

ARTICLES

THE ATTRIBUTION TO STATES OF THE CONDUCT
OF PUBLIC ENTERPRISES IN THE FIELDS OF INVESTMENT
AND HUMAN RIGHTS LAW

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Abstract

Since the 2008 global crisis, States have developed new forms of State intervention in economics, by influencing and controlling in different ways the activities of enterprises which, irrespective of their legal characterization in the national legal orders, may be defined as “public enterprises” due to the State-business nexus. This article aims at discussing the test of attribution according to which the internationally wrongful acts of these enterprises may be attributed to States, in the fields of investment law and human rights law. To this end, it surveys whether and to what extent the general rules codified in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARSIWA), particularly Articles 4, 5 and 8, have been applied in the fields of law concerned. The article concludes that, although Articles 4, 5 and 8 DARSIWA are not always mentioned in the examined case law, their underlying criteria normally apply, albeit with some specificity in their interpretation. In particular, the functional test, according to which the conduct of enterprises is attributable to States when they are empowered to exercise governmental activities, embodies the test codified in Article 5 (which refers to “elements of governmental authority”). However, the author argues that the relevant concept of “governmental authority” in the surveyed practice in both fields has been interpreted as including not only the traditional sovereign functions mentioned in the ILC Commentary to Article 5 DARSIWA, but also a wider set of economic activities strategic for the States, including the provision of services of general interest. According to the author, this wide construction of the concept of “governmental authority” has the merit of reducing the risk that States escape attribution by outsourcing goods, services and tasks of general interest. It also enhances the responsibility of States and the role of international courts and monitoring bodies as watchdogs of the international rule of law.

Keywords: public enterprises; Article 5 Draft Articles on State Responsibility; attribution of conduct; elements of governmental authority; business and human rights.

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1. INTRODUCTION

The role of States in economics has never been neutral. Different forms of State intervention have developed across the decades. Starting from the last century, State-controlled or State-owned enterprises (SOEs) became a common tool of protectionist trade policies and a means of developing national industry.¹ Through SOEs, States acted as direct entrepreneurs in the market and as service providers in natural monopoly situations, in the event of market failures, or even in the field of social policy for the purpose of implementing their welfare programmes.² Over time, however, the role of States has gradually transformed into various indirect forms of influence over the activities of enterprises. In the 1970s and 1980s, governments in different parts of the world – including in developing countries – started privatization programmes with the aim of improving the efficiency and economic performance of SOEs: by selling their assets or shares, by delegating their management, by liberalizing the sector where they operated or by contracting out services of public relevance.³ This wave of privatization gradually changed the face of State intervention in the economy and transformed SOEs into more independent public-private partnerships, whereby States maintained the role of regulator or monitor of activities run by enterprises.⁴ However, since the 2008 global financial crisis, States have again been intervening directly.⁵ New forms of multinational enterprises have emerged as powerful actors in the global market.⁶ In this phase, the role of States has evolved as well, as they often act more like shareholders than direct entrepreneurs in the international market.⁷ This phenom-

¹ According to a recent definition, the notion of SOE includes “any corporate entity recognised by national law as an enterprise, and in which the state exercises ownership”. This definition comprehends “joint stock companies, limited liability companies and partnerships limited by shares. Moreover statutory corporations, with their legal personality established through specific legislation, should be considered as SOEs if their purpose and activities, or parts of their activities, are of a largely economic nature”; OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition, available at: <<http://dx.doi.org/10.1787/9789264244160-en>>.

² RAJAVUORI, “State Ownership and the United Nations Business and Human Rights Agenda: Three Instruments, Three Narratives”, *Indiana Journal of Global Legal Studies*, 2016, p. 665 ff.

³ HALLO DE WOLF, *Reconciling Privatization with Human Rights*, Cambridge, 2012, p. 42; LIKOSKY, “The Privatization of Violence”, in CHESTERMAN and FISHER (eds.), *Private Security, Public Order. The Outsourcing of Public Services and Its Limits*, Oxford, 2009, p. 11 ff.

⁴ RAJAVUORI, *cit. supra* note 2, p. 672.

⁵ BREMMER, *The End of the Free Market*, New York, 2010.

⁶ According to the UN Working Group on the issue of human rights and transnational corporations and other business enterprises “the proportion of State-owned enterprises among the Fortune Global 500 companies is estimated to have grown from 9.8 per cent in 2005 to 22.8 per cent in 2014, with US\$ 389.3 billion in profits and US\$ 28.4 trillion in assets”: see Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, UN Doc A/HRC/32/45 (2016).

⁷ CARNEY, *Authoritarian Capitalism. Sovereign Wealth Funds and State-Owned Enterprises in East Asia and Beyond*, Cambridge, 2018; BASSAN (ed.), *Research Handbook on Sovereign Wealth Funds and International Investment Law*, Cheltenham, 2015.

enon, usually defined as “State capitalism”, is characterised by States exercising different forms of economic influence over various multinational enterprises: by owning a part of the capital as they do for SOEs, or by acquiring their equity stakes through sovereign wealth funds (SWFs)⁸ or through holding companies and development banks. While a common legal definition of such typology of enterprises is lacking, for the purpose of the present contribution they are referred to as “public enterprises”.

In spite of their changing roles, States continue to achieve public aims through public enterprises so that, even when they are formally private entities with an independent legal personality, they may operate as hybrid economic actors to provide public utility services. For this reason, academics and international institutions have raised concerns about the privileged relationship between public enterprises and States and doubts about compliance with international rules governing competition and prohibiting subsidies and other preferential measures.⁹ Less attention has been paid so far to the implications of the influence of States over public enterprises in the fields of investment law and human rights law and to the relevant case law concerning attribution to States of their wrongful conduct.

