

**STATE ATTRIBUTION: WHETHER STATE OWNERSHIP OF A PRIVATE
ENTITY IS IMPORTANT IN DETERMINING IF THE ACTIONS OF THAT
ENTITY ARE ATTRIBUTABLE TO THE STATE**

Alejandro Solano Meardi^{1*}

I. Introduction

This paper aims to investigate to what extent arbitral tribunals in investment disputes consider state ownership of business entities as a factor when deciding whether the actions of the state-owned business entity (“SOE”) in question are attributable to the State. This paper will address this, in the following order: It (i) gives a background on the concept of SOE’s, the notion of attribution, and explains how tribunals consider attribution in investment treaty arbitration cases; (ii) with the aid of investment arbitration case law, presents tests that are commonly used by arbitrators when conducting their attribution analysis, with a focus on how state ownership of the entity in question is analyzed under each test; (iii) notes important limitations; and (iv) demonstrates how state ownership, although not a decisive factor, remains significantly relevant to establish attribution in the context of bilateral investment treaty (“BIT”) arbitration.

This paper aims to provide the reader with a general understanding of the doctrinal basis of attribution in the investment arbitration arena and showcase how tribunals may weigh over the state ownership of the business entities under scrutiny when undergoing their attribution analysis.

II. Background

^{1*} Alejandro Solano Meardi is an alumnus of American University Washington College of Law, Class of 2017. He is a member of the New York State bar and specializes in international litigation and arbitration.

In many countries, business entities, instead of the central government, manage domestic industries deemed important for that particular country. In some cases, these individual entities are owned either wholly or partially by the state, referred to as state-owned entities (“SOE”), and deal with foreign investors.² They are separate legal entities with the dual purpose of (i) specializing in the management of these important domestic industries, and (ii) dealing with foreign investors who are interested in investing domestically.³

When actions of an SOE allegedly harm the rights of a foreign investor under an applicable international treaty, the foreign investor may try to resolve the dispute through investment arbitration. In this scenario, attribution becomes an incredibly important issue because it establishes a nexus between the actions of a private entity and the host state. Here, if the state violates its international obligations through the actions or inactions of the SOE in question, it can be held liable for the resulting grievances suffered by the foreign investor.

In the attribution analysis, tribunals generally consider customary international law on state responsibility, specifically Articles 4, 5, and 8 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts by the International Law Commission (“ILC”).⁴ Prior to analyzing attribution, a general understanding of these provisions as a whole is paramount, as they embody the doctrinal essence with which arbitral tribunals predominantly conduct the attribution analysis.

In general terms, these provisions enumerate obligations that a state has towards individuals and legal entities. While the ILC articles are not binding, they are internationally recognized as a codification of principles of customary international law on state

² See RUDOLF DOLZER & CHRISTOPH SCHREUER, *Principles of International Investment Law* 198 (2008).

³ See *id.*

⁴ See *id.* at 200.

attribution.⁵ Moreover, tribunals commonly allude to ILC Articles 4, 5, and 8 in their attribution analysis one way or another, and for uniformity purposes are herein referenced to as the ‘Structure Test,’ ‘Function Test,’ and ‘Control Test,’ respectively. Much like in *CMS v. Argentina*⁶ and *SGS v. Philippines*⁷, arbitral tribunals may analyze these tests separately, and in the end, attribution can be established with a favorable finding on any of these articles.⁸ On rare occasions, tribunals also consider the doctrine of piercing the corporate veil to establish attribution. These four considerations and their limitations will be further explained in the remainder of this paper.

In investment treaty disputes, tribunals tend to commence their attribution analysis by verifying whether the state owns the private entity in question. The logical reason for this is explored in *Maffezini v. Spain*, where the tribunal stated that attribution is more easily established when state ownership is present.⁹ It is important to note that when SOEs are involved, attribution claims will be argued in both the jurisdictional and merits stages of the case. At the jurisdictional stage, the investor only needs to establish a *prima facie* case that the acts of the SOE are attributable to the state.¹⁰ This *prima facie* test is widely used by tribunals in ICSID cases like *CMS v. Argentina*, *SGS v. Philippines*, and *Salini v. Jordan*, and non-ICSID cases like *United Parcel Service v. Canada*.¹¹ Later on in the proceeding, state ownership is considered on the merits when the tribunal decides whether the acts or omissions of the SOE are effectively attributable to the state. This paper will

⁵ See *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, ¶ 69 (Oct. 12, 2005).

