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Can Acta Jure Gestionis *Be Attributable to the State? A Restrictive Doctrine of State Responsibility*

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Abstract

The distinction between acta jure imperii *and* jure gestionis*, while playing a pivotal role in the law of state immunity, appears alien to the law of state responsibility. However, recent practice has shown conceptual overlaps between these different areas of international law. The sovereign/commercial dichotomy has informed the attribution of parastatal entities' conduct to a state under Article 5 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). More precisely,* acta jure gestionis *have been excluded from the scope of attributable conduct. Against this backdrop, this study investigates whether, and to what extent, the distinction between* acta jure imperii *and* jure gestionis *dictates the interpretation and application of Article 5 of ARSIWA. We conclude that the distinction does have relevance in this context, although Article 5 was not designed to preclude the attributability of commercial acts. However, its obscure wording has allowed subsequent practice to overly narrow the scope of attributable conduct. This study, critically analysing a restrictive doctrine of state responsibility, aims to provide a more accurate and desirable conception of the rule and a clear and detailed guideline on when the commercial act of parastatal entities can be attributable to the state.*

1 Introduction

While the distinction between *acta jure imperii* and *jure gestionis* plays a pivotal role in the law of state immunity, now predicated on a doctrine of restrictive immunity,[1]

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1 See, e.g., Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions', 54 *British Yearbook of International Law* (*BYBIL*) (1984) 75, at 75.

it appears alien to the law of state responsibility. The International Law Commission (ILC) specifies in its commentary on the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)[2] that '[i]t is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as *acta iure gestionis*'.[3] More precisely, the commercial act of a state organ may be attributable to the state and, thus, engage state responsibility unless the organ acts in a purely 'private' (as opposed to 'official' or 'public' rather than 'sovereign') capacity.[4] Therefore, it is logical to assume that the official (or public) act attributable to a state may encompass not only *acta jure imperii* but also *acta jure gestionis* and that the private act that is non-attributable is a narrower concept than the commercial act for the purposes of state immunity.

However, recent practice has shown conceptual overlaps between the law of state responsibility and that of state immunity. Today, the boundaries between the public and private spheres, which have been the basis of the law of attribution,[5] are blurred. States are increasingly entrusting persons or entities outside the state apparatus with public functions. This enables states to achieve certain public goals in a more stable and efficient manner when persons or entities within the state organization do not have relevant capabilities, such as expertise, credibility, legitimacy and operational capacity.[6] Given that outsourcing public functions to the private sector has now become a global phenomenon,[7] the crux of the current law of attribution lies in a rule that regulates the circumstances in which a state may be held responsible for the conduct of a parastatal entity – that is, an entity that does not have the status of a state organ but is empowered to exercise a public function under the domestic law of that state.[8] Article 5 of ARSIWA is a provision drafted for this purpose:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[9]

2 Responsibility of States for Internationally Wrongful Acts (ARSIWA), UN Doc. A/RES/56/83, 12 December 2001, annex.

3 International Law Commission (ILC), 'Responsibility of States for Internationally Wrongful Acts. Text of the Draft Articles with Commentaries Thereto', 2(2) *ILC Yearbook* (2001) 31, at 41, para. 6.

4 *Ibid.*, at 42, para. 13.

5 Christenson, 'The Doctrine of Attribution in State Responsibility', in R.B. Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens* (1983) 321, at 321.

6 Abbott *et al.*, 'Competence-Control Theory: The Challenge of Governing through Intermediaries', in K.W. Abbott *et al.* (eds), *The Governor's Dilemma: Indirect Governance Beyond Principles and Agents* (2020) 3, at 4.

7 Mégret, 'Are There "Inherently Sovereign Functions" in International Law?', 115 *American Journal of International Law* (*AJIL*) (2021) 452, at 453.

8 In practice and literature, the term 'state instrumentality' is also used to denote such an entity. See, e.g., C. Kovács, *Attribution in International Investment Law* (2018), at 129.

9 Thus, it is argued that ARSIWA 'Article 5 is the expression of the "ultimate analysis" of the rationale for attribution'. Petrochilos, '*Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine*: When Is Conduct by a University Attributable to the State?', 28 *ICSID Review* (*ICSIDR*) (2013) 262, at 267.

Regarding this provision, a few preliminary remarks are required. First, it should be noted that parastatal entities are conceptually distinct from state-owned enterprises (SOEs). It is true that 'parastatal' is not a legal term of art; however, when it comes to the attribution of conduct, the core of the concept lies in the legal entrustment of specific public functions. Thus, state ownership as such is neither requisite nor sufficient for an entity to be qualified as parastatal for the purposes of ARSIWA Article 5. In the absence of public functions being specifically entrusted pursuant to the domestic law of the state, the attribution of SOEs' conduct is governed by ARSIWA Article 8.[10] Second, parastatal entities are classified into two major groups: states can enlist an existing private entity that is equipped with relevant capabilities in public services, or parastatal entities can be established by a state for the purpose of exercising specific public functions.[11] As to the former category, examples provided by the commentary on Article 5 include private security firms acting as prison guards with powers of detention and discipline and private airlines exercising certain powers in relation to immigration control or quarantine.[12] Parastatal entities falling under the latter category are prevalent in strategic sectors, such as national resources, energy and infrastructure, which is, as seen below, illustrated by the practice of investor-state dispute settlement (ISDS) tribunals.[13]

That said, the key term, upon which attribution under ARSIWA Article 5 depends, is full of obscurities: 'elements of the governmental authority' (*prérogatives de puissance publique*). Notwithstanding that the concept is 'not only undefined but elusive when pursued',[14] subsequent practice and the literature appear to converge in interpreting it as encapsulating a 'restrictive approach' that excludes *acta jure gestionis* from the scope of attributable conduct.[15] In investment treaty arbitration, where the interpretation and application of ARSIWA Article 5 is frequently at issue, ISDS tribunals have recently applied the distinction between *acta jure imperii* and *jure gestionis* to determine whether the conduct of a parastatal entity is attributable to a respondent state and have maintained that the commercial act is categorically non-attributable to the state. Moreover, James Crawford, who contributed considerably to the finalization of ARSIWA as the last special rapporteur, opined that '[a]pplication of these concepts [*acta jure imperii* and *jure gestionis*] to attribution under ARSIWA Article 5 is useful' and 'achieves consistency' between the law of state responsibility and that of state immunity.[16] Remarkably, his first report prepared for the work of the ILC emphasized

[10] ARSIWA Commentary, *supra* note 3, at 48, para. 6; see also 43, para. 7.
[11] *Ibid.*, at 43, para. 2.
[12] *Ibid.*
[13] Kovács, *supra* note 8, at 130; de Stefano, 'Attribution of Conduct to a State', 37 *ICSIDR* (2022) 20, at 37–38.
[14] Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority', 96 *AJIL* (2002) 857, at 861.
[15] Olleson, 'Attribution in Investment Treaty Arbitration', 31 *ICSIDR* (2016) 457, at 473.
[16] J. Crawford, *State Responsibility: The General Part* (2013), at 130; see also C. de Stefano, *Attribution in International Law and Arbitration* (2020), at 23–25.

the irrelevance of that distinction for the purposes of the attribution of state organs' conduct under ARSIWA Article 4.[17] What is missing is a clear and sufficient justification for the difference between Articles 4 and 5.

Against this backdrop, this study explores whether, and to what extent, the distinction between *acta jure imperii* and *jure gestionis* dictates the interpretation and application of ARSIWA Article 5. It is argued that the wording of Article 5 fails to convey the quintessence of the rule precisely and, thus, has allowed subsequent practice and the literature to become too restrictive – that is, the scope of attributable conduct has been overly narrowed. This doctrinal critique provides a more accurate and desirable conception of the rule and a clear and detailed guideline on when the commercial act of parastatal entities can be attributable to the state.[18] To put it in a broader context, this study attempts to gauge the potential of (public) international law to govern the increasingly privatized world.[19]

After identifying the rationale for attribution, section 2 of the article analyses the *travaux préparatoires* of ARSIWA Article 5, from which it is difficult to conclude that the provision was designed to preclude the attributability of *acta jure gestionis*. Contrarily, the investigation of subsequent practice leads to the conclusion in section 3 that Article 5 now represents a restrictive approach to the attribution of parastatal entities' conduct. Subsequently, we discuss whether the law of state responsibility can also be predicated on a restrictive doctrine and, if so, how restrictive it can be. More precisely, to what extent is the state allowed to deny attribution to it of parastatal entities' commercial conduct? A further analysis is made in section 4 as to why ISDS practice has developed an overly restrictive approach to Article 5 and why it is unjustifiable. Finally, section 5 of this article concludes by suggesting a revised wording of ARSIWA Article 5 to clarify the contours of the rule.

[17] J. Crawford, 'First Report on State Responsibility', 2(2) *ILC Yearbook* (1998) 1, at 36, para. 172 (first report by Crawford).

[18] Commentators tend to be brief regarding ARSIWA Article 5. See, e.g., Momtaz, 'Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority', in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility* (2010) 237, at 244–246; M.M. Barnes, *State-Owned Entities and Human Rights: The Role of International Law* (2022), at 221–225.

[19] The broader relevance of ARSIWA Article 5 is illustrated by the World Trade Organization (WTO) case in which China argued that the Chinese state-owned entities in question were not 'public bodies' within the meaning of Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) 1994, 1869 UNTS 14, on the grounds that 'the defining characteristic of a public body is that it exercises authority vested in it by the government for the purpose of performing functions of a governmental character'. The Appellate Body concurred with China and found that this 'interpretation of the term "public body" coincides with the essence of [ARSIWA] Article 5'. WTO, *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China – Report of the Appellate Body*, 11 March 2011, WT/DS379/AB/R, paras 279, 310. The USA harshly criticizes 'the Appellate Body's "government authority" test [for] significantly limit[ing] the ability of governments to effectively combat unfairly subsidized imports and [for being] nowhere reflected in the text of the SCM Agreement'. Office of the United States Trade Representative, Report on the Appellate Body of the World Trade Organization (2020), at 85, available at https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf.

2 Rationale for Attribution and *Travaux Préparatoires* of ARSIWA Article 5

The attribution of conduct is defined as a legal operation whereby it is determined whether the conduct of a physical person is to be regarded as that of a state from the viewpoint of international law.[20] Attribution is ubiquitous in international law because that law is still primarily created by and addressed to states, which, as juridical persons, cannot act without a natural person as the intermediary.[21] However, the issue of attribution has been mainly discussed in terms of state responsibility. The rules that regulate the operation for the purposes of state responsibility are stipulated in Part 1, Chapter 2 (Articles 4–11) of ARSIWA. Among them, Articles 4, 5 and 8 are the most relevant provisions in practice. The application of Article 4, in most cases, involves little difficulty. If the author of the conduct has the status of a state organ under the domestic law of that state, attribution under international law is reduced to a formal (and simple) operation of *renvoi* to that domestic law arrangement.[22] The conduct of any state organ is to be regarded as that of the state under international law, which is, as confirmed by the International Court of Justice (ICJ), well established as a rule of customary international law.[23]

In contrast, the application of Article 8, which regulates the attribution of private persons' conduct and, according to the ICJ, also reflects the rule of customary international law,[24] has been problematic in practice and heatedly debated by international lawyers.[25] It is trite to say that, in principle, a state is not responsible for the conduct of private persons or entities.[26] However, as articulated in Article 8, there are two circumstances 'where such conduct is nevertheless attributable to the State because there

[20] Condorelli and Kress, 'The Rules of Attribution: General Considerations', in Crawford, Pellet and Olleson, *supra* note 18, 221, at 221.

[21] Olleson, *supra* note 15, at 457.