In this regard, even the application of the general rules on attribution codified by the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARSIWA) is problematic. In principle, the DARSIWA are grounded on a rigid public-private duality in the light of which the criteria governing attribution to States of the conduct of enterprises are highly controversial – especially as far as State intervention in the economy is concerned.¹⁰

⁸ The Working Group on Sovereign Wealth Funds has defined the SWFs as “special purpose investment funds or arrangements, owned by the general government. Created by the general government for macroeconomic purposes, SWFs hold, manage, or administer assets to achieve financial objectives, and employ a set of investment strategies which include investing in foreign financial assets” (International Working Group on Sovereign Wealth Funds, Generally Accepted Principles and Practices (Santiago Principles), 2008). See BASSAN, *The Law of Sovereign Funds*, Cheltenham, 2011.

⁹ See, *ex multis*, VILLALPANDO, “Attribution of Conduct to the State: How the Rules of State Responsibility May be Applied within the WTO Dispute Settlement System”, *JIEL*, 2002, p. 393 ff.

¹⁰ It has been argued that the theoretical foundation of this limitation is that States cannot control all the activities run by nationals, as this would unduly restrict the scope of the private sphere of individuals and the freedom of enterprises (DE FROUVILLE, “Attribution of Conduct to the State: Private Individuals” in CRAWFORD, PELLET and OLLESON (eds.), *The Law of International Responsibility*, Oxford, 2010, p. 257 ff., p. 261). Some authors have criticized the dividing line between public and private responsibility when issues of protection of fundamental rights of individuals are at stake. As has been emphasised by Kress, “[I]a division entre le public et le privé comme elle est reflétée par les règles de l’imputation peut être jugée différemment sous l’angle de la protection de l’individu [...] on peut aussi mettre l’accent sur la nécessité d’un contrôle plus effective de l’Etat sur certaines catégories d’actes de particulier afin de mieux protéger les droits de l’homme” (KRESS, “L’organe de facto en droit international public. Réflexions sur l’imputation à l’état de l’acte d’un particulier à la lumière des développements récents”, *RGDIP*, 2001, p. 93 ff., p. 138. See also CHINKIN, “A Critique of the Public/Private Dimension”, *EJIL*, 1999, p. 387 ff.).

The present contribution aims at shedding some light on this area. To this end, Section II will discuss the applicability of the general rules of attribution codified by DARSIIWA in the fields concerned.¹¹ Sections III and IV will then focus on recent case law concerning the responsibility of States for wrongs committed by public enterprises, respectively in the fields of protection of investments and human rights. Finally, the last section will present some concluding remarks.

2. APPLICABILITY OF GENERAL RULES ON ATTRIBUTION

The criteria under which a breach of an international obligation is attributable to a State are codified by Articles 4-11 DARSIIWA. Among them Articles 4, 5 and 8 are specifically relevant to questions of State responsibility in cases involving public enterprises. Considered as a whole, this body of rules is grounded on the principle that the conduct of private entities is generally not attributable to the State. The rationale is that responsibility is to be attributed to States for their own conduct; at the same time this principle has been balanced with exceptions in order to prevent States from evading responsibility by instructing private entities to perform acts that would imply State responsibility if performed by their own organs. As authors have stressed, this need has become even more urgent in the era of human rights protection and State sovereignty conceptualized as a responsibility to protect.¹²

Article 4 lays down the basic rule attributing to States the conduct of their organs – including public enterprises¹³ – whatever position they hold in the organization of the State, when exercising their functions.¹⁴ However, the fact that a public enterprise is established by law is not sufficient to qualify it as a State organ under Article 4. Indeed, in many cases, public enterprises are created or regulated by legislation, without becoming part of the governmental organization. This is so even in spite of their being designed to accomplish political goals, being under total or partial public ownership, having a management system imposed by the government, and enjoying significant privileges such as a domestic trading monopoly. Ultimately, what matters is the formal status of the entity in question as a part of the organization of the State, regardless of the functions entrusted to it. In this regard, it is significant that the commentary to Article 4

¹¹ ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001.

¹² ÁLVAREZ ORTEGA, “The Attribution of International Responsibility to a State for Conduct of Private Individuals within the Territory of Another State”, InDRET, 2015, p. 24, available at: <https://indret.com/wp-content/themes/indret/pdf/1116_es.pdf>.

¹³ See, for example: *Alex Genin, Eastern Credit Limited, Inc and AS Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award of 25 June 2001, para. 327.

¹⁴ Art. 4(1) DARSIIWA reads: “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”.

specifies that the conduct of a State organ is attributable irrespective of its classification as “commercial” or as *acta jure gestionis*.¹⁵

In addition, Article 4(2) requires us to look beyond the formal status under the internal law of the State when an entity’s independence from the State’s organization is purely fictitious and hides a factual relationship of “complete dependence” on the State.¹⁶ This attribution link is sometimes applied by ICSID arbitrators when public enterprises lack independence at administrative, financial and institutional level in spite of their separate private personality.¹⁷

Since the majority of public enterprises are not included within the organization of the State and possess an independent legal personality, attribution in most cases depends on the applicability of Articles 5 or 8 DARSIVA.

According to Article 5, the conduct of enterprises exercising “elements of governmental authority” can be attributed to States.¹⁸ In this case, attribution depends on two concurrent requirements the presence of a formal internal act – a statute or a public contract – whereby the State has charged a certain enterprise with a public task¹⁹ and the characterization of the conferred tasks as entailing “elements of governmental authority”.

The first requirement, according to which tasks and services delegated to a private company must be conferred by law, is also a selective criterion. This means that attribution is limited to the portion of activity which has been conferred by law or contract and does not cover any additional commercial activity in which the enterprise may engage. If, for example, a State confers policy tasks on a private railway company, attribution would cover breaches committed in the exercise of such tasks, excluding complementary activities, such as ticket sales. By contrast, any conduct of State organs under Article 4 DARSIVA is always attributable to the State itself; accordingly, if a State directly manages a railway service, then it assumes responsibility for any international breaches committed in the running of the service.

Greater interpretative doubts arise in relation to the second requirement, namely the meaning of “elements of governmental authority”. In this regard,

¹⁵ *Ibid.*, p. 41, para. 6.

