include the preservation of their dominant position,[723] and some countervailing investigations are considered as abuses of trade remedies.

Countervailing investigations between countries reflect the regulation of one country's sovereignty over another, and the motivation for regulation is national interest. The trade protection policies that emerge from the competition between countries over trade interests are by definition biased in favour of their own interests.[724] International trade remedy rules are influenced by domestic regulations. Countries will develop internal systems that are as favourable to themselves as possible, and government departments will rely on the relevant regulations to provide relief to domestic industries. Externally, international regulations are also developed with the involvement of the state. In the development of international regulations that are common to all countries, countries

[721] WTO (n 101) art. 10.
[722] WTO (n 101) art 10. WTO, The General Agreement on Tariffs and Trade (GATT 1947) (July1986) art 6.
[723] Xiangchen Zhang, *The Political and Economy Relations Between the Developing Countries and WTO* (发展中国家与 WTO 的政治关系) (Law Press China 2000), 57.
[724] Lin Li, 'International Protective Trade Policies and China's Response' (国际保护性贸易政策及其中国的对策) (2005) 8 Development Research 70, 70.

expect the requirements of their national rules to be more reflected in international rules. For example, the anti-dumping rules in Article 6 of the GATT are based on the US Anti-Dumping Act of 1929.[725] Additionally, there may be differences in the rules addressing certain issues within the domestic regulations of various countries, which can influence the formation and content of international rules. If the domestic regulations of the countries involved are relatively similar, it becomes easier to establish comprehensive international rules on the matter. Conversely, if the rules on a specific issue vary significantly between countries, it becomes more difficult for them to reach a compromise. As a result, international rules on that issue may either be difficult to formulate or may result in incomplete rules. [726]

While international trade between nations does indeed benefit both trading parties, the benefits obtained by these parties through trade are not equal. Generally, in international trade between developed and developing countries, developed countries receive more benefits than developing countries.[727] Article 27 of the SCM Agreement specifically provides special and differential treatment for developing country members.[728] The implication of this provision is that developing countries are more dependent on subsidies for their economic development than developed countries are, and that developed countries should support developing countries rather than suppressing them.[729]

However, states are also bound by international rules in safeguarding their own interests. When the international rules do not meet their requirements in this regard, the state will interpret the international rules in a self-serving manner. The previous analysis showed that in countervailing rules, developed countries determine whether the behaviour of SOEs is a subsidy by focusing on the identity of the actor in relation to the state. State policies in developing countries result in SOEs being readily identified as being under state control. The government control identification rule is likely to identify the SOE as being the provider of the subsidy. Even if the Appellate Body clarifies the standard of

[725] Xueqing Zhao, International Anti-Dumping Law and Practice (国际反倾销法理论与实务) (Chongqing University Press 1995) 24.
[726] Zhao (n 93) 87-88.
[727] Li (n 724) 70.
[728] WTO (n 101) art 27.
[729] Ni Zhen, 'Countervailing: The Main Thrust of US Trade Policy' (反补贴: 美国贸易政策的主攻方向) (2007) 8 China WTO Tribune 72, 73.

identification in the relevant case, the state will make self-serving interpretations for its own benefit in the investigation of countervailing duty cases.

In the Appellate Body's determination of the "public body" status of SOEs in the area of anti-dumping and countervailing duties, the "meaningful control" standard established by the Appellate Body is considered as an upgraded version of "ownership and control" and to some extent covers the latter.[730] This indicates that the field is more concerned with the ownership of SOEs than other fields, and that it considers ownership as one of the factors in determining the public body status of SOEs, which sets it apart from other fields where the rules do not consider ownership of SOEs at all. This is because the rules on countervailing duties were originally established to reduce direct unjustified state intervention in the economy and to avoid unreasonably low prices for goods in one country harming the market of another country.[731]

Identifying SOEs as public bodies through ownership and control is a simple and efficient approach for the investigating country. SOEs are inevitably under government supervision due to their equity status, so they can easily be considered public bodies.[732] This means that the focus on ownership and control in the countervailing duty rules expands the scope of public bodies, which facilitates the collection of countervailing duties by the state. This is an interpretation of the countervailing duty rules by the state in favour of its own trade interests for the purposes of the trade remedy regime.[733]

Some countries such as the United States and Canada, along with the European Union, have included the pursuit of policy objectives as an important criterion in determining whether an entity constitutes a public body in their criteria for identifying public bodies. They consider that if the actions of an SOE have an objective of achieving public policy, it will likely be recognised as a public body.[734] These countries espouse free

[730] Wei Shi, *The theory and practice of "competition neutrality" regimes (竞争中性制度的理论和实践)* (Law Press·China 2017) 111.
[731] Sun (n 111) 59.
[732] Ibid.
[733] Hu and Liu (n 506) 66.
[734] For example, in the respondent's brief submitted by the United States in the *US — Countervailing Measures (China)* case, it was argued that industrial policy plans provide important insights and context for understanding the motivations, objectives, and expected future outcomes of Chinese SOEs. *States – Countervailing Duty Measures on Certain Products from China, Recourse to Article 21.5 of the DSU by China*, APPELLEE SUBMISSION OF THE UNITED STATES OF AMERICA (15 May 2018) AB-2018-2 / DS437, para 55. In the *US — Countervailing Measures (China)* case, Canada, as a

competition and fair play in trade and believe that governments in non-market economies may try to use SOEs to circumvent countervailing rules.[735] In developing countries, SOEs have close connections with governments, and the purpose of their actions inevitably has an element of achieving public interest, making it straightforward to identify SOEs as public bodies based on the purpose criterion. The debate over whether the purpose of an SOE's actions can determine its status as a public body is therefore a game between WTO members' different understandings of the economic system and their own interests.[736]

In summary, in the area of anti-dumping and countervailing duties, the anti-dumping and countervailing duty rule is itself a regulation of a country's sovereignty over other countries. The WTO anti-dumping and countervailing duty rules are international rules that help to reduce the negative impact of countries' domestic rules on national trade. They are influenced by states, and the competition in national trade interests leads to competition over the relevant legal standards, with countries preferring to interpret the relevant rules in a way that supports their own trade interests.

In conclusion, the ISDS, state immunity, and the WTO anti-dumping and countervailing duty areas each have their own specific legislative objectives, so differences in the rules governing the identification of SOEs in each area are inevitable. The development of laws to meet specific demands, with different legislative objectives, is bound to introduce variances, and further, a future convergence of laws with different legislative objectives would result in the original objectives and needs of the law not being met or the original purpose not being achieved. Therefore, this thesis argues that, in terms of satisfying social demands, the rules governing the status of SOEs arising from different legislative objectives in various fields do not require the harmonisation of different legal systems. Next, the thesis will analyse the reasons for not requiring a uniform legal

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third party, argued that the determination of a public body should be based on evidence of government policies and other aspects of the relationship between the entity and the government. *United States – Countervailing Duty Measures on Certain Products from China* (n 79) para 7.12. In the *Korea — Commercial Vessels* case, the European Communities argued that the KEXIM was a public body because it pursued public policy objectives. *Korea — Measures Affecting Trade in Commercial Vessels* (n 592) para 7.32-736.

[735] Liao (n 243) 22.

[736] Ibid 18.

system from another two perspectives.

6.2.2 Fragmentation of international law and self-contained systems

It is argued that international interactions are becoming increasingly close, and that the norms of international law are multiplying.[737] There are crossovers between different fields, which also make it possible for conflicts between norms to arise.[738] In the meanwhile, inconsistency in the rules of identification does little to stabilise the legitimate expectations of investors and sovereign states.[739] Due to the 'anarchic' nature of international society, the rules of international law are mostly formed by international treaties and other contracts between states and, on the whole, there is no strict system or hierarchy of rules.[740] Although scholars have attempted to classify international laws, it is not possible to create a real hierarchy of rules.[741] Therefore, when a conflict arises, it is difficult to resolve it in the same way as in domestic law, by applying "*Lex posteriori detogat lex priori*" or "*lex specialis derogat lex generali*".[742] The inconsistency of the rules used in the identification of SOEs makes it impossible for SOEs to satisfy two or more rules at the same time, which can make the legal

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[737] UNGA (n 632) para 7.