⁶ *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8.

⁷ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6.

⁸ See Michael Feit, *Responsibility of the State Under International Law for the Breach of Contract Committed by A State-Owned Entity*, 28 BERKELEY J. INT'L L. 142, 148 (2010).

⁹ See *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, ¶ 77 (25 January 2000).

¹⁰ Feit, *supra* note 7, at 145.

¹¹ See *id.*

now analyze the different ‘tests’ arbitrators consider when conducting their attribution analysis, more specifically how each of these apply to SOE scenarios.

III. Structural Analysis

Tribunals may evaluate the Structure Test first, as was the case in *Maffezini*. This test seeks to find whether a state can be found liable through its organs.¹² Pursuant to principles set forth in Article 4 of the ILC, here tribunals evaluate whether the structure of the entity in question falls under the umbrella of a state, as a state organ.¹³ On this point, I found secondary materials differ on whether domestic law of the country in question is applicable to find the entity as a state organ.¹⁴ The bottom line is that if an entity is considered a state organ, the actions of the SOE may be attributable to the state.¹⁵ As a side note, the reach of this analysis also extends to acts of entities relating to, or owned by, provincial and local levels of government.¹⁶

The circumstances in *Maffezini* provide a good example of Structural Test analysis. The case involved a dispute between an Argentinian foreign investor, Maffezini, and a public Spanish entity, SODIGA, over the failure of a joint venture called EAMSA.¹⁷ The tribunal classified SODIGA as a state organ, deemed that its actions fell inside the scheme of public administration, hence found the state liable for SODIGA’s errors.¹⁸ In the jurisdictional decision, the tribunal importantly added that whenever a state directly or indirectly owns a private entity, there is a rebuttable presumption that the entity is a state organ.¹⁹ As a result, state ownership of the business entity in question will likely

¹² *Maffezini*, *supra* note 8.

¹³ See DOLZER & SCHREUR, *supra* note 1, at 195.

¹⁴ See *id.*; but see Feit, *supra* note 7, at 150.

¹⁵ See DOLZER & SCHREUR, *supra* note 1, at 196.

¹⁶ See *id.* at 197.

¹⁷ *Maffezini*, *supra* note 8.

¹⁸ *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award, ¶48 (Nov. 13, 2000).

¹⁹ *Maffezini*, *supra* note 8.

suffice for the arbitral tribunal to find for attribution under the Structure Test.

The holding in *Maffezini* was corroborated in August 2016 in the non-ICSID case *Flemingo DutyFree Shop v. Poland*.²⁰ The case involved a dispute over the rescission of a lease by Chopin airport in Poland, which was fully owned by the Polish government. The tribunal found that the airport's action was attributable to the state.²¹ It reasoned that the state, through its full ownership, interacted with the airport in a way that invariably made it a *de facto* state organ.²² The tribunal cited interactions such as the government's modernization of the airport, and the Secretary of State's public statements on behalf of the airport to the Ministry of Transport.²³

IV. Control Analysis

Tribunals also consider the Control Test to enrich their attribution analysis. Under ILC Article 8, the tribunal evaluates whether the entity in question acted pursuant to the instructions of, or under the directions of, the host state.²⁴ Here, when presented with an attribution claim involving an SOE, an arbitral tribunal effectively considers whether, directly or indirectly, state ownership enabled the state to exert control over the actions or omissions of the SOE that brought about the claim. If such control is present, the arbitral tribunal may find for attribution under the Control Test.

The occurrences in *EDF v. Romania* provide a good example of how state ownership may be relevant under the Control Test analysis. In this case, the claimant argued that the termination of its agreement with AIBO (an SOE), TAROM and AIBO's organization, regarding a lease for a commercial space at the

²⁰ *Flemingo DutyFree Shop Case* (Ind. v. Pol.), Award, ¶ 426 (Perm. Ct. Arb. 2016).