[22] Crawford, *supra* note 17, at 34, para. 154; see also D. Anzilotti, *Corso di diritto internazionale* (3rd rev. edn, 1928), at 418–419; Ago, 'Third Report on State Responsibility', 2(1) *ILC Yearbook* (1971) 199 (third report by Ago), at 237, para. 117. In the absence of state organ status under the domestic law, the conduct may be nevertheless attributable to the state when the author of the conduct acts 'in "complete dependence" on the State, of which [the author is] ultimately merely the instrument'. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (*Bosnian Genocide*), Judgment, 26 February 2007, ICJ Reports (2007) 43, at 205, para. 392. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1968, ICJ Reports (1986) 14, at 62–63, paras 109–110. The wording of ARSIWA Article 4(2) implies that the provision envisages not only *de jure* organs but also *de facto* organs: 'An organ *includes* any person or entity which has that status in accordance with the internal law of the State' (emphasis added). However, it should be noted that 'to equate persons or entities with State organs when they do not have that status under internal law must be exceptional'. *Bosnian Genocide*, *ibid.*, at 205, para. 393.

[23] *Ibid.*, at 202, para. 385.

[24] *Ibid.*, at 207, para. 398.

[25] See. e.g., de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the *Tadić* Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia', 72 *BYBIL* (2002) 255; Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18 *European Journal of International Law* (*EJIL*) (2007) 649.

[26] De Frouville, 'Attribution of Conduct to the State: Private Individuals', in Crawford, Pellet and Olleson, *supra* note 18, 257, at 261–264.

exists a specific factual relationship between the person or entity engaging in the conduct and the State'.[27] In the first scenario, a private person acts on the instruction of the state in carrying out the conduct: 'The second deals with a more general situation where private persons act under the State's direction or control.'[28] The attribution in the latter case is governed by the so-called 'effective control' test, whose threshold is considered to be high.[29] Furthermore, it is an arduous task to demonstrate that the state gives instructions to, or exercises direction or control over, the perpetrator.[30]

Although Article 5 has come into play less frequently than Articles 4 and 8,[31] the development of investment treaty arbitration highlights its increasing significance. Conceptually, the parastatal entity envisaged in Article 5 is located between the state organ and private person in terms of attribution. The attribution under Article 5 is neither as simple as the legal operation pursuant to Article 4 nor as exceptional as the attribution under Article 8. Moreover, Article 5 is usually, and should be,[32] applied by ISDS tribunals after the application of Article 4 has resulted in non-attribution and before examining a slim possibility of attribution under Article 8.[33]

In order to accurately locate the rule regulating the attribution of parastatal entities' conduct, it is imperative to trace the rationale for attribution. According to 'the fundamental principle governing the law of international responsibility' affirmed by the ICJ, 'a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf'.[34] Specifically, 'the only conduct attributed to the State at the international level' is that of persons or entities 'who have acted… as agents of the State'.[35] Different factors or links may indicate a relationship

[27] ARSIWA Commentary, *supra* note 3, at 47, para. 1.

[28] *Ibid.*

[29] *Nicaragua*, *supra* note 22, at 64–65, para. 115; *Bosnian Genocide*, *supra* note 22, at 208–211, paras 399–407.

[30] *Ibid.*, at 129, para. 209. In 2021, the European Court of Human Rights (ECtHR) actually applied ARSIWA Article 8 for the first time (M. Milanovic, 'European Court Finds Russia Assassinated Alexander Litvinenko', *EJIL: Talk!* [23 September 2021], available at www.ejiltalk.org/european-court-finds-russia-assassinated-alexander-litvinenko/) and shifted the burden of proof onto the respondent state in arguably exceptional circumstances. ECtHR, *Carter v. Russia*, Appl. no. 20914/07, Judgment of 21 September 2021, paras 162–169; see also Tsagourias and Farrell, 'Cyber Attribution: Technical and Legal Approaches and Challenges', 31 *EJIL* (2020) 941, at 965–966.

[31] The International Court of Justice (ICJ), while not yet having an opportunity to wrestle squarely with ARSIWA Article 5, gave it implicit recognition as a customary rule through perfunctory application. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports (2005) 168, at 226, para. 160; see also *Bosnian Genocide*, *supra* note 22, at 215, para. 414. The International Tribunal for the Law of the Sea (ITLOS) also seems to be of the opinion that the provision reflects the rule of customary international law. ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area – Advisory Opinion*, 1 February 2011, Case no. 17, para. 182.

[32] Schicho, 'Attribution and State Entities: Diverging Approaches in Investment Arbitration', 12 *Journal of World Investment and Trade* (2011) 283, at 288–289.

[33] The possibility is, however, not merely theoretical. See, e.g., ICSID, *EDF (Services) Limited v. Romania – Award*, 8 October 2009, ICSID Case no. ARB/05/13, paras 199–213.

[34] *Bosnian Genocide*, *supra* note 22, at 210, para. 406; see also ARSIWA Commentary, *supra* note 3, at 52, para. 2.

[35] ARSIWA Commentary, *supra* note 3, at 38, para. 2.

of agency, and the rules on attribution each correspond to such indicative factors. The origin of the debate on attribution in the ILC lies in the third report prepared in 1971 by Roberto Ago, the second special rapporteur on the topic of state responsibility. At the beginning of the 1970s, the basic rule of attribution, now enshrined in ARSIWA Article 4,[36] was already well established.[37] However, as stated by Ago, the rule, which is predicated on an institutional link between the author of the conduct and the state, is neither 'absolute' nor 'exclusive'.[38]

First, it is not absolute because the conduct of a state organ is not attributable when the organ does not act in its capacity. Article 4 is not explicit in this regard; however, its predecessor provision in the first reading of the Draft Articles on State Responsibility (Article 5) specified this condition as follows: '[The] conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, *provided that organ was acting in that capacity in the case in question*.'[39] Crawford proposed that this condition should not be expressly included in the final version. The reason for the proposal was that 'the language of the proviso might tend to suggest that there is a special onus on a claimant to show, over and above the fact that the conduct was that of an organ, that it was acting in an official capacity'.[40] Therefore, the deletion of the proviso did not alter the substance of the rule.[41] This is in full accordance with the wording of ARSIWA Article 7.[42] Whether a state organ 'exercises legislative, executive, judicial or any other functions' does not matter; however, exercising some state function is requisite for attribution.[43]

Second, the basic rule of attribution is not exclusive because the conduct of a person who does not formally belong to the state organization may be nevertheless attributable under certain circumstances specified by, for instance, ARSIWA Articles 5 and 8. The latter provision represents a factual link of control that exceptionally makes private persons' conduct attributable to the state.[44] Then, what link is the basis

[36] *Ibid.*, at 39, para. 8.

[37] The conduct of any state organ is to be considered as that of the state under international law; it is irrelevant whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the state apparatus (Ago, *supra* note 22, at 243–253, paras 136–162) and whether it is an organ of the central government or a local government of the state (*ibid.*, at 253–262, paras 163–185).

[38] *Ibid.*, at 253–254, para. 163.

[39] 'Report of the International Law Commission on the Work of Its 32nd Session (5 May—25 July 1980)', 2(2) *ILC Yearbook* (1980) 1, at 31 (emphasis added).

[40] Crawford, *supra* note 17, at 35–36, para. 164.

[41] ARSIWA Commentary, *supra* note 3, at 42, para. 13.

[42] 'The conduct of an organ of a State… shall be considered an act of the State under international law if the organ… acts *in that capacity*, even if it exceeds its authority or contravenes instructions' (emphasis added).

[43] For the purposes of ARSIWA, according to the ILC's commentary, 'the reference to a "State organ" covers all the individual or collective entities which make up the organization of the State *and act on its behalf*'. ARSIWA Commentary, *supra* note 3, at 40, para. 1 (emphasis added).

[44] While ARSIWA Article 8 specifies the relevant factors (instructions, direction and control), its predecessor provision (Article 8(a) of the first reading) contented itself with restating the rationale for attribution: 'The conduct of a person or group of persons shall also be considered as an act of the State under international law if… it is established that such person or group of persons was in fact acting on behalf of that State.' Report of the ILC (1980), *supra* note 39, at 31. See also *Nicaragua*, *supra* note 22, at 188, para. 16, Opinion individuelle de M. Ago.

of ARSIWA Article 5? In his third report, Ago elaborated on this point, arguing that it is 'logical' to attribute conduct to a state as long as its author is 'providing public services or performing public functions – in a word, [performing] an activity on behalf of the community'.[45] Therefore, 'the decisive criterion' is not whether such functions 'are performed by an organ of the State machinery proper' or not but, rather, what is 'the nature of the functions performed'.[46] Public functions may be entrusted to a person or entity by a state, either pursuant to the domestic law of that state or through factual control by a state organ.[47] Theoretically, a person or entity can act on behalf of a state without being entrusted with public functions. In such cases, the conduct is not attributable unless there are highly exceptional circumstances specified by ARSIWA Article 9.[48]

In this regard, Articles 4 and 5 are equally based on the legal entrustment of functions; however, how the legal operation of attribution proceeds differs significantly from one to the other. For state organs, their institutional link with the state leads to the presumption that their conduct is attributable to the state. It is generally understood, as implied by Crawford,[49] that a claimant who invokes state responsibility is not required to demonstrate that the state organ was acting on behalf of the state. Such a presumption does not arise in the case of parastatal entities. Therefore, the onus is on the claimant to demonstrate that the author of the conduct was acting on behalf of the state in the particular instance – more precisely, the function performed in carrying out the conduct is of a public nature. Accordingly, Article 5 is considered to represent 'a functional test of attribution'.[50]

The difference between Articles 4 and 5 is derived from the right to self-organization as an attribute of state sovereignty. Luigi Condorelli fully elucidated why the self-organization of states matters in this context. The basis for a discussion is that international law does not offer any criteria for determining which person is vested with the status of a state organ and what authority and competence are assigned to them because domestic law fulfils that role.[51] Essentially, international law does not regulate the manner in which the state organizes itself; that matter belongs to the 'hard core' of the domain reserved for states.[52] Without the so-called 'right to self-organization', an entity cannot be a sovereign state. In summary, the right is one of

45 Ago, *supra* note 22, at 256, para. 170.

46 *Ibid.*

47 '[A] State is responsible only for its own conduct, that is to say the conduct of persons acting, *on whatever basis*, on its behalf'. *Bosnian Genocide*, *supra* note 22, at 210, para. 406 (emphasis added).

48 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority'.

49 Crawford, *supra* note 17, at 35–36, para. 164.

50 Crawford, *supra* note 16, at 127.

51 Condorelli, 'L'imputation a l'Etat d'un fait internationalement illicite: Solutions classiques et nouvelles tendances', 189 *Recueil des cours* (1984) 9, at 27.

52 *Ibid.*, at 28.

the principal elements or attributes of sovereignty.[53] However, a state must pay a price for the right to self-organization on the plane of international relations; more specifically, a state is obliged to endorse the international consequences that exercising this right entails. Thus, if it is proven that the author of the conduct in question is a state organ in accordance with the domestic law, the state, while being allowed to object to a claim that the conduct is wrongful, may not deny in good faith that it is its own conduct. To summarize, the operation of attribution under international law is in substance reduced to interdicting states from contradicting themselves (estoppel in a large sense), which is derived from the principle of good faith.[54]

This is not the case with parastatal entities that do not formally belong to a state organization. However, their conduct may nevertheless be attributable to a state; otherwise, states could evade all responsibility by making persons who do not form a part of the state apparatus act on their behalf. How to distribute public functions between persons or entities within the state organization and external institutions is up to each state and also varies from system to system. Therefore, as argued by Ago in his third report, 'it would be absurd to conclude, on the basis of this distribution, that an act or omission in the performance of one and the same public function should, from the international standpoint, be considered as an act of the State in one case and not in another'.[55] Consequently, he emphasized the principle of the unity of the state and concluded that 'the distinction between all the different institutions which, also in a public capacity, provide specific services for the community or perform functions considered to concern the community' must be disregarded for the purposes of attribution under international law.[56]

Accordingly, the special rapporteur proposed the following draft article to address the conduct of organs of public institutions separate from the state: 'The conduct of a person or group of persons having, under the internal legal order of a State, the status of an organ of a public corporation or other autonomous public institution or of a territorial public entity (municipality, province, region, canton, member state of a federal State, autonomous administration of a dependent territory, etc.), and acting in that capacity in the case in question, is also considered to be an act of the State in international law.'[57] Importantly, this first draft article addressed not only the organ

[53] *Ibid.*, at 29. For Condorelli, the 'right to self-organization' does not capture the veritable situation under discussion because international law is not capable of granting it to states. International law has no choice but to acknowledge the existence of sovereign states as a reality resulting from a historical process that it does not regulate. However, this does not prevent international law from protecting the sovereignty of states by means of its rules. Therefore, it would be more precise to term it the right of a state to have other states not intervene in the manner in which the state organizes itself. *Ibid.*, at 29–30.