[738] Dissonance, lack of consistency and conflicting rules of international law have emerged. Jing Kang, 'Treaty Interpretation in the Context of Fragmentation of International Law - On the Question of "Parties" in Article 31(3)(c) of the Vienna Convention on the Law of Treaties' (国际法断片化背景下的条约解释——论《维也纳条约法公约》第 31 条第 3 款(c)项中的 "当事国" 问题) (2012) 13(1) Peking University Law Review 299, 299; The growing number of international law norms has given rise to many conflicting and contradictory rules. Quanqi Wang, 'An analysis of the phenomenon of fragmentation of international law' (浅析国际法碎片化现象) (2014) 7 Legality Vision 268, 268；They do not form a structural organic link, they are in conflict and contradict each other, like "glass fragments" piled up on top of each other. Zuxue Gu, 'Diversity, fragmentation and order in modern international law' (现代国际法的多样化、碎片化与有序化) (2007) 1 Chinese Journal of Law 135, 139; The existence of separate mechanisms for the implementation of and compliance with international rules, while generally acknowledging the absence of a system of equivalence in international law. Yonghong Yang, 'Fragmented Powers: Conflicts of Jurisdiction of International Tribunals in the MOX Plant Case' (分散的权力: 从 MOX Plant 案析国际法庭管辖权之冲突) (2009) 3 Jurists Review 107, 107.

[739] Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 Fordham L Rev 1521, 1581.

[740] Herbert Lionel Adolphus Hart, *The Concept of Law* (Oxford: Clarendon Press 1961) 208-231.

[741] Hoffmann categorises international law into three types: international law on political structures, international law on reciprocity, and international law on communityy. Stanley Hoffmann, 'International Systems and International Law' (1961)14 (1) World Politics 205.

[742] Huimin Tian, 'Conflict of Rights in International Law' (国际法上的权利冲突问题研究) (PhD thesis, Graduate School of Jilin University 2013) 35.

qualifications of SOEs' behaviour unpredictable.

However, it is important to note that, firstly, separate fields have separate aims and adjudicators. Even though there is crossover between different areas, they still have different objectives, otherwise separate fields would not have been established. Each field has its own system, values, and rules, and inevitably inconsistencies in provisions will exist between them. Conflict between rules is a phenomenon in every legal order, whether in the domestic legal order or in the international legal system.[743]

Moreover, the fragmentation of international law is an inevitable development. It is not only SOEs that are affected by different rules of identification, as other subjects regulated by international law face similar problems. The sheer number of international organisations and international adjudicatory bodies has proliferated over time.[744] For functional reasons, many international organisations have a complete, detailed and relatively certain set of rules, constituting a self-contained body of law.[745]

The United Nations International Law Commission has reported on the 'Fragmentation of international law: difficulties arising from the diversification and expansion of international law'. Although it is argued that different states, based on their own interests, are bound to choose different values, behaviours, and response strategies in the formulation, interpretation, and application of different rules of international law, resulting in differences between different rules of international law,[746] the fragmentation of international law reflects the expansion of international legal activity into new areas and the consequent diversity of objectives and techniques.[747] The fragmentation of international law is thus a result of specialisation.[748] The creation and development of specialised fields enriches the content of international law, extends its scope of regulation, and is an important indicator of the diversification of international

[743] UNGA (n 29) para 26.
[744] Jenny S Martinez, 'Towards an international judicial system' (2003) 56 Stan L Rev 429, 429.
[745] Hui Ge, 'Unilateral Measures on Climate Change in the Light of Fragmentation of International Law - The EU Aviation Directive as an Example' (国际法 "碎片化" 视角下的气候变化单边措施——以欧盟航空指令为例) (2015) 3 International Business 121, 125.
[746] Gu (n 738) 139.
[747] UNGA (n 632) para 246.
[748] Ian Brownlie, Problems concerning the unity of international law, *International Law in the Time of Codification: Essays in Honor of Roberto Ago* (Guiffrè 1987) 168.

law.[749]

International law has evolved over time from a general international law into highly specialised areas for dealing with specific issues in different fields. *The Peace of Westphalia*, which marks the emergence of modern international law, was created solely as a solution to a specific problem, but the history of international law that began with it has always been focused on specific areas and issues.[750] Even if a unified rule was to be established, the rules specific to a particular field should take precedence in that field, because the axiom that *lex specialis derogat generali* is an accepted method of interpretation and conflict resolution in international law.[751]

The current rules on the identification of SOEs vary from field to field, and when cases enter a specific field for adjudication, efficiency is high. Each area has its own experience in dealing with such cases, and the decisions that have already been made provide useful reference points for subsequent judgments. This avoids the problem of lengthy deliberations by international courts to resolve cases and increases efficiency and responsiveness to the needs of the international community.[752] If uniformity were required in all areas then the important role of previous jurisprudence would be diminished, thus affecting the efficient resolution of disputes. In summary, the rules in each field are self-sufficient, given the fragmented status of international law as demonstrated by the rules on the determination of SOEs. The specialisation of each field has long led towards a more mature and complete system of case handling, and the efficiency of the resolution of cases can be enhanced by handling them according to the rules unique to that field.

The ISDS, state immunity, and WTO anti-dumping and countervailing duties areas of law that relate to the regulation of the conduct of SOEs are all relatively well developed. The activities carried out by an entity such as an SOE can involve areas regulated by different sectoral laws, and it is not possible to enact specific laws to regulate them, nor

[749] Gu (n 738) 136.
[750] Zewei Yang, *Study on the history of international law (国际法史论)* (Higher Education Press 2011) 55-56.
[751] UNGA (n 632) para 251.
[752] Desheng Dai, 'Proliferation of international judicial institutions and its impact on the system of international law' (国际司法机构的扩散及其对国际法体系的冲击) (2007) 6 Jianghuai Tribune 84, 86.

is it possible to complete the harmonisation of the relevant regimes. Even if a specific law could be enacted, it would lead to new disputes and complicate the issue. Therefore, according to the specific area involved in the behaviour and the activities of the SOEs, applying the relevant institutional rules in this area, just like the regulation of the behaviour of private enterprises, is the most efficient and scientific method of regulation.[753] It is therefore considered more efficient to maintain distinct rules for each area and this thesis argues that it is not necessary to harmonise the rules for the identification of SOEs.

6.2.3 Other considerations

Along with the discussion of meeting specific demands under the consequentialist evaluation standard and the fragmentation of international law as set out above, this thesis argues that other factors support the argument that there is no need to harmonise the rules for the identification of SOEs, including the inherent 'state-owned nature' of SOEs and the fact that the specific nature of international law itself makes it difficult to change the current regime.

In addition to the two points mentioned above, this thesis will also put forward other considerations. One is the inevitably political nature of the regulation of SOEs, arising from the 'state' nature of SOEs, and the discussion of this will address elements relating to the competitive neutrality of SOEs. Furthermore, there are additional restrictions on the overseas activities of SOEs because of their inherent state ownership, and certain characteristics of international law inevitably affect SOEs as actors in international law; for example, compared with domestic law, the more ambiguous legal language of international law and the possibility of subjective interpretations of international law. These factors can lead to differences in practice even when the rules in question are uniformly regulated. A more detailed analysis of these factors will be presented in this part.

[753] Han (n 288) 171.

a. The inevitably political nature of the regulation of SOEs

It is argued that the current ambiguity around the legal nature of SOEs and inconsistent practice in various fields create certain obstacles to relief for many SOEs in their foreign activities and make activities involving state assets abroad more difficult. However, this thesis considers that the risks faced by SOEs in their overseas activities stem more from the inherent 'state-owned' nature of SOEs than from the inconsistent rules in various fields.

International law does not directly regulate SOEs, but does so indirectly by defining the relationship between the state and SOEs. International law generally deals with issues involving SOEs in two ways: establishing whether SOEs are tools of the state which are being used to participate in international activities, and whether SOEs are privileged to compete in the market because of their state ownership status.[754] SOEs possess inherent competitive advantages.[755] SOEs' 'state' status has led to legal restrictions on their competitive advantage. In order to better satisfy their own interests, countries have made interpretations which are favourable to themselves in relation to the determination of the status of SOEs.

