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STATE-OWNED ENTERPRISES AS INVESTORS IN THE ISDS MECHANISM

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Abstract

State-owned enterprises (SOEs) now appear regularly as claimants in investor–State dispute settlement (ISDS), from Československá obchodní banka v Slovak Republic to Beijing Urban Construction Group v Yemen and claims brought by European state-owned utilities. The regime nonetheless rests on a different premise: the ICSID Convention excludes disputes between States, and most international investment agreements (IIAs) say nothing about whether government-controlled entities qualify as 'investors'. This article examines how a mechanism designed to depoliticise disputes between private capital and host States accommodates claimants that are, to varying degrees, extensions of another State.

The article maps six problem clusters and argues that three of them are distorted by a common analytical error. Tribunals and commentators increasingly resolve the standing of SOE claimants by borrowing the rules on attribution of conduct in the International Law Commission's Articles on State Responsibility, while courts at the enforcement stage apply domestic alter-ego doctrines to the same entities. Standing, attribution and enforcement-stage separateness are, however, governed by different legal sources and answer different questions. Treating them as a single inquiry into 'State control' produces inconsistent outcomes and obscures where the genuine policy choices lie.

The article contends that the functional, transaction-specific reading of the Broches test adopted in recent practice is defensible, but that it should be grounded in the text and object of Article 25 of the ICSID Convention and the

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applicable treaty definition rather than in secondary rules of State responsibility. Attribution analysis belongs to the merits, and enforcement-stage separateness to the law of the forum. Legitimacy concerns about 'State capitalism' are real but are better addressed through treaty drafting than through jurisdictional exclusion. Recent models — the CPTPP and the EU–China Comprehensive Agreement on Investment — and the limited agenda of UNCITRAL Working Group III are assessed against that conclusion. The method is doctrinal, combining textual and drafting-history analysis of the ICSID Convention, a study of published decisions involving SOE claimants, and comparative analysis of IIA definitions.

Keywords: state-owned enterprises; investor–State dispute settlement; ICSID Convention Article 25; Broches test; attribution; State responsibility; standing; State capitalism

I. INTRODUCTION

The ICSID Convention was designed for disputes between a Contracting State and 'a national of another Contracting State'.[1] Its preamble speaks of the role of private international investment in economic development, and the Executive Directors presented it as a means of 'stimulating a larger flow of private international capital' to the countries that sought it.[2] The treaty network built around the Convention rested on the same picture: a private firm, exposed to the sovereign power of its host, given a neutral forum so that its home State need not take up its cause.

That picture no longer fits the population of claimants. The first ICSID tribunal to confront the issue, in Československá obchodní banka (ČSOB) v Slovak Republic, heard a claim by a bank in which the Czech Republic held, directly or

[1]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) 575 UNTS 159 (ICSID Convention) art 25(1).

[2]ibid preamble; Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965) para 9.

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indirectly, more than 65 per cent of the shares.[3] In Beijing Urban Construction Group (BUCG) v Yemen, a wholly state-owned Chinese contractor was admitted as a claimant over Yemen's objection that it was an agent of the Chinese State.[4] And in Vattenfall v Germany, a utility wholly owned by Sweden challenged under the Energy Charter Treaty the nuclear phase-out that Germany legislated after the Fukushima accident.[5] Behind these cases lies a structural change in outward investment, in which state-owned and state-influenced enterprises have become leading actors. Treaty texts have lagged behind: an OECD survey of 1,813 IIAs found that 84 per cent did not mention any category of government-controlled investor in their definition of 'investor'.[6]

Tribunals, counsel and scholars have answered the resulting questions largely case by case. May an entity owned by a State be a 'national of another Contracting State'? If so, on what test — and does that test look to the entity, to the investment, or to the transaction in dispute? When a home State sets an SOE's strategy, does the SOE's claim become an inter-State claim of the kind the Convention excludes? And what follows when the very control that an SOE claimant disowns at the jurisdictional stage is later invoked against its assets?

The literature divides broadly in two. One position regards SOE standing as largely unproblematic: most treaties are open to SOEs, and the customary rules on attribution supply a workable means of separating commercial from governmental activity.[7] Du, writing on Chinese SOEs, considers it highly unlikely that such an entity would be denied standing and argues that denial would in any

[3] *Československá obchodní banka, as v Slovak Republic*, ICSID Case No ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (24 May 1999) para 18.
[4] *Beijing Urban Construction Group Co Ltd v Republic of Yemen*, ICSID Case No ARB/14/30, Decision on Jurisdiction (31 May 2017) paras 41–47.
[5] *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12, Decision on the Achmea Issue (31 August 2018).
[6] Yuri Shima, 'The Policy Landscape for International Investment by Government-controlled Investors: A Fact Finding Survey' (2015) OECD Working Papers on International Investment 2015/01, 5.
[7] Mark Feldman, 'State-Owned Enterprises as Claimants in International Investment Arbitration' (2016) 31 ICSID Review 24 [CITATION TO BE VERIFIED: pinpoint].