¹⁶ DE STEFANO, “Attributing to Sovereigns the Conduct of State-Owned Enterprises: Toward Circumvention of the Accountability of States under International Investment law”, ICSID Review, 2017, p. 267 ff.

¹⁷ *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award of 31 October 2012, para. 401 ff.; *F-W Oil Interests, Inc v. Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award of 3 March 2006, para. 2013. See GALLUS, “State Enterprises as Organs of the State and BIT Claims”, JWT, 2006, p. 761 ff.

¹⁸ Art. 5 of the DARSIVA reads: “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”.

¹⁹ As has been noted, the provision speaks about functions conferred “by the law”, not “by a law”, hence including contracts, and even the commentary includes examples of enterprises “contracted to act” (SPINEDI, “La responsabilità dello Stato per comportamenti di *private contractors*”, in SPINEDI, GIANELLI and ALAIMO (eds.), *La codificazione della responsabilità internazionale alla prova dei fatti. Problemi e spunti di riflessione*, Padova, 2006, p. 67 ff.

the ILC commentary has included in the scope of this article “public corporations, semi-public entities and, even, in special cases, private companies”, provided that the domestic law has empowered them to exercise some kind of governmental activities.²⁰ Typical examples are private military contractors and private companies charged with immigration control or prison management. However, the ILC has not circumscribed the scope of the concept of “elements of governmental authority”, affirming that it depends largely on the nature of the society in question, its history and traditions, and therefore must be ascertained in accordance with the internal law of each State. Yet some indications may be inferred from international practice. The WTO Appellate Body, for example, has considered as functions of governmental character those necessary to “regulate” or “control” people, such as legislative, administrative, policy and judicial powers.²¹ The European Court of Human Rights (ECtHR) has also recognized that a body invested by the State with “administrative as well as rule-making and disciplinary prerogatives [...] employs processes of a public authority”.²² As will be dealt with in the following sections, the case law in the fields of investment law and human rights offers further insights on the delimitation between commercial and governmental activities exercised by enterprises.

In any case, activities of a purely commercial character are excluded from the scope of Article 5 DARSIIWA, regardless of the degree of control exercised by the State. However, the rationale underlying this limitation is not easy to reconcile with the general rule of attribution of Article 4 DARSIIWA. In other words, if the conduct of a State organ is attributable to the State itself regardless of its governmental or commercial character, why is the conduct of a private entity to which the State has entrusted certain tasks not attributable to that State under the same conditions? And why should States be liable for wrongs committed in the exercise of commercial activities by State organs only and not also by private or public companies? The risk underlying this limitation is that States may elude their international obligations by outsourcing goods, services and tasks, which – in so far as they are excluded from the scope (of a strict interpretation) of the notion of “elements of governmental authority” – are not attributable under Article 5 DARSIIWA.

A different solution was instead proposed in the old version of Article 5 contained in the Third Report of DARSIIWA, submitted by the then Special Rapporteur Ago.²³ According to this version, “[t]he conduct of a person or group of persons who, under the internal legal order of a State or of a public institution are separate from the State, but in fact perform public functions or in fact act on

²⁰ ILC, *cit. supra* note 11, p. 43, para. 6.

²¹ *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Report of the Appellate Body*, adopted on 13 October 1999, WT/DS103/AB/R, para. 97.

²² European Court of Human Rights, *Le Compte, Van Leuven and De Meyere v. Belgium*, Applications Nos. 6878/75 and 7238/75, Judgment of 23 June 1981, para. 64.

²³ AGO, Third Report on State Responsibility, YILC, 1971, Vol. II, Part One, p. 191.

behalf of the State, is also considered to be an act of the State in international law". With regard to this provision, the ILC commentary clarified that whatever activities an enterprise exercises on behalf of a State under a factual or legal relationship is attributable to that State, regardless of its governmental or commercial character.²⁴

Under the current DARSIIWA, by contrast, conduct of enterprises entrusted with tasks or set goals not including "elements of governmental authority" could be attributable to States solely according to the conditions provided by Article 8 DARSIIWA, which are particularly difficult to meet in the case of enterprises exercising commercial activities. While Article 5 DARSIIWA is based on the existence of an internal act of the State, the criterion codified by Article 8 DARSIIWA is mainly based on a factual relationship between the State and the enterprise and must be applied in accordance with the circumstances of each case, which are not always transparent where corporate activities are concerned. Indeed, the provision requires that "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".²⁵ In practice, its application has been a matter of debate as the stricter test adopted by the ICJ – which requires that the State has exercised effective control over the wrongful conduct at stake²⁶ – was challenged by the Appeal Chamber of the ICTY in the *Tadić* case and by the ECtHR in the *Loizidou* case, which supported the broader "overall control" test.²⁷ However, the disagreement over the relevant notion of control has mainly revolved around questions concerning the attribution of wrongful acts committed by armed groups. Its pertinence in cases concerning economic activities of enterprises in the fields of protection of investments and human rights is not straightforward. Indeed, the relevant case law in the latter fields does not replicate the debate on the notion of effective *versus* overall control, drawing instead a more complex picture of the applicable attribution tests in the case of wrongs committed by public enterprises. Elaborating further on this point, the next section will focus on disputes concerning the protection of investments.

²⁴ SPINEDI, *cit. supra* note 19, p. 86.

²⁵ CRAWFORD, *State Responsibility*, Cambridge, 2013, p. 116 (emphasis added).

²⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 26 November 1984, ICJ Reports, 1986, p. 14 ff.; *Application of the Convention on the prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports, 2007, p. 43 ff.

²⁷ ICTY, Appeals Chamber, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment of 15 July 1999; ECtHR, *Loizidou v. Turkey*, Application No. 15318/89, Judgment of 18 December 1996. See, *ex multis*, KRESS, *cit. supra* note 10, p. 138.