The establishment of the concept of competition neutrality, for example, is evidence of the importance that the international community attaches to the issues raised by the 'state' character of SOEs. The concept "competitive neutrality" refers to "a situation in which no business entity is advantaged or disadvantaged solely because of its ownership".[756] In this situation, firms are in a fair competitive environment.[757] "Competitive neutrality can be understood as a legal and regulatory environment in which all enterprises, public or private, face the same set of rules, and government ownership or involvement does not confer unjustified advantages on any entity."[758]

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[754] Han (n 288) 163.
[755] Willemyns (n 1) 659.
[756] Karl P Sauvant and others, 'Trends in FDI, home country measures and competitive neutrality' (7 February 2017) Yearbook on international investment law & policy 2012-2013 3 Available at SSRN: https://ssrn.com/abstract=2814307 97.
[757] Antonio Capobianco and Hans Christiansen, 'Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options' (2011) 1 OECD Corporate Governance Working Papers OECD Publishing, Available at < https://doi.org/10.1787/5kg9xfgjdhg6-en>.
[758] OECD, 'State-owned Enterprises and the Principle of Competitive Neutrality' (20 September 2010) DAF/COMP (2009)37, Available at <https://www.oecd.org/daf/competition/46734249.pdf> 11.

Competitive neutrality, which emphasises that governments cannot use their privileges to gain competitive advantage in the private sector, does not apply to non-profit and non-commercial activities.[759]

It is argued that scarcity of resources causes competition. By comparing the benefits and advantages of the solutions offered by suppliers, trading partners can choose from among them.[760] If competition in the market is not disrupted, buyers can freely choose from among similar goods according to their own preferences, without any interference from 'outside factors'. However, if there is interference from 'outside factors' to change the buyer's product choice, then this is a manifestation of market competition distortion.[761]

The 'outside factors' that produce interference refer to the institutional environment of a country.[762] These systems are likely to have different effects on SOEs when compared to ordinary private enterprises. They usually include exemption regulations for relevant enterprises issued by the state, government taxes and fees, government aid, government subsidies, ownership restriction policies, preferential financing policies, industry monopoly status, etc.[763] These factors can affect the characteristics of a product, including price and quality.[764]

Since SOEs bear certain state responsibilities, they also have functions which private enterprises do not, such as providing public services. So, when the market fails to function effectively and competition is compromised, the government should ensure that it intervenes effectively. SOEs are also a tool for the government to rectify problems such as market failures.[765] Therefore, it is difficult for SOEs to avoid the competitive advantage generated by being "state-owned".

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[759] Jun Wang and Hao Song, 'Sino-US trade war, the principle of competitive neutrality and the reform of China's state-owned enterprises' (2019) 11 Transnational Corporations Review 298, 299.
[760] Martti Virtanen and Pekka Valkama, 'Competitive neutrality and distortion of competition: A conceptual view' (2009) 32 (3) World Competition 393, 395.
[761] Ibid 397.
[762] Ibid.
[763] Sebastian Zwalf, 'Competitive neutrality in public-private partnership evaluations: a non-neutral interpretation in comparative perspective' (2017) 39 (4) Asia Pacific Journal of Public Administration 225, 227.
[764] Virtanen (n 760) 398.
[765] Han (n 288) 6.

Because the state ownership advantage of SOEs can affect the competitive market environment, this can result in more restrictions on their activities abroad compared to those applying to privately owned enterprises. The purpose of detailed regulations and restrictions on investment by SOEs in each country is to ensure that foreign SOE investment does not adversely affect domestic enterprises.[766] The risks faced by SOEs in their overseas activities also relate to the increased restrictions and regulatory standards imposed on them due to their potential competitive advantage over private enterprises.[767] Likewise, the different interpretations of the rules relating to the identification of SOEs in cases are driven by self-serving interpretations motivated by national interests. The state-owned attributes of SOEs have led to particular attention being paid to them by states.

In summary, this thesis argues that the different regulations and interpretations of the status of SOEs in international activities are primarily the result of their inherent 'state' nature. The existence of the 'state' nature attribute of SOEs inevitably leads to interest-driven interpretations and rulemaking by countries. In the absence of an agreement on interests, changing the different regimes to determine a uniform regime would be difficult to achieve.

In conclusion, the thesis argues that the determination of the status of SOEs does not require the harmonisation of international law regimes. International law lacks an independent legislative body such as that found in domestic law, making it very difficult to reconcile differences in the rules in each area.[768] Establishing a uniform rule would be highly challenging, so a proper understanding of the differences that exist between the rules in each area, as well as learning and borrowing some specifics from the rules in other areas as appropriate, may be a better way to deal with the issue of inconsistent

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[766] Przemyslaw Kowalski, et al., "State-Owned Enterprises: Trade Effects and Policy Implications", (2013) 147 *OECD Trade Policy Papers*, OECD Publishing, Available at < https://doi.org/10.1787/5k4869ckqk7l-en>, 35-43.

[767] Robert Hormats, the then Under Secretary for Economic, Energy and Agricultural Affairs, pointed out in his article that state-owned enterprises (SOEs) could potentially distort competition. As a response, the U.S. plans to utilize international economic law frameworks such as free trade agreements (FTAs), bilateral investment treaties (BITs), WTO accession commitments, and the Trans-Pacific Partnership (TPP) to address and counter the global competitive actions of SOEs that restrict or distort market competition. Robert Hormats, 'Ensuring a sound basis for global competition: competitive neutrality' (2011) Available at <https://2009-2017.state.gov/e/rls/rmk/20092013/2011/163472.htm>.

[768] Mo (n 28) 124.

treatment of SOEs in different areas.

b. Characteristics of international law - ambiguity of legal language and the subjective nature of legal interpretation

In addition to the existence of state-owned attributes of SOEs leading to more restrictions and arbitrary interpretations of their international activities, some of the characteristics of international law may also contribute to the difficulty of establishing uniform legal rules for the identification of SOEs. Examples include the vaguely worded nature of international law and the subjectivity of legal interpretation.

The law, as the basis for people's reasonable expectations of the outcome of their actions, cannot react quickly over time and, in order to maintain relative stability, it often provides for specific rights in an abstract and general way.[769] In international law, this phenomenon is even more evident. As international law involves the joint participation of states, the rules of treaties are often vague and ambiguous, taking into account the many participants and the different interests of states when negotiating and concluding the treaties. The adoption of an international treaty requires the unanimous consent of the participating states, unlike the simple majority requirement of domestic legislation.[770] Therefore, treaties resulting from the game between states are often reflected in ambiguous wording as a way to balance the different interests of states.[771]

Due to the complexity of social life, legal language has a certain degree of ambiguity and abstraction, and some abstract legal words lack a corresponding clear “term referent” that can be referred to. This can easily lead to uncertainty in legal provisions and subjectivity in legal interpretation.[772] When it is not clear that only one specific object is being clearly regulated, vague and abstract legal probabilities need to be used. The abstraction and vagueness in legal language are inevitable; drafters can only strive for 'precision' in the formulation of laws. But vagueness is not always criticised, and it may

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[769] Tian (n 742) 73.
[770] Joost Pauwelyn, *Conflict of norms in public international law: how WTO law relates to other rules of international law* (Cambridge University Press 2003) 110.
[771] Tian (n 742) 35.
[772] As the famous Supreme Court Justice Oliver Wendell Holmes Jr. once said, "Most of the disputes in the world are caused by words".

sometimes be better to use vague legal language to protect the more important interests of society and its values.[773]

The reasons for the controversy over the different interpretations of the rules governing the status of SOEs in different fields also include the fact that the rules in themselves do not have an entirely definitive meaning due to the ambiguity of the terms used. For example, in the Broches Test, the terms "agent" and "governmental function", both of which are used in the context of acting as an agent of the government and exercising governmental functions, require further interpretation. Similarly, in the commercial interest rule in state immunity, the question of what constitutes "commercial" needs to be judged in the specific context of the case. The definition of "authorisation" in the WTO rules in the field of anti-dumping and countervailing duties also requires specific determination in the case. The vagueness of the legal language leads to ambiguities and non-objective interpretations in its application, which can lead to disputes. The application of this legal language to a specific case relies on the discretion of the judge.

