States, Firms, and Their Legal Fictions: Attributing Identity and Responsibility to Artificial Entities

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Between States and Firms

Attribution and Construction of the Shareholder State

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INTRODUCTION

State ownership of private firms was revitalized in the early twenty-first century. Government bailouts and equity injections in the wake of the financial and COVID-19 crises, the aggressive expansion of state-owned national champions, and the emergence of sovereign wealth funds investing in private companies have recalibrated states' ownership functions across the world. As state ownership grows, morphs, and globalizes, states increasingly channel their influence through the financialized markets. The ensuing merger of the state's commercial and sovereign roles suggests that state ownership is, again, becoming a vector of sovereign authority.

Unsurprisingly, the global reconfiguration of state ownership is also reflected in the rules by which the contemporary "shareholder state" organizes and operates. This chapter analyzes the international legal system that has developed around surging state ownership. It suggests that the legal construction of distinctive "shareholder identities" in international economic law plays a key role in this complex regulatory matrix. Specifically, the chapter focuses on how arbitral tribunals adjudicating claims arising from international investment treaties use *attribution*, a doctrine of customary international law, in creating, maintaining, and disciplining state shareholders. Arbitral tribunals use the analytical category of the state shareholder in order to delineate and construct state and company identities and to understand the economic, political, and legal implications of those identities in the global economy. Accordingly, the interactions between substantive international economic law and the law of state responsibility form important, but underappreciated, elements of this constitutive process, which comes to affect the institutional design of state shareholding and disincentivize hands-on control over state-owned entities.

The argument proceeds in three steps. Part 1 provides a concise history of state ownership with a focus on its current permutations. Building on the rich multidisciplinary scholarship on state capitalism that has emerged over the past decade, the part traces the institutional evolution of state ownership from archetypical state-owned entities to the contemporary forms, thus identifying the state shareholder as

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an analytical category that mediates the state's direct market participation through the corporate form. Part 2 analyzes how the rise of the shareholder state is reflected in contemporary international economic law. In particular, the part examines how substantive trade and investment treaty provisions and the law of state responsibility conceptualize and govern the relationship between state-owned companies and their state shareholders. Against this backdrop, Part 3 analyzes recent arbitral awards that focus on the organization and operative logic of state shareholders. The part suggests that the ways arbitral tribunals use doctrines of attribution show how the state shareholder is legally constructed and, moreover, how the adjudicators put forward an idealized shareholder template that pivots on the concept of the "ordinary" shareholder. This concept mirrors the thrust of other domestic and transnational normative projects, including investment screening legislation and corporate governance codes, that are involved in disciplining state capitalism.

The chapter thus embeds the doctrine of attribution as a distinctive response to the emergent shareholder state. Moreover, the legal construction of the state shareholder through attribution highlights the significance of customary international law as a site for managing state-company relationships amid the fast-paced development of novel disciplines against state-owned companies.

THE RISE OF THE SHAREHOLDER STATE

State ownership has been an essential component of the world economy throughout the modern era. States' direct market participation, most prevalent in Europe, Asia, Africa, Latin America, and even the United States, forms one of the core instruments of their economic policies. While the rationales for, and applications of, state ownership have varied over time, its common uses have been to overcome undeveloped capital markets, organize natural monopolies, produce public goods, account for strategic interests, and pursue social policy.[1] The past decades have witnessed rapid internationalization of state ownership, once initially confined mostly within national jurisdictions, along with its extreme politicization in international economic relations, primarily due to the expansion of Chinese state-owned enterprises (SOEs).[2] However, the current debates on the effects of hybrid forms of state capitalism, such as economic statecraft, only become understandable against the complex economic, political, and legal history of state ownership.[3]

By most accounts, the heyday of state ownership was the 1960s and early 1970s, a period characterized by the completion of postwar nationalizations, the ascendancy

[1] *See, e.g.*, The Routledge Handbook of State-Owned Enterprises (Luc Bernier et al. eds., 2020).

[2] *See, e.g.*, Milan Babic et al., *The Rise of Transnational State Capital: State-Led Foreign Investment in the 21st Century*, 27 Rev. Int'l Pol. Econ. 433 (2020).

[3] *See, e.g.*, Robert Loring Allen, *State Trading and Economic Warfare*, 24 L. Contemp. Probs. 256 (1959).

of the socialist economic model, and massive expropriations brought about by the decolonization movement.[4] During this period, the functions of state ownership were both numerous and pervasive, leading commentators to consider "public ownership … the main mode of economic regulation," as it enabled the state "to impose a planned structure on the economy and at the same time to protect the public interest against powerful private interests."[5] From the mid-1970s onward, the state ownership model, as a catalyst of economic development, quickly fell from grace. State ownership was increasingly viewed as an inefficient burden for public finances, as a barrier to flourishing private enterprise, and as a site for elite expropriation.[6] Notwithstanding the prominent position of privatization in the Washington Consensus policy bundle, however, state ownership proved sticky in the 1990s and 2000s, particularly in Asia, Europe, and South America.[7] The continuing relevance of state ownership became particularly acute after the 2008 financial crisis. Following the bailouts of key financial companies in the United States and across Europe, and the capital provided by sovereign wealth funds, heavy-handed state intervention was, at least for the moment, again a legitimate course of economic policy.[8] More recently, the growth and internalization of state ownership have rendered hybrid state capitalism a pertinent issue of economic innovation and security policy and revitalized the debate on the pros and cons of direct state intervention.[9] The effects of the COVID-19 pandemic on the macro trends of state capitalism are still inconclusive, but initial reactions suggest that policy responses to the pandemic resulted in the growth of direct state control over companies.[10]

The ebb and flow of state ownership policy is inextricably linked to its evolving institutional arrangements. During the 1960s, for example, the dominant mode of state capitalism centered on wholly owned companies. As the sole owner, the state could essentially arrange many facets of economic and social life through its

[4] *See, e.g.*, Pier Angelo Toninelli, *The Rise and Fall of Public Enterprise: The Framework*, *in* The Rise and Fall of State-Owned Enterprise in the Western World (Pier Angelo Toninelli ed., 2000).

[5] Giandomenico Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, 17 J. Pub. Pol'y 139, 144 (1997).

[6] *See, e.g.*, World Bank, Bureaucrats in Business: The Economics and Politics of Government Ownership (1995); William L. Megginson, The Financial Economics of Privatization (2005).

[7] *See, e.g.*, Alice Amsden, The Rise of "The Rest": Challenges to the West From Late-Industrializing Economies (2001); Bernardo Bortolotti & Mara Faccio, *Government Control of Privatized Firms*, 22 Rev. Fin. Stud. 2907 (2009).

[8] *See, e.g.*, William Megginson, *Privatization, State Capitalism, and State Ownership of Business in the 21st Century*, 11 Founds. Trends Fin. 1 (2017).