[54] *Ibid.*, at 54.

[55] Ago, *supra* note 22, at 256, para. 170.

[56] *Ibid.*

[57] *Ibid.*, at 262, para. 185. The relevant part of its original (French) version was as follows: 'Est aussi considéré comme un fait de l'Etat sur le plan du droit international le comportement d'une personne ou d'un groupe de personnes qui, d'après l'ordre juridique interne de cet Etat, ont la qualité d'organe d'un établissement public ou d'une autre institution publique autonome… et qui, en l'occurrence, agissent en cette qualité.'

of a public corporation or institution but also that of a territorial government now covered by ARSIWA Article 4, under which *acta jure gestionis* are indisputably attributable. Nothing in this drafting phase indicated a restrictive approach that requires the conduct of a public corporation or institution to be done *jure imperii* in order for it to be attributable to the state.[58] In light of the principle of the unity of the state, Ago considered it unreasonable that the conduct attributable if performed by a state organ would become non-attributable only because it was carried out by a person outside the state apparatus.[59] Therefore, for the purposes of the draft article, 'a public corporation or other autonomous public institution' was broadly defined as corporations and institutions which, under the domestic law, 'have their own legal personality and autonomy of administration and management, and are intended to provide a particular service or to perform specific functions'[60] – that is, to provide 'public services' (*services publics*) or to perform public functions.[61]

The special rapporteur's inclusive approach was challenged by Paul Reuter, who suggested to adopt the term '*privileges de puissance publique*' in the draft article. He intended to add the term to condition the attribution under the provision upon the exercise of 'juridical, legislative, judicial, executive, physical or other *compulsion*' (*la contrainte juridique, législative, judiciaire, executive, physique ou autre*).[62] This restrictive approach predicated on the '*puissance publique*' element sharply contrasted with Ago's conception that the provision of '*service public*' is a material factor. The distinction between '*puissance publique*' and '*service public*' has developed in the context of French administrative law. In a nutshell, while the '*service public*' is a concept whose focus is on 'purposes pursued' (*buts poursuivis*), the material factor in the '*puissance publique*' consists of 'means employed' (*moyens employés*).[63]

In face of the opposed view, however, Ago remarked that '[t]he expression "prerogatives of public power" proposed by Mr. Reuter seemed very felicitous'.[64] Nevertheless, beyond the terminology, it does not seem that the ILC achieved a consensus about the scope of attributable conduct under that provision. Although the installation of the *puissance publique* element could not help entailing substantial changes in the original version, the special rapporteur was silent on this point. It is obvious that the francophonic jurists took the initiative to draft the provision, especially in the initial (and critical) phases; however, it is questionable whether other ILC members grasped the nuances of French domestic law to the same extent. In fact, Edvard Hambro,

[58] Russo, 'The Attribution to States of the Conduct of Public Enterprises in the Fields of Investment and Human Rights Law', 29 *Italian Yearbook of International Law* (2020) 93, at 98–99.

[59] Ago, *supra* note 22, at 262, para. 184.

[60] *Ibid.*, at 254, para. 163

[61] *Ibid.*, at 256, para. 170.

[62] '1253rd Meeting (Paul Reuter), Summary Records of the 26th Session', 1 *ILC Yearbook* (1974) 12, at 16, para. 26 (emphasis added). The English expression 'elements of the governmental authority' was proposed by Richard Kearney. '1258th Meeting (Richard Kearney), Summary Records of the 26th Session', 1 *ILC Yearbook* (1974) 31, at 33, para. 11.

[63] M. Hauriou, *Précis de droit administratif et droit public* (11th edn, 1927), at vii.

[64] '1257th Meeting (Roberto Ago), Summary Records of the 26th Session', 1 *ILC Yearbook* (1974) 26, at 28, para. 16.

the chairperson of the Drafting Committee, explained that 'the words "which is empowered by the internal law of that State to exercise elements of the governmental authority"… corresponded to the adjective "public" appearing in the text submitted by the Special Rapporteur'.[65]

Consequently, in 1974, the ILC adopted the following provision as Article 7(2) of the first reading, which does not differ from ARSIWA Article 5 in its substance: 'The conduct of an organ of an entity which is not a part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.'[66] Its commentary, anchoring the provision to the 'fundamental idea of the unity of the State from the international point of view', did not go any further than repeating the expressions employed by both Ago and Reuter: the conduct is attributable to the state when its author 'perform[s] specific services for the community and, in so doing, exercise[s] functions which constitute elements of the governmental authority'.[67]

Therefore, tracing the *travaux préparatoires* up to 1974 does not provide complete clarification on the textual obscurities of ARSIWA Article 5. Nevertheless, certain critical findings were obtained. First, for Reuter, the adoption of the restrictive approach lay in the nature of things because he reckoned that 'legal acts of a commercial nature, such as acts of exchange or sale, were never attributable to the State, *even if carried out by a State body*' (*même s'ils sont le fait d'un organisme d'Etat*).[68] Specifically, the coverage of his restrictive approach was not limited to parastatal entities but extended to state organs. However, this premise, based on which Reuter asserted the insertion of '*puissance publique*' into the draft article, is now completely refuted. Condorelli, for instance, observed that functions other than those of the traditional core of public authority now form an integral part of the institutional and essential duties of the state.[69] Likewise, Crawford pointed out that '[t]he reason a State is not, generally speaking, internationally responsible for the "private law" acts of its organs (e.g. the breach of a commercial contract entered into by the State) has nothing to do with attribution: it is simply that the breach of a contract is not a breach of international law but of the relevant national law'.[70] Therefore, ARSIWA Article 5 cannot be considered as reflecting Reuter's restrictive approach as it was in 1974.

[65] '1278th Meeting (Edvard Hambro), Summary Records of the 26th Session', 1 *ILC Yearbook* (1974) 151, at 152, para. 9.

[66] 'Report of the International Law Commission on the Work of Its 26th Session (6 May—26 July 1974)', 2(1) *ILC Yearbook* (1974) 157, at 277.

[67] *Ibid.*, at 278, para. 2.

[68] '1253rd Meeting (Paul Reuter)', *supra* note 62, at 16, para. 26 (emphasis added).

[69] Condorelli, *supra* note 51, at 70. This is well illustrated by the *ELSI* case (*Elettronica Sicula S.P.A. (ELSI) (United States of America v. Italy)*, Judgment, 20 July 1989, ICJ Reports (1989) 15), in which, as recalled by Crawford, 'the Mayor of Palermo requisitioned and attempted to run an industrial plant in order to maintain local employment; it was accepted without question that his conduct was attributable to the State of Italy'. Crawford, *supra* note 17, at 36, para. 173.

[70] *Ibid.*, at 37, para. 174.

Second, Reuter also highlighted the principle of the unity of the state: '[F]or practical reasons international law wishes to treat the activity of the State… as a unity.'[71] Thus, Ago and Reuter agreed that whether the conduct is performed by a state organ or a parastatal entity does not make a difference in the scope of attributable conduct. Hence, given that Reuter's restrictive approach to the attribution of state organs' conduct is now considered obsolete,[72] there seems to be no reason to categorically exclude the commercial conduct of a parastatal entity from the scope of attributable conduct.

Comments of governments exhibited a striking discrepancy over the scope of attributable conduct under Article 7(2) of the first reading. Canada, for instance, expressed concern 'with respect to the breadth of responsibility of a State that is outlined in paragraph 2 of draft article 7… the circumstances in which a State may be held responsible for [parastatal entities'] actions must be more restrictively delineated'.[73] In contrast, Germany observed that the relevant provisions in the first reading 'might not sufficiently take into account the fact that States increasingly entrust persons outside the structure of State organs with activities normally attributable to a State', and, thus, it was doubtful whether they sufficiently covered 'acts of natural persons and juridical persons, who, at the time of committing a violation of international law, do not act as State organs but nevertheless act under the authority and control of the State'.[74] The United Kingdom raised a more fundamental doubt: '[A] problem arises from the absence of any definition in the draft articles, and of any shared international understanding, of what acts are and what are not "governmental"…. There is a need for the Commission to consider whether an effective criterion of "governmental" functions can be devised and incorporated in the draft.'[75]

Based on the governmental comments, Crawford decided not to identify the scope of 'governmental authority' and acknowledged that what is regarded as 'governmental' is essentially a question of the application of a general standard to particular and highly varied circumstances.[76] Consequently, the ILC's commentary is far from clear regarding whether Article 5 is to be interpreted to preclude, by definition, the attributability of *acta jure gestionis*. The governmental authority is paraphrased as 'functions of a public character normally exercised by State organs'.[77] It is not difficult to give an example: the commentary mentions a private security firm that runs a prison and exercises detention and discipline powers.[78] However, it is impossible to define 'functions of a public character' in general terms; thus, 'Article 5 does not attempt to identify

[71] '1253rd Meeting (Paul Reuter)', *supra* note 62, at 16, para. 25.
[72] Condorelli, *supra* note 51, at 70.
[73] 'Observations and Comments of Governments on Chapters I, II and III of Part 1 of the Draft Articles on State Responsibility for Internationally Wrongful Acts (Canada)', 2(1) *ILC Yearbook* (1980) 93, at 94, para. 2.
[74] 'State Responsibility: Comments and Observations Received from Governments (Germany)', 2(1) *ILC Yearbook* (1998) 105, at 105.
[75] 'State Responsibility: Comments and Observations Received from Governments (United Kingdom of Great Britain and Northern Ireland)', 2(1) *ILC Yearbook* (1998) 106, at 106, para. 1.
[76] Crawford, *supra* note 17, at 39, para. 190.
[77] ARSIWA Commentary, *supra* note 3, at 43, para. 2.
[78] *Ibid.*

precisely the scope of "governmental authority" for the purpose of attribution' because '[b]eyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and traditions'. Significantly for our purposes, the commentary recognizes that 'the content of the powers' is not the only factor to be considered in determining the attribution of parastatal entities' conduct under Article 5: '[P]articular importance' is also attached to 'the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise'.[79] This may imply that it is relevant for the purposes of attribution whether the parastatal entity in question is a body specifically created by a state or an existing private entity subsequently enlisted in public services. However, nothing in the commentary clearly indicates that conduct is more likely to be attributable to the state in the former case. To summarize, it is arguable that the ILC adopted a case-by-case, rather than restrictive, approach on completion of its work on state responsibility in 2001.

Nevertheless, this does not necessarily mean that the exercise of 'governmental authority' required under Article 5 is no more than paraphrasing the rationale for attribution: acting on behalf of a state. It is true that the same expression adopted in ARSIWA Article 6 does not have a restrictive connotation at all regarding the conduct of organs placed at the disposal of a state by another state; more precisely, the attributability of *acta jure gestionis* is not precluded.[80] However, it should not be ignored that the conduct of a territorial government that was addressed together with the conduct of a parastatal entity in the same article up to the first reading[81] is now regulated by ARSIWA Article 4 and not by Article 5. This move was initiated by Crawford in his first report, according to which 'local or regional governmental units are like the organs of central government, and quite unlike the "entities" covered by article 7, paragraph 2, in that all their conduct as such is attributable to the State, and not only conduct involving the exercise of "governmental authority" in some narrower sense'.[82] The question is in what sense the scope of attributable conduct in case of parastatal entities is 'narrower' and how it is justified. Thus, we are prompted to examine subsequent practice regarding ARSIWA Article 5.