The characteristics of the legal system outlined by Max Weber include the fact that any concrete legal decision is the application of abstract legal principles to concrete facts.[774] In that process, it is inevitable that subjectivity will come into play in legal interpretation. The need for judges to concretise the abstract legal provisions in a case gives them discretion in exercising their value judgment, which can be somewhat arbitrary and lack uniform standards. The existence of the judge's discretion leads to outcomes that cannot be uniform, in turn making disputes difficult to avoid.[775]

Because of the general nature of legal rules, it is not possible to give a straightforward

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[773] Ulf Linderfalk states in his article that: "it protects the "basic values of the international legal order". Inevitably, such language makes the individual lawyer reluctant to criticize *ius cogens* arguments, whatever their merit, thus conferring on such arguments a rhetorical strength far beyond that of legal arguments in general. The fuzziness of the *ius cogens* regime does not impair this conclusion – rather the opposite. Fuzziness makes is even easier for a discussant to impose upon a reader or a listener the particular understanding of the *ius cogens* regime that she happens to find fitting at the particular occasion. Considered from the perspective of the practicing international lawyer, then, the fuzziness of the international *ius cogens* regime would seem to be a positive thing." Ulf Linderfalk, 'Normative Conflict and the Fuzziness of the International ius cogens Regime' (2009) 69 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 961, 977.

[774] Linyong Peng, 'Certainty and uncertainty in legal reasoning' (法律推理的确定性和不确定性) (PhD thesis, Graduate School of Chinese Academy of Social Sciences 2001) 7.

[775] Pinghua Zhang, 'Is the Conflict of Rights a False Proposition? --Discussion with Professor Hao Tiechuan' (权利冲突是伪命题吗？——与郝铁川教授商榷) [2006] 21(1) Legal Forum 16, 16.

description of the facts of each case. When judges encounter ambiguous rules, they have to interpret and apply them in a specific way. Judges, in practice, cannot engage in pure natural reasoning divorced from legal norms and must always begin applying the law during the process of fact-finding;[776] indeed, "The court does not separately consider the law and facts and then attempt to apply the law to the facts. Both the relevance of evidence and the scope of fact-finding are determined by the law".[777] What may happen is that when the content of the rule is "plural", the judge will need to identify and select it.[778] For example, as was discussed earlier in this article, when determining whether the conduct of a state-owned enterprise is commercial conduct, the choice of whether to apply the nature of the conduct, the purpose of the conduct, or both may differ across cases. Therefore, the ambiguity of the rules can lead to variations in the results of factual investigation and determination by different judges.

Therefore, due to the characteristics of international law itself, the vagueness of legal language, and the subjective nature of legal interpretation, even though it is dangerous to engage in legal reasoning, it may be used to make interpretations that are protective. But it is necessary and unavoidable for these rules to undergo legal reasoning in their specific application.[779] Thus, even if there is uniformity in the rules of recognition (and there is bound to be some ambiguity in the rules of international law, given the compromise between the interests of the parties), the existence of the need for legal reasoning dictates that it will be difficult to reach unanimous interpretations in specific applications. Therefore, in this case, the uniformity of the rules of identification cannot solve the problem of the different results of the identification of the status of SOEs in specific cases.

In summary, this part has demonstrated that there is no need for uniformity in the international law regime in relation to the status of SOEs. In terms of the social demand element of the consequentialist approach to evaluation, the existence of rules on the status of SOEs in each of the three fields of law examined here serves a specific legislative purpose and objective. The ISDS field expands the scope of SOEs as eligible

[776] Baosheng Zhang, 'Factual findings and their role in legal reasoning' (事实认定及其在法律推理中的作用) (2019) 6 Zhejiang Social Science 25, 32.
[777] Hock Lai Ho, *A philosophy of evidence law: Justice in the search for truth* (OUP Oxford 2008) 7.
[778] Zhang (n 775) 33.
[779] Ibid.

"investors" in order to promote private investment. In the area of state immunity, the pursuit of equality and comity between states, on the one hand, considers the purpose of the act as an extension of the scope of SOEs that can be immune, and on the other hand, emphasises that the act must only be performable by the government and the application of the "private person standard" in the case, in order to better assess the legality and the pursuit of equality between states. Last but not least, the WTO anti-dumping and countervailing duties area places its emphasis on the restriction of the acts of one state against another, and many of the rules are selfishly interpreted by developed states in order to expand the scope of the recognition of SOEs as public bodies. From the point of view of meeting social demands, it would be difficult (if not impossible) to reconcile the different legislative objectives of the three areas and to satisfy the different legislative objectives with a single uniform rule.

In addition, the fragmented status and decentralised rules of international law in these areas facilitate access to specific areas where the content is completer and more systematic, and where prior experience in dealing with similar cases enables the quicker and more efficient resolution of cases. Also, other factors, including the inherent 'state' nature of SOEs and the nature of international law, may make it unlikely that the current fragmented regime will be changed.

In conclusion, the thesis argues that the determination of the status of SOEs does not require the harmonisation of international law regimes. International law lacks an independent legislative body similar to domestic law, making it unrealistic to reconcile differences in the rules in each area.[780] Establishing a uniform rule would be difficult to achieve, and a proper understanding of the differences that exist between the rules in each area, as well as learning from and borrowing some specifics from the rules in other areas as appropriate, may be a better way to address the issue of the inconsistent treatment of SOEs in different areas.

6.3 Drawing on rules from the field of state immunity

It has already been discussed that the differences in the legislative objectives of the

[780] Mo (n 28) 124.

rules in each area lead to differences in the interpretation of the relevant rules. The existence of contradictory rules identified in each area can threaten and reduce the space for SOEs' overseas activities.

The current trends of anti-globalisation and trade protectionism in the international community and the mixed political and economic attributes of SOEs are leading to a more challenging international environment for SOEs in their overseas activities.[781] Countries may hinder the market access of SOEs by raising the standards of security and anti-monopoly reviews, taking advantage of the unclear relationship between SOEs and the state to justify certain restrictive measures, and also by taking measures such as expropriation against SOEs in their investment activities. So, the risks faced by SOEs in their overseas activities are greater than those confronting private enterprises.[782] In this context, the currently vague understanding of the legal nature of SOEs and inconsistent practice in various fields is likely to make the rules on determining the the status of SOEs more open to interpretation, in turn meaning it will be more challenging for SOEs to seek international legal remedies.

For example, it is argued that current ICSID practice also tends towards a uniform interpretation and application of the rules and a blend of customary international law and relevant treaty rules. Some scholars have therefore recommended a strong rejection of the different self-serving interpretations by states of the rules to be used for identifying the same conduct in different areas including international investment, WTO anti-dumping and countervailing duties, and state immunity.[783] This would help SOEs to gain effective protection and recognition in the international community. The contradictory readings of other rules of international law and rules in ISDS area create difficulties in the application of the law in litigation. The international investment law system does not exclude the application of rules from other legal systems; however, it lacks a clear functional positioning and coordination among different legal orders. [784] Even though general international law rules serve as guidance and supplementation,

[781] Liu (n 5) 15.
[782] Ibid.
[783] Ibid 16.
[784] Yun Zheng and Chongli Xu, 'The Structure and Properties of Fragmented International Investment Law' (论国际投资法体系的碎片化结构与性质) (2015) 37(1) Modern Law Science 162, 167.

they are rarely invoked in practice and remain insufficiently clear. [785] This creates the risk of friction and conflicts between legal provisions, potentially leading to situations where states may be required to comply with mutually exclusive obligations.[786]

The current problems with the rules for the identification of the status of SOEs in international law should therefore not be allowed to deepen, but as discussed in the previous section, the establishment of uniform rules is difficult to achieve from the point of view of meeting specific demands and efficiency, as each field is a self-sufficient and separate system. In response to this complex and contradictory situation, this thesis suggests that it is possible to draw on the area of state immunity in order for the other areas to learn from the relevant rules and practice in this the area about the identification of SOEs, and then to attempt an appropriate integration of some aspects of state immunity law with their own rules.

6.3.1 Feasibility assessment

Rules in one area may be used in other areas. International investment law, for example, constructs an open system and does not exclude the application of other legal rules in the settlement of investor-state disputes.[787] Aron Broches suggested that an arbitral tribunal should first apply the rules of domestic law and then test the result of this application against international law.[788] In the *Asian Agricultural Products Ltd. v.*

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[785] Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals - an Empirical Analysis' (2008) 19 (2) European Journal of International Law 301, 314. Thomas W. Wälde, 'Interpreting Investment Treaties: Experiences and Examples', in Christina Binder, and others (eds), International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer (Oxford University Press, 2009) 725.