[9] *See, e.g.*, Andreas Nölke, *Introduction: Toward State Capitalism 3.0*, *in* Multinational Corporations from Emerging Markets: State Capitalism 3.0 (Andreas Nölke ed., 2014).

[10] *See, e.g.*, *Equity Injections and Unforeseen State Ownership of Enterprises during the COVID-19 Crisis*, OECD (2020), https://read.oecd-ilibrary.org/view/?ref=131_131932-wj071ujbxy&title=Equity-injections-and-unforeseen-state-ownership-of-enterprises-during-the-COVID-19-crisis.

entrepreneurial, not regulatory, roles. Operationally, this was achieved by maintaining administrative controls over SOEs, for instance, through using sectoral ministries to accomplish extensive direction of business operations.[11] By contrast, the current organizational models are often built around minority ownership, centralization of the state ownership in dedicated ownership entities, and the emergence of novel types of state-owned asset and investment vehicles, which create additional institutional boundaries between politicians, state officials, and company management.[12] In China, for instance, the move from direct government control to a centralized ownership entity-driven model, with the State-owned Assets Supervision and Administration Commission (SASAC) of the State Council on top of the pyramid, was part of a broader financialization policy whereby "the Chinese state transform[ed] its management of the economy from administrative intervention and fiscal allocation to supervising its massive state assets according to shareholder value."[13] In France, the creation of Agence des participations de l' État (APE) in the early 2000s was motivated by similar outcomes – professionalization of asset ownership – but was more limited in scope.[14]

Each of these examples indicates institutional evolution in the policy frameworks that hinge on the separation between the state's regulatory function and its shareholder function. Instead of pervasive and direct control by ministries or other governmental agencies, state ownership interests are increasingly ring-fenced in distinctive shareholder entities, including state holding companies or various investment vehicles. This broad shift – while diverse in its particular instantiations – hints at the emergence of a distinct organizational paradigm, *the shareholder state*.

Under this emergent model – which the existing scholarship often compares to that of an asset manager or institutional investor – the state ownership function deviates from many prior eras in its organization, operation, rationality, and geographical scope.[15] Rather than viewing the state as a dirigiste sovereign administrator, able

[11] *See, e.g.*, Aldo Musacchio and Sergio Lazzarini, Reinventing State Capitalism. Leviathan in Business, Brazil and Beyond (2014).

[12] *See, e.g.*, Dag Detter & Stefan Fölster, The Public Wealth of Nations: How Management of Public Assets Can Boost or Bust Economic Growth (2015); Aldo Musacchio et al., *New Varieties of State Capitalism: Strategic and Governance Implications*, 29 Acad. Mgmt. Perspectives 115 (2015).

[13] Yingyao Wang, *The Rise of the "Shareholding State": Financialization of Economic Management in China*, 13 Socio-Econ. Rev. 603 (2015).

[14] Hadrien Coutant & Scott Viallet-Thévenin, *The State as an Eager Shareholder*, 30 Revue de la Régulation [Rev. Regul.] (2021) (Fr.).

[15] *See, e.g.*, Junmin Wang et al., *The Rise of SASAC: Asset Management, Ownership Concentration, and Firm Performance in China's Capital Markets*, 8 Mgmt. Org. Rev. 253 (2012); Adam Dixon, *The State as Institutional Investor: Unpacking the Geographical Political Economy of Sovereign Wealth Funds*, *in* Handbook on the Geographies of Money and Finance (Ron Martin & Jane Pollard eds., 2017); Roberto Cardinale & Emanuele Belotti, *The Rise of the Shareholding State in Italy: A Policy-Oriented Strategist or Simply a Shareholder? Evidence from the Energy and Banking Sectors' Privatizations*, 62 Strucl. Chan. Econ. Dynamics 52 (2022).

to coordinate and dictate corporate decision-making using regulatory authority, it is positioned as a shareholder whose power is channeled transnationally through the investee company's investor relations and ultimately exercised in the general meeting of shareholders. Even though the policy objectives traditionally associated with the regulatory use of SOEs have not disappeared, they are increasingly mediated through professionalized shareholder entities and deployed through established company decision-making structures.

The new geographical and institutional set-up of the shareholder state is underwritten by a complex, diffuse, and multitiered governance framework. Much of the regulatory infrastructure in which state shareholders operate is of domestic origin. In particular, national administrative, corporate, competition, and constitutional laws provide the basic structure and the general parameters for state shareholding, often as a reflection of the domestic legal traditions and varieties of capitalism.[16] In a process mirroring the rise of the shareholder state paradigm, most legal systems have opted to limit the government's abilities to exert undue influence over its investee companies through public listings and corporate law reforms,[17] thus essentially transforming the earlier paradigm of "ownership as regulation" into "regulation of ownership."[18] Moreover, specific ownership and foreign investment statutes, such as the recent crop of investment screening laws that create additional hurdles for corporate acquisitions by foreign SOEs, also illustrate the expanding domestic regulation of internationalizing state capitalism.[19]

Many of these national law and policy choices are embedded in international regulatory arrangements that enable, constrain, and shape the broad parameters of state shareholding. On the regional level, the European Union is known for maintaining state aid and free movement of capital provisions, which regulate the conduct of states when they intervene in the market economy through shareholder positions.[20] On the transnational level, several prominent soft law codes, such as the Organization for Economic Cooperation and Development (OECD) Guidelines for Corporate Governance of State-owned Enterprises, provide a robust set of best practices for organizing the state shareholder function. These codes have

[16] *See, e.g.*, Benjamin Templin, *The Government Shareholder: Regulating Public Ownership of Private Enterprise*, 62 Admin. L. Rev. 1127 (2010); Mariana Pargendler, *State Ownership and Corporate Governance*, 80 Fordham L. Rev. 2917 (2012).

[17] Curtis J Milhaupt & Mariana Pargendler, *Governance Challenges of Listed State-Owned Enterprises around the World: National Experiences and a Framework for Reform*, 50 Cornell Int'l L. J. 473 (2017).

[18] Ian Thynne, *Ownership as an Instrument of Policy and Understanding in the Public Sphere: Trends and Research Agenda*, 32 Pol'y Stud. 183 (2011).

[19] *See, e.g.*, Mikko Rajavuori & Kaisa Huhta, *Investment Screening: Implications for the Energy Sector and Energy Security*, 144 Energy Pol'y 111646 (2020).

[20] *See, e.g.*, Andrea Biondi, *When the State Is the Owner – Some Further Comments on the Court of Justice "Golden Shares" Strategy*, *in* Company Law and Economic Protectionism: New Challenges to European Integration (Ulf Bernitz & Wolf-Georg Ringe eds., 2010).

proliferated over the past decades.[21] On the international level, trade and investment treaties increasingly register the impact of SOEs and their owner states.[22] The proliferation of various supranational regulatory mechanisms targeted at the rise of the shareholder state exposes the significance of state ownership on global economic governance and draws attention to regional and international economic law as key domains for structuring its normative and operative conditions.