3 ARSIWA Article 5 in Investment Treaty Arbitration

In 2004, the United Nations (UN) General Assembly requested the Secretary-General to compile the decisions of international courts, tribunals and other bodies referring

[79] *Ibid.*, para. 6 (emphasis added).

[80] *Ibid.*, at 44, paras 1–2. The expression of 'elements of the governmental authority' also appears in Article 9, which requires a separate study. See, e.g., P. Dumberry, *Rebellions and Civil Wars: State Responsibility for the Conduct of Insurgents* (2022), at 170–175.

[81] In the first reading, Article 7, which was entitled '[a]ttribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority', covered not only parastatal entities but also organs of a territorial governmental entity in its first paragraph.

[82] Crawford, *supra* note 17, at 38, para. 187.

to ARSIWA.[83] The Secretary-General has since submitted triennial reports compiling the relevant practice: the first report appeared in 2007, and the latest is the 2022 version.[84] The reports show that Article 5 has manifested its practical relevance mostly in the context of investment treaty arbitration, although occasional references that fall short of actual application have been made by regional human rights courts.[85] Although ARSIWA is intended to be applied primarily to interstate legal relationships, Part 1 'applies to all the cases in which an internationally wrongful act may be committed by a State'[86] or, more precisely, 'to *any* internationally wrongful act, no matter to whom the obligation which is breached may be owed'.[87] In fact, the applicability of the provisions on attribution in ARSIWA has rarely been questioned in investment treaty arbitration, and Article 5 is no exception.[88]

In the *Maffezini* case, the tribunal was required to address the issue of attribution of parastatal entities' conduct a year before the ILC completed its work on state responsibility.[89] The dispute involved a Spanish entity, the Sociedad para el Desarrollo Industrial de Galicia (SODIGA), created by a decree of the Ministry of Industry to promote regional industrial development in the Autonomous Region of Galicia. The claimant started a business with chemical products by establishing and investing in a corporation with the support of SODIGA. However, the enterprise ended in failure. Consequently, the claimant filed a request for arbitration to the International Centre for Settlement of Investment Disputes (ICSID) under the Argentine-Spain bilateral investment treaty (BIT),[90] alleging that the failure was caused by the misconduct of SODIGA, such as providing faulty advice regarding the project cost. The tribunal, in its decision on jurisdiction, concluded that 'the Claimant has made out a *prima facie* case that SODIGA is a State entity acting on behalf of the Kingdom of Spain'; however,

[83] Responsibility of States for Internationally Wrongful Acts, UN Doc. A/RES/59/35, 2 December 2004, para. 3.

[84] Responsibility of States for Internationally Wrongful Acts: Complication of Decisions of International Courts, Tribunals and Other Bodies, Report of the Secretary-General, UN Doc. A/62/62, 1 February 2007; UN Doc. A/65/76, 30 April 2010; UN Doc. A/68/72, 30 April 2013; UN Doc. A/71/80, 21 April 2016; UN Doc. A/74/83, 23 April 2019; UN Doc. A/77/74, 29 April 2022.

[85] For instance, the ECtHR in *Jones* referred to ARSIWA Article 5 as relevant international law in determining whether granting immunity to the Kingdom of Saudi Arabia and the individual defendant in the case of alleged torture constituted a violation of the right of access to a court enshrined in Article 6(1) of the European Convention on Human Rights (ECHR). ECtHR, *Jones and Others v. United Kingdom*, Appl. nos 34356/06 and 40528/06, Judgment of 14 January 2014, paras 108, 207; see also text accompanying notes 200–205.

[86] ARSIWA Commentary, *supra* note 3, at 87, para. 3.

[87] Crawford and Olleson, 'The Application of the Rules of State Responsibility', in M. Bungenberg *et al.* (eds), *International Investment Law: A Handbook* (2015) 411, at 416 (emphasis in original).

[88] The *ICSID Review* published two articles accompanied by case appendixes that summarize references by investor-state dispute settlement (ISDS) tribunals to ARSIWA. For the 2001–2009 list of references to Article 5, see Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility', 25 *ICSIDR* (2010) 127, at 152–157. The 2010–2020 list shows that Article 5 has become increasingly relevant in investment treaty arbitration. Shirlow and Duggal, 'The ILC Articles on State Responsibility in Investment Treaty Arbitration', 37 *ICSIDR* (2022) 378, at 419–430.

[89] ICSID, *Emilio Agustín Maffezini v. Kingdom of Spain – Decision of the Tribunal on Objections to Jurisdiction*, 25 January 2000, ICSID Case no. ARB/97/7.

[90] Agreement on the Reciprocal Promotion and Protection of Investments 1991, 1699 UNTS 187.

whether SODIGA's specific acts and omissions were attributable to the respondent state was a matter of merit.[91]

In its award on the merits, the tribunal relied on a 'functional test', according to which 'whether specific acts or omissions are essentially commercial… or… governmental' in nature is decisive. Specifically, '[c]ommercial acts cannot be attributed to the Spanish State, while governmental acts should be so attributed'.[92] At the relevant time, according to the tribunal, 'SODIGA was in the process of transforming itself from a State-oriented to a market-oriented entity. While originally a number of SODIGA's functions were closer to being governmental in nature, they must today be considered commercial in nature'.[93] The application of the functional test led to the conclusion that 'SODIGA was not discharging any public functions in providing the aforesaid information assistance' to the claimant[94] and, therefore, that the conduct was not attributable to Spain because '[t]his type of activity does not ordinarily go beyond the commercial assistance that many financial and commercial entities provide to their prospective customers'.[95]

However, it took some time for the functional test to become a commonly accepted standard for the attribution of parastatal entities' conduct. In the *Noble Ventures* case, the tribunal was sceptical of the relevance of the governmental/commercial distinction in applying ARSIWA Article 5.[96] The claimant, a US company, concluded a privatization agreement with the Romanian State Ownership Fund (SOF), an institution of public interest, with a function to conduct the privatization of Romanian SOEs.[97] The claimant's allegations included the SOF's misrepresentation in concluding the agreement, which allegedly constituted a violation of the fair and equitable treatment obligation under the Romania-US BIT.[98] Although the tribunal observed that ARSIWA

[91] *Maffezini*, *supra* note 89, para. 89. Attribution for the purposes of state responsibility is a question of merits, not of jurisdiction; however, ISDS tribunals are sometimes required to address the issue to establish their jurisdiction. It should be noted that the same test is applied at the jurisdictional and merits phases, although a tribunal may be satisfied at the preliminary phase with 'a *pro tem* conclusion that the facts alleged by the claimant, if established, can meet the requirements demanded by the applicable rules of attribution'. De Stefano, *supra* note 13, at 29.

[92] ICSID, *Emilio Agustín Maffezini v. Kingdom of Spain – Award*, 13 November 2000, ICSID Case no. ARB/97/7, para. 52.

[93] *Ibid.*, para. 57.

[94] *Ibid.*, para. 62. It seems that the tribunal employed the adjective 'public' interchangeably with 'governmental' in qualifying the Sociedad para el Desarrollo Industrial de Galicia's (SODIGA) functions.

[95] *Ibid.* In contrast, SODIGA was considered to be acting 'in the exercise of [its] public or governmental functions' when making a transfer of funds from the claimant's personal bank account without his consent. The transfer 'amounted to an increase of the investment', and a 'decision to increase the investment taken not by [the claimant] but by the entity entrusted by the State to promote the industrialization of Galicia, cannot be considered a commercial activity'. *Ibid.*, paras 77–79.

[96] ICSID, *Noble Ventures, Inc. v. Romania – Award*, 12 October 2005, ICSID Case no. ARB/01/11.

[97] *Ibid.*, para. 69. The tribunal found that, because the State Ownership Fund was a 'legal entit[y] separate from the Respondent, it is not possible to regard [it] as [a] *de jure* organ' under ARSIWA Article 4.

[98] The Treaty between the Government of the United States of America and the Government of Romania Concerning the Reciprocal Encouragement and Protection of Investment 1992, Senate Consideration of Treaty Document 102-36.

Article 5 reflected the well-established rule of customary international law,[99] doubts were cast on the respondent's argument that the 'governmental' conduct attributable to a state should be understood in contrast to the 'commercial' conduct. It is true that '[t]he distinction plays an important role in the field of sovereign immunity.... However, in the context of responsibility, it is difficult to see why commercial acts, so called *acta iure gestionis*, should by definition not be attributable while governmental acts, so called *acta iure imperii*, should be attributable'. The tribunal continued that ARSIWA 'does not maintain or support such a distinction'.[100]

However, such scepticism has gradually disappeared in investment treaty arbitration.[101] This trend was marked by the *Jan de Nul* case, in which it was disputed whether the conduct of an Egyptian agency, the Suez Canal Authority (SCA), was attributable to Egypt.[102] The SCA launched an international tender process to implement a project to dredge the Suez Canal and concluded a contract with the claimants of Belgian dredging companies. However, when the claimants started dredging, it turned out that the volume and distribution of the materials to be dredged and the proportion of rocks differed considerably from their expectations based on the information provided by the SCA. They demanded that the SCA bear an additional cost, but the SCA refused. Thus, the claimants submitted a request for arbitration to ICSID in accordance with the BITs between the Belgo-Luxembourg Economic Union and Egypt.[103]

The tribunal first examined attributability under ARSIWA Article 4 and derived a negative conclusion from the fact that the SCA had an independent legal personality under Egyptian domestic law.[104] In applying Article 5, the tribunal, '[r]elying on the functional test adopted by the *Maffezini* tribunal',[105] opined that 'the fact that the subject matter of the Contract related to the core functions of the SCA, i.e., the maintenance and improvement of the Suez Canal, is irrelevant'. The tribunal focused on 'the actual acts complained of' instead: 'In its dealing with the Claimants during the tender process, the SCA acted like any contractor trying to achieve the best price for the services it was seeking.'[106] The tribunal's approach to ARSIWA Article 5 was well summarized as follows: 'What matters is not the "*service public*" element, but the use of "*prérogatives de puissance publique*" or governmental authority.'[107] Therefore, 'the reasons' for SCA's conduct regarding the claimants were irrelevant in terms of

[99] *Noble Ventures*, *supra* note 96, para. 70.
[100] *Ibid.*, para. 82.
[101] But see UNCITRAL, *InterTrade Holding GmbH v. Czech Republic – Final Award*, 29 May 2012, PCA Case no. 2009-12, paras 12–17, Separate Opinion of Henri Alvarez.
[102] ICSID, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt – Award*, 6 November 2008, ICSID Case no. ARB/04/13.
[103] Agreement on the Encouragement and Reciprocal Protection of Investments 1977, 1130 UNTS 89; Agreement between the Belgo-Luxembourg Economic Union and the Arab Republic of Egypt on the Reciprocal Promotion and Protection of Investments 1999, 2218 UNTS 3.
[104] *Jan de Nul*, *supra* note 102, paras 158–162.
[105] *Ibid.*, para. 168.
[106] *Ibid.*, para. 169.
[107] *Ibid.*, para. 170.

attribution. The material factor was that '[a]ny private contract partner could have acted in a similar manner'.[108]

In the *Bayindir* case, the respondent state, Pakistan, contended that the conduct in question was not of a '*puissance publique*' character but was carried out in the performance of a contract.[109] In this case, the conduct of a Pakistani public corporation, the National Highway Authority (NHA), was at issue. The NHA was established under the 1991 National Highway Authority Act to assume responsibility for the planning, development, operation and maintenance of national highways and strategic roads in Pakistan. It planned the construction of a six-lane motorway and concluded a contract for the execution of the project with the claimant, a Turkish company. However, the work was delayed, and the reason for this was disputed. Although the claimant called for a time extension, alleging that the delay was caused by the NHA's failure to hand over a construction site, the NHA eventually notified the claimant of its decision to terminate the contract.