3. THE RELEVANT CASE LAW IN DISPUTES CONCERNING THE PROTECTION OF INVESTMENTS

The attribution to States of conduct of public enterprises has been debated before international fora having different material jurisdictions, particularly in the fields of protection of investments and human rights.

In the field of protection of investments, one of the earliest contributions to the debate was given by the Iran-United States Claims Tribunal. In dealing with public enterprises the Tribunal has made reference to the general principle according to which acts of enterprises are not attributable to States unless a sufficiently strong principal-agent relationship has been proved. As reported by Caron, Iran and Iranian-appointed arbitrators have on many occasions asserted that the Tribunal should draw from the restrictive theory of sovereign immunity the conclusion that the commercial activities of private entities should never be attributed to States, regardless of whether they are State owned or controlled.²⁸ However, the rules concerning immunity limit the jurisdiction of municipal courts in order to ensure respect for the principle of equal sovereignty of States, but they do not affect the international responsibility of the State. For this reason, the Tribunal has always rebutted such an argument. Nevertheless, it has applied a broad interpretation of the separateness of the legal personality of enterprises in order to allow States a certain degree of flexibility in economic and commercial activities. This interpretation has resulted in a presumption of separateness, which is rebuttable when an enterprise carries out activities involving elements of public authority.²⁹

The attribution of conduct of public enterprises to States has been dealt with more extensively in investor versus State disputes before ICSID tribunals.³⁰ In these disputes, ICSID tribunals normally apply Articles 4, 5 and 8 DARSIIWA. In particular, the organic link established by Article 4 applies when a public enterprise is included within the organization of the State: in this case, a public

²⁸ CARON and CROOK, *The Iran-United States Claims Tribunal and the Process of International Claims Resolution*, Leiden, 2000.

²⁹ Similarly, US Courts normally apply the principle of separateness and permit the piercing of the corporate veil only in exceptional circumstances, when SOEs play the role of mere State agents or are employed for fraudulent purposes or to circumvent legislative policies. This is also called the “BANCES” principle, after the leading case *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 US 611 (1983). More recently, see *Bridas SAPIC v. Government of Turkmenistan*, 447 F.3d 411 (5th Cir. 2006), where the United States Court of Appeal for the Fifth Circuit held Turkmenistan directly liable for the full 495 million dollar award sum rendered against the SOE Turkmenneft, because of the misuse of the corporate form to commit fraud. See NELSON, “BRIDAS v. Government of Turkmenistan: US Courts Uphold an Arbitrator’s Power to hold a Foreign Sovereign Liable for the Acts of its State-Owned Enterprise”, *ASA Bulletin*, 2006, p. 3 ff.

³⁰ See DOLZER and SCHREUER, *Principles of International Investment Law*, Oxford, 2012; FEIT, “Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity”, *Berkeley Journal of International Law*, 2010, p. 142 ff.

enterprise is qualified as an agency of the State.³¹ In other cases, even if a public enterprise is classified as a separate legal entity, the arbitrators may determine the existence of a strong factual relationship with the State and qualify the enterprise as a “*de facto* organ” under Article 4(2) DARSIIWA. In *Alex Genin, Eastern Credit Limited, Inc and AS Baltoil v. Estonia*, for example, the arbitrators found the decisive element to be that the SOE in question was 100% owned by the State, which also exercised pervasive control over its management, finance and personnel and could prescribe binding instructions, even against the economic interests of the enterprise.³² In contrast, in *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, the tribunal concluded that the public enterprise at stake was not a *de facto* organ because the Government could only prescribe “directions of a general character”, which could not circumvent commitments assumed by the public enterprise towards other economic actors.³³ In short, the application of Article 4 DARSIIWA requires either the formal qualification of the public enterprise as a State organ (*de jure* organ) or the existence of a pervasive control over its decision-making process (*de facto* organ).

In other cases, ICSID tribunals have grounded attribution on criteria that seem similar to those embodied in Articles 5 and 8 DARSIIWA.

In *Maffezini v. Spain*,³⁴ for example, the arbitral tribunal had to establish whether the acts of the SOE called SODIGA could be attributed to Spain. In the decision of jurisdiction, the arbitrators noted that the BIT at stake did not contain any criteria dealing with the question of attribution to the State of conduct undertaken by such an entity and left the question aside to be decided at the merit stage.³⁵ Then, in the award on the merits, the tribunal solved the question without mentioning the criteria codified by DARSIIWA and relied entirely on a functional test, which looked at the commercial or governmental nature of SODIGA’s activities.³⁶ Applying this rationale, the tribunal noted that SODIGA was originally established in order to pursue an active policy of industrial promotion, especially in less developed regions of Spain, but since the 1980s had been undergoing a

³¹ *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award of 31 October 2012, para. 327.

³² *Alex Genin, Eastern Credit Limited, Inc and AS Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award of 25 June 2001, para. 405.

³³ *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award of 18 June 2010, para. 187.

³⁴ *Emilio Augustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction of 13 November 2000.

³⁵ *Emilio Augustin Maffezini v. Kingdom of Spain*, ICSID Case n. ARB/97/7, Award of 25 January 2000: “[t]he Convention contains no criteria dealing with the attribution to the State of acts or omissions undertaken by such State entities, subdivisions or agencies. The Argentine-Spanish BIT does not assist either in this determination. While it speaks of actions of State authorities (‘*autoridades de una Parte*’), it does not define the phrase” (para. 74).

³⁶ According to the Tribunal: “the Tribunal must again rely on the functional test, that is, it must establish whether specific acts or omissions are essentially commercial rather than governmental in nature or, conversely, whether their nature is essentially governmental rather than commercial. Commercial acts cannot be attributed to the Spanish State, while governmental acts should be so attributed” (*ibid.*, para. 52).

process of transformation from a State-oriented to a market-oriented entity. For this reason, while most of SODIGA's functions were originally governmental, at the time of the ICSID decision there was a combination of functions of a different nature; therefore, only those of a governmental nature could be attributed to Spain. In conclusion, the tribunal found that the only conduct for which Spain could be held responsible was the irregular transfer of funds from Maffezini's bank account to EAMSA (a company in which both Maffezini and SODIGA had investments) and ruled out any responsibility for the advice given by SODIGA on the feasibility and costs of the project, given that this was not an activity of a public nature.