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event weaken the rule of law in international investment.[8] The other position, associated with Poulsen, treats sovereign investment as a challenge to the regime's foundations, exposing the legal fictions on which the separation of investor and home State depends.[9]

This article takes a third route. It asks whether the doctrinal tools now used to assess SOE claimants are fit for the questions put to them, and answers that they are not, for one specific reason. Three distinct questions — whether an SOE has standing as an investor, whether conduct is attributable to a State under the law of State responsibility, and whether an SOE's assets are separate from the State's for purposes of enforcement — are increasingly folded into a single inquiry into 'State control'. Each belongs to a different body of law: the jurisdictional provisions of the ICSID Convention and the applicable treaty; the secondary rules of State responsibility; and the law of the enforcement forum. Folding them together yields results that do not cohere across the life of a dispute, and it conceals policy choices that belong to States rather than to tribunals.

Part II sets out the method and scope of the study. Part III works through six problem clusters: definitional indeterminacy and the Broches test; attribution; nationality and control; legitimacy and politicisation; enforcement and immunity; and the reform debate. Part IV draws these strands together, argues for separating the standing, attribution and enforcement inquiries, and identifies the corresponding drafting options. Part V concludes.

II. METHOD AND SCOPE

A. Method

The study is doctrinal. Treaty provisions are interpreted according to the general rule and the supplementary means of interpretation codified in Articles 31 and 32

[8]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 [CITATION TO BE VERIFIED: pinpoint].

[9]Lauge N Skovgaard Poulsen, 'States as Foreign Investors: Diplomatic Disputes and Legal Fictions' (2016) 31 ICSID Review 12 [CITATION TO BE VERIFIED: pinpoint].

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of the Vienna Convention on the Law of Treaties.[10] For the ICSID Convention, that means reading Article 25 in light of its text, context and object, with the drafting history and the Report of the Executive Directors as supplementary means. For IIAs, it means close reading of the definitions of 'investor', 'enterprise' and, where they exist, 'state enterprise' or 'state-owned enterprise'. Awards and decisions are treated as evidence of how the rules are applied, not as binding precedent. Investment tribunals are not bound by earlier decisions, and the weight of a decision depends on the quality of its reasoning and on whether later tribunals have followed it. The analysis therefore distinguishes holdings that address SOE standing directly from observations made in passing.

The comparative element is limited. Treaty techniques for defining SOEs and disciplining their conduct — chiefly in the CPTPP and the EU–China CAI — are compared in order to identify the options open to States. The article does not attempt an empirical study of SOE claims; its few quantitative statements rest on published surveys.[11]

B. Analytical Framework

The argument depends on keeping three questions apart, and Part III uses that separation as its yardstick. The first is standing: whether a claimant is a protected 'national' or 'investor' for the dispute in hand. It is decided at the jurisdictional phase, under Article 25 of the ICSID Convention and the treaty's definition of 'investor'. The second is attribution: whether particular conduct is an act of the State, so as to engage its responsibility for breach of a primary obligation. That is a merits question, governed by the secondary rules in Articles 4, 5 and 8 of the ILC Articles on State Responsibility. The third is separateness: whether a creditor of the State may reach an entity's assets, or the reverse. It arises at recognition

[10] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts 31–32.
[11] Shima (n 6).

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and enforcement and is governed by the law of the forum, within the space that Articles 54 and 55 of the ICSID Convention leave to it.

The distinction is analytical, not terminological. Standing concerns a claimant's capacity to invoke a treaty; attribution, the respondent's responsibility for conduct; separateness, the allocation of assets and liabilities in domestic proceedings. A single entity may properly receive a different answer to each.

C. Scope

The study concerns SOEs — legally distinct entities owned or controlled by a State and principally engaged in commercial activity — acting as claimants. Sovereign wealth funds are mentioned only where the same doctrinal issues arise. SOEs appear as respondents, or as entities whose conduct is said to be attributable to a host State, only so far as respondent-side attribution doctrine has been borrowed in claimant-side standing analysis.

The primary materials are the ICSID Convention and its preparatory record, the ILC Articles and their commentaries, the CPTPP, the published text of the EU–China CAI, and the documents of UNCITRAL Working Group III up to its fifty-fifth session in October 2026. The case law comprises published decisions in which SOE standing, or the relationship between an SOE and its State, was in issue — centrally ČSOB, Maffezini, BUCG and Vattenfall — together with the United States enforcement decisions in the Crystallex litigation. The ICSID Secretariat's 2026 background paper on contract-based arbitration serves as evidence of the institution's own reading of current practice.[12] Scholarship is drawn principally from ICSID Review, the Chinese Journal of International Law and other peer-reviewed law journals.[13]

[12]ICSID Secretariat, *Contract-Based ICSID Arbitration: Background Paper* (ICSID, June 2026) para 33.

