

## Making International Legal Persons in Investment Treaty Arbitration: State-owned Enterprises along the Person/Thing Distinction

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### Abstract

*Investment treaty arbitration (ITA) has emerged as a space where the international legal personality of states and foreign investors is continuously created, maintained, and redefined. Focusing on treatment of state-owned enterprises (SOEs), this Article juxtaposes investment law's doctrinal foundations with Roberto Esposito's political philosophy to explore the dynamics, porosity, and ramifications of international legal personality in ITA. Skeptical of gradual conceptualizations of legal personality, this Article frames investment law in terms of Esposito's person/thing distinction and argues for SOEs to form a liminal category that exposes malleability of legal doctrines when ITA tribunals make or break international legal persons. Ultimately, the ITA cases seem to open a distinct dispositif of a SOE that both delineates the exact normative demarcation of the state as international legal person and creates pockets of indistinguishability and politics at its borders—often to the detriment of the Global South. This insight provides a new perspective on the creation of international legal persons in ITA and international law more generally but, at the same time, also adds a new dimension to Esposito's overarching framework resting on the asymmetric relationship between persons and things.*

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### A. Introduction: Persons/Things in Investment Treaty Arbitration

International legal personality has traditionally been one of the most jealously guarded judicial categories. Once available only to states, contemporary international legal personality is increasingly viewed as flexible and functional.<sup>1</sup> According to the former president of the International Court of Justice (ICJ) Rosalyn Higgins, for example, it makes more sense to talk about international law as a “dynamic” process where “there are a variety of participants, making claims across state lines, with the object of maximizing various values” than to cling to crude doctrinal divisions between subjects and objects<sup>2</sup>—persons and things.<sup>3</sup>

Over the past decades, investment treaty arbitration (ITA) has emerged as an important site where the erosion of strict binary categories between international legal personality and non-personality has been acutely felt. Following investment law’s journey from margins of international law to its mainstream,<sup>4</sup> the conception of international legal personality as porous, gradual, and context-sensitive has resonated strongly with the ITA system which, as a general matter, allows foreign investors to challenge state action on neutral international fora.<sup>5</sup> Two important outcomes for international legal personality flow from this basic premise. On the one hand, the extensive rights and protections investment law assigns on foreign investors are often considered to render them “partial subjects” under international law.<sup>6</sup> On the other hand, ITA is also viewed as the systematic erosion of governmental policy space and, as such, pervasive emasculation of the state as a sovereign subject.<sup>7</sup> Both developments impinge on fundamental concepts of international legal personhood. Together they suggest—as argued in the Introduction to this Special Issue—that contemporary liberal law, international law included, has come to adopt a mode of

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<sup>1</sup> Jan Klabbers, *The Concept of Legal Personality*, 11 *IUS GENTIUM* 35 (2005).

<sup>2</sup> ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 49–50 (1994).

<sup>3</sup> Toni Selkälä & Mikko Rajavuori chapter in this volume, 18 *GERMAN L. J.* (2017).

<sup>4</sup> See, e.g., Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 *EUR. J. INT’L L.* 875 (2011).

<sup>5</sup> RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 8–11 (2008).

<sup>6</sup> Tillmann Rudolf Braun, *Globalization-driven Innovation: The Investor as a Partial Subject in Public International Law - An Inquiry into the Nature and Limits of Investors Rights*, 15 *J. WORLD INV. & TRADE* 73, 96–106 (2014). For ITA practice, see especially *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, para. 141 (Feb. 8, 2005).

<sup>7</sup> See, e.g., A. Claire Cutler, *Transformations in Statehood, the Investor-State Regime, and the New Constitutionalism*, 23 *IND. J. GLOBAL LEGAL STUD.* 95 (2016).

construing legal persons where international legal personality comes across in varying grades and intensities.<sup>8</sup>

This Article presents a case study that problematizes the prevailing conception of gradual international legal personality in ITA and in international law more generally. To this end, the Article uses ITA practice involving state-owned enterprises (SOEs) as descriptive and analytical lenses to investigate dynamics and ramifications of international legal personality. Methodically, the Article operates on two levels. First, it provides a doctrinal account on the general framework of investment law in an SOE-context and identifies the law of state responsibility and doctrines of attribution as crucial gatekeepers of international legal personality. Against this backdrop, the Article embeds legal techniques used by ITA tribunals in the wider theoretical debate over legal personality as developed in the Introduction to this Special Issue. In doing so, the Article frames the discussion in the light of Roberto Esposito's contemporary political philosophy, particularly the person/thing distinction, which is used as a stepping stone to discuss politics, porosity, and ramifications of personhood as they emerge from legal doctrines when deciding cases that involve SOE. As an undergirding argument, the Article maintains that the treatment of SOEs in ITA reproduces strict binary structures of international legal personality and non-personality, and that upholding these categories yields outcomes of exclusion and domination that are particularly visible in the North/South relations.