Thus, the reinvigorated state shareholders are subject to domestic regulation consisting of both public and private law, and they garner increasing global attention through specialized regional, transnational, and international regimes. Due to the rapid internationalization of state ownership, international economic law in particular has emerged as a vital piece in this global regulatory infrastructure. Given how equity ownership continues to encroach on the exercise of sovereign authority and plays a significant role in the world economy, the next part focuses, first, on the governance of state shareholders in substantive international trade and investment law and, second, on their characterization under customary international law.

GOVERNING THE SHAREHOLDER STATE IN INTERNATIONAL ECONOMIC LAW

This part discusses the international economic law setting in which the contemporary shareholder state operates. First, the part introduces primary trade and investment treaty law provisions that relate to state ownership, with a focus on recent treaty practice. Next, the part identifies customary international law as a key, but underappreciated, site for managing the relationship between state shareholders and their investee companies.

State Shareholders under International Trade and Investment Law

State involvement in the market through ownership has been a staple issue in international economic law for over a century. In the mid-twentieth century, for instance, the toughest legal conundrums related to whether and how to apply the law of state immunity to SOEs operating outside their home jurisdictions.[23] By contrast, in the decolonization era the most topical issues were nationalizations and the respective protections allotted to foreign companies under state contracts.[24]

[21] *See, e.g.*, Mikko Rajavuori, *Governing the Good State Shareholder: The Case of the OECD Guidelines on Corporate Governance of State-Owned Enterprises*, 29 Eur. Bus. L. Rev. 103 (2018).

[22] *See, e.g.*, Petros Mavroidis & Merit Janow, *Free Markets, State Involvement, and the WTO: Chinese State-Owned Enterprises in the Ring*, 16 World Trade Rev. 571 (2017).

[23] *See, e.g.*, Vernon Setser, *The Immunities of the State and Government Economic Activities*, 24 L. Contemp. Probs. 291 (1959).

[24] *See, e.g.*, Robert von Mehren & Nicholas Kourides, *International Arbitrations between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 Am. J. Int'l L. 476 (1981).

International economic law has never, however, tackled state ownership in a comprehensive way. For example, a few isolated references to state trading enterprises aside, early trade regimes refrained from explicitly singling out SOEs.[25] Even the current World Trade Organization system tackles state ownership mostly indirectly through subsidy regulation.[26] In the same vein, most bilateral investment treaties (BITs) omit specific references to SOEs or to the conduct of states as their shareholders. While there are many reasons for the lack of explicit legal control of state ownership, perhaps the most compelling argument builds on the dynamics of the post-World War II economic architecture. On the one hand, the Soviet bloc insisted on deference to SOEs in their international operations, blocking various regulatory instruments.[27] On the other hand, the Bretton Woods institutions that provided the basic framework for international economic governance in the West operated under the paradigm of embedded liberalism, which allowed a great deal of domestic flexibility in pursuing different modes for economic development.[28] The effects of these historical bargains remain visible to this day.

Whether the silence of international economic law on state ownership was based on comity or on the inability to negotiate effective multilateral rules, the relevant treaty law remains skeletal. The most prominent early example of a highly specific SOE provision was the Energy Charter Treaty's Article 22(1), which stipulates that "[e]ach Contracting Party shall ensure that any state enterprise which it maintains or establishes shall conduct its activities in relation to the sale or provision of goods and services in its Area in a manner consistent with the Contracting Party's obligations under … this Treaty."[29] Some BITs also contain special measures targeting SOEs. According to the US-Ukraine BIT Article II(2)(b), for example, "[e]ach Party shall ensure that any State enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under this Treaty."[30] Likewise, Article 10.1.2 of the US-Oman free trade agreement stipulates that a "Party's obligations … shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party."[31] Despite their ambiguity, these treaty provisions extend obligations to arrange and

[25] *See, e.g.*, Roy Baban, *State Trading and the GATT*, 11 J. World Trade 334 (1977).

[26] *See, e.g.*, Ming Du, *China's State Capitalism and World Trade Law*, 63 Int'l & Compar. L. Q. 409 (2014).

[27] *See, e.g.*, Rosanne Thomas, *Host State Treatment of Transnational Corporations: Formulation of a Standard for the United Nations Code of Conduct on Transnational Corporations*, 7 Fordham Int'l L. J. 467 (1983).

[28] *See, e.g.*, John Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 Int'l Org. 379 (1982).

[29] Energy Charter Treaty art. 22(1), *opened for signature* Dec. 17, 1994, 34 I.L.M. 360 (entered into force Apr. 1998).

[30] Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.–Ukr., art. II(2)(b), T.I.A.S. No. 96-1116 (1996).

[31] U.S.-Oman Free-Trade Agreement, U.S.–Oman, art. 10.1.2 120 Stat. 1192 (2016).

control the behavior of "state enterprises" to match the state party's own obligations. The provisions are, however, typically limited in scope to the most obvious arrangements where SOEs assume distinct public functions. As the existing treaty provisions mostly predate the rise of state capitalism in the early twenty-first century, they do not seem to regulate the changing institutional structures of the shareholder state, such as those that are most acutely reflected in the organization and practices of Chinese state capitalism.

Against this backdrop, it is no surprise that trade and investment treaties drafted and negotiated from the 2010s onward have taken a more comprehensive approach to state ownership, both in terms of definitions and substantive obligations. The evolving treaty practice emphasizes competitive neutrality – fair competition between firms regardless of their ownership structure or nationality – and it builds on a mix of provisions tackling issues ranging from coordination to covert state aid, subsidies, and transparency.[32] An influential early example is the Trans-Pacific Partnership (TPP), a U.S.-driven mega-regional trade agreement that included a distinct SOE-chapter, but was promptly abandoned by the Trump administration.[33] Several major trade and investment agreements have since included SOE provisions. The successor of the TPP – the Comprehensive and Progressive Agreement for Trans-Pacific Partnership – for example, extended state obligations to SOEs. Moreover, SOEs are explicitly defined in that agreement. They are companies in which the state party directly owns more than 50 percent of the stock, controls the enterprise through the ownership of more than 50 percent of its voting rights, or has the right to appoint the majority of the members of the executive board or any other decision-making body.[34]

The EU-Japan Free Trade Agreement opts for a similar definition, but also covers situations where the state has the power to "legally direct the actions of the enterprise or otherwise exercises an equivalent degree of control in accordance with its laws and regulations."[35] By contrast, the EU-Vietnam Free Trade Agreement expands the definition of state-owned enterprises beyond the ownership stake by reference to the state party's ability to "exercise control over the strategic decisions of the enterprise."[36] The EU-UK Trade and Cooperation Agreement opts for a formulation whereby an SOE is defined by whether the state party has

[32] *See, e.g.*, Mitsuo Matsushita & Chin Leng Lim, *Taming Leviathan as Merchant: Lingering Questions about the Practical Application of Trans-Pacific Partnership's State-Owned Enterprises Rules*, 19 World Trade Rev. 402 (2020).