[13]See eg Mark McLaughlin, 'Defining a State-Owned Enterprise in International Investment Agreements' (2019) 34 ICSID Review 595; Dini Sejko, 'Sovereign Investors as ICSID Claimants: Lessons from the Drafting Documents and the Case Law' (2023) 56 Vanderbilt Journal of Transnational Law 855; Shixue Hu, 'State Enterprises in International Investment Disputes: Focus on Actor or Action?' (2020) 51 Georgetown Journal of International Law 323.

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III. ANALYSIS OF THE PROBLEMATIC AREAS

A. Definitional Indeterminacy and the Limits of the Broches Test

Article 25(1) of the ICSID Convention extends jurisdiction to disputes between a Contracting State and 'a national of another Contracting State', and Article 25(2)(b) defines a juridical national by nationality, not by ownership. The Convention is silent on juridical persons owned by a State, and most IIAs are equally silent. Where a treaty defines 'investor' to include any enterprise constituted under the law of a Contracting Party, an SOE satisfies the text on its face. The real question is therefore not whether the words admit SOEs but whether an implied limit follows from the Convention's exclusion of inter-State disputes.

The prevailing answer comes from Aron Broches, the Convention's principal architect. In his 1972 Hague Academy lectures he proposed that 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.[14] The test has two limbs, agency and governmental function, and it casts exclusion as the exception.

ČSOB applied the test with the agreement of both parties.[15] The Slovak Republic relied on the Czech State's majority shareholding to argue that the bank was, in substance, a State organ. The tribunal held that ownership or control did not by itself disqualify the claimant,[16] and that 'the focus must be on the nature of these activities and not their purpose'; the bank's activities were commercial even though they served State policy.[17] Two propositions have since been widely followed: ownership and control alone do not defeat standing, and the inquiry concerns the nature rather than the purpose of the activity.

[14]Aron Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1972) 136 Recueil des Cours 331, 354–55 [CITATION TO BE VERIFIED: volume number; *ČSOB* (n 3) fn 4 cites vol 135].
[15]*ČSOB* (n 3) para 17.
[16]ibid para 18.
[17]ibid para 20; see also para 27.

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BUCG refined the test in two ways. It confirmed, first, that the inquiry is tied to context. Yemen argued that Chinese SOEs act under the direction of the Government and the Communist Party, so that the Chinese State was the ultimate decision maker. The tribunal found that assertion 'too remote from the facts of the Sana'a International Airport project to be relevant'.[18] What mattered was whether BUCG acted as an agent or exercised governmental functions in relation to the investment in dispute, and on the evidence it had worked on the airport site as a commercial contractor.[19] Secondly, and of more consequence here, the tribunal described the Broches factors as 'the mirror image of the attribution rules in Articles 5 and 8' of the ILC Articles and used those rules to apply them.[20] Section B returns to that step.

Three difficulties survive these decisions. The first concerns the unit of analysis. ČSOB examined the bank's activities; BUCG examined the specific project. Neither explains why the transaction rather than the entity is the right unit. Article 25 speaks of the 'national', which points to the entity, whereas the exclusion of inter-State disputes points to the dispute. For a diversified SOE that performs both commercial and public functions, the two readings can diverge.

The second concerns nature and purpose. ČSOB excluded purpose from the inquiry. Feldman, writing in 2012, argued that ICSID tribunals should consider the purpose as well as the nature of investments by State-controlled entities, in order to preserve the Convention's boundary against public investment disputes between States.[21] The argument has force where a commercially structured investment pursues a strategic aim of the home State, such as securing the supply of a resource. A purpose test would, however, require tribunals to assess the motives of a foreign State — an evidentially fraught inquiry that invites the very politicisation the Convention was meant to avoid. The ČSOB default is

[18] *BUCG* (n 4) para 43.
[19] ibid paras 41, 44.
[20] ibid para 34.
[21] Mark Feldman, 'The Standing of State-Controlled Entities under the ICSID Convention: Two Key Considerations' (2012) Columbia FDI Perspectives No 65.

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preferable. Yet the purpose argument exposes the fact that the Broches test does not answer the strategic-investment problem; it sets it aside.

The third difficulty is definitional. Investment law has no agreed concept of an SOE. McLaughlin identifies five variables on which definitions diverge — separate legal personality, the extent and form of control, the governmental units that count as the State, the commercial nature of the activity, and its purpose — and finds many bilateral investment treaties insufficiently precise.[22] The OECD survey confirms that most treaties say nothing at all.[23] In that vacuum the Broches test operates as a judge-made default rule. That is not objectionable in itself, but it means that the content of the rule is set by tribunals rather than by the treaty parties.