In *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, by contrast, the Tribunal enhanced the criteria of DARSIIWA in order to ascertain whether the conduct of the public enterprise Cocobod, an enterprise trading in cocoa beans, was attributable to the respondent State. After concluding that Cocobod was not an organ either *de jure* or *de facto* of Ghana, the Tribunal considered whether attribution could be derived from Article 5 DARSIIWA. The Tribunal underlined that Cocobod actually was entrusted with governmental functions given that it had the mission of regulating the market of cocoa, including the power to manage the licences and the conditions under which they might be used, and to impose penalties.³⁷ However, it then considered that only the acts of Cocobod utilising State prerogatives could be attributed to Ghana under Article 5 DARSIIWA, while those acts which were performed in the fulfilment of commercial relations were not attributable, unless they were exercised "on the instructions of, or under the direction or control" of Ghana under the wording of Article 8 DARSIIWA.³⁸ Hence, the Tribunal applied the same approach as the *Maffezini* case, which specifically analyses the nature of each single act of the enterprise.

Differently from the previous cases, in *EDF v. Romania*, the Tribunal grounded its decision on Article 8 DARSIIWA. After concluding that neither Article 4 nor Article 5 DARSIIWA were relevant in this case, the Tribunal found that the two SOEs, AIBO and TAROM, acted under the direction and control of Romania through a system of mandates instructing the SOEs' management boards to accomplish specific goals, including the one that resulted in the commission of the alleged wrong.³⁹ According to the Tribunal, the system of mandates issued by the Ministry of Transportation was not limited to direction and control of AIBO and ASRO's shareholder but aimed at indicating the interests that the two entities had to pursue. Hence, they did not act in their own economic interests, instead they acted to accomplish objectives mandated by the State.⁴⁰

Criteria similar to those concerning attribution were employed to solve the preliminary question of jurisdiction in cases where a public enterprise brought

³⁷ *Gustav F W Hamester GmbH & Co KG*, *cit. supra* note 33, para. 190.

³⁸ *Ibid.*, para. 198.

³⁹ *EDF v. Romania*, ICSID Case No. ARB/05/13, Award of 8 October 2009, para. 210.

⁴⁰ *Ibid.*, paras. 212-213.

a claim.⁴¹ In fact, according to Article 25 ICSID Convention, tribunals have jurisdiction only in relation to legal disputes arising directly out of an investment between a State and a national of another State. While the Convention does not address the legal standing of public enterprises to bring claims before the arbitral tribunals, this issue has generally been discussed by referring to the so-called “Broches test”, devised by the first secretary-general of ICSID at the time of negotiation. According to this test “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”.⁴² In circumstances where the BIT at stake is silent on the matter, tribunals might question the standing of a public enterprise as a claimant, looking at the relationship with the State and the nature of the activities performed. The case in *Salini et al. v. Morocco* offers an interesting example. Here, the tribunal solved the question applying two criteria: the former structural, i.e. related to the structure of the company and, in particular, to its shareholders, and the latter, functional, i.e. related to the objectives pursued by the public enterprise.⁴³ On applying this twofold test, it concluded that the enterprise in question was 80% owned and controlled by the State and accomplished tasks – the construction and operation of communication routes – which responded to public needs of the State. Hence, in spite of its separate legal personality, the public enterprise was found to act on behalf of the State.

Although the question of jurisdiction cannot be entirely assimilated to that of attribution, the criteria employed for the determination of the (commercial or public) nature of the activities run by a public enterprise are comparable.

The case law briefly described in this section suggests that the notion of governmental authority may have acquired a scope wider than that resulting from the ILC commentary to Article 5 DARSIVA. Indeed, the definition of what is “governmental” is essentially policy driven and mostly depends on the existence of a law or a contract through which a State delegates a public enterprise to fulfil public goals and endows it with the necessary regulatory and operational powers to this end. Examples of activities entailing elements of governmental authority from the case law analysed above are: in *Maffezini v. Spain*, the promotion of industry in less developed regions of the country; in *Salini et al. v. Morocco*, the construction and operation of highways; and in *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, the regulation and marketing of a key national product (cocoa). In this case law, the notion of elements of governmental authority is not limited to traditional sovereign functions such as waging war or managing prisons, but is wide enough to encompass economic activities which are

⁴¹ MOHTASHAMI and EL-HOSSENY, “State-Owned Enterprises as Claimants before ICSID: Is the Broches Test on the Ebb?”, Bahrain Chamber for Dispute Resolution International Arbitration Review, 2016, p. 371 ff.

⁴² BROCHES, *Selected Essays, World Bank, ICSID, and other Subjects of Public and Private International Law*, Dordrecht, 1995.

⁴³ *Salini costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Award of 31 July 2001, para. 31.

considered strategic by the State as a means of fulfilling public needs and whose implementation may be delegated to public enterprises.