[33] *See, e.g.*, Julien Sylvestre Fleury & Jean-Michel Marcoux, *The US Shaping of State-Owned Enterprise Disciplines in the Trans-Pacific Partnership*, 19 J. Int'l Econ. L. 445 (2016).

[34] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTT) art. 17(1)(3), *opened for signature* Mar. 8, 2018 (entered into force Dec. 30 2018) *available at* www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership (last visited March 6, 2023).

[35] European Union-Japan Economic Partnership Agreement, Japan-E.U., art. 13(1)(h), Feb. 1, 2019.

[36] European Union-Vietnam Free Trade Agreement, Viet.-E.U., art. 11(1)(g), Aug. 1, 2020.

"the power to exercise control over the enterprise," with "all relevant legal and factual elements [to] be taken into account on a case-by-case basis" in establishing control.[37] The European Union's recent major trade agreement, the EU-China Comprehensive Agreement on Investment (CAI, Agreement in Principle), combines the two special rules, although the relevant provision refrains from using SOE terminology, opting instead for a similar formulation through the term "covered entity."[38]

The most comprehensive rules are included in the Agreement between the United States of America, the United Mexican States, and Canada (USMCA), which define SOEs expansively to cover companies with more than 50 percent of state ownership or the power to control the enterprise through any other ownership interest, including indirect or minority ownership.[39] This form of control is further detailed as an ownership interest through which the state party can determine or direct important matters affecting the enterprise, excluding minority shareholder protections. In assessing control, "all relevant legal and factual elements shall be taken into account on a case-by-case basis," including "the power to determine or direct commercial operations."[40]

Taken together, recent trade and investment treaty practice makes several innovations that seek to accommodate the changes in the operating conditions of state ownership. On the definitional side, the new provisions result in quantifiable bright-line tests as to what constitutes an SOE, often detaching the definition from abstract notions of governmental authority. Compared to prior, and often elliptic treaty language, new definitional attempts can be seen to better cover the state's commercial and regulatory roles even when it operates as a minority shareholder or exercises control over the company's strategic decisions in other ways. By focusing on the organization and intensity of state shareholding, rather than the overt exercise of governmental authority, the new provisions are an indication of a concerted, if largely Western-driven, response to the evolution of the shareholder state. Notwithstanding the explicit expansion of SOE obligations to cover the state's minority shareholding and the attempted changes in state shareholder rationality, however, the new provisions are unlikely to provide a comprehensive international regime to manage state capitalism.[41] While the geographical coverage of the treaties is wide, the new trade and investment regimes remain binding only on the signatory states and thus lack

[37] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, art. 4.1, Jan. 12, 2021.

[38] U.S.-Mexico-Canada Agreement part II, art. 3bis, Dec. 13, 2019, Office U.S. Trade Rep., https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

[39] *Id.*, art. 22(1)–(2).

[40] *Id.*, art. 22(1), n. 8.

[41] *Cf.* Weihuan Zhou et al., *Building a Market Economy through WTO-Inspired Reform of State-Owned Enterprises in China*, 68 Int'l & Compar. L. Q. 977 (2019).

global applicability. In addition, even the recent treaties contain numerous exceptions that carve out significant portions of the SOE-sector from the reach of the new disciplines.[42]

State Ownership under Customary International Law

The continuing absence of a comprehensive regime to discipline SOEs under international economic law is, however, mitigated by a branch of customary international law, the law of state responsibility, and specifically its doctrine of attribution. In essence, attribution refers to a process which demarcates the exact boundaries of the state for the purpose of triggering state responsibility. Attribution in the context of state ownership is of practical importance, as it is frequently relied upon in international adjudication to establish if the state is responsible for the conduct of a state-owned or controlled company. This is especially so in international investment law, a regime fragmented into thousands of individual investment treaties. In this regime, the law of state responsibility and the doctrine of attribution provide a unifying framework used to distinguish permissible state behavior from conduct that infringes a BIT's substantive guarantees. In this way, attribution emerges as a key doctrinal pathway to structure and align the operation of shareholder states with their existing treaty obligations.

The attribution doctrine of the law of state responsibility is most commonly discussed with reference to the International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), a codification of customary international law completed in 2001.[43] Even though the ARSIWA is not binding as such, it is widely accepted as an accurate representation of the customary standards of state responsibility, which international adjudicators use to assess claimed breaches of international law.[44] While some international treaty regimes contain special rules of attribution, the ARSIWA's universally applicable "transubstantive" rules influence international adjudication across different branches of international law, spanning from human rights to international humanitarian law.[45]

[42] *See, e.g.*, Leonardo Borlini, *When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements*, 33 Leiden J. Int'l L. 313 (2020); Jaemin Lee, *The "Indirect Support" Loophole in the New SOE Norms: An Intentional Choice or Inadvertent Mistake?*, 20 Chinese J. Int'l L. 63 (2021).

[43] Int'l L. Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. Doc. A/56/10 (Oct. 24, 2001) [hereinafter "ILC Articles"].

[44] *See, e.g.*, Luigi Condorelli & Claus Kress, *The Rules of Attribution: General Considerations*, *in* The Law of International Responsibility (James Crawford et al. eds., 2010); James Crawford, State Responsibility: The General Part (2013).

[45] Compare with David Caron, *The Basis of Responsibility: Attribution and Other Transubstantive Rules*, *in* The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility (RB Lillich & DB Magraw eds., 1998); Marko Milanovic, *Special Rules of Attribution of Conduct in International Law*, 96 Int'l L. Stud. 1 (2020).