As an interpretation of Article 25, the Broches test is defensible. Nothing in the text excludes State-owned juridical persons, and the drafting history, as Sejko shows, establishes no settled position to the contrary.[24] The ICSID Secretariat itself reads SOE standing as depending on the functional nature of the entity's activities.[25] The weakness of current practice lies not in the test's functional orientation but in the source of its content. Once the Broches limbs are filled with rules of attribution, the test ceases to be a jurisdictional rule about the claimant and becomes a borrowed rule about State responsibility.

B. Attribution, State Responsibility and the Standing Question

The ILC Articles identify when conduct is an act of the State: conduct of State organs (Article 4); conduct of entities empowered by law to exercise elements of governmental authority, when acting in that capacity (Article 5); and conduct carried out on the instructions of, or under the direction or control of, the State

[22]McLaughlin (n 13) [CITATION TO BE VERIFIED: pinpoint].
[23]Shima (n 6) 5.
[24]Sejko (n 13) 858–68 [CITATION TO BE VERIFIED: pinpoint].
[25]ICSID Secretariat (n 12) para 33.

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(Article 8).[26] These are secondary rules. They determine when a State is responsible for breaching a primary obligation; they do not determine who may bring a claim.

The bridge between the two questions was built for practical reasons. The Broches limbs resemble Articles 8 and 5 closely enough that tribunals and commentators have treated the attribution rules as a ready-made body of law for applying them. Feldman's 2016 article makes the case explicitly: decision-makers should rely on customary attribution principles to distinguish commercial from governmental conduct, both when construing treaty definitions of 'investor' and when applying the ICSID Convention.[27] The BUCG tribunal took the same course,[28] and Du applies the ILC Articles to Chinese SOEs to conclude that a denial of standing is highly unlikely.[29]

Practice on the respondent side reinforced the bridge. Where investors allege that an SOE's conduct is attributable to the host State, tribunals have developed structural and functional tests. Maffezini v Spain is the standard reference. At the jurisdictional stage the tribunal asked whether SODIGA, a Galician development company, was a State entity. It applied a structural test of ownership and control, under which State ownership raised a rebuttable presumption, and a functional test looking to the functions the entity was to perform, drawing on ČSOB as it did so.[30] Hu's study of investor–State cases involving State enterprises shows tribunals divided between 'actor-focused' and 'action-focused' methods, with competing results.[31]

The borrowing is convenient, but it is not neutral, and three problems follow from it. The questions differ in object. Attribution asks whether specific conduct is an

[26]International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) YILC vol II(2) 26, arts 4, 5 and 8.
[27]Feldman, 'State-Owned Enterprises as Claimants' (n 7) [CITATION TO BE VERIFIED: pinpoint].
[28]*BUCG* (n 4) paras 33–34.
[29]Du (n 8).
[30]*Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000) paras 76–80, 89.
[31]Hu (n 13) 325.

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act of the State, so as to fix responsibility for a breach; standing asks whether a claimant may invoke a treaty in relation to an investment. Article 8, above all, is conduct-specific: it requires instructions, direction or control in respect of the conduct in question. Carried over to standing, it invites the question 'which conduct?' — the making of the investment, its operation, or the commencement of the arbitration. Tribunals have not answered that question consistently, which helps to explain why the unit of analysis identified in Section A remains unsettled.

The attribution rules also carry their own instability. Boon argues that control tests in the law of attribution suffer from 'slippage', because the nature of the State and the forms of control it exercises are changing.[32] To import those tests into jurisdiction is to import their indeterminacy. The effective-control standard was devised for a different problem — attributing the acts of non-State actors to a State in situations of conflict — and it fits commercial corporate groups poorly.

Finally, the borrowing produces asymmetry. An SOE whose conduct is found not to be attributable to its home State under Articles 5 and 8 gains standing. Yet the same entity, examined in another proceeding or at the enforcement stage, may be treated as an instrumentality of the State on different criteria. One vocabulary of 'control' thus yields different results according to which party benefits from the finding. That is not necessarily wrong — different questions may deserve different answers — but it becomes incoherent when the same rules are presented as governing each question.

The strongest defence of the borrowing is that it buys predictability. The ILC Articles are widely regarded as reflecting custom, investment tribunals apply them routinely, and they offer a structured vocabulary where the ICSID Convention offers none. BUCG, moreover, used them by analogy rather than as directly applicable law.[33] On this view analogy is a legitimate interpretive

[32]Kristen E Boon, 'Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines' (2014) 15 Melbourne Journal of International Law [CITATION TO BE VERIFIED: first page and pinpoint].
[33]*BUCG* (n 4) para 34.