[786] Gerhard Hafner, 'Risks ensuing from fragmentation of international law' UN Doc ILC(LII)/WG/LT/L.1/Add.1 p.25, Available at <https://www.legal-tools.org/doc/bdb990/pdf/>.

[787] Zheng and Xu, (n 784)166. In investment treaties, it is affirmed that arbitral tribunals have the authority to select the application of domestic laws and other international legal provisions beyond the scope of the investment treaty. As specified in Article 30 of the 2012 U.S. BIT, "the tribunal shall apply: (a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or (b) if the rules of law have not been specified or otherwise agreed: (i) the law of the respondent, including its rules on the conflict of laws (the law that a domestic court or tribunal of proper jurisdiction would apply in the same case); and (ii) such rules of international law as may be applicable." US Model BIT, *US Model Bilateral Investment Treaty (2012)* art 30. The 2014 BIT agreement of Canada also stipulates: "Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." Canada Model BIT, *Agreement Between Canada and ----------For the Promotion and Protection of Investments (2014)* art 40.

[788] Broches (n 64) 392.

Republic of Sri Lanka case, the tribunal also suggested that the broader legal context should be considered, and that both international and domestic law rules could be referred to.[789] Article 42(1) of the ICSID Convention provides that "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."[790]

Accordingly, there would be no complete exclusion of other provisions of international law, such as the ILC Articles or the UN Convention on State Immunity, by the arbitral tribunal. These rules in public international law can be used as a source of law in arbitration cases.

It is argued that the transplantation, borrowing, or *mutatis mutandis* application of legal systems can only be successfully achieved in similar situations and in similar legal environments.[791] There is some commonality in the identification of SOEs in the areas of state immunity, ISDS, and WTO anti-dumping and countervailing duties. The fact that SOEs can be the object of regulation in each of these areas is triggered by the fact that SOEs are 'state-owned'. The focus of the rules in all three areas is on the special connection of SOEs to the state arising from their state ownership, whether SOEs are tools of the state when they participate in international activities, and whether SOEs are privileged in terms of market competition because of their state ownership.

In addition, the three areas are in the same system of international law. International law comprises the set of legal rules that regulates international relations and primarily defines the rights and obligations of states. International law regulates SOEs indirectly by defining the rights and obligations of the state.[792] These areas of specialised law now regulate matters that were once governed by "general international law" before they came into existence.[793] As the scope of international law expanded, the

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[789] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award (27 June 1990) para 21.
[790] ICSID (n 68) Article 42(1).
[791] Meng Sun, 'On the Application of the State Responsibility Regime to the United Nations Organization' (论国家责任制度在联合国组织的适用) (2005) 1 Chinese Legal Science 137, 138.
[792] Han (n 288) 162.
[793] UNGA (n 632) para 243.

development of international law changed from general ideas and principles to a pluralistic system of rules. The original general concepts and principles were the basis of a system of international law that has since expanded and grown.[794] Although each area of law has its own principles and institutions, none is entirely free from the scope of general international law, of which state immunity is part.

6.3.2 Assessment of the advancement of the corresponding rules in the field of state immunity

This thesis suggests that other areas can learn from the relevant rules and practice in the area of state immunity in relation to the identification of SOEs. Firstly, the UN Convention on State Immunity is a relevant rule in the field of public international law and can be invoked as an important source of law in judicial practice. As a universal international legal instrument, the Convention's provisions on the identification of SOEs have a guiding role. The Convention is not currently in force, but has been signed by 28 countries.[795] Under Article 18 of the Vienna Convention on the Law of Treaties (1969), the parties are obliged not to defeat the object and purpose of a treaty, even if the treaty has not entered into force.[796] And since most of its provisions are codified under international customary law, they should still be binding on states in practice.[797] Although the UN Convention on State Immunity has not yet entered into force, it represents an attempt to unify state immunity treaties at the international level, and is therefore also a source of guidance to individual states with regard to the treatment of state immunity.[798]

Whether the SOE's conduct is a governmental or commercial act is one of the keys to the determination of the relationship between the SOE and the state. In determining whether an act is a commercial or governmental act, the UN Convention on Immunity

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[794] Mo (n 28) 119.
[795] See data in United Nations Treaty Collection, available at < https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&clang=_en >
[796] UN (n 648) art 18.
[797] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (n 227) para 117. Fox and Webb (n 24) 167 (The Convention is an "authoritative written codification of the international law relating to state immunity" that "represents a coherent statement of the current international law based on State practice").
[798] Dickinson (n 44) 98.

is clear on commercial transactions, stating that the nature of the act is the primary consideration, while also taking into account the purpose of the act in a way that is not found in other areas.[799] Neither the provisions of Article 25 of the ICSID Convention, the provisions of Articles 4, 5, and 8 of the ILC Articles, nor Article 1.1(a)(1) of the SCM Agreement explicitly indicate the identification of behaviour through its nature or purpose.

Moreover, as has previously been analysed in this thesis, the legislative basis of the field of state immunity is that of mutual respect and comity between states, and there is a greater incentive for states to develop and improve the rules in this field in order to obtain mutual respect and equal rights between states without infringement. In the field of state immunity, the debate over the "nature and purpose" standard or the distinction between "governmental acts and commercial acts" is less contentious than in other areas. Both states and the UN Convention on Immunity retain the scope for SOEs to claim state immunity by analysing whether their conduct qualifies them for immunity. The differences between national laws and the UN Convention on Immunity are also not significant. The relevant provisions in the area of state immunity may therefore be regarded as more mature than in other areas, and the rules as more uniform.

In contrast, the rules concerning SOEs in the ISDS are not clear, and there is additional uncertainty in their implementation.[800] As was mentioned above, the omission of the "purpose" element in practice has often been questioned by scholars, particularly in relation to the question of the extension of jurisdiction that it raises. The nature of the act and the purpose of the act have always been debated in the field of ISDS, and no uniform interpretation or regulation of its criteria has emerged. In addition, some scholars are seeking theoretical support for limiting the eligibility of SOEs for arbitration, for example by "focusing on the ownership element of SOEs".[801] The majority of the ICSID's annual arbitration cases are dismissed due to jurisdictional

[799] "In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction." UNGA (n 25) Article 2(2).
[800] Zhang and Song (n 390) 165.
[801] Blyschak (n 6) 45.

issues,[802] and the rules on whether SOEs are investors in investment arbitration cases remain unclear, making it difficult for SOEs to be protected at the jurisdictional stage.[803]

In the area of WTO anti-dumping and countervailing duties, developed countries seek to connect SOEs to unfair competition, state intervention in the economy, etc. In the Sixth Joint Statement, the Trade Ministers of the United States, Japan, and the European Union called for a new regime on SOEs to address the distortion of economic markets by public institutions and SOEs.[804] The statement connected SOEs with national economic systems, arguing that the nature and status of SOEs should be determined through national economic systems, a stance which rejects the WTO Appellate Body's rulings. Even the US Economic Security Review Commission proposed to Congress in its 2016 annual report to directly identify all Chinese SOEs or state-controlled enterprises as being representatives of the state in anti-dumping and countervailing duties cases;[805] this is an extreme interpretation of the legal status of SOEs. The possible consequence of this stance is that the non-subsidised behaviour of SOEs could also be subject to countervailing measures,[806] which would have a negative impact on the normal activities of SOEs. It appears that the WTO anti-dumping and countervailing duties area is more serious in pursuing its own interests and interpreting the rules differently.

In summary, the identification of SOEs in the area of state immunity is clearer than in the other areas. Considering that the three areas share a similar legal environment and that the determination of the status of SOEs focuses on the international issues arising from the determination of SOEs' "state" status, this thesis suggests that the other areas can learn from the relevant provisions in the area of state immunity.

6.3.3 Drawing on the identification criteria of the area of state immunity

802 Liu (n 5) 6.
803 Suilong Wu, 'Eligibility of SOEs for Arbitration in ICSID Jurisdiction' (国有企业在 ICSID 管辖权中的仲裁资格) (2022) 42(5) Journal of South-Central Minzu University (Humanities and Social Sciences 107, 108.
804 Han (n 288) 167.
805 USCC, Report to Congress, *U.S.-China Economic and Security Review Commission (*114th Congress, 2nd Session) 2016 pp. 121.
806 Han (n 288) 168.