4. THE RELEVANT CASE LAW IN THE FIELD OF HUMAN RIGHTS LAW

For a long time the human rights implications of State intervention in the economy have not been addressed in the policy of the UN or other international organizations, nor have they attracted attention in the literature, except in sporadic cases and concerning specific topics.⁴⁴ In this regard, one might remember the UN Security Council's asset freeze against Gaddafi's Libya in 2011, a measure that froze the assets of various Libyan SOEs and SWFs in order to prevent their funding of the regime, which was accused of serious human rights violations,⁴⁵ or the reaction against the Chinese National Petroleum Company's involvement in the Sudanese genocide.⁴⁶

Only recently has the issue of human rights accountability for abuses committed by public enterprises featured on the international agenda of business and human rights (hereinafter B&HR), following the 2007 report by the UN Special Rapporteur Ruggie, who claimed that SOEs were worse human rights offenders than their fully private competitors and were reluctant to commit to Corporate Social Responsibility initiatives.⁴⁷ In its 2016 report, the UN Working Group on the issue of human rights and transnational corporations and other business enterprises (UNWG) also dealt with allegations of human rights abuses by public enterprises at the domestic and international level.⁴⁸ Furthermore, a study by the Business and Human Rights Resource Centre showed that among the 180 com-

⁴⁴ DE SCHUTTER, "The Responsibility of States", in CHESTERMAN and FISHER (eds.), *Private Security, Public Order. The Outsourcing of Public Services and Its Limits*, Oxford, 2009, p. 25 ff.; FEENEY, "The Human Rights Implications of Zambia's Privatization Programme", in ADDO (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, Den Haag, 1999. The case of private military industry has attracted special attention among authors. See, for example, SINGER, *Corporate Warriors: The Rise of the Privatized Military Industry*, New York, 2003.

⁴⁵ SACERDOTI and ACCONCI, "The Security Council's Asset Freeze Against Gaddafi's Libya and Its Implementation in Italy", *IYIL*, 2011 p. 61 ff.

⁴⁶ KELLY, "Ending Corporate Impunity for Genocide: the Case Against China's State-Owned Petroleum Company in Sudan", *Oregon Law Review*, 2011, p. 414 ff.

⁴⁷ Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, "Addendum: State responsibility to Regulate and Adjudicate Corporate Activities under the United Nations Core Human Rights Treaties: An Overview of Treaty Body Commentaries", UN doc A/HRC/4/35/Add.1 (2007), para. 80.

⁴⁸ *Ibid.*, para. 16. See also BACKER, "The Human Rights Obligations of State Owned Enterprises (SOEs): Emerging Conceptual Structures and Principles in National and International Law and Policy", *Vanderbilt Journal of Transnational Law*, 2017, p. 850 ff.; WEE, "Regulating the Human Rights Impact of State-owned Enterprises: Tendencies of Corporate Accountability and State Responsibility", 2008, available at: <<https://www.business-human-rights.org/sites/default/files/reports-and-materials/State-owned-enterprises-Oct-08.pdf>>.

panies contacted for information about their human rights commitments, SOEs were the least responsive.⁴⁹

Finally, the UN Guiding Principles on B&HR, which, in spite of having the nature of soft law, are the key international document in this field, have dedicated a chapter to public enterprises, entitled “State-Business Nexus”. According to Guiding Principle 4, States should take “additional steps” to protect against human rights abuses by public enterprises,⁵⁰ while Guiding Principle 5 specifies that States should exercise “adequate oversight” in order to respect their human rights obligations when they contract with or legislate for enterprises that provide services.⁵¹ Regrettably, these provisions do not focus on the question of attribution of human rights abuses. In his 2008 report, the Special Rapporteur Ruggie claimed that “the State itself may be held responsible under international law for the internationally wrongful acts of its SOEs if they can be considered State organs or as acting on their behalf [...]”.⁵² However, this possibility was not included either in the UN Guiding Principles, or in the recently released “Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises – Zero Draft”.⁵³ Nonetheless, in the process of implementation of the UN Guiding Principles through National Action Plans (the so-called NAPs), some States have reported their intention to adopt legislation setting special human rights standards, with Germany and Switzerland, for example, expressly mentioning that abuses by public enterprises could be attributed to them.⁵⁴

In sum, the UN Guiding Principles leave it up to the general rules on State responsibility to deal with the attribution of human rights abuses by public enterprises, including the question of where to trace the boundary between direct State responsibility and breach of due diligence.

In the field of human rights law, courts and monitoring bodies have developed their own jurisprudence. A common starting point of their reasoning is that

⁴⁹ Business and Human Rights Resource Centre, “Actions on Business and Human Rights: Where Are We Now?”, 2015, p. 4, available at: <<https://www.business-humanrights.org/en/action-on-business-human-rights-where-are-we-now-key-findings-from-our-action-platforms>>.

⁵⁰ UNGP 4 reads: “States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence”.

⁵¹ UNGP states: “States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights”.

⁵² RUGGIE, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/8/5 (2008), para. 32.

⁵³ Drafted by the open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, 2018, available at: <<https://www.business-humanrights.org/sites/default/files/documents/DraftLBI.pdf>>.

⁵⁴ Available at: <<https://globalnaps.org/issue/state-owned-enterprises-public-private-partnerships/>>.

the provisions of human rights treaties impose both negative and positive obligations on contracting States: while negative obligations require States to ensure that State agents refrain from violations, positive obligations require them to adopt adequate measures to prevent and repress human rights abuses perpetrated by third parties. In principle, the two-fold obligations under human rights provisions give rise to either direct responsibility, in cases of enterprises acting as State agents, or indirect responsibility, when States have omitted to adopt adequate preventive or repressive measures according to a due diligence standard. Although the two levels of State responsibility may entail diverse consequences as far as reparation is concerned,⁵⁵ in the case-law of the ECtHR, Inter-American Court of Human Rights (IACtHR) and Human Rights Committee (HRC) the boundaries between them are blurred.⁵⁶

Yet there are significant reasons for distinguishing between direct and indirect responsibility. First, only negative obligations bind States to effectively prevent violations in terms of “duty of result”, while positive obligations imply solely a duty of diligent conduct, in particular the duty to adopt adequate measures of prevention and repression. Consequently, in the latter case, States could be exonerated from any responsibility simply by proving their due diligence, even when serious violations have occurred. Second, only negative obligations have a potential extraterritorial projection, while positive obligations are generally limited by the territorial scope of the functions of States. Hence, if one assumes the point of view of victims of human rights violations, the definition of the proper level of responsibility in terms of attribution – rather than due diligence – is not an irrelevant question. Hence, founding responsibility on direct attribution encourages States to monitor activities of public enterprises and improves access to remedies for the victims.⁵⁷

However, distinguishing between different levels of State responsibility is not an easy task when abuses have been committed by public enterprises. In order to trace the boundary between direct attribution and responsibility for a breach of due diligence, the ECtHR has elaborated a complex attribution test. This test requires the overall consideration of different criteria, such as the legal status of the enterprise under domestic law, the nature of its activity and its structural and

⁵⁵ An example may be drawn from the judgement of the ICJ in *Application of the Convention on the prevention and Punishment of the Crime of Genocide*, *cit. supra* note 26, where the Court held that Serbia did not have a duty to pay compensation for its failure to prevent genocide (p. 239).