In applying ARSIWA Article 4, the tribunal regarded it as material that the NHA had a distinct legal personality under the laws of Pakistan and, therefore, concluded that it could not be treated as a state organ.[110] Attribution under Article 5 was also denied because the tribunal was not persuaded that 'in undertaking the actions which are alleged to be in breach of the [Turkey-Pakistan BIT], the NHA was acting in the exercise of elements of the governmental authority'.[111] Definitively, the conduct 'must be seen in the framework of the contractual relationship, not as an exercise of sovereign power'.[112] The tribunal, thus, concurred with the respondent's position.

Furthermore, the *Hamester* tribunal, in adjudicating whether the conduct of the Ghana Cocoa Board (Cocobod) was attributable to Ghana, provided a clear-cut definition of the restrictive approach to Article 5.[113] While 'all acts – including acts de *jure gestionis* – of State organs' are attributable to the state under ARSIWA Article 4, it is not the case for 'public or private entities or persons exercising governmental authority'. The attributable conduct under Article 5 'by definition cannot include acts

[108] *Ibid.* After the application of Article 5 also led to non-attribution, there was an investigation into whether the Suez Canal Authority's (SCA) conduct was still attributable to Egypt under ARSIWA Article 8. The tribunal observed, referring to the ICJ's *Nicaragua* judgment, that '[i]nternational jurisprudence is very demanding in order to attribute the act of a person or entity to a State, as it requires both a general control of the State over the person or entity and a specific control of the State over the act the attribution of which is at stake; this is known as the "effective control" test'. *Ibid.*, para. 173. Although it is doubtful that general control is requisite for the attribution of conduct under Article 8, the tribunal arguably intended no deviation from the customary rules on attribution reflected in ARSIWA.

[109] ICSID, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan – Award*, 27 August 2009, ICSID Case no. ARB/03/29, para. 454.

[110] *Ibid.*, para. 119.

[111] *Ibid.*, para. 123. For the Turkey-Pakistan BIT, see Agreement between the Islamic Republic of Pakistan and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments 1995, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2135/download.

[112] *Bayindir*, *supra* note 109, para. 461.

[113] ICSID, *Gustav FW Hamester GmbH & Co KG v. Republic of Ghana – Award*, 18 June 2010, ICSID Case no. ARB/07/24.

de *jure gestionis*'.[114] Importantly, the tribunal regarded the contrary position taken in the *Noble Ventures* award as 'isolated'.[115] The tribunal recognized that Cocobod was entrusted with some governmental functions by the Ghana Cocoa Board Law;[116] however, it concluded that all the relevant acts of Cocobod 'are properly characterised as acts *de jure gestionis*, and as such are not attributable to the Government of Ghana'.[117]

This approach was followed by the *Almås* tribunal presided over by Crawford.[118] The dispute concerned a land lease agreement between the Polish Agricultural Property Agency (Agencja Nieruchomości Rolnych or ANR) and a limited liability company owned by the claimants. The former was a Polish institution responsible for administering, leasing and selling Polish state-owned land operating under the supervision of the Ministry of Agriculture and Rural Development.[119] The ANR terminated the lease agreement pursuant to its termination clause, according to which termination may occur 'without statutory notice if the Lessee… fails to fulfil the duties' described in the agreement, such as one requiring the ANR's prior written consent in order to change the land use.[120] The respondent argued that ARSIWA Article 5 embodies the so-called 'functional test', according to which the conduct is attributable to a state only when it 'is not one that could be performed by a commercial entity'.[121] It is true that the ANR 'entered into the relevant contract in the exercise of statutory powers to manage State agricultural property'; however, the relevant conduct is not attributable because 'vis-à-vis the Claimants, termination was not an exercise of public power but of a purported contractual right'.[122] The tribunal, relying on the *Jan de Nul* and *Hamester* awards,[123] fully endorsed the respondent's argument.[124]

Recently, the *Staur* case has illustrated that the restrictive approach to ARSIWA Article 5 is now well established in practice.[125] The claims were mainly concerned with the conduct of a Latvian state-owned company, SJSC International Airport Riga (SJSC Airport), which led the land lease agreements between it and the claimants' local subsidiary to be cancelled. The respondent state contended that a particular act of SJSC Airport could be attributable to the state under ARSIWA Article 5 'only if it involves the use of force or compulsive State power, that is *puissance publique*' and that '[t]he mere exercise of public functions, or acting in the public interest, does not

[114] *Ibid.*, para. 180.
[115] *Ibid.*, para. 180, note 169.
[116] *Ibid.*, paras 189–190.
[117] *Ibid.*, paras 250, 266, 284.
[118] UNCITRAL, *Kristian Almås and Geir Almås v. Republic of Poland – Award*, 27 June 2016, PCA Case no. 2015-13.
[119] In applying ARSIWA Article 4, the tribunal found that the Agencja Nieruchomości Rolnych 'cannot be considered a State organ *de jure* under Polish law', nor it can be characterized as 'a *de facto* organ of the Polish State' in light of its autonomous management and financial status. *Ibid.*, paras 209, 213.
[120] *Ibid.*, paras 41–42, 71
[121] *Ibid.*, para. 99.
[122] *Ibid.*, para. 219.
[123] *Ibid.*, paras 215–216.
[124] *Ibid.*, para. 251.
[125] ICSID, *Staur Eindom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia – Award*, 28 February 2020, ICSID Case no. ARB/16/38.

meet this test'.[126] This argument clearly denies the equation of the exercise of 'governmental authority' required under Article 5 with the performance of public functions.

The tribunal, concurring with the respondent's contention, held that the claimants failed to demonstrate, in the first place, that SJSC Airport was empowered 'to exercise any sovereign powers at all, such as acts of a regulatory nature or otherwise involving the use of the State's public prerogatives or *imperium*, *i.e.*, acts of "*puissance publique*"'.[127] Moreover, even if the requirement of empowerment had been met, the conduct in question would still remain non-attributable to Latvia. As in *Jan de Nul*, *Hamester* and *Almås*, 'the conduct of SJSC Airport with which this dispute is concerned is of a quintessentially commercial character, *i.e.*, the management of its relationship with private investors in relation to the development of real estate in accordance with contracts concluded for that purpose on commercial terms and governed by Latvian private law'.[128]

4 A Restrictive Doctrine of State Responsibility?

A *The Restrictive Approach to ARSIWA Article 5 and the Restrictive Doctrine of State Immunity*

As described above, it has become mainstream in investment treaty arbitration to exclude *acta jure gestionis* from the scope of attributable conduct under ARSIWA Article 5.[129] This restrictive approach has been supported by some commentators, including the last special rapporteur for the ILC's work on state responsibility.[130] For instance, Carlo de Stefano asserted that 'the scope of acts of "State entities" attributable to the State under ARSIWA Article 5 and the definition of State acts immune from the jurisdiction of domestic courts should be reciprocally consistent'.[131] Therefore, ISDS tribunals should resort to the functional test that 'basically corresponds with the nature test under the law of State immunity from adjudication, which is grounded on the dichotomy between *acta jure imperii* and *acta jure gestionis*'.[132]

[126] *Ibid.*, para. 289.
[127] *Ibid.*, para. 342.
[128] *Ibid.*, para. 343.
[129] See, e.g., *InterTrade*, *supra* note 101, paras 179–192; UNCITRAL, *Ulysseas, Inc. v. Republic of Ecuador – Final Award*, 12 June 2012, PCA Case no. 2009-19, paras 135–139; ICSID, *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine – Award*, 25 October 2012, ICSID Case no. ARB/08/11, paras 164–178; ICSID, *Ortiz Construcciones y Proyectos S.A. c. République Algérienne Démocratique et Populaire – Sentence*, 29 April 2020, ICSID Case no. ARB/17/1, paras 193–234. For overviews of the jurisprudence of investment treaty arbitration on ARSIWA Article 5, see, e.g., Kovács, *supra* note 8, at 129–186; Petrochilos, 'Attribution: State Organs and Entities Exercising Elements of Governmental Authority', in K. Yannaca-Small (ed.), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (2nd edn, 2018) 332, at 347–357; see also de Stefano, *supra* note 13, at 37–44.
[130] See text accompanying note 16 above. See also Olleson, *supra* note 15, at 472–473; Badia, 'Attribution of Conducts of State-Owned Enterprises Based on Control by the State', in C. Baltag (ed.), *ICSID Convention after 50 Years: Unsettled Issues* (2016) 189, at 191; R. Dolzer, U. Kriebaum and C. Schreuer, *Principles of International Investment Law* (3rd edn, 2022), at 322–325.
[131] De Stefano, *supra* note 16, at 61.
[132] *Ibid.*, at 158.

The distinction between *acta jure imperii* and *jure gestionis* is now firmly anchored in the law of state immunity.[133] Although it is difficult to draw a clear line of demarcation between them, it is generally recognized that the material factor lies in the nature, rather than in the purpose, of the transaction. For instance, Article 2(2) of the United Nations Convention on Jurisdictional Immunities of States and Their Property[134] does not completely discard the relevance of 'purpose' in determining whether the contract or transaction is characterized as 'commercial'; however, it provides that 'reference should be made primarily to the nature of the contract or transaction'. The US Foreign Sovereign Immunities Act (FSIA) is clearer in this regard: 'The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.'[135] Furthermore, domestic case law attaches greater importance to the nature of the transaction in distinguishing *acta jure gestionis* from *jure imperii*. In the *Empire of Iran* case, for instance, the German Federal Constitutional Court found that '[a]s a means for determining the distinction between acts *jure imperii* and *jure gestionis* one should rather refer to the nature of the State transaction or the resulting legal relationships, and not to the motive or purpose of the State activity'.[136]

However, 'an absolute separation is [not] always possible between the ontology and the teleology of an act'.[137] More precisely, 'the notion that human activity can be classified, or even described, without referring to its purpose is a delusion'.[138] Therefore, 'the terminology of the "nature/purpose" distinction is untenable'; however, what is intended 'seems to be to distinguish the narrower from the broader aspects or descriptions of a transaction' and is 'entirely legitimate'.[139] As suggested by Lord Wilberforce's much-cited formula in *I Congreso*, 'the existence of a governmental purpose or motive', which, in most cases, constitutes a broader background of the particular act, 'will not convert what would otherwise be an *act jure gestionis*, or an act of private law, into one done *jure imperii*'.[140]

[133] A recent empirical study demonstrates that '[m]any states have switched to restrictive immunity, in which foreign states can be sued for their private or commercial activities'. Verdier and Voeten, 'How Does Customary International Law Change? The Case of State Immunity', 59 *International Studies Quarterly* (2015) 209, at 210.

[134] United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI), UN Doc. A/RES/59/38, 2 December 2004 (it has not entered into force yet at the time of writing).

[135] 28 U.S.C. §1603(d).

[136] Federal Constitutional Court (Germany), *Claim against the Empire of Iran Case*, 30 April 1963, BVerfGE 16, at 27, reprinted in 45 *International Law Reports* (*ILR*) (1972) 57, at 80.

[137] *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, at 1393 (5th Circ. 19 September 1985).

[138] Crawford, *supra* note 1, at 95.