In Chapters 3, 4, and 5 of this thesis, the issue of determining the status of state-owned enterprises based either on their structure or conduct, or both was analysed. Although there are certain differences among the rules in various domains, they are not entirely distinct and unrelated, and it is possible to draw inspiration from the rules in the field of state immunity. In defining conduct as either commercial or governmental in the field of state immunity, the nature of the conduct is the main criterion used to establish whether an entity's conduct is commercial, but the purpose of the conduct is also duly considered. The idea of considering both the nature and the purpose of the conduct has already been discussed in depth in this thesis in Chapter 5. This approach could help to reconcile the conflicting interests of developed and developing countries and address the reality of the situation due to the inevitable entanglement of the nature and the purpose of the SOE's conduct. This is in keeping with the rules in the field of state immunity.

There has been controversy within the ISDS field on the application of the nature and the purpose of the conduct in the identification of an SOE's conduct. While most cases in the ISDS field rely on the nature of the act to determine whether it is a governmental act, there have been some cases where the tribunal has also taken into account the purpose of the act. For example, in *EDF (Service) v. Romania,* the arbitral tribunal considered both the nature of the act and the purpose of the act in determining the conduct of the SOE. EDF (Service) filed an arbitration request with ICSID as an investor, with Romania as the respondent.[807] EDF had collaborated with two Romanian state-owned companies - National Company Bucharest Otopeni International Airport (AIBO) and Spangfei Company for Air Transportation (TAROM) - and formed two limited liability companies (EDF ASRO and SKY Services) with them. The business included some commercial activities at Otopeni Airport in Romania.[808]

EDF as the claimant argued that AIBO and TAROM had blocked its proper exercise of shareholder rights, which ultimately resulted in the termination of the company's associated business activities. In addition, EDF believed that the Romanian government had terminated the operation of two limited liability companies through controlling the

[807] *EDF (Service) v. Romania* (n 200).
[808] Levana Zigmund, Cristina Metea and Matei Purice, 'EDF Services Limited v. Romania-An Analysis' (2011) 5 Rom. Arb. J. 15.

AIBO and TAROM. EDF therefore demanded compensation from the Romanian government based on the fact that the behaviour of AIBO and TAROM could be attributed to government.[809] Romania's government insisted that it did not control the two state-owned companies, despite becoming the de facto shareholder in them.

The arbitral tribunal in this case made a judgment on whether the actions of EDF ASRO and SKY Services, two SOEs, were exercising government authority in their conducts. Firstly, the behaviour of the two SOEs included cooperating with EDF to set up a limited liability company and bid for the duty-free shop area of Otopeni Airport for the purpose of generating profit, which was no different from ordinary private enterprises. Therefore, the behaviour of SOEs was not one of exercising government power.[810]

The tribunal then ruled on EDF's claim that the Romanian government exercised shareholder rights by controlling the state-owned companies, and found that EDF ASRO and SKY Services were acting under the control of the Romanian government following compulsory instructions from the government. The purpose of these actions was to achieve a specific outcome, namely contract termination and repurchase.[811] The arbitration tribunal ultimately concluded that Romania bore responsibility for the actions of the two SOEs.[812] In this case, the arbitral tribunal not only determined the nature of the SOEs' behaviour, but also emphasised the importance of the purpose of the behaviour when determining the SOE's actions.

In *Noble Ventures, Inc. v. Romania*, the tribunal also noted that the activities of the entity were undertaken for the specific purpose of privatisation. Having also considered other elements such as governmental control, it was ultimately determined that responsibility for the conduct was attributable to the state.[813] These are examples of known cases where concern was shown for the purpose of the act in determining whether the act was governmental or not. So, it is not necessarily impossible to consider the element of

[809] Stefan Dudas, 'Investment Protection and Services and Trade: An Overview of ICSID Case Law' (2017) 11 Rom Arb J 16, 41.
[810] *EDF (Service) v. Romania* (n 200) para 196, 197.
[811] Alejandro Solano Meardi, 'State Attribution: Whether State Ownership of a Private Entity Is Important in Determining If the Actions of That Entity Are Attributive to the State' (2021) 7 Arb Brief lv.
[812] *EDF (Service) v. Romania* (n 200) para 209.
[813] *Noble Ventures, Inc. v. Romania* (n 151) para 69.

purpose of the act in a case, and it is feasible to make a more comprehensive determination by including it as one of the factors to be examined.

There is also some theoretical support for drawing on the rules in the field of state immunity that focus on both nature and purpose of conduct. A number of scholars have already discussed the relevant points of doing so in their articles. Mark Feldman proposed that tribunals should consider the nature and purpose of SOEs' activities when determining the boundaries of sovereign conduct in accordance with customary international legal principles.[814] Paul Blyschak shows in his article that a common test used in domestic law to determine whether foreign states and their instrumentalities are subject to the jurisdiction of courts has long been the "commercial transaction" test, which has many similarities to the Broches test.[815] Considering both the nature and purpose of the SOE's conduct is the best approach to analysing the potentially complex operations of today's large and often very powerful SOEs.[816] Therefore, this thesis suggests that the ISDS field draws upon and learns from the commercial transaction test in the field of state immunity while focusing on both the nature of the act and the purpose of the act.

Additionally, in identifying the status of SOEs, the area of state immunity also emphasises the focus on the conduct of SOEs. Chapter 4 of this thesis argued that in the area of WTO anti-dumping and countervailing duties, whether an SOE is a "public body" should be determined by exploring whether the specific acts performed by the SOE are "governmental acts". Otherwise, specific acts that do not correspond to the activities and concerns of the authorised governmental authority are inconsistent with the purpose for which the rules on anti-dumping and countervailing duties were established. This area could therefore also draw on the rules in the area of state immunity to determine the status of an SOE as a "public body" by confirming that the specific conduct of the SOE is in the exercise of governmental functions.

In the field of state immunity, the structure of SOEs is not a significant factor in identifying their status. However, in the WTO anti-dumping and countervailing duties

[814] Feldman (n 118) 24.
[815] Blyschak (n 6) 30.
[816] Ibid 33.

area, it has different results. As Chapter 3 explained, when identifying SOEs as "public bodies" in the context of WTO anti-dumping and countervailing duties, government control and government function standards are applied. The government control standard is undoubtedly related to the control of SOEs and is determined by government majority ownership. The government functions standard, which is initially unrelated to government control, involves exercising or being vested with government powers, but its subsequent application has sparked controversy.

As Chapter 3.3.3 discussed, it should be made clear that the structure of SOEs should not be a factor in identifying whether they are "public bodies" in the field of WTO anti-dumping and countervailing duties. This is consistent with the rules in the field of state immunity. This thesis suggests that the WTO anti-dumping and countervailing duties field could appropriately learn from the rules in the area of state immunity, emphasizing the importance of using the conducts of state-owned enterprises as the standard for evaluation. At the same time, this thesis also argues that the role of "meaningful control" should be maintained when identifying the status of SOEs in the WTO anti-dumping and countervailing duties field.

The coexistence of the government control standard and the government functions standard in this field reflects the controversy over the roles of state control and the conducts of SOEs in determining the status of SOEs. The government functions standard is not completely divorced from control. Meaningful control is one of the three evidential standards of the "government functions standard." Evidence of the government exercising meaningful control over an entity and its actions can be used as evidence that the entity possesses government authority and exercises this power in fulfilling government functions.[817] The "meaningful control" standard emphasizes the relationship between SOEs and the state through the specific control of the actions of SOEs by the state. This is different from state control.

The requirement for the "meaningful control" of SOEs by the state demands evidence that the formal indicators of government control are diverse and that this control is

[817] *United States — Definitive Anti ―Dumping and Countervailing Duties on Certain Products from China* (n 66) para 318.

exercised in a meaningful way.[818] There is a controversy surrounding the relationship between "meaningful control" and "ownership control," which could reintroduce government control as one of the factors in determining the status of SOEs as public entities. It can also be considered that meaningful control represents an upgraded version of government control, to some extent encompassing the latter or coinciding with it.[819] However, in practice, the Appellate Body has emphasized that meaningful control itself cannot trigger the characterization of a public entity It is used as one of the pieces of evidence to infer that the entity is exercising political authority.[820] The Appellate Body in cases also made it clear that the fact that the government holds a majority interest in an entity is not enough to prove that the government exercises meaningful control over the entity's conduct, let alone that it has delegated authority over it. Only in some cases is government control the evidence of meaningful control.[821]

Therefore, meaningful control is quite different from state control. In addition to ownership, the meaningful control exercised by the state over SOEs encompasses the content of "government functions", which will not give rise to the controversy that state control would lead to an expanded scope of SOEs being considered as providers of subsidies.[822] The interpretative scope of "meaningful control" is also broader than control, leaning more towards a comprehensive consideration of relevant factors.[823] The Appellate Body has also emphasized in cases that determining the status of a "public body" should not solely or inappropriately focus on any single characteristic without properly considering other potentially relevant features.[824] Therefore, this thesis argues that it is necessary to maintain the role of meaningful control in determining the status of SOEs.