²¹ *See id.* at ¶ 448.

²² *See id.* at ¶¶ 434-35.

²³ *See id.*

²⁴ DOLZER & SCHREUR, *supra* note 1, at 222.

Otopeni airport in Romania, was attributable to the state. This finding was a result of, *inter alia*, the Control Test embodied in ILC Article 8.²⁵ Although the state submitted that it did not exercise control over AIBO beyond its role as a shareholder,²⁶ the tribunal found that the Ministry of Transportation had acted within the meaning of ILC Article 8. It reasoned that the state had issued instructions to AIBO and TAROM, involving the conduct with which they should exercise their shareholder rights “in order to achieve a particular result,” which was to “bring[] to an end, or not extend[], the contractual arrangements with [EDF].”²⁷ This was the action that constituted the BIT violation. In the end, the tribunal concluded that the aforementioned conduct, which was conducted through state ownership of AIBO, fell within the meaning of ILC Article 8, hence attributable to Romania.²⁸

Arbitral tribunals have used variations of the Control Test, where state ownership of the entity in question remains an important factor in establishing attribution. In *Jan de Nul NV v. Egypt*, the investor alleged that the SOE misrepresented terms involving the scope and nature of an agreement concerning the expansion of the Suez Canal.²⁹ In its claim, the investor sought to establish that the SOE’s actions were attributable to the state.³⁰ The tribunal used the two-fold “Effective Control” test,³¹ which in order to be met (i) the state must have a general control over the entity, and (ii) the state must specifically have control over the act in question. In this case, although the facts did not lead to a finding of attribution,³² the analysis the tribunal discussed remains important for our purposes. Considering this framework, state ownership could be a relevant factor under the effective control

²⁵ *EDF v. Romania*, ICSID Case No. ARB/05/13, Award, ¶¶ 102, 185 (Oct. 8, 2009).

²⁶ *See id.* at ¶ 171.

²⁷ *See id.* at ¶¶ 201, 209.

²⁸ *See id.* at ¶ 213.

²⁹ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, ¶ 112 (Oct. 24, 2008).

³⁰ *See id.* at ¶ 113.

³¹ *See id.* at ¶ 173.

³² *See id.* at ¶ 174.

analysis, whereby states, through their ownership interest in the SOE, exert general control (first part of analysis) and specific control (second part of analysis) over the SOE's actions, enabling tribunals to establish attribution.

V. Piercing the Corporate Veil

Piercing the corporate veil is a special form of attribution, where the liability resulting from the breach of a contractual obligation, instead of the act that constitutes the breach of international law, is attributed to the state. Piercing the corporate veil is the mechanism through which tribunals remedy circumstances recognized, for example, on ILC Article 8's commentary: "[W]here the 'corporate veil' is a mere device or a vehicle for fraud or evasion."³³ Hence, if state ownership over an SOE is used as a vehicle to commit fraud or evasion by the state, an arbitral tribunal could justifiably pierce the veil and make the SOE's actions in question attributable to the state.

In this vein, a case that acknowledged the applicability of veil piercing in the investment arbitration arena was *Deutsche Bank AG v. Sri Lanka*. That case involved a dispute against CPC, a SOE fully owned by Sri Lanka, for defaulting in payments due under a hedging agreement.³⁴ Therein, Deutsche Bank successfully argued that Sri Lanka used its ownership in the company to (i) exercise significant control over negotiations; (ii) execute the hedging agreement; and (iii) steer CPC's refusal to pay the amounts due to claimant.³⁵ There, although the arbitral tribunal did not pierce the corporate veil, it recognized attribution could happen if "the [SOE] has no effective independent existence or where the conduct of the State justifies lifting the corporate veil."³⁶

VI. Limitations

³³ Commentary of ILC Art. 8, ¶ 6.

³⁴ *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, ¶¶ 12-3, 43-4, (Oct. 31, 2012).

³⁵ *Seed.*, at ¶¶ 366, 405(c).

³⁶ *Id.*, at ¶ 405(e).