[139] *Ibid.*, at 96. More precisely, what matters here is to single out, or identify with precision, the particular act or series of acts giving rise to the claim in question. *Ibid.*, at 94, 102. This is in full accordance with the basic structure of the internationally wrongful acts as formulated in ARSIWA Article 2. Thus, in applying ARSIWA Article 5, ISDS tribunals focus on the 'specific acts or omissions', 'the actual acts complained of' or 'the precise act in question'. *Maffezini*, *supra* note 92, para. 52; *Jan de Nul*, *supra* note 102, para. 169; *Hamester*, *supra* note 113, para. 193; see also *Bayindir*, *supra* note 109, paras 122–123; *Almås*, *supra* note 118, para. 216.

[140] *I Congreso del Partido*, [1983] 1 AC 244, at 267 (Lord Wilberforce).

The reverse is also true; it would be too categorical to define *acta jure gestionis* exclusively by the nature of a transaction with no reference to its purpose. Most recently, the US Court of Appeals for the Fourth Circuit denied the argument that South Korea's military procurement contracts regarding F-35 fighter planes and a 'Next-gen' military satellite are characterized as 'commercial' for the purposes of the FSIA.[141] The plaintiff, Blenheim Capital Holdings Limited, asserted that the transaction was of a commercial nature and, thus, not immune because it involved the purchase and sale of goods. For the defendants, 'Blenheim's definition of commercial activity is made at too general a level, such that it would essentially encompass every purchase or sale of goods involving a foreign sovereign'.[142] The Court concurred with the defendants[143] and found that 'the entire procurement activity and transaction in this case was inherently sovereign activity.... [P]roviding [armed forces] with F-35s that can only be obtained from the U.S. government and only provided to a friendly government' is a 'peculiarly sovereign' activity.[144] What matters for the Court was that 'the activity at issue in this case was not the *type* that could be pursued by private citizens or corporations'.[145]

Therefore, under the restrictive theory of state immunity, the key question is 'whether the contract or transaction could have been engaged in by a private party'.[146] In this process of classification, 'the whole context in which the claim against the state' is made must be taken into consideration,[147] although, in most cases, the relative weight is assigned to the nature of a transaction. Thus, the Swiss Federal Court in its 1960 decision paraphrased the nature test as follows: '[T]o distinguish between acts *jure gestionis* and acts *jure imperii*, the judge must... examine whether... the act is an act of public power [*puissance publique*] or whether it is similar to an act which any private individual could perform.'[148]

Significantly for our purposes, in France, domestic courts have relied on 'French internal law's division of competence between the civil and commercial courts on one hand and the administrative tribunals on the other' in developing a restrictive approach to state immunity.[149] More precisely, the material factor has been whether the foreign state has recourse to 'methods and prerogatives which would be excluded in relations between private parties' – that is, '"des *prérogatives exorbitantes du droit*

[141] *Blenheim Capital Holdings Ltd. v. Lockheed Martin Corp. et al.*, No. 21-2104 (4th Circ. 15 November 2022).
[142] *Ibid.*, at 11–12 (emphasis added).
[143] *Ibid.*, at 12.
[144] *Ibid.*, at 15–16.
[145] *Ibid.*, at 16 (emphasis in original).
[146] Wittich, 'Article 2 (1)(c) and (2) and (3)', in R. O'Keefe and C.J. Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (2013) 54, at 69. To that effect, see Supreme Court (Japan), *X v. Pakistan*, Judgment, 21 July 2006, Case no. 2003 (Ju) 1231, available at www.courts.go.jp/app/hanrei_en/detail?id=848.
[147] *I Congreso*, *supra* note 140, at 267 (Lord Wilberforce); see also *Dynasty Company for Oil and Gas Trading Limited v. Kurdistan Regional Government of Iraq and Dr Ashti Hawrami*, [2021] EWHC(Comm) 952, para. 116.
[148] Federal Court (Switzerland), *United Arab Republic v. Mrs. X*, 10 February 1960, BGE 86 I 23, at 29, reprinted in 65 *ILR* (1984) 385, at 390; see also Mégret, *supra* note 7, at 469–471.
[149] H. Fox and P. Webb, *The Law of State Immunity* (3rd edn, 2013), at 405.

commun", involving unilateral powers of coercion'.[150] For instance, in the case of *État espagnol v. Société anonyme de l'Hôtel George V*, the Court of First Instance denied the plea of immunity by Spain, arguing that the lease in question did not contain 'clauses which are not a private law character [*clauses exorbitantes du droit commun*]'. It concluded that the Spanish Tourist Office, in contracting with the Hotel George V company, acted 'as if it had been an individual' and 'in performance of an activity which is at least in part commercial, and without recourse to the exercise of any public authority [*puissance publique*]'.[151]

These formulas appear to be consonant with Reuter's intention in asserting the insertion of '*puissance publique*' into the current Article 5. Although it is questionable whether his intention materialized itself in the provision adopted by the ILC, it is obvious that ISDS tribunals, in interpreting and applying ARSIWA Article 5, borrow certain concepts from the law of state immunity and are thus inclined towards Reuter's restrictive approach. In *Maffezini*, the tribunal emphasized that the service of information assistance provided by SODIGA could be offered by other commercial entities.[152] The *Jan de Nul* tribunal held that '[a]ny private contract partner could have acted in a similar manner' to the SCA.[153] Specifically, the attributability of parastatal entities' conduct depends upon whether it was, or could have been, carried out in the exercise of contractual or proprietorial powers, or whether it was beyond the framework of contractual relationships, so that it is qualified as the exercise of exorbitant authority.[154]

B *Sceptical Views about, and Justification for, the Restrictive Approach*

However, it should be recalled that ARSIWA Article 5 was not originally designed to preclude, by definition, the attributability of *acta jure gestionis*. As an ISDS tribunal rightly observed, ARSIWA 'contain[s] no definition of the broad notion of "elements of the governmental authority"… the ILC consciously refrained from including in the draft even elements towards defining its application in particular cases'.[155] The commentary on Article 5 is far from categorical, and, thus, it does not demonstrate that the *service public* element is not relevant at all.[156] Therefore, some commentators are sceptical of the restrictive approach to ARSIWA Article 5. For instance, Franck Latty

[150] *Ibid.*, at 405–406.

[151] Tribunal de grande instance of Paris (France), *État espagnol v. Société anonyme de l'Hôtel George V*, 14 May 1970, reprinted in 52 *ILR* (1979) 317, at 321; see also Court of Cassation (First Civil Chamber) (France), *Spanish State v. Société anonyme de l'Hôtel George V*, 17 January 1973, reprinted in 65 *ILR* (1984) 61.

[152] *Maffezini*, *supra* note 92, para. 62.

[153] *Jan de Nul*, *supra* note 102, paras 169–170; see also *Hamester*, *supra* note 113, para. 193; *Almås*, *supra* note 118, para. 217.

[154] *Jan de Nul*, *supra* note 102, paras 169–170; *Bayindir*, *supra* note 109, para. 461; *Hamester*, *supra* note 113, para. 248; *Almås*, *supra* note 118, paras 221–251; *Staur*, *supra* note 125, para. 343.

[155] ICSID, *F-W Oil Interests, Inc. v. Republic of Trinidad and Tobago – Award*, 3 March 2006, ICSID Case no. ARB/01/14, para. 203.

[156] ARSIWA Commentary, *supra* note 3, at 43, para. 6 (stating that '[o]f particular importance will be not just the content of the powers, but… the purposes for which they are to be exercised').

described his impression that, in the *Maffezini* and *Jan de Nul* awards, the attribution of parastatal entities' conduct was submitted to far stricter conditions than those derived from customary international law.[157] In expounding ARSIWA Article 5, he employed the expression of '*service public*' interchangeably with the term '*puissance publique*' (*les personnes ou entités exerçant des prérogatives de service public*).[158] It is therefore argued that the term '*prérogatives de puissance publique*' in Article 5 may broadly embrace the exercise of 'state functions' (*functions étatique*).[159] More precisely, the conduct of a parastatal entity is attributable if the entity acts in the general interests – that is, if it exercises 'public functions which serve the interests of the community'[160] – which remains the case even if no element attests to the exercise of exorbitant authority (*pouvoirs exorbitants*).[161]

As confirmed by the *Hamester* tribunal, one of the firmest proponents of the restrictive approach, *acta jure gestionis* may be attributable to a state not only under ARSIWA Article 4 but also under Article 8.[162] Why is the nature of conduct relevant only under Article 5? To assess whether the restrictive approach to that provision is warranted to reflect the rule of international law in effect, it is useful to revisit the 'fundamental principle governing the law of international responsibility' formulated by the ICJ: '[A] State is responsible *only* for… the conduct of persons acting… on its behalf.'[163] Importantly, it describes a necessary, rather than sufficient, condition for attribution. Therefore, it is logical to assume that an additional condition may be imposed in some policy considerations and that the scope of attributable conduct can be narrowed to that extent. Essentially, the attributability of conduct to a state may be precluded, even if the author of the conduct acts on behalf of the state. In the *Jan de Nul* case, as the tribunal acknowledged, the SCA was acting in the performance of 'the core functions of the SCA, i.e., the maintenance and improvement of the Suez Canal',[164] which were entrusted by the respondent state through Law no. 30 of 1975 that established the SCA (Article 1).[165] What policy consideration justifies non-attribution in such a case?

[157] Latty, 'Arbitrage transnational et droit international général', 54 *Annuaire français de droit international* (2008) 467, at 489.

[158] Latty, 'Conditions d'engagement de la responsabilite de l'Etat d'accueil de l'investissement', in C. Leben (ed.), *Droit international des investissements et de l'arbitrage transnational* (2015) 415, at 423.

[159] *Ibid.*, at 425.

[160] Ago, *supra* note 22, at 254, para. 166.

[161] Latty, *supra* note 158, at 425; see also P. Palchetti, *L'organo di fatto dello Stato nell'illecito internazionale* (2007), at 269–278 (arguing that ARSIWA Article 5 does not play an autonomous role in relation to Article 4).

[162] *Hamester*, *supra* note 113, para. 180; see also ARSIWA Commentary, *supra* note 3, at 47, para. 2.

[163] *Bosnian Genocide*, *supra* note 22, at 210, para. 406 (emphasis added). See also ARSIWA Commentary, *supra* note 3, at 38, para. 2.

[164] *Jan de Nul*, *supra* note 102, para. 169. Furthermore, '[t]here is no doubt that from a functional point of view, the SCA can be said to generally carry out *public* activities, as acknowledged by the Respondent itself'. *Ibid.*, para. 161 (emphasis added).

[165] Law no. 30 of 1975 on the Organization of the Suez Canal Authority, available at www.suezcanal.gov.eg/English/About/CanalTreatiesAndDecrees/Pages/ARepublicanDecreeLawNo.30of1975.aspx.