⁵⁶ As the European Court of Human Rights affirmed: “[t]he boundaries between the State’s positive and negative obligations [...] do not lend themselves to precise definition. The applicable principles are, none the less, similar [...]” (*Keegan v. Ireland*, Application No. 16969/90, Judgement of 26 May 1994, para. 49). AUGENSTEIN and DZIEDZIC, “State Obligations to Regulate and Adjudicate Corporate Activities under the European Convention on Human Rights”, EUI Working Papers (2017), available at: <<http://cadmus.eui.eu/handle/1814/48326>>.

⁵⁷ CHIRWA, “The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights”, *Melbourne Journal of International Law*, 2004, p. 1 ff.

operational independence. For example, in *Yershova v. Russia*, the ECtHR held that “the Court will have regard to such factors as the company’s legal status, the rights that such status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the authorities”.⁵⁸ In this case, the applicant complained that he was unable to enforce against a public enterprise a court’s award in his favour. Therefore, it was essential to establish whether the debtor was Russia or the public enterprise at stake, considered as a third party, in order to distinguish between direct obligations of the State entailing attribution and those entailing responsibility for breach of due diligence only. According to the ECtHR, if the State is the debtor, under Articles 6 of the European Convention and 1 of Protocol No. 1 thereto it will be obliged to comply with the award fully and in due time, whereas should the debtor be the company, as a third party, the State will only have due diligence obligations such as ensuring effective insolvency procedures.⁵⁹ In addressing this question, the ECtHR declared that the company’s independent legal status under domestic law was not a decisive factor. Thus, it grounded attribution in other factors, namely the existence of strong institutional and operational ties, such as public ownership and control over the company’s management, together with the public relevance of the activities. In the latter regard, the ECtHR noted that “as one of the main heating suppliers [...] the company provided a public service of vital importance to the city’s population”.⁶⁰ Hence, as in the case law concerning the protection of investments, structural and functional considerations prevail over the company’s domestic legal status.

In a different line of cases, the ECtHR had to judge whether a public enterprise was entitled, under Article 34 of the European Convention, to act as an applicant, in order to assess whether the Court had jurisdiction (*kompetenz-kompetenz* principle). Despite the fact that the ECtHR applies elements similar to those characteristic of attribution, this assessment does not concern attribution but the preliminary question of the admissibility of the claim. This may explain why in most cases the Court, following the logic of favouring jurisdiction, concludes that the applicant is an entity separate from the State, notwithstanding State ownership and control, institutional and operational dependence and the public nature of its activities.⁶¹

⁵⁸ *Yershova v. Russia*, Application No. 1387/04, Judgment of 8 April 2010, para. 55. On the contrary, in *Fadeyeva v. Russia*, Application No. 55723/00, Judgment of 9 June 2005, concerning a violation of Art. 8 of the European Convention by a formerly SOE then privatized by Russia, the Court concluded that “the Severstal steel plant was not owned, controlled, or operated by the State. Consequently, the Court considers that the Russian Federation cannot be said to have directly interfered with the applicant’s private life or home. At the same time, the Court points out that the State’s responsibility in environmental cases may arise from a failure to regulate private industry [...]”. Hence, the Court, excluding attribution, moved on to judge on indirect responsibility for breach of duty of diligence (paras. 89-92).

⁵⁹ *Yershova v. Russia*, *cit. supra* note 58, para. 53.

⁶⁰ *Ibid.*, para. 58.

⁶¹ See for example, *Radio France and Others v. France*, Application No. 53984/00, Decision of 30 March 2004; *Islamic Republic of Iran Shipping v. Turkey*, Application No.

While the jurisprudence of the ECtHR offers examples of detailed analysis of the question of attribution, in the case law of the IACtHR and of the HRC attribution is generally implied, without elaboration.

For example, in *Abrill Alosilla v. Peru*, the respondent State itself acknowledged its responsibility for violations committed by the SOE “SEDAPAL”, a private company owned by Peru and entrusted with water and sewer services for the city of Lima. Attribution was then implicitly confirmed in the judgment of the IACtHR.⁶² Analogously, in *Trabajadores v. Peru*, the IACtHR found Peru responsible for human rights abuses committed by Petroperú, which is a majority State-owned company carrying out hydrocarbon activities with economic, financial and administrative autonomy, but in accordance with the objectives and strategies approved by the Ministry of Energy and Mines.⁶³

A similar approach may be found in *Leo Hertzberg et al. v. Finland*. In this case, the HRC declared Finland responsible for violations of freedom of expression committed by the Finnish Broadcasting Company (FBC), considering the State’s dominant stake (90 per cent) and the public mission of the company.⁶⁴

On the proper qualification of activities serving public needs or tied to the provision of utility services, such as the supply of electricity, water, health services or education, further insights may be drawn from the following decisions of the IACtHR and the ECtHR.