In fact, within a given field, there are different rules and practices. In the area of WTO anti-dumping and countervailing duties, although the status of SOEs is most often determined based on government control, there is also case where their status is

[818] Ibid.
[819] Shi (n 730) 111.
[820] *United States — Definitive Anti ―Dumping and Countervailing Duties on Certain Products from China* (n 66) para 318.
[821] Ibid para 297, 318.
[822] Sun (n 111) 57.
[823] Liu (n 5) 15.
[824] *United States — Definitive Anti ―Dumping and Countervailing Duties on Certain Products from China* (n 66) para 319.

determined based on their conduct. [825] As mentioned earlier in Chapter 5.4, in cases where the status of a "public body" is determined based on conduct, more emphasis is placed on the purpose of the conduct. When determining the status of SOEs based on their conduct, this thesis argues that both the nature of the conduct and its purpose should be considered comprehensively.

A possible proposal to consider is that when evaluating the conduct SOEs, the first step should be to examine whether the nature of their conducts involves exercising governmental functions. If so, the SOEs could be identified as a "public entity." If the conduct is of a commercial nature, it is then necessary to assess whether its purpose is to fulfil state policies and public objectives. This is because, due to the particularities of countervailing measures, even commercial conduct may constitute a subsidy under the SCM Agreement. If the determination is based solely on the nature of the SOEs, certain commercial activities, such as providing loans with the purpose of subsidizing, would not be considered as subsidy in SCM Agreement. Therefore, when identifying conduct, the purpose of the conduct should also be considered in determining whether it constitutes a subsidy.

It is important to note that this thesis suggests that the other two fields could moderately learn from the rules in the area of state immunity, but it does not advocate for a full adoption or replication of those rules. Instead, it proposes borrowing certain elements that would help improve case handling and reduce disputes. In fact, within each field, different practices and disputes already exist, and there is no complete uniformity. In the ISDS field, the debate over whether to assess conduct based on its nature or its purpose persists. While the general trend leans toward assessing based on the nature of the conduct, some scholars and a few cases emphasize the importance of the purpose. [826] Similarly, in the WTO anti-dumping and countervailing duties field, the question of whether to identify SOEs based on their conduct has sparked debate. There are cases

[825] In *US — Anti-Dumping and Countervailing Duties (China)*, the Appellate Body concluded that examining substantive actions is a key factor in determining whether an entity is authorized to perform governmental functions. Ibid, para 317.

[826] In the *CSOB v. The Slovak Republic* case, the tribunal focused solely on the nature of the conduct, overlooking its purpose. *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic* (n 74) para 23-25. In the *Noble Ventures, Inc. v. Romania* case, the tribunal considered the purpose of the conduct when determining whether it constituted governmental conduct. *Noble Ventures, Inc. v. Romania* (n 151) para 69. Mark Feldman, in his article, suggests that the purpose of the conduct should not be overlooked. Feldman (n 150) 24.

where conduct has been used to determine whether an entity is a "public body," while in other instances, conduct has been disregarded. [827] In each of these areas, there are already inconsistencies in the rules and practices regarding the identification of the status of SOEs.

This thesis suggests that the ISDS field can draw from the state immunity field's approach to determining conduct, which is based on both the nature of the conduct and its purpose, as well as the WTO field's emphasis on the importance of conduct, and both the nature and the purpose of the conduct should be considered. The goal is not to establish a unified international legal framework for SOEs, but rather to propose the development of more effective and less contentious rules within each area. Additionally, while advocating for the appropriate adoption of rules from the state immunity field, this thesis also emphasizes retaining field-specific criteria, such as "meaningful control," and does not propose that other fields should completely align with the state immunity framework. As previously discussed, it is not necessary to create unified rules for identifying the status of SOEs; the existence of individual rules in each area holds significant importance. Learning certain rules and practices from the state immunity field is intended to offer suggestions for refining the rules within each area.

In summary, the ISDS and WTO anti-dumping and countervailing duty fields can learn from, and draw upon, the rules in the state immunity field to remedy some limitations of their proper field rules. Of course, attention should also be paid to compatibility with their own respective rules, because although some rules from other fields can be helpful in the adjudication of cases, it is still necessary to focus on the rules which have been established in each specific field. The unique rules that have developed in the field over time are a combination of theory and practice, while also focusing on maintaining consistency in the use of rules within the field.

[827] In *US — Anti-Dumping and Countervailing Duties (China)*, the Appellate Body supported the examination of an entity's specific conducts to assist in determining whether the entity is authorized to perform governmental functions. *Appellate Body Report, US — Anti-Dumping and Countervailing Duties (China)* (n 66) para 317. Assessing whether an entity qualifies as a public body should involve evaluating the entity's conduct, its fundamental characteristics, and its relationship with the government. *Appellate Body Report, US — Countervailing Measures (China)* (n 79) para 5.100.

6.4 Conclusion

In conclusion, this chapter has demonstrated that despite the differences in the rules governing the status of SOEs in various fields, the establishment of a unified system for the identification of SOEs is not a viable option. A decentralised regime is better able to achieve legislative objectives and maintain efficiency, in accordance with the consequentialist perspective that focuses on satisfying specific demands and the inevitability of the fragmentation of international law. Also, the limitations of international law, including its ambiguous language and the subjective nature of legal interpretation, make the establishment of a uniform regime to address the issue of determining the status of SOEs a difficult task. The state ownership of SOEs is the primary reason for stricter regulation of SOEs by the international community. In addition, the fragmentation of rules across sectors leads to greater specialisation in the handling of disputes by sectoral bodies, and the activities of SOEs are governed by specific laws and regulations.

The legal systems of the various sectors of international law are each formulated for the needs of specific areas and to address specific issues, and each area has its own types of disputes, as well as its own principles and institutions. The ISDS and WTO anti-dumping and countervailing areas can draw on and learn from some interpretations of the rules in the area of state immunity, but with attention paid to the adaptation and integration process in relation to their own existing rules. More exploration is also needed of how best to integrate the borrowed criteria and concepts in order to improve the acceptance of the rules and balance the interests of all parties.

Chapter 7 Conclusion

This thesis considers the situation whereby the relationship between SOEs and the state means that the former are uniquely regulated in their international activities, with different sets of rules for the determination of their relationship with states within the three areas of international law. The dissertation has analysed how the rules in the three areas already differ in law and in practice, as well as discussing the need (or otherwise) for a uniform rule on the determination of the status of SOEs.

The legal provisions in the fields of ISDS, state immunity, and WTO anti-dumping and countervailing duties on the determination of SOE status and practice were introduced in Chapter 2. The provisions in the field of ISDS mainly include the ICSID Convention and the Broches Test, which stipulate that the parties entering into arbitration must be nationals on one side and states on the other. Nationals can be either natural or legal persons. More detailed provisions are found in the Broches Test, which suggests that SOEs are not considered to be private investors in the context of carrying out essentially government functions, in which case they act as agents of the government. The ILC Articles, which are often applied in practice, identify the relationship between SOEs and the state by stating that the responsibility of the SOE is attributed to the state when the SOE is "exercising government power" and directing or controlling acts directed or controlled by the state. In practice, in the field of ISDS, the determination of the status of SOEs is primarily based on whether the SOE can bring an arbitration claim as a national and whether the host state can be named as the respondent, which is clarified by establishing the relationship between the SOE and the state. In specific cases, the arbitral tribunal will identify the state's control over the SOE, with emphasis mainly on the nature of the specific conduct, to determine whether it constitutes commercial activity. However, in some individual cases the finding has been reached that the distinction between governmental and commercial conduct is not meaningful.