International investment arbitration has historically been one of the most active forums for applying the doctrines of attribution in concrete disputes involving state-owned entities. This is because typical large-scale investment projects, particularly in Global South and transition economies, are often arranged with foreign investors contracting, interacting, and cooperating with SOEs or other separate instrumentalities rather than the state itself. From the perspective of the state, this allows flexibility and other advantages of the corporate form, such as segmentation and limitation of potential liabilities. If, however, the investment project faces obstacles, such as governmental interference, undercapitalization, or contractual breaches, questions often emerge as to the responsibility and, with that, the liability of the shareholder state.[46] State shareholders are thus subject to scrutiny when claimants seek to construe SOEs and other state-owned entities either as functional parts of the state or its instrumentalities. The issue of attribution often emerges as the focal point of litigation.[47]

ARSIWA contains three primary attribution rules that delineate whether a state is internationally responsible for the conduct of a state-owned company in the light of the substantive obligations of a given treaty. These basic rules, found in Articles 4, 5, and 8 of the ARSIWA and the ILC's commentary, provide a framework where markedly private arrangements can trigger state responsibility. The rules cover the instances where an entity is considered an organ of the state, where it is empowered to exercise elements of the governmental authority, and where it is acting under instructions or under the direction or control of the state.[48] All three of these relevant rules are usually pursued in litigation involving private parties. From the perspective of the foreign investor litigating against a state under international investment law, for example, the optimal outcome is usually to equate an SOE with a state organ under Article 4. Under that rule, all conduct of a separate entity, irrespective of its regulatory or commercial nature, shall be considered an act of that state.[49] Alternatively, the foreign investors can also seek to demonstrate, under Article 5, that an SOE was exercising elements of governmental authority when breaching a substantive provision of a BIT.[50] Finally, under Article 8, the conduct of a company may be attributed to the state if there is "evidence that the corporation was exercising public powers, or that the State was using its ownership interest in or control of a corporation specifically to achieve a particular result."[51] The threshold for attributing conduct under Article 8 is very high because of the

[46] *See generally*, Albert Badia, Piercing the Veil of State Enterprises in International Arbitration (2014).

[47] *See, e.g.*, Mikko Rajavuori, *Making International Legal Persons in Investment Treaty Arbitration: State-Owned Enterprises along the Person/Thing Distinction*, 18 German L. J. 1183 (2017).

[48] For a more comprehensive analysis, see the chapter by Kristen E. Boon in this volume.

[49] ILC Articles, *supra* note 43, art. 4, 6.

[50] *Id.* at art. 5.

[51] *Id.* at art. 8.

evidentiary difficulties claimants face when trying to establish state direction and control over an SOE.[52]

Together, the rules articulated in ARSIWA cover instances where SOEs have, for example, been established as standalone companies with separate legal personalities in their domestic jurisdictions, but nevertheless have been entrusted with carrying out governmental policies. This is usually in sensitive fields such as energy, telecommunications, infrastructure, or finance. Another typical situation involves state-owned companies that clearly operate outside any governmental prerogative, but in which states retain a high degree of influence and control. That influence and control is then used to breach the shareholder state's treaty commitments.[53] From a practical perspective, the law of state responsibility thus is instrumental in probing the conduct of state shareholders in order to enforce the substantive guarantees arising from individual treaties. At the same time, however, the law of state responsibility – through the doctrine of attribution – also plays a key role in shaping and channeling the wider international economic law responses to the rise of the emergent shareholder state.

ATTRIBUTION AND LEGAL CONSTRUCTION OF THE SHAREHOLDER STATE

This part analyzes how investment arbitration tribunals use doctrines of attribution to construe the shareholder state. First, the part discusses how attribution may be understood as a regulatory technique that frames legitimate state shareholder power. Next, the part analyzes five arbitral awards that focus on the organization and operation of the state shareholder. The part suggests that the analysis of attribution by the tribunals in these cases pivots on the concept of the "ordinary" shareholder, which forms a key element in the legal construction of the state shareholder.

Attribution as a Regulatory Technique

The way investment tribunals interpret and apply the doctrines of attribution greatly affect the outcome of investment treaty arbitration. In some concrete disputes involving state-owned entities, the tribunals' interpretive standards may lead to establishing attribution and state responsibility. In others, the facts of the case and the conduct of shareholder states do not meet the necessary control threshold. While analysis of the technical operation of attribution in the case of state-owned

[52] *Cf.* Thomas Wälde, *Equality of Arms in Investment Arbitration: Procedural Challenges*, *in* Arbitration Under International Investment Agreements: A Guide to the Key Issues (Katia Yannaca-Small ed., 2010).

[53] *See, e.g.*, 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 (2010).

companies is already well-rehearsed in scholarly commentary,[54] significantly less emphasis has been placed on its system-level ramifications for the emergent shareholder state. This is a significant omission because the doctrines of attribution can form trans-substantive and universally applicable techniques that frame and sustain the legitimate exercise of state shareholder power. This applies particularly "in the foggy borderland between the worlds of public and private" where the doctrines of attribution enable international adjudicators to demarcate the exact boundaries of the state regardless of its domestic administrative traditions and institutional arrangements.[55]

In principle, attribution doctrines perform a highly specialized function. According to ARSIWA, the purpose of attribution is to define "the conditions under which conduct is attributable to the State" and thus the rules ought not to be used "for other purposes for which it may be necessary to define the State or its Government."[56] Notwithstanding such a clear position, ARSIWA's rules of attribution are regularly used in multiple roles and at multiple stages of international adjudication. The doctrine appears, for instance, when investment tribunals analyze the proper authors of a particular representation and the attribution of contractual obligations, both of which clearly deal with attribution of internationally *lawful* acts.[57] Similarly, rules of attribution often appear at the jurisdictional stage when tribunals examine their competence over disputes involving state-owned entities.[58] Accordingly, international courts and tribunals also use the attribution doctrine in ways that extend their scope and applicability beyond what the ILC's conceptualization of them would suggest, with important ramifications.

[54] *See, e.g.*, Mikko Rajavuori, *How Should States Own? Heinisch v. Germany and the Emergence of Human Rights-Sensitive State Ownership Function*, 26 Eur. J. Int'l L. 727 (2015); Simon Olleson, *Attribution in Investment Treaty Arbitration*, 31 ICSID Rev. 457 (2016); Judith Schönsteiner, *Attribution of State Responsibility for Actions or Omissions of State-Owned Enterprises in Human Rights Matters*, 40 U. Penn. J. Int'l L. 895 (2019); Jorge Viñuales, *Attribution of Conduct to States in Investment Arbitration*, 20 ICSID Rep. 13 (2022).

[55] Gus van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 Int'l & Comp. L. Q. 371, 371–94 (2007).

[56] ILC Articles, *see supra* note 43, Ch. II, ¶ 5.

[57] *See, e.g.*, Csaba Kovács, Attribution in International Investment Law (2018).

[58] It is important to note that state-owned entities can also appear as claimants in investment treaty arbitration. In these cases, the tribunals often rely on the so-called *Broches* test, which suggests that claims under the ICSID Convention by government-owned corporations should not be disqualified unless they act as agents for the government or discharge essentially governmental functions. *See* Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, *in* 136 Collected Courses of the Hague Academy of International Law, Part II, 334–335 (1972). These conditions closely resemble those under ILC Articles 8 and 5, and their parallels are frequently discussed both in arbitral case law and legal commentary. *See*, e.g., Mark Feldman, *State-Owned Enterprises as Claimants in International Investment Arbitration*, 31 ICSID Rev. 24 (2016); Anran Zhang, *The Standing of Chinese State-Owned Enterprises in Investor-State Arbitration: The First Two Cases*, 17 Chinese J. Int'l L. 1147 (2018). Due to space constraints, however, this article does not address these jurisdictional issues in greater detail.