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technique, and the alternative — an unstructured functional inquiry — would be less predictable.

That defence is strongest as a point of method and weakest as a point of principle. Analogy is legitimate when two rules serve comparable functions, and these do not. The attribution rules allocate responsibility to a State for wrongful conduct; the standing inquiry protects the Convention's exclusion of State-to-State disputes. A more principled approach would derive the content of the Broches limbs from Article 25 and its object, asking whether the dispute is in substance one between the respondent and the home State rather than one between the respondent and a commercial actor that the home State happens to own. The ILC Articles may then serve as evidence of how international law distinguishes governmental from commercial activity, but not as the governing test. Attribution analysis would return to the merits, where it determines whether the conduct of entities linked to the respondent engages that State's responsibility.

C. Nationality, Control and Competitive Neutrality

Nationality determines whose treaty an SOE may invoke. Under the first limb of Article 25(2)(b), a juridical person is a national of the State whose nationality it held on the date of consent; under the second, a juridical person having the host State's nationality may be treated as foreign where it is under foreign control and the parties have so agreed.[34] Most IIAs, and most tribunals, fix corporate nationality by incorporation or seat. Ownership and control matter only where a treaty makes them relevant, as in a denial-of-benefits clause.

The newer instruments that regulate SOEs define them by control. The CPTPP's SOE chapter covers an enterprise principally engaged in commercial activities in which a Party directly owns more than 50 per cent of the share capital, controls more than 50 per cent of the voting rights through ownership interests, or holds

[34]ICSID Convention (n 1) art 25(2)(b).

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the power to appoint a majority of the board.[35] Such definitions serve conduct disciplines, not standing. Read alongside the incorporation test, however, they produce a structural irony. For conduct disciplines, an SOE is defined by its link to the State; for nationality and standing, the same link is, in most treaties, irrelevant or even a ground of objection.

The irony is sharpest under the second limb of Article 25(2)(b). Where an SOE of State A invests through a subsidiary incorporated in host State B, the subsidiary can qualify as a foreign national only by showing foreign control — that is, control by its State-owned parent. The stronger that showing, the nearer the claimant comes to the Broches agency limb. The two provisions pull in opposite directions, and neither the text nor the published case law reconciles them.

A separate concern is substantive. SOEs may enjoy advantages — subsidised finance, implicit guarantees, privileged access to information — that private competitors lack. Lu Wang asks whether SOE investors should receive the same non-discrimination treatment as private investors in these circumstances.[36] The point bears on standing because one argument for restricting SOE access to ISDS is that the regime should not protect investments whose competitive position rests on State support. That argument, however, confuses the merits with jurisdiction. Whether an SOE's advantages justify differential treatment by the host State is a question for the substantive standards — national treatment and its 'like circumstances' comparison, and fair and equitable treatment — not for the threshold of standing.

The literature reviewed here documents neither a pattern of SOEs routing investments through third-State vehicles to obtain treaty access nor any published decision treating an SOE as a national of the respondent State. Both scenarios are

[35]Trans-Pacific Partnership Agreement (signed 4 February 2016) (TPP) art 17.1, incorporated by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, entered into force 30 December 2018) (CPTPP) art 1.

[36]Lu Wang, 'Non-Discrimination Treatment of State-Owned Enterprise Investors in International Investment Agreements?' (2016) 31 ICSID Review 45 [CITATION TO BE VERIFIED: pinpoint].

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plausible but, on the available evidence, hypothetical. They are treated here as risks the doctrine should be able to meet, not as established practice.

The nationality cluster thus confirms the central claim from another direction. Control performs at least three functions in the relevant law: it defines an SOE for conduct disciplines, it can establish foreign nationality under Article 25(2)(b), and it can defeat standing under the Broches agency limb. A single finding of 'State control' cannot coherently do all three jobs. Each should be assessed against the purpose of the provision in which it appears.

D. Legitimacy, Politicisation and the 'State Capitalism' Critique

ISDS was designed to take investment disputes out of inter-State diplomacy. Article 27(1) of the ICSID Convention bars a Contracting State from giving diplomatic protection, or bringing an international claim, in respect of a dispute that its national and another Contracting State have submitted to arbitration, unless the latter fails to comply with the award.[37] The premise is that home State and investor are distinct actors, so that the investor's claim can be detached from the home State's foreign policy. An SOE claim tests that premise directly, for the State barred from espousing the claim is also the claimant's owner.