State ownership may not be dispositive in all attribution analyses. The commentary on ILC Article 8 notes, “Since [SOEs], although owned and in that sense subject to the control of the [s]tate, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable unless they are exercising elements of governmental authority within the meaning of [ILC] article 5.”³⁷

On this note, a clear example of applicable limitations lies when arbitral tribunals consider ILC Article 5, under the ‘Function Test.’ Instead of focusing on ownership, this test focuses on whether the activity that gave rise to the claim is an activity generally reserved to the host state. It consists of two elements: (i) whether the activity by the SOE is governmental in nature; and (ii) whether such activity gave rise to the dispute. If both are met, the test favors a finding for attribution. It is important to note that in the Function Test, unlike the other two tests mentioned under the ILC Articles, the focus is on the nature of the action and not the actor.

Another limitation worth noting concerns the Structure Test. Although state ownership is important to establish attribution under the Structure Test, it is still possible for a state-owned entity to not be considered an organ of the state. *Limited Liability Company AMTO v. Ukraine* is a good illustration of this limitation. In this case, the claimant, AMTO, was an investment company interested in entering the nuclear energy industry in Ukraine.³⁸ AMTO bought a considerable number of shares of EYUM-10, a company that had several maintenance contracts with the state-owned Energoatom, the National Nuclear Power Generating Company of Ukraine.³⁹ Upon bankruptcy, Energoatom defaulted in its contracts with EYUM-10. However, due to Ukrainian bankruptcy law, AMTO, as partial owner of EYUM-10, was unable to enforce several court orders against Energoatom.⁴⁰

³⁷ Commentary of ILC, *supra* note 8.

³⁸ See *Limited Liability Company Amto and Ukraine*, AISCC Case No. ARB/080/2005, Decision, ¶ 19 (Aug. 12, 2006).

³⁹ See *id.*

⁴⁰ See *id.* at ¶ 85.

Notwithstanding state ownership of Energoatom, the arbitral tribunal decided that under the case at hand Energoatom was not a state organ of Ukraine.⁴¹ Although the arbitral tribunal in *AMTO* did not go into detail as to why they did not find Energoatom to be a state organ of Ukraine, the case exemplifies an important limitation on the Structure Test. Namely, that state ownership of a business entity does not guarantee that it will be deemed a state organ and pass the Structure Test.

Moreover, there are times when a SOE may violate a right of a foreign investor without breaching international law protections. As James Crawford noted in the ILC commentaries, holding all or a significant number of shares in a corporation does not amount to controlling every act of that entity to create liability for their every action.⁴² This was the case in *Impregilo v. Pakistan*, where the tribunal held that it lacked jurisdiction to rule over the breach of a municipal contract by a state-owned entity because the issue only concerned a breach of a municipal contract and not any rights enshrined in the relevant Italy-Pakistan investment treaty.⁴³

VII. Conclusions

While acknowledging that there is no binding precedent in investment treaty caselaw, tribunal decisions in many investment arbitrations demonstrate that state ownership, although not decisive, can be a very significant consideration for arbitral tribunals to resolve the issue of attribution.

Furthermore, although there are considerations, like the Function Test, where state ownership is not evaluated, it is important to identify that, as implied by the tribunal in *Maffezini*, each of the aforementioned tests are elements to be considered

⁴¹ See *id.* at ¶ 101.

⁴² See James Crawford, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2 YEARBOOK OF THE INT'L L. COMM'N, 43, ¶ 3 (2008).

⁴³ See *Impregilo v. Pakistan*, ICSID CASE No. ARB/03/3, Decision on Jurisdiction, ¶ 216. (Apr. 22, 2005).

separately. Furthermore, they do not necessarily need to be cumulative for the tribunal to conclude one way or another on the issue of attribution.⁴⁴

Lastly, as the wide range of investment treaty cases in this paper show, whenever the acts of a state-owned entity are in question, state ownership will surely play an important role, in one way or another, in the tribunal's attribution analysis.

⁴⁴ *Maffezini*, *supra* note 17, at ¶ 50, *see also Maffezini*, *supra* note 8, at ¶ 81; *see also Feit*, *supra* note 7, at 148.