In the context of international investment law, the practical "distributive effects of extending attribution rules" on the host state's political economy are clear, given that triggering state responsibility over the acts of separate entities can lead to awarding substantial pecuniary compensation to private investors.[59] Volatile and potentially costly outcomes of attribution can, already by themselves, incentivize states to limit the use of state-owned entities, but attribution also has more constitutive effects.[60] Thus, this chapter suggests that attribution forms a key, but underappreciated, component in shaping, nudging, and defining the ways in which states organize themselves when they operate as shareholders in the global economy. Specifically, the malleability of the attribution doctrine enables adjudicators to create and maintain powerful templates to manage and discipline the relationship between the state shareholder and the investee company. Often, these templates privilege institutional arrangements where the state commits to being an "ordinary" shareholder. The construction of such a shareholder identity is visible both in the tribunals' analysis of the organizational set-up of the state shareholder function and in its substantive operation. Crucially, this image is vital for legal construction of the state shareholder, and it connects the doctrine of attribution with the other major regulatory and normative projects, such as domestic investment screening or transnational corporate governance, that have developed to temper the rise of contemporary state capitalism.

To support this idea, the following part focuses on the doctrinal analysis performed in five recent arbitral awards involving state-owned companies. Naturally, the awards give only a fleeting overview of the complex arbitral case law that consists of dozens of awards ranging from the conduct of national oil companies to that of privatization funds.[61] Because the specific language of different BITs can vary – as can the different tribunals' interpretation of customary law relating to state responsibility – providing a coherent doctrinal exposition of the heterogeneous case law is a task that goes beyond this chapter. For this reason, the awards discussed here were selected due to their explicit, and often careful, analysis of the organizational and operative conditions in which state shareholders interact with their investee companies and foreign investors.

Making "Ordinary" State Shareholders in Investment Treaty Arbitration

When assessing the conduct of state-owned entities, arbitral tribunals frequently focus on the broader organizational setting of state ownership in a given country.

[59] James Crawford & Paul Mertenskötter, *The Use of the ILC's Attribution Rules in Investment Arbitration*, *in* Building International Investment Law: The First 50 Years of ICSID 33 (Meg Kinnear et al. eds., 2015).

[60] Compare with the established debates on regulatory chill, *see, e.g.*, Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement*, 7 Transnat'l Env't L. 229 (2018); Carolina Moehlecke, *The Chilling Effect of International Investment Disputes: Limited Challenges to State Sovereignty*, 64 Int'l Stud. Q. 1 (2020).

[61] For a different set of cases, *see* Boon in this volume.

This prong of the analysis is primarily interested in how state shareholding has been institutionally arranged and how it interacts with the overall exercise of public authority. Doctrinally, this scrutiny is embedded in Articles 4 and 5 of the ARSIWA.

Flemingo v. Poland

Flemingo v. Poland, a case arising out of the Polish Airports State Enterprise's (PPL) termination of lease agreements for retail stores at the Warsaw airport, illuminates the operation of these Articles.[62] PPL was a company separate from the state, established in 1987 pursuant to special legislation, whose sole shareholder was the Polish State Treasury. The respondent state argued that the company formed "an independent, self-governing and self-financing entrepreneur with legal personality" and conducted "its business activities 'independently of the Polish authorities and on the same principles as any other business entity'."[63] In the claimant's view, however, PPL was a direct successor of Poland's Air Traffic and Airport Management Board, a governmental agency, pursuing a clear governmental task and factually immersed in the Ministry of Transport. The Tribunal agreed with the claimant, deeming PPL a de facto state organ under Article 4 of the ARSIWA and, in any case, an entity exercising governmental authority in the sense of Article 5 of the ARSIWA. While the analysis was informed by specific legislation on the PPL and the company's ownership structure, crucial factors in establishing attribution related to the institutional and practical arrangements through which the state interacted with the SOE. The fact that PPL was, according to relevant evidence, "an enterprise which is functioning within the structure of the Ministry" and that "[w]hen it comes to questions on investments … the supervision over PPL's action is exercised by the minister responsible for transport" was enough to convince the Tribunal of the PPL's status as a de facto organ of the state.[64]

By foregrounding the company's persistent legacy as an administrative agency, the Tribunal essentially highlighted the limited transformation of state institutions despite corporatization. While the state efforts to insulate PPL from state machinery by turning it into a company with a separate legal personality and independent decision-making structure, the dynamics of the shareholder-company-relationship, which blended shareholder control with persistent governmental oversight, enabled the Tribunal to construe the institutional set-up of the state shareholder to jeopardize the neat separation between the Ministry and the company.

Staur Eiendom v. Latvia

Another investment Tribunal reached a different outcome in *Staur Eiendom v. Latvia*, a case where the claimants entered into a contract with the Latvian

[62] *Flemingo DutyFree Shop Private Ltd. v. Republic of Poland*, PCA Case No. 2014-11, Award (Aug. 12, 2016).
[63] *Id.* at ¶¶54–55.
[64] *Id.* at ¶¶434–435.

state-owned company SJSC Airport Riga (SJSC) to develop land adjacent to the airport.[65] Over the course of the project, SJSC initiated numerous amendments to the development plan which, ultimately, meant significant downsizing of the planned airport, to the detriment of the foreign investors. The Tribunal had to assess if the SJSC's conduct in revising the development plans was attributable to the state for the purposes of triggering state responsibility over breaches of a fair and equitable treatment provision in the relevant treaty. As in *Flemingo*, the claimants sought to establish attribution by pursuing Articles 4 and 5 of the ARSIWA, thus focusing on the organization of the state shareholder. In their view, SJSC was "an instrument of the Latvian State, with no real autonomy of its own, notwithstanding its separate legal personality" and the Ministry of Transport exerted significant control of "SJSC Airport's decision-making and operations."[66] The claimants heavily relied on the separate legal framework governing the operation of the airport, the general provisions on state-owned companies, the OECD reviews of the general Latvian policy on the corporate governance of state-owned enterprises, as well as the involvement of the Ministry in "nearly all decisions by [SJSC] Airport."[67]

The respondent, in turn, emphasized the separate legal personality of SJSC, the general nature of the "so-called instructions," and the independence of the company to "determine its own strategy in line with … broad objectives."[68] The government further argued that "the Latvian State as Shareholder of SJSC Airport, represented by the Ministry of Transport, consistently made it clear that, in accordance with Latvian law, it could not interfere with the operation of the company."[69] By contrast, the "State shareholder was only responsible" for regular functions under the Latvian corporate law such as:

> approval of the annual accounts, the decisions on the use of profits from the previous year, the appointment of the members of the Supervisory Council and the auditor, the approval of the articles of association, acquisition or disposal of a business and abandoning existing activities and initiating new activities, and decisions relating to the winding up of the company.[70]

The Tribunal agreed, ruling that by limiting its role to "that ordinarily played by the shareholder of any private company"[71] and refraining from "day-to-day governance decisions,"[72] the actions of the state shareholder were "not sufficient … for

[65] Staur Eiendom AS, *EBO Invest AS & ROX Holdings AS v. Latvia*, ICSID Case No. ARB/16/38, Award (Feb. 28, 2020).
[66] *Id.* at ¶258.
[67] *Id.* at ¶¶259–264.
[68] *Id.* at ¶¶279–292.
[69] *Id.* at ¶282.
[70] *Id.* at ¶325.
[71] *Id.* at ¶332.
[72] *Id.* at ¶329.