Poulsen argues that the growing stock of investment by States themselves strains the treaty regime, because the separation between sovereign investors and their home States is often a legal fiction; inter-State disputes about diplomatic relations risk being recast as investor–State disputes about law.[38] Rajavuori reaches a related conclusion by a theoretical route, treating SOEs as a liminal category that exposes the malleability of investment law's doctrines of legal personality.[39]

Vattenfall illustrates the stakes, though it should not be over-read. A company wholly owned by Sweden sued another EU Member State over a legislative

[37]ICSID Convention (n 1) art 27(1); Report of the Executive Directors (n 2) para 33.
[38]Poulsen (n 9) [CITATION TO BE VERIFIED: pinpoint].
[39]Mikko Rajavuori, 'Making International Legal Persons in Investment Treaty Arbitration: State-owned Enterprises along the Person/Thing Distinction' (2017) 18 German Law Journal 1183.

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decision of high political salience. Germany's objections centred on the intra-EU dimension rather than on Vattenfall's ownership,[40] and the dispute ended in a settlement announced in March 2021, after which the ICSID proceedings were brought to a close.[41] The case shows that an SOE claim can set two States on opposite sides of a dispute about a democratic choice. It does not show that tribunals have treated State ownership as decisive.

Two responses to the critique carry weight. Du argues that denying standing to SOEs would not address concerns about their conduct and would undermine the rule of law in international investment.[42] Exclusion would leave SOE investments protected, if at all, only through diplomacy — precisely the politicisation the regime sought to avoid. Moreover, the Convention itself contemplates claims by State-owned entities: what it excludes are disputes between States, not entities owned by States. Feldman observes that the Convention does not extend to State-to-State disputes even in a subrogation context, which suggests that the drafters drew the line at the identity of the parties rather than at the ownership of the claimant.[43]

Read as a case for jurisdictional exclusion, then, the legitimacy critique identifies a real risk but proposes the wrong remedy. The risk is that a tribunal adjudicates what is in substance an inter-State dispute without the procedural and political safeguards appropriate to one. The Broches agency limb already meets that risk where an SOE serves as a conduit for its home State. Beyond that point the concern is for treaty parties to address, through express SOE clauses, denial-of-benefits provisions or substantive disciplines on SOE conduct. Tribunals cannot calibrate access by reference to political sensitivity without exceeding their mandate.

[40] *Vattenfall* (n 5).
[41] Vattenfall AB, 'Understanding to Terminate Disputes on German Nuclear Phase Out' (Press release, 5 March 2021) [CITATION TO BE VERIFIED: ICSID procedural record of the discontinuance].
[42] Du (n 8).
[43] Feldman, 'State-Owned Enterprises as Claimants' (n 7) [CITATION TO BE VERIFIED: pinpoint].

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E. Enforcement, Immunity and Post-Award Obstacles

ICSID awards bind the parties and must be recognised and enforced by Contracting States as if they were final judgments of their own courts; Article 55, however, preserves each State's law on immunity from execution.[44] Enforcement therefore turns on domestic law, and in particular on two doctrines: the immunity of State property from execution, and the separateness of State instrumentalities from the State itself.

In United States law, Bancec established a presumption that an instrumentality with separate legal personality is distinct from the State, rebuttable where the State exercises extensive control over it or where recognising separateness would work a fraud or injustice.[45] In Crystallex, the Third Circuit relied on that doctrine to permit an ICSID award creditor of Venezuela to attach the shares held by PDVSA, Venezuela's state-owned oil company, in its United States subsidiary. The court held the extensive-control exception satisfied, so that PDVSA was Venezuela's alter ego, and treated that finding as sufficient for jurisdiction over PDVSA in the enforcement proceeding.[46]

Crystallex concerned an SOE on the debtor side, not as claimant. Its relevance here is structural: it shows enforcement courts applying their own control tests, independently of how an arbitral tribunal characterised the same entity. For SOE claimants, two consequences follow. An SOE claimant that loses on the merits and is ordered to pay costs, or against which a host State succeeds on a counterclaim, may resist enforcement by invoking immunity or separateness. Whether it can do so depends on the law of the forum and on whether the assets in question serve commercial or sovereign purposes. The literature has not examined this scenario in any depth, and the article does not claim that it has arisen in practice.

[44] ICSID Convention (n 1) arts 53–55.

[45] *First National City Bank v Banco Para El Comercio Exterior de Cuba* 462 US 611 (1983) [CITATION TO BE VERIFIED: pinpoint]; as applied in *Crystallex International Corp v Bolivarian Republic of Venezuela* 932 F 3d 126 (3d Cir 2019) 140.

[46] *Crystallex* (n 45) 146–52.

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The same control facts, moreover, can be characterised differently at different stages. A tribunal may find that an SOE was not acting as its home State's agent for purposes of standing; a domestic court may later find the State's control over the same entity so extensive that the entity's assets answer for the State's debts. In law these findings are not contradictory, because they answer different questions under different rules. They become incoherent only if the standing finding is presented as resting on a general rule of international law about State control — as it is when the attribution rules are imported into Article 25.