To answer this question, we must return to the *raison d'être* of parastatal entities – that is, the reason states increasingly entrust public functions to entities legally distinct from the states themselves. In this regard, Ago's third report provided a concise and lucid explanation, arguing that the main causes of the emergence and proliferation of parastatal entities are the increasing number and diversification of 'the tasks of common interest' and 'the fact that they are often of a technical nature and thus require autonomy of decision and action and the possession of special qualifications, [and] the need to make procedures more flexible and simplify controls in order to increase the efficiency of the service'.[166] The trade-off for more competent parastatal entities is usually less hierarchical control over them.[167] It is true that a state is, or must be, reluctant to lose control over its agents in certain circumstances even if their competence to achieve public goals is to that extent compromised. In such a case, where the state opts for a highly controlled mode of governance mostly based on institutional ties with its agents, attribution is governed by ARSIWA Article 4.[168] Parastatal entities – whether existing private entities enlisted in public services or institutions specifically created by the state – are marked by their independence from the government, which is a necessary (if not sufficient) condition for high competence.[169] Significantly, attributing conduct to a state for the purposes of legal responsibility has a direct impact on the author's independence and autonomy from the state.[170]

Ago's third report referred to arguments advanced by the parties in the *Case of Certain Norwegian Loans* before the ICJ.[171] The position taken by the government of Norway was that 'the Norwegian banks which had contracted some of the loans in question had a personality distinct from that of the State, so that the international responsibility of the State could not be incurred by an act or omission of the management of these banks'.[172] The government of France admitted that public institutions or agencies that are 'created to meet a need for decentralization' should be granted a certain degree of independence. It continued that this is achieved by granting them legal personality, and 'in internal law, the legal personality of public institutions, distinct from that of the State, has the consequence that actions relating to these institutions must be brought against them and not against the State'. What the government of France opposed was transferring 'this consequence… to international law'.[173]

166 Ago, *supra* note 22, at 254, para. 164.
167 Abbott *et al.*, *supra* note 6, at 6–11.
168 When hierarchical relationships between a state and its agents are based on factual control, ARSIWA Article 8 applies.
169 Abbott *et al.*, *supra* note 6, at 16, n. 9.
170 ARSIWA Commentary, *supra* note 3, at 38, para. 2.
171 Plaidoirie de M. le professeur Gros, *Case of Certain Norwegian Loans (France v. Norway)*, ICJ Pleadings, vol. 2, at 52.
172 Ago, *supra* note 22, at 255, para. 167.
173 *Case of Certain Norwegian Loans*, *supra* note 171, at 72 (translation prepared by the United Nations Secretariat for the purposes of the ILC's work on state responsibility).

The validity of the restrictive approach to ARSIWA Article 5 depends on whether such 'a need for decentralization' is to be respected not only under domestic law but also under international law.[174] Ago's first draft article proposed for the work of the ILC was not restrictive at all so that the attributability of parastatal entities' conduct was sufficiently warranted if the author has acted in the exercise of a public function – that is, on behalf of the state. Therefore, he appeared to concur with the position of the government of France articulated before the ICJ: international law did not defer to the policy consideration for decentralization. However, as of 1971, Ago hesitated 'to conclude that there is a rule on the matter already firmly established in practice', adding that the issue belonged to the realm of 'progressive development of international law'.[175]

Importantly, at a later phase of ILC's work on state responsibility, an increasing emphasis was laid on the 'trend for privatization of State functions'.[176] Chusei Yamada, for instance, observed that '[t]here was in fact a rapid and large-scale transition to smaller government throughout the world', and in cases where states invite the private sector to participate in state functions 'in order to improve efficiency by means of competition', 'the acts of non-State entities should not be attributed to the State'.[177] If a state is held responsible for parastatal entities' conduct, either under domestic law or international law, it would be forced to exercise a certain control over such entities. Their *raison d'être* – that is, the more efficient performance of public services by means of market competition – would thus be seriously jeopardized. Therefore, it is argued that the restrictive approach to ARSIWA Article 5 is espoused in light of the competitive neutrality of parastatal entities.[178]

It is also worth examining again the difference between parastatal entities and territorial governments in terms of attribution. In either case, the question is whether international law should pay deference to the independence and autonomy that domestic laws grant to such entities. In the context of territorial governments, the main topic has been the attribution to a federal state of the conduct of an organ of its component states. By the end of the 19th century, it had been well established that, even when 'internal law does not provide the federal State with means of compelling the organs of component states to fulfil international obligations', the organs' conduct is attributable to the federal state.[179] For example, in the *'Montijo'* case, the umpire found that the conduct of Panama, which formed a part of Colombia at that time, was attributable to Colombia as a federal state: 'It may seem at first sight unfair to make the

[174] States have sometimes attempted to take the deference to domestic law to extremes, arguing that 'the conduct of persons or entities that do not belong to State organs is a matter of internal law'. Responsibility of States for Internationally Wrongful Acts: Comments and Information Received from Governments, Report of the Secretary-General, UN Doc. A/74/156, 12 July 2019, at 6, para. 2 (Sudan).

[175] Ago, *supra* note 22, at 256, para. 170.

[176] '2555th Meeting (Chusei Yamada), Summary Records of the 2519th to 2564th Meetings', 1 *ILC Yearbook* (1998) 241, at 242, para. 6.

[177] *Ibid.*

[178] De Stefano, *supra* note 16, at 162–165, 178.

[179] Ago, *supra* note 22, at 257, para. 175.

federal power… responsible… for events over which [it] have no control'.[180] However, this inconvenience is inseparable from the federal system. A state that 'deliberately adopts that form of administering its public affairs' must be regarded as having done so 'with full knowledge of… the advantages and drawbacks' and cannot 'complain if the latter now and then make themselves felt'.[181]

Consequently, international law clearly does not respect the independence and autonomy of territorial governments; thus, the rule is now enshrined in ARSIWA Article 4. If the same holds true for parastatal entities, Article 5 would be deprived of its autonomous role in relation to Article 4. Whereas federalism is no more than one of the various forms of decentralization, the phenomenon of outsourcing public functions to parastatal entities is currently observed in every quarter of the globe. Therefore, it is only natural that international law should distinguish parastatal entities from subfederal constituent entities in terms of attribution. These factors may corroborate the restrictive approach to ARSIWA Article 5.

C *State Involvement as an Inherent Factor of the Restrictive Approach*

However, it is logical to assume that the restrictive approach thus justified cannot be restrictive to the extent that factors other than the nature of a particular act are irrelevant. Essentially, when it is demonstrated that the independence and autonomy of a parastatal entity are impaired by state involvement to the extent that it no longer acts on an equal footing with other private competitors in the marketplace, the conduct resumes being attributable to the state. Otherwise, outsourcing public functions would be nothing but a pretext for evading legal responsibility, which is exactly what Article 5 is intended to prevent. In this sense, state involvement is an inherent factor of the restrictive approach that excludes *acta jure gestionis* from the scope of attributable conduct; if a state organ is involved in a commercial transaction conducted by a parastatal entity, the entity's conduct is attributable to the state. Without taking the factor into consideration, it would not be possible to determine conclusively whether the parastatal entity has acted in a manner that is similar to other commercial actors.

This remains the case even when the conduct in question is characterized as commercial, which is well illustrated by the *LESI v. Algeria* case.[182] The dispute arose from dissension between the claimants and an Algerian parastatal entity, the National Barrage Agency (Agence Nationale des Barrages or ANB). The claimants, through a tender process, concluded a contract with the ANB for a project financed by the African Development Bank (AfDB). However, a deterioration in local security required project modifications. Accordingly, the AfDB considered it appropriate to

[180] *Case of the 'Montijo' between the United States and Colombia*, Award, 26 July 1875, reprinted in J.B. Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party*, vol. 2 (1898) 1421, at 1440.

[181] *Ibid.*, at 1440–1441.

[182] ICSID, *LESI S.p.A. et ASTALDI S.p.A. c. République algérienne démocratique et populaire – Sentence*, 12 November 2008, ICSID Case no. ARB/05/3.

create another tender for the project. Although the claimants attempted to maintain the contract by proposing to substitute an Italian company for the AfDB so that the project would be financed, the ANB rejected the offer. The ANB and the claimants then negotiated an amicable termination of the contract but failed to reach an agreement. Consequently, the ANB unilaterally terminated the contract. It is difficult to distinguish the ANB's conduct from that of the SCA in the *Jan de Nul* case in terms of the nature of transactions. However, the *LESI* tribunal found that the ANB's conduct was attributable to the respondent under ARSIWA Article 5 on the grounds that the director general of the ANB received a recommendation from the minister of water resources when the ANB rejected the claimants' offer about financing, and three members of the Ministry of Water Resources, along with the director general, attended a meeting in which the ANB informed the claimants of its intention to terminate the contract.[183]

The *Bayindir* award also needs to be understood in light of the state organs' involvement in the transaction. Considering the nature of the transaction, the tribunal found the NHA's conduct non-attributable under ARSIWA Article 5 and immediately moved to the application of Article 8, which eventually led to the attribution of the NHA's conduct to Pakistan. The tribunal observed that 'each specific act allegedly in breach of the [BIT] was a direct consequence of the decision of the NHA to terminate the Contract, which decision received *express clearance* from the Pakistani Government'.[184] Furthermore, 'there was indeed a certain degree of governmental involvement', as evidenced by the fact that the Pakistani 'Minister of Communications… confirmed that the decision to terminate the Contract could not have been taken without some *guidance* from higher levels of the Pakistani government'.[185]

It is clear that the governmental involvement was established in the application of Article 8; however, the tribunal's reasoning was somewhat cryptic. The tribunal maintained that 'the levels of control required for a finding of attribution under Article 8 in other factual contexts, such as foreign armed intervention or international criminal responsibility', are 'not always adapted to the realities of international economic law'. It believed, however, that 'they should not prevent a finding of attribution if the specific facts of an investment dispute so warrant'.[186] This may imply that the 'governmental involvement', such as 'express clearance' and 'guidance' from the government, falls short of the threshold of effective control applied by the ICJ in *Nicaragua* and *Bosnian Genocide*;[187] however, the standard that is special to ISDS justifies the tribunal's conclusion. Or, as construed by a commentator, '[t]he issue is not so much

[183] Furthermore, the ANB notified the claimants of its decision to terminate the contract under the letterhead of the People's Democratic Republic of Algeria, the Ministry of Water Resources and the National Barrage Agency. *Ibid.*, para. 113.

[184] *Bayindir*, *supra* note 109, para. 125 (emphasis added).

[185] *Ibid.*, para. 128 (emphasis added).

[186] *Ibid.*, para. 130.

[187] *Nicaragua*, *supra* note 22; *Bosnian Genocide*, *supra* note 22.

one of challenging the substance of the applicable rule requiring "effective control", but rather whether there is scope for some flexibility in its application to the concrete facts of a particular case'.[188] The present study advances another view of this award.

Since the NHA was not acting in its private capacity but in the performance of public functions, the state organs' involvement in the transaction should have been considered in the application of Article 5 rather than Article 8. The governmental involvement, such as 'express clearance' and 'guidance' from the state organs, may fall short of the high threshold adopted in Article 8; however, it may demonstrate that the independence and autonomy of the NHA were impaired to the extent that it was no longer acting in a manner similar to other private entities. Article 5 inquires whether the exclusion of attribution to a state is exceptionally justified despite the functional link between the author of the conduct and the state. In contrast, private persons' conduct is, in principle, not attributable to a state. Such conduct is attributable only when the case meets the high standard of control – that is, a specific instruction given or effective control exercised by a state organ. Therefore, it is difficult to see why the standard of state involvement for the attribution of parastatal entities' conduct should be as high as the standard of control provided in ARSIWA Article 8.

This should not be considered as conflating Articles 5 and 8, which are conceptually distinct from each other. Under Article 5, the conduct is attributable to a state only when the author of the conduct is empowered by the state to exercise a public function and, in fact, exercises it in the particular instance. In this regard, it is useful to critically review the *Saint-Gobain* case, in which the tribunal concluded that the conduct of a SOE with distinct legal personality was attributable to the respondent state, Venezuela, pursuant to ARSIWA Article 5.[189] In applying the provision, the tribunal observed that the SOE 'was vested with governmental authority'. However, without inquiring whether the SOE carried out the conduct in question in the exercise of the vested authority, it found that the SOE 'had received specific instructions from the President of the Bolivarian Republic of Venezuela to carry out' the activity in question.[190] This factual link could have properly justified the attributability under Article 8; however, it cannot replace the second requirement of Article 5 – that is, the actual exercise of public functions. In the application of the latter provision, state involvement comes into play only when the second requirement as well as the first concerning empowerment are met, but the particular act in question is of a commercial nature. Thus, the award does not provide reliable guidance on how to interpret and apply ARSIWA Article 5.

It should be acknowledged that the relevant practice has yet to precisely identify the degree of state involvement that requires demonstration for parastatal entities' conduct

[188] Olleson, *supra* note 15, at 482. It is also said that 'the fact that the relevant test was elaborated in relation to the action of paramilitary groups appears not to affect the applicable standard which must be fulfilled in order for conduct to be attributable on this basis'. Crawford and Olleson, *supra* note 87, at 436; see also Latty, *supra* note 158, at 429–430.