SJSC Airport's separate legal personality to be disregarded and for SJSC Airport to be treated as an organ of the State."[73] Compared to *Flemingo*, the *Staur Eiendom* award illustrates how a stable regulatory environment, where the roles and procedures for exercising shareholder power are clear and firmly established, can absolve the state shareholder even when circumstantial evidence supports attribution.

Tenaris and Talta v. Venezuela

In *Tenaris and Talta v. Venezuela*, the Tribunal rendered a similar conclusion. This case dealt with national expropriation and the state's pre-nationalization interference with an investment in a steel company.[74] As a part of their argument, the claimants suggested that a raw materials company, CVG FMO, whose majority shareholder was a state-owned company (CVG), discriminated against the foreign investor in the supply of raw materials for the benefit of another state-owned company.[75] The claimants further argued that CVG FMO formed "part of the 'functionally decentralized public administration' of the Government of Venezuela and that the company is subject to the control of the Ministry of Industry by reason of CVG's shareholding."[76] By contrast, the respondent argued that "the powers of CVG over CVG FMO are no more than those of a shareholder."[77] The Tribunal agreed with the respondent, thus accepting that the company's obligations toward foreign investors were contractual and not in any way connected to exercising governmental authority. In this context, the Tribunal also determined that "to the extent that the actions of its principal shareholder CVG might be said to be relevant, there is nothing in the evidence to suggest that its oversight of CVG FMO went beyond the exercise of general supervision."[78]

Unlike in *Flemingo*, the *Staur Eiendom*, and *Tenaris and Talta* Tribunals thus emphasized how the state's efforts to confine its interaction with the investee companies to standard corporate law mechanisms could provide institutional insulation around the organization of the state shareholder function. As a result, the latter two cases show how tribunals can interpret the attribution doctrines in such a way as to shield the shareholder state from responsibility when its exercise of public authority is isolated from its shareholding functions via intuitional design, thus encouraging this kind of organizational arrangement.

Tulip v. Turkey

While state commitment to the "ordinary" shareholder role is most often discussed with reference to the organizational set-up of state shareholding, a similar analysis

[73] *Id.* at ¶332.
[74] *Tenaris S.A. & Talta v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award (Jan. 29, 2016).
[75] *Id.* at ¶323.
[76] *Id.* at ¶400.
[77] *Id.* at ¶401.
[78] *Id.* at ¶417.

also emerges with respect to the substantive and operative aspects of shareholder conduct. *Tulip v. Turkey* provides an illustrative example of such an analysis.[79]

The case arose from the termination of a real estate development contract by Emlak, a Turkish real estate investment trust owned by TOKI, a state organ responsible for Turkey's public housing. The claimant argued, based on Article 8 of ARSIWA, that TOKI had maintained an "extraordinary level of control over every aspect of Emlak's operations" through the control of voting shares and members of the board, and thus furthered interests alien to Emlak's genuine business interests.[80] As part of its defense, the respondent contended that the termination of the contract did not go "beyond the legitimate exercise of the rights of a majority shareholder to manage the company's affairs in furtherance of those perceived interests."[81] The Tribunal agreed, noting how the evidence suggested "ordinary control exercised by a majority shareholder acting in the company's perceived best interests" rather than specific activity "in the sense of sovereign direction or control."[82] On this point the minority of the Tribunal dissented, suggesting that Emlak's decision to terminate the contract was, both in terms of the company's organizational structure and the substance of the decision, "guided – if not fully directed – by the sovereign's hand."[83] For the majority, however, the "plain documentary," including Emlak's board of directors' minutes and agenda papers, did not support outsized substantive instruction by the state shareholder in the company's "decision-making process."[84]

EDF (Services) v. Romania

A different verdict was reached in *EDF (Services) v. Romania*, a case concerning an arbitrary taking of a concession to provide duty-free services at Romanian airports and particularly the role of two Romanian SOEs, which together participated in the joint venture companies, in the process.[85] Relying on Articles 4, 5, and 8 of ARSIWA, the claimant argued the conduct of both entities was attributable, as they acted "as agents of the Romanian State."[86]

The Tribunal rejected the claimant's position with regard to Articles 4 and 5, holding the Romanian SOEs were separate legal persons "in pursuit of the corporate objects of a commercial company with the view to making profits, as any other commercial company operating in Romania."[87] A more detailed examination

[79] *Tulip Real Est. Inv. & Dev. Netherlands BV v. Republic of Turkey*, ICSID Case No ARB/11/28, Award (Mar. 10, 2014).
[80] *Id.* at ¶243.
[81] *Id.* at ¶307.
[82] *Id.* at ¶¶309–11.
[83] Tulip, ICSID Case No. ARB/11/28, Separate Opinion of Michael Evan Jaffe ¶8.
[84] *See supra* note 79, ¶¶311, 314.
[85] *EDF (Serv.) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award (Oct. 8, 2009).
[86] *Id.* at ¶102.
[87] *Id.* at ¶198.

was conducted under Article 8 of ARSIWA. As part of its defense, the Romanian government argued that the Ministry of Transportation, the sole shareholder of the SOEs in question, only provided rough mandates to the companies, consistent with its significant shareholder role. Thus, the government "did not exercise control … beyond its role as shareholder."[88] Examining the evidence, the Tribunal noted that the mandates the Ministry gave to the SOEs were not as general as they were depicted to be. Instead, the instructions contained concrete instructions impinging on the relationship between the SOEs and the claimant, leading the Tribunal to an:

> understanding that the corporate bodies of companies under the authority of the Ministry of Transportation had [no] initiative to originate, in full independence, proposals to the Ministry concerning the kind of decisions to be taken, much less that such bodies were free to decide other than as provided by the mandates.[89]

Even though the ownership mandates were deployed through proper channels and operationalized by both the joint venture companies' boards of directors and the general meeting, the directives emanating from the Ministry were considered compelling in achieving the particular result of bringing the contractual arrangements to an end.[90] Unlike *Tulip*, the *EDF (Services)* award thus showcases how the specificity of shareholder communication and the tight limits posited on the company may trigger attribution despite the shareholder state's reliance on standard influence mechanisms provided by domestic corporate law.