Of the six clusters, this is the least developed in the literature and the one with the thinnest evidence base. Its value for the argument is demonstrative: a third body of law, with its own test of control, operates on SOEs after the award. Recognising that this question is separate — governed by the law of the forum, not by the Broches test or the ILC Articles — is a precondition for a coherent account of SOE participation in ISDS.

F. Reform Debates and Treaty Drafting

Recent treaty practice addresses SOEs in two ways, which map onto the distinction between standing and conduct. The CPTPP deals with standing expressly. Its investment chapter defines an 'investor of a Party' as 'a Party, or a national or an enterprise of a Party' that attempts to make, is making or has made an investment in the territory of another Party,[47] so that the Parties themselves are potential investors and SOEs fall within 'enterprise'. The same chapter applies its obligations to measures of a state enterprise when it exercises governmental authority delegated by a Party — a rule about responsibility, not standing.[48] Chapter 17 then imposes conduct disciplines on SOEs, including non-discriminatory treatment, commercial considerations and limits on non-commercial assistance.[49] The CPTPP thus separates, at least implicitly, the three

[47]TPP (n 35) art 9.1, incorporated by CPTPP (n 35) art 1.
[48]TPP (n 35) art 9.2(2)(b).
[49]ibid arts 17.4, 17.6.

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questions this article distinguishes: who may claim, when conduct engages a Party's responsibility, and how SOEs must behave.

The EU–China CAI takes another route. It concentrates on conduct, requiring 'covered entities' to act in accordance with commercial considerations, and defines those entities broadly: beyond majority ownership, the definition reaches entities that a Party controls through other ownership interests or can legally direct, as well as designated monopolies.[50] The published text contains no investment protection standards or ISDS; disputes about its application are to be settled between the Parties under a State-to-State section that the published text leaves as a placeholder.[51] Concluded in principle in December 2020, the CAI is not in force. It is instructive nonetheless, because it shows that a major treaty can regulate SOE behaviour without resolving SOE standing at all.

Working Group III has not treated SOEs as a distinct topic, and its draft provisions on procedural and cross-cutting issues do not mention them.[52] Two provisions nonetheless touch the problem. Draft Provision 17 would allow a Party to deny treaty benefits to an enterprise owned or controlled by persons of a non-Party where it has no substantial business activities in the relevant territory, and Draft Provision 10 on counterclaims bears on the post-award scenario discussed in Section E.[53] Both remained under discussion at the Working Group's fifty-fifth session in October 2026.[54] As drafted, Draft Provision 17 targets ownership by non-Party persons and would not reach an SOE of a Contracting Party. A clause directed at State ownership would have to be drafted differently and, if framed by reference to control alone, would reproduce the conflation identified above.

[50]EU–China Comprehensive Agreement on Investment (agreed in principle 30 December 2020; text published by the European Commission, 22 January 2021) s II, art 3bis.

[51]ibid s II, art 5(3) and 'Section X (State to State Dispute Settlement)' [CITATION TO BE VERIFIED: final section number].

[52]UNCITRAL Working Group III, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Provisions on Procedural and Cross-Cutting Issues' (Note by the Secretariat, 30 June 2025) UN Doc A/CN.9/WG.III/WP.253.

[53]ibid Draft Provisions 10 and 17.

[54]UNCITRAL Working Group III, 'Possible Reform of Investor-State Dispute Settlement (ISDS)' (Note by the Secretariat, 2026) UN Doc A/CN.9/WG.III/WP.267, pt II.

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The reform landscape thus confirms that the policy choices about SOE access belong to treaty parties. The CPTPP shows that States can admit SOEs expressly while subjecting their conduct to separate disciplines; the CAI, that conduct can be regulated without any decision on standing. Working Group III's procedural agenda offers tools that could be adapted to SOEs, but none designed for them. The gap is one of attention rather than of technique.

IV. DISCUSSION: SEPARATING STANDING, ATTRIBUTION AND SEPARATENESS

A. Synthesis

The six clusters are not independent problems. Three of them — the Broches test, attribution and enforcement — share a structure. In each, a decision-maker asks whether an SOE is, for some purpose, 'the State'; in each, the answer turns on ownership, control and the nature of the entity's functions; and in each, the governing law differs. Article 25 of the ICSID Convention governs standing, the ILC Articles govern the attribution of conduct for the purposes of State responsibility, and the law of the enforcement forum governs separateness. The nationality cluster adds a fourth use of control, under Article 25(2)(b). The legitimacy and reform clusters show why the confusion matters: it allows policy concerns about State capitalism to be resolved through doctrines never designed to bear them.