In the area of state immunity, the UN Convention on Immunity provides that SOEs can become "States" for the purposes of the Convention on State Immunity when they are authorised to exercise sovereign powers on behalf of the state. The UN Convention on Immunity emphasises the principle of the "commercial exception", the key element of which is the criteria for determining commercial transactions. Therefore, whether an

act is commercial or not is often discussed in cases. The UN Convention on Immunity adopts a standard combining nature and purpose, which is a compromise regarding the commercial identification rule at issue.

In the area of WTO anti-dumping and countervailing duties, the SCM Agreement provides for the status of a public entity to be granted to SOEs that have been entrusted and authorised by the government. In the more nuanced cases that have clarified the rule of identification, the appellate body has held that a public entity is one that "possesses, exercises or is vested with governmental authority", and has required determination that the SOE satisfies the statutory delegation of authority, exercises governmental functions, and that the government exercises meaningful control over the entity and its conduct. In Chapter 2, the legal provisions of the specific identification rules and their specific application were described. The rules in the three areas are similar in that they emphasise the need to explore the relationship between the SOE and the state and the special status of SOEs. However, there are differences in the application of the rules, and these differences can lead to different outcomes.

The thesis discussed the issue of whether the identification of the status of SOEs relies on the structure of these entities in Chapter 3. Before addressing this issue, the thesis first analysed issues related to the structure of SOEs in various fields. The structure of an SOE involves the question of the nature of control by the state, i.e., the state ownership of SOEs. In addition to control, the ISDS also includes the concept of "effective control." In the WTO anti-dumping and countervailing duties field, there is also the concept of "meaningful control." After that, the paper then discussed whether structure can be used to determine the status of SOEs. In the ISDS field, state control is excluded as a factor in determining the responsibility of SOEs. The rules in the field of state immunity are similar, as they also exclude the role of state control in determining the status of state-owned enterprises. However, the WTO anti-dumping and countervailing duties field diverges from the approaches of the other two areas. The "government control standard" involves confirming the identity of state-owned enterprises as "public entities" based on government control elements. As a result, in comparison to the other two fields, the WTO anti-dumping and countervailing duties field is more likely to classify state-owned enterprises as "public entities." The thesis also suggested that the WTO field should consider excluding state control from the

identifying rules. However, the concept of "meaningful control" can to some extent be retained.

Both the ISDS and state immunity areas emphasise that the identification of SOEs should be based on the conduct of the SOEs. However, the WTO anti-dumping and countervailing duties area does not consider it necessary to determine the status of SOEs as "public bodies" through specific acts by SOEs. This may lead to the potential issue where specific actions carried out by SOEs, despite being inconsistent with their authorized government authority, were considered subsidies. This is inconsistent with objectives established by the rules of WTO anti-dumping and countervailing duties. Based on this, the thesis suggests the idea that the area of WTO anti-dumping and countervailing duties should also focus on specific behaviours, while emphasizing the need to retain "meaningful control."

Chapter 5 presented a discussion of the rules governing the determination of commercial conduct, addressing the question of whether conduct is identified as commercial through the nature of the conduct or the purpose of the conduct. While state immunity focuses both on the nature of the conduct and the purpose of the conduct, the neglect of the purpose of the conduct in the ISDS area has attracted criticism from scholars, while the WTO anti-dumping and countervailing duties area is more concerned with the role of the purpose of the conduct, which is considered to be a case of abuse of the remedy. This thesis argues that as it is often difficult in practice to separate the nature of the act and the purpose of the act, and in order to balance the interests of developing countries and developed countries, the determination of commercial acts should learn from the rules in the area of state immunity and focus on both the nature of the act and the purpose of the act.

Having analysed the differences between the four elements of the rules of identification in the three fields, in Chapter 6 the thesis discussed the possible need for greater uniformity of the rules of identification. In terms of a consequentialist approach to evaluation, the situation of maintaining the current rules in the various fields of international law best meets specific demands. The current situation of each field having different rules stems from the specific legislative objectives of each field. the ISDS field emphasises the protection of private investment and weakens the role of the

state. Corresponding rules, such as those that exclude elements of state control and those that focus on the nature of the act and ignore the purpose of the act, make it easier to identify SOEs as "private", thus expanding the ICSID's jurisdiction and achieving the goal of promoting private investment. In the area of state immunity, meanwhile, the rules reflect the goal of comity between states. The restricted immunity regime balances national jurisdiction with international comity, as the rules on the identification of SOEs expand the scope of SOEs that can be identified as 'states' on the one hand, and the possibility of identification as states on the other, through the provision that “acts may only be performed by the government”. The WTO anti-dumping and countervailing duties rules emphasise the regulation of a country's behaviour towards other countries, and the imposition of taxes to limit the damage caused to domestic industries by international trade. With this aim, the rules in this area could easily lead to an expansion of the scope of SOEs being recognised as 'public bodies', thereby extending relief to domestic industries. As a result of the different legislative objectives in each area, the legal provisions that have developed are bound to differ. An attempt to align the rules towards different legislative objectives would result in a weaker ability to continue meeting area-specific needs as originally intended. Therefore, this thesis has argued that the idea of unifying the rules is not a worthwhile endeavour.

In addition, the fragmentation exhibited by the rules on the identification of SOEs is self-sustaining. The laws governing the conduct of SOEs in each area have developed over a long period of time, and a number of cases have been decided. Drawing from previous case judgments can improve efficiency. Moreover, the development of uniform new rules may lead to the emergence of new issues, which in turn may reduce efficiency. Therefore, for reasons of efficiency, it is also more appropriate to maintain the current rules in each area.

In addition, the thesis considered objective factors such as the 'state' nature of SOEs, the ambiguity of the legal language of international law, and the subjective nature of legal interpretation, all of which make it unwise to try to establish uniform rules. SOEs, because of their state-controlled nature, have a closer relationship with the state than other enterprises, which can lead to their receiving special attention and restrictions by states. The principle of competition neutrality was also introduced as a result of the state-owned nature of SOEs leading to their regulation. States may interpret the identity

of SOEs in a favourable manner driven by their interests, and in the absence of a harmonisation of national interests it is difficult to imagine a uniform regime that would change the situation where the identity of SOEs is interpreted arbitrarily due to their 'state' status. At the same time, the vagueness of the language of international law and the subjective nature of legal interpretation mean that legal provisions may be subject to interpretation that upholds one party's own interests. Even with a uniform rule of identification such a situation would be difficult to avoid, and it would be difficult to reach a consistent interpretation in practice. In summary, this thesis argues that there is no need for a consistent rule of determination of the status of SOEs in the field of international law.

Chapter 6 also suggested that although a uniform system of identification is not required, the other two areas could appropriately draw upon some of the elements of identification on offer in the area of state immunity. In Chapters 3, 4, and 5, when comparing the identification rules, the thesis has already analysed the possibility of modifying the identification rules. After assessing the advanced nature of the rules in the area of state immunity and the feasibility of borrowing from them, the thesis suggests that the ISDS and WTO anti-dumping and countervailing duties areas can learn from the rules in the area of state immunity on the determination of commercial conduct by considering both the nature and the purpose of the SOE's conduct. In addition, this thesis argues that in the WTO anti-dumping and countervailing duties fields, it should be clarified that specific behaviours play an important role in identifying the status of SOEs. Although WTO anti-dumping and countervailing duties should draw upon the rules in the field of state immunity, 'state control' should not be regarded as a determining factor for identifying the status of SOE, but the role of 'meaningful control' should be maintained.

The thesis thus discussed the differences between the rules used in the identification of SOE status in the areas of ISDS, state immunity, and WTO anti-dumping and countervailing duties, and the question of whether there is a need for the harmonisation and coordination of these different regimes of international law in relation to SOEs. The thesis concluded that there is no need for a unified international law regime for the identification of SOE status, but that the other two areas can draw on some of the rules in the area of state immunity as appropriate to improve their own rules and practices.

In conclusion, the present thesis has undertaken a detailed comparison of the rules on the status of SOEs in three international legal areas. Although there are many articles on the status of SOEs, very few of them involve a comparison of the three areas at the same time, and the prior research is often limited to one specific area. This thesis has provided a comprehensive analysis of international attitudes towards SOEs in the context of international law, and to some extent helped to remedy the problem of incomprehensive research on SOEs.

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