The Making of the State Shareholder under Investment Law

Two key findings arise from the discussed arbitral case law. First, the category of the "state shareholder" emerges as the analytical linchpin when applying the doctrines of attribution in concrete cases. Whether the issue is the institutional set-up of ownership functions across ministries and various holding companies or the substantive elements of shareholder communication, the parties' arguments and the tribunals' analyses focus on the state shareholder's organization and operation. In *Flemingo*, for example, the fact that SOE operations were physically run by the Polish Ministry of Transport – the company's sole shareholder – was crucial for attributing the conduct of the company to the state. Similarly, the *EDF (Services)* Tribunal considered the specificity of mandates given by the Romanian Ministry of Transportation to amount to detailed micromanagement, which jeopardized the neat separation between the shareholder and the company. Thus, these mandates injected elements of governmental authority into the shareholder–investee company relationship that was otherwise arranged to preserve each entity's unique competency under corporate law. Focusing on the organizational structure and operation of shareholding

[88] *Id.* at ¶171.
[89] *Id.* at ¶205.
[90] *Id.* at ¶209.

institutions enables tribunals to largely disregard the domestic variations of state capitalism and concentrate on the processes that mediate the state's market participation. As with the law of state responsibility, more generally, the making of the state shareholder under investment law is a matter of international law rather than national law.

Second, the interpretative practices in the arbitral case law also propound on the normative elements of state shareholder behavior. In particular, the concrete techniques used to employ doctrines of attribution to legally construe state shareholders expose how deeply international investment law enmeshes with other regulatory projects focused on the rise of the shareholder state. The examined cases underscore how concepts of shareholders' *ordinary* roles, competences, and interests, as well of those of *ordinary* company law and the *ordinary* commercial interests of state-owned companies are profoundly featured in tribunals' analytical processes. In each case, the malleable doctrine of attribution seems to extend a template for managing the relationship between the state shareholder, the rest of the state apparatus, and other market actors by rationalizing institutional arrangements, practices, and the state shareholder's behavior. The outcome, which brings forward the distinction running through most SOE-related legal regimes, is that by deviating from the standard shareholder competencies and behavior underwritten by corporate law, the state exposes itself to a high risk of responsibility and liability. As such, the tribunals' use of attribution under the law of state responsibility imbues an "ordinary" shareholder logic on state shareholders, suggesting that the organization and operation of state shareholders is increasingly compared to that of a hypothetical ordinary shareholder.

In sum, the concept of the "ordinary" shareholder emerges as a crucial analytical tool used by tribunals to put forward an idealized shareholder template which privileges separation of regulation and ownership via institutional design, portrays the state shareholder as any other private shareholder, and provides a robust set of legal disciplines that disincentivize hands-on control over state-owned entities. While fragmented, this notion emerges as a touchstone that frames both the regulatory and the normative dimensions of international investment law. Relatedly, the doctrinal operation connects attribution to other international, regional, and domestic legal regimes that attempt to manage the relationship between state shareholders and their investee companies.

While it is possible to make a normative case both for and against such a hypothetical comparator, this regulatory image comes to influence the identity of the state shareholder, as well as how it mediates interactions between states and companies in the aggregate. Through customary international law's doctrines of attribution, investment tribunals partake in a larger regulatory undertaking that has developed around the rise of the shareholder state. Beyond this, the heavy emphasis on the category of the "state shareholder" as an analytical lens may have a broader impact on international economic governance. For one example, the doctrinal construction of state-company relationship could be informative for future trade and investment

treaties as state ownership is increasingly channeled through minority, rather than majority, positions and organized through complex holding company structures or sovereign wealth funds.[91] The covert legal construction of shareholder identities may also have more drastic implications. Given the ubiquity of state ownership in several sectors critical to the sustainability transition, for instance, the doctrinal templates that arise from investment treaty arbitration will likely come to influence both the use of SOEs as vehicles of energy policy and the international legal challenges to climate policy by private investors in general.[92]

CONCLUSION

State shareholding has grown in significance with the rise of state capitalism in the early twenty-first century, but it has long implicated questions of law, economics, and political philosophy. State control over the economy is also a key area of political contestation, and the state shareholder's constitution, operation, and legitimacy are, as a result, moving targets. Over the past decades, the practice and regulation of public intervention in the private market have experienced major shifts that have transformed the earlier dominant paradigms of "ownership as regulation" into "regulation of ownership."[93] Most recently, the internationalization of state ownership, and varied responses to its economic, political, and intellectual underpinnings, has put forward a distinctive model of the shareholder state.

This chapter has examined the legal construction of state shareholders as a part of this diffuse regulatory system addressing state shareholding. Focusing on international economic law, the chapter identified state shareholders as key targets in the evolving international regulatory framework that shapes the parameters of state ownership. In this context, the chapter suggested that the law of state responsibility forms a crucial, but underappreciated, fulcrum in the international legal framework that has developed around state capitalism.

Specifically, the chapter concentrated on the shareholding institutions that mediate the state's market participation, focusing on investment arbitration tribunals' use of the doctrines of attribution when they analyze the organization and operation of state shareholders. Through these doctrinal operations, investment arbitration tribunals can be seen to construe a particular state shareholder identity centered on the notion of the "ordinary shareholder." When states deviate from this hypothetical category – either through the organizational structure of their ownership or control or their intervention in a company's operations – they increase their risk of responsibility and liability for breaches of investment treaties' substantive guarantees.

[91] Compare with Borlini, *supra* note 42.

[92] *See, e.g.*, Kyla Tienhaara et al., *Investor-State Disputes Threaten the Global Green Energy Transition*, 376 Sci. 701 (2022).

[93] Thynne, *supra* note 18.

Beyond this specific context, the "ordinary" shareholder template also shapes, nudges, and defines the ways in which states organize themselves when they operate through shareholder positions more broadly. While the law of state responsibility and its doctrine of attribution cannot be solely responsible for the governance patterns of state shareholders – these doctrines form too slender of a support for that – their universal applicability and doctrinal malleability not only compensate for the dearth of primary investment treaty law, but also connect the operation of customary international law with many other regulatory projects. These include the new forms of transnational corporate governance and invigorated investment screening procedures, which have emerged to rein in the rise of the shareholder state. In this way, the legal construction of the state shareholder through attribution also highlights the dynamics and persistent significance of customary international law – a branch of law that often receives less attention than novel treaty regimes or specific SOE-disciplines – for international economic law.