Current practice is not wrong in its results. ČSOB and BUCG reached defensible conclusions, and the functional orientation of the Broches test is consistent with the text and object of Article 25. The difficulty is one of justification and coherence. When the standing inquiry borrows its content from the attribution rules, it inherits their conduct-specific structure and their instability. It also creates the appearance that a single international-law test of 'State control' governs every stage of a dispute, when each stage in fact applies its own.

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B. A Separation Thesis

The article proposes that the three questions be kept apart along the following lines.

(1) Standing should be determined under Article 25 and the applicable treaty definition. The Broches limbs should be read in light of the object of excluding inter-State disputes: the question is whether, in substance, the claimant is the home State acting through a corporate form in relation to the investment and the dispute. The ILC Articles may be consulted as evidence of the line between governmental and commercial activity, but they should not supply the test.

(2) Attribution should be confined to the merits, where it determines whether conduct of entities linked to the respondent State engages that State's responsibility for breach of a primary obligation. A finding on the claimant's standing has no bearing on attribution, and vice versa.

(3) Separateness at the enforcement stage is a matter for the law of the forum. Arbitral findings on standing should be neither presented nor relied on as determinations of an SOE's separateness for enforcement purposes.

The principal objection is that separation multiplies tests and so reduces predictability. The objection has some force, but it overstates what unification gains. A single test applied to different questions offers an appearance of consistency while producing different results according to which party invokes it. Separate tests, each tied to its own source and purpose, are more candid about what is being decided.

A second objection is that separation is artificial, because the relevant facts overlap. They do, but that is not decisive. Overlapping facts are common in law: the same conduct may matter both to jurisdiction and to the merits, and tribunals routinely distinguish the two. The point is not that the facts differ but that their legal significance depends on the question asked.

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C. Systemic Risks and Reform Options

Two systemic risks follow from the present state of the law. One is inconsistency across tribunals and across the stages of a dispute, which erodes the predictability that SOEs and host States alike require. The other is the displacement of policy choices: whether, and how far, State capital should benefit from investment protection is being decided through jurisdictional doctrine by tribunals rather than by treaty parties.

The reform options are chiefly matters of drafting. States may include SOEs and States expressly among protected investors, as the CPTPP does; this removes uncertainty about treaty coverage, although it leaves the Broches agency limb under Article 25 untouched. They may instead exclude claims by SOEs acting in a governmental capacity, codifying the Broches limit in treaty terms — an option that would require a workable definition of governmental capacity, and for which this study located no verified treaty model. Conduct disciplines of the CPTPP or CAI type address competitive-neutrality concerns on the merits, but are not linked to access to ISDS. A denial-of-benefits clause directed at State ownership would permit targeted exclusion, provided that it is not framed by reference to control alone. Counterclaim provisions such as Draft Provision 10 address part of the post-award asymmetry, although enforcement will still depend on the law of the forum.

Each option places the decision with the treaty parties and ties it to a specific function. None requires tribunals to resolve, through Article 25, questions of economic policy that the Convention does not address.

D. Contribution

The article contributes to the literature in three ways. It identifies the conflation of standing, attribution and separateness as a distinct analytical problem, rather than treating SOE standing either as settled or as a crisis of legitimacy. It offers a principled ground for the functional Broches test that does not depend on the ILC

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Articles. And it connects the jurisdictional debate with the enforcement stage and with current treaty practice, showing that recent instruments already separate, in practice, the questions that arbitral reasoning tends to merge.

V. CONCLUSION

State-owned enterprises entered ISDS through a door that the ICSID Convention neither opened expressly nor closed. Tribunals have kept it open, rightly, on a functional reading of Article 25 that admits SOEs acting commercially and excludes those acting as agents of their home States or discharging governmental functions. The difficulty lies not in that outcome but in how it is reached. By borrowing the rules on attribution of conduct to give content to the Broches test, arbitral practice has merged a jurisdictional question about the claimant with a question of responsibility for conduct. Domestic courts, applying their own doctrines of separateness, then supply a third answer to what appears to be the same question.

Separating these inquiries matters in practice as well as in principle. It allows each decision-maker to apply the law that governs the question before it. It brings into view the policy choices that current doctrine conceals — whether State capital should enjoy investment protection, on what terms and subject to what disciplines — and returns them to treaty parties, who, as the CPTPP and the CAI show, are able to make them.

The argument has limits. It is doctrinal and rests on a small body of published decisions; unpublished awards may reveal practice that complicates it. The enforcement analysis draws on United States law, and other jurisdictions apply different doctrines of immunity and separateness. Nor does the separation thesis settle the harder normative question raised by the critique of State capitalism: whether a regime built for private capital should protect State capital at all. It claims only that this question should be asked openly, by those with the authority

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to answer it, rather than settled implicitly through the content of a jurisdictional test.

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