In the case *Ximenes-Lopes v. Brazil*, concerning violations of private health providers, the IACtHR declared that “the acts performed by any entity, either public or private, which is empowered to act in a State capacity, may be deemed to be acts for which the State is directly liable, as happens when services are rendered on behalf of the State”.⁶⁵ It is interesting that in this case the IACtHR distinguished private institutions that render services for the public system, which are delegated through a public contract or agreement and funded by the State, from private institutions providing services fully paid by the patients outside the public system. In the former case, States are directly bound to ensure quality and human rights standards; therefore, private providers bear the same responsibility as State agents.⁶⁶ As a consequence, any failure to respect human rights standards is attributable to the State itself.⁶⁷ In the latter case, by contrast, when enterprises

40998/98, Decision of 13 December 2007, para. 79; *Transpetrol v. Slovakia*, Application No. 28502/08, Decision of 15 November 2011; and *Luganskvugillya v. Ukraine*, Application No. 23938/05, Decision of 27 January 2009, para. 58.

⁶² *Abrill Alosilla v. Peru*, Judgement of 4 March 2011. A similar assumption may be found in *Sarayaku v. Ecuador*, Judgment of 27 June 2012, with reference to the SOE Petroleum. See SCHÖNSTEINER, “Attribution of State Responsibility for Actions or Omissions of State-Owned Enterprises in Human Rights Matters”, *University of Pennsylvania Journal of International Law*, 2018, p. 895 ff.

⁶³ *Trabajadores Cesados de Petroperú y otros v. Perú*, Judgment of 23 November 2017. More information on this SOE is available at: <<https://www.petroperu.com.pe/english/about-us/legal-framework/>>.

⁶⁴ *Leo Hertzberg et al v Finland*, Decision of 2 April 1982, para. 9.1.

⁶⁵ *Ximenes-Lopes v. Brazil*, Judgment of 4 July 2006, para. 87.

⁶⁶ *Ibid.*, para. 93.

⁶⁷ *Ibid.*, paras. 96-97.

act as supplementary agents outside the public system, States are bound to adopt adequate legislative and supervisory measures to ensure that they respect a minimum standard of quality and rights and, in this regard, they could be liable for a breach of due diligence.⁶⁸

This jurisprudence suggests that the provision of services that are essential for the proper functioning of the State and its society, and that are incorporated within the public system, may be qualified as including “elements of governmental authority”. Thus, in this case, private suppliers are equivalent to State agents as far as the attribution of international responsibility is concerned.

A similar conclusion may be drawn from the case law of the ECtHR. In the *Islamic Republic of Iran Shipping v. Turkey* case, for example, the ECtHR had to interpret the notion of “governmental organisations” in order to establish whether the applicant enterprise was legally distinct from the State and therefore entitled to bring a claim under Article 34 of the European Convention. In this regard, it considered that the relevant notion included legal entities, regardless of their private or public legal personality, which participated in the exercise of governmental powers or ran a public service under government control.⁶⁹ It then concluded that the applicant was an entity independent of the State because it neither participated in the exercise of governmental powers nor had a public service role or a monopoly in a competitive sector. Despite not being a judgment on attribution, this conclusion nonetheless places services of public relevance on an equal footing with traditional governmental functions.

To sum up, attribution is generally assumed at least in the case of majority enterprises that are engaged in activities which, despite not entailing the exercise of traditional “governmental functions” in a strict sense, are nonetheless of public interest, such as the provision of public services (e.g. the supply of heating or water) or other activities strategic for the national economy (e.g. the management of hydrocarbon activities).

5. CONCLUDING REMARKS

Based on an analysis of the application of the relevant provisions of DARSIVA in the fields of protection of investments and human rights, this article has discussed the criteria employed for attributing the internationally wrongful conduct of public enterprises to States. This is a topic that the ample literature on attribution has left aside because the issues involved have still to be settled in international practice.⁷⁰ Yet, as this contribution indicates, although Articles 4, 5 and 8 DARSIVA are not always mentioned in the case law considered above,

⁶⁸ *Ximenes-Lopes v. Brazil*, *cit. supra* note 65, para. 85. See also European Court of Human Rights, *Storck v. Germany*, Application No. 61603/00, Judgment of 16 June 2005, p. 103.

⁶⁹ *Islamic Republic of Iran Shipping v. Turkey*, Application No. 40998/98, Judgment of 13 December 2007, para. 80.

⁷⁰ CONDORELLI, “Imputation à l’Etat d’un fait internationalement illicite: solutions classiques et nouvelles tendances”, RCADI, 1984, p. 158 ff.; DIPLA, *La responsabilité de l’état*

their underlying criteria normally apply, albeit with some specificity in their interpretation. In particular, in all the decisions analysed, there is agreement that the formal qualification of a company is not a decisive factor. Indeed, they show that the attribution may derive from the existence of a factual organic link, according to Article 4(2) DARSİWA, when a public enterprise is fully dependent on a State. This may happen, for example, in the case of 100% State ownership and pervasive operational control over the decision-making process of the enterprise, to the point where the enterprise must obey State instructions, even against its own economic interests.

In cases where such conditions are not satisfied, attribution might still be based on a functional test, which gives relevance to the public character of the activities carried out by an enterprise. While the key notion used in this functional test basically reflects that of “elements of governmental authority” embodied in Article 5 DARSİWA, the analysis has showed that in the surveyed practice of both fields, the notion has been interpreted in a way that encompasses not only the traditional sovereign functions of waging war or managing prisons. In particular, it has also embraced a wider set of economic activities, which may be considered strategic by the State as a means of fulfilling public needs, including the provision of services of general interest, such as the supply of heating or water, or other activities key for the national economy, such as the management of hydrocarbon activities. This construction has the merit of reducing the risk that States escape attribution by outsourcing goods, services and tasks of general interest. Indeed, it diminishes the impact of the paradox according to which the conditions for establishing attribution of conduct by enterprises are not consistent with the conditions for establishing attribution of conduct by State organs. As highlighted in Section 2 of this article, such paradox stems from the rules of DARSİWA, which provide that while the conduct of a State organ is attributable to the State regardless of its governmental or commercial character, the conduct of enterprises is only attributable when they exercise “elements of governmental authority”.

In these modern times of elusive forms of State intervention in the international economy, the wide interpretation of the notion of “governmental authority” appropriately expands the responsibility of States and the role of international courts and monitoring bodies as watchdogs of international rule of law.