SOEs provide promising ground for investigating dynamics and consequences of international legal personality for conceptual, doctrinal, historical, and theoretical reasons. First, SOEs epitomize how corporations lead double lives as independent legal persons and proxies of governmental policy under state control. Occasionally, these tensions lead SOEs to assume sovereign qualities and effectively merge with their owner—the state.<sup>9</sup> Second, as the high number of SOE-related investment disputes suggests, delineation between states and SOEs carries significant economic consequences both for host states and foreign investors. For this reason, argumentative and doctrinal practices used to mark boundaries of the state are highly developed and well-rehearsed, allowing in-depth examination of the creation and maintenance of international legal personality on the transnational plane.<sup>10</sup> Third, SOEs sit comfortably on the complex historical trajectory of personhood. They straddle the ancient *imperium/dominium* and the more recent public/private distinction, they enmesh with the emergence of aggregate corporate personality and they reveal

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<sup>8</sup> Selkälä & Rajavuori, *supra* note 3.

<sup>9</sup> As such, SOEs complicate the common taxonomy where companies are treated simultaneously as things whose stock is owned by their shareholders and as persons capable of owning property and representing themselves in legal proceedings. See, e.g., Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583 (1999).

<sup>10</sup> Selkälä & Rajavuori, *supra* note 3.

tensions in the ways legal personality frames the North/South relations.<sup>11</sup> Fourth, the recent emergence of SOEs as important players in the world economy may provide a backdrop that indicates a shift from gradual to monist conceptualization of SOE personhood, both in ITA and in broader international law theorization.

The Article proceeds as follows. Section B provides a concise introduction to political philosophy of Roberto Esposito whose notions of politics, porosity, and ramifications of personhood illustrate the dynamics of personhood. Section C uses the recent case of *Tulip v. Turkey* as a narrative device to introduce the basic framework of investment law and state responsibility, which serve as building blocks for the broader argument. Following Esposito's notions, the section suggests contemporary investment law system to rest on sharp asymmetric relationship between host states (persons) and foreign investors (things) which, however, struggles to include hybrid entities such as SOEs. Against this setting, Section D focuses on the politics and porosity of a person/thing distinction in ITA. The section opens with an exposition of three ITA cases revolving around the status of a single SOE, Petrobangla of Bangladesh. Pursuing both a bottom-up approach focusing on instability of attribution doctrines and a top-down approach where merger of sovereignty and international legal personality is viewed from the perspective of postcolonial theory, the section documents ramifications of SOEs being cast either as persons or things in ITA, particularly from the perspective of the Global South. As a form of conclusion, Section E summarizes the argument and hypothesizes the value of Esposito's political philosophy for examining creation and maintenance of international legal persons.

## **B. Esposito on Politics, Porosity, and Ramifications of Personhood**

This Section introduces Roberto Esposito's political philosophy as it applies to politics, porosity, and ramifications of personhood. The section briefly discusses two elements of Esposito's philosophy: The person/thing distinction and the *dispositif* of the person that structure the analytical lens through which contemporary SOE-related ITA proceedings can be gleaned. Moreover, the section draws attention to a crucial conceptual category of the slave—a concept that is later related with that of a SOE—that undergirds much of Esposito's writings.

### *I. The Person/Thing Distinction and the Dispositif*

Over the past decade, Esposito has argued that the person/thing distinction forms a conceptual building block for much of Western political and legal thought.<sup>12</sup> Tracing

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<sup>11</sup> *Id.*

<sup>12</sup> ROBERTO ESPOSITO, PERSONS AND THINGS: FROM THE BODY'S POINT OF VIEW 35 (2015). For broader discussion, see Selkälä & Rajavuori, *supra* note 3.

genealogies of persons and things from ancient Roman law to the emergence of human rights, Esposito suggests that the world is continuously divided into these mutually opposite categories: At a given time, one is either a person or a thing.<sup>13</sup> While one's status as a person or a thing may change over time,<sup>14</sup> the distinction emphasizes asymmetry between the two categories.

Originating in Roman law and Gaius' *Institutes*,<sup>15</sup> but reproduced in Christian theology, modern philosophy, and