[189] ICSID, *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela – Decision on Liability and the Principles of Quantum*, 30 December 2016, ICSID Case no. ARB/12/13.

[190] *Ibid.*, paras 457–460.

to be attributable in the absence of governmental authority elements. However, it can be argued that what needs to be addressed here is whether a parastatal entity acts on its own initiative and out of commercial considerations or within the general framework of the public policy pursued by the government.[191] General regulations, to which any other private actors in the marketplace are subject, fall short of this threshold. Furthermore, in the case of a SOE, the power of the state as a shareholder to appoint and remove members of the SOE's executive body is not sufficient for its commercial act to be attributable to the state.[192] It must be established that the state has exerted a substantial influence over the parastatal entity regarding the transaction in question; however, the threshold is not as high as that of specific instructions or effective control required under Article 8 to substantiate attribution.

D *What Makes the Interpretation and Application of ARSIWA Article 5 Too Restrictive?*

As described above, the *travaux préparatoires* of ARSIWA Article 5 do not necessarily warrant the preclusion of the attributability of *acta jure gestionis*. However, ISDS tribunals appear to be fairly categorical at this point. Their approach, which exclusively focuses on the nature of a transaction, seems to be more restrictive than the current law of state immunity, which is more context sensitive.[193] As for state immunity, the more restrictive its scope becomes, the more judicially accountable the state is. This is exactly what has brought about the shift to a restrictive approach to state immunity.[194] However, adopting a restrictive approach in the law of state responsibility leads to the exact opposite result: the state is allowed to deny attribution to it of parastatal entities' conduct and thus evade responsibility. This is partly justifiable in terms of the deference that international law pays to the independence and autonomy of parastatal entities under domestic law. However, as demonstrated above, the commercial nature of a transaction is not always decisive, and state involvement may convert *acta jure gestionis* into attributable conduct. Nevertheless, as the *Bayindir* award indicates, ISDS tribunals have not yet clearly identified state involvement as an inherent factor in attribution under ARSIWA Article 5 and have thus become too restrictive.

Why are ISDS tribunals inclined in that direction? One hypothesis worth considering is that one of the deep-rooted ideas regarding the ISDS system has brought about a restrictive approach to ARSIWA Article 5. In the *El Paso v. Argentina* case, the tribunal maintained that 'it is necessary to distinguish the State as a merchant from the

[191] *Cf. Maffezini*, *supra* note 92, paras 77–79; *Almås*, *supra* note 118, paras 252–267; *Staur*, *supra* note 125, para. 348.

[192] *Ibid.*, para. 349.

[193] See text accompanying notes 137–147 above. This might be also true with the distinction between *service public* and *puissance publique* that originates in French administrative law. Latty observes that the *Jan de Nul* tribunal decontextualized those concepts in espousing the restrictive approach to ARSIWA Article 5. Latty, *supra* note 157, at 487.

[194] See, e.g., Crawford, *supra* note 1, at 77.

State as a sovereign' and that 'it is essentially from the State as a sovereign that the foreign investors have to be protected through the availability of international arbitration'.[195] It follows that, regardless of the extent to which a state organ is involved in a transaction between a parastatal entity and a foreign investor, no protection will be given to the investor under international investment law as long as the state organ acts as a merchant – that is, without recourse to the exercise of any public authority.

Brigitte Stern, one of the arbitrators composing the *El Paso* tribunal, emphasizes that ISDS tribunals should strike a fair balance between 'the State's sovereignty and its responsibility to create an adapted and evolutionary framework for the development of economic activities and the necessity to protect foreign investment and its continuing flow', and mentions 'rebalancing the system' in favour of states' regulatory powers.[196] It is worth noting that Stern has made a major contribution to the development of the restrictive approach to ARSIWA Article 5 as an arbitrator of the *Jan de Nul* and *Hamester* tribunals.[197] It may be true that the ISDS system needs to be rebalanced; however, this should not be achieved by adjusting the standard for attribution of parastatal entities' conduct towards the need. The issue of attribution, as recognized by Stern, falls within 'the general framework of public international law'.[198] Therefore, the interpretation and application of the relevant rules must be free from such considerations as special to a certain area or regime of international law unless it is established that a *lex specialis* applies.[199] As demonstrated above, a restrictive approach that exclusively focuses on the nature of a transaction is not justifiable as a matter of the general law of state responsibility.

Regardless of whether the hypothetical analysis has a point, it is arguable that one should be all the more cautious in applying ARSIWA Article 5 to non-ISDS cases, such as complaints lodged with human rights treaty bodies. Interestingly, the European Court of Human Rights (ECtHR) has bypassed the application of ARSIWA Article 5.[200] For instance, in the *O'Keeffe* case, the Grand Chamber found Ireland responsible in relation to sexual abuse at primary schools.[201] When the relevant facts took place,

[195] ICSID, *EI Paso Energy International Company v. Argentine Republic – Decision on Jurisdiction*, 27 April 2006, ICSID Case no. ARB/03/15, paras 79–80; see also ICSID, *Pan American Energy LLC v. Argentine Republic* and *BP America Production Company v. Argentine Republic – Decision on Preliminary Objections*, 27 July 2006, ICSID Case nos. ARB/03/13 and ARB/04/8, para. 108.

[196] Stern, 'The Contours of the Notion of Protected Investment', 24 *ICSIDR* (2009) 534 at 550–551.

[197] Stern also served as an arbitrator in the *InterTrade* and *Ulysseas* cases. A commentator highlights the fact by stating that an approach which 'focuses narrowly on the relevant conduct severed from its context' has been developed 'by tribunals which included Professor Stern'. See Petrochilos, *supra* note 129, at 353.

[198] Stern, *supra* note 196, at 544.

[199] See ARSIWA, *supra* note 2, Art. 55. In the *Al-Tamimi* case, the tribunal found that '[g]iven the specific test laid out by the State parties under Article 10.1.2 [of the US-Oman Free Trade Agreement], the criteria of Article 5 of the ILC Articles are not directly applicable to the present case'. ICSID, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, Award, 3 November 2015, ICSID Case no. ARB/11/33, para. 324.

[200] Crawford and Keene, 'The Structure of State Responsibility under the European Convention on Human Rights', in A. van Aaken and I. Motoc (eds), *European Convention on Human Rights and General International Law* (2018) 178, at 181–184.

[201] ECtHR, *O'Keeffe v. Ireland*, Appl. no. 35810/09, Judgment of 28 January 2014.

the vast majority of Irish children, including the applicant, attended schools 'owned and managed by, and in the interests of, a non-State actor, to the exclusion of State control'.[202] The ECtHR emphasized that 'a State cannot absolve itself from its obligations to minors in primary schools by delegating those duties to private bodies or individuals'.[203] Thus, Ireland's responsibility was not predicated on the attribution of the sexual misconduct to it but, rather, on the failure to fulfil its positive obligation to protect the applicant from the sexual abuse under Article 3 of the European Convention on Human Rights.[204] Consequently, whether the law of state responsibility can be predicated on a restrictive doctrine remains an open question. However, the reluctance to apply ARSIWA Article 5 might also be counted as evidence that the provision has a restrictive connotation in the eyes of the ECtHR.[205]

5 Conclusion

The distinction between *acta jure imperii* and *jure gestionis* is relevant for the attribution of conduct under ARSIWA Article 5. However, the categorical exclusion of *acta jure gestionis* from the scope of the attributable conduct is not always rational. It is true that the wording of Article 5 affords a foundation on which the restrictive approach has developed; however, because of its textual obscurities, the rule has been interpreted in an overly restrictive manner. To provide a clearer outline, the rule can be formulated as follows:

> The conduct of a person or entity which is not an organ of the state under Article 4 but which is empowered by the law of that state to exercise a public function shall be considered an act of the state under international law unless in the particular instance,
> (a) The person or entity acts in its private capacity; or
> (b) The person or entity acts without exercising sovereign prerogatives and is free from state involvement beyond general regulations.

To define the terms 'public function', 'sovereign prerogatives' and 'state involvement beyond general regulations' amounts to summarizing the arguments advanced by this study. First, the exercise of a public function is a broad concept that encompasses any function entrusted by a state through its law to be performed in the public interest. It corresponds exactly with the exercise of 'legislative, executive, judicial or any other functions' in ARSIWA Article 4. If the parastatal entity acts in its private capacity – that is, the conduct in question has nothing to do with the entrusted public function – it is, as under Article 4 (and Article 7), not attributable to the state. Second, the scope of attributable conduct under the rule is, however, narrower than that under Article 4, which is represented by the condition of 'exercising sovereign

[202] *Ibid.*, para. 157.
[203] *Ibid.*, para. 150.
[204] *Ibid.*, para. 169.
[205] It should be noted, however, that the ECtHR tends to avoid 'the need to engage in the secondary rules of State responsibility' in general by 'broadly interpret[ing] many ECHR rights as giving rise to positive or primary obligations of the State'. Crawford and Keene, *supra* note 200, at 179.

prerogatives' – more precisely, by employing a means peculiar to the public authority, such as regulatory and coercive powers. This requirement precludes the attributability of the conduct of parastatal entities if they act on equal footing with other private actors in the marketplace.[206] Third, in the absence of the *puissance publique* element, the conduct of parastatal entities may be nevertheless attributable to the state. If state involvement indicates that the parastatal entity is no longer considered to be acting as if it were a commercial actor, the principle of the unity of the state prevails: the conduct is attributable despite its commercial nature. In this light, it is not sufficient to demonstrate that the state imposes regulations that are applicable to all the actors in the marketplace in common. Neither can the power as a shareholder as such make the commercial act of SOEs attributable to the state. It must be established that the state gets involved with the parastatal entity in its decision-making with regard to the transaction in question; however, there is no need to establish whether the parastatal entity is specifically directed or controlled by a state organ as required under ARSIWA Article 8.

Therefore, it stands to reason that the law of state responsibility conceptually overlaps with that of state immunity. It is true that the long-term accumulation of practice and studies regarding the restrictive doctrine of state immunity has paved the way for the development of a restrictive approach to ARSIWA Article 5.[207] However, the different purposes of these distinct areas of international law can lead to a divergence that may arise in applying their rules. On the one hand, state involvement in commercial transactions does not make a difference to the (non-)availability of state immunity. *Acta jure gestionis* are not immune from jurisdiction of foreign domestic courts, even if the transaction in question is conducted by state organs themselves. On the other hand, under the law of state responsibility, state involvement is a material factor in determining the attributability of conduct – that is, it may convert a non-attributable transaction into attributable conduct in the case of parastatal entities acting in a manner that is open to any private entity. It is true that ARSIWA Article 5 represents an interface between the law of state responsibility and that of state immunity; however, 'stretching analogies and ignoring differences' cannot be justified.[208]

[206] De Stefano, *supra* note 16, at 162–165. As a separate issue, how to prevent state-owned enterprises (SOEs) from causing market distortions has been keenly discussed. See, e.g., Section III of OECD Guidelines on Corporate Governance of State-Owned Enterprises (2015 edition), available at www.oecd.org/corporate/guidelines-corporate-governance-soes.htm.

[207] Since 'the State and its various organs of government' do not exclusively occupy state immunity (Article 2(1)(b) of the UNCSI, *supra* note 134), parastatal entities (or SOEs) have also caused difficulties in the interpretation and application of the law of state immunity. See, e.g., *La Générale des Carrières et des Mines Sarl v. FG Hemisphere Associates LLC*, [2012] UKPC 27. This might give rise to another conceptual overlap between these different areas of international law.

[208] Webb, 'How Far Does the Systemic Approach to Immunities Take Us?', 112 *AJIL Unbound* (2018) 16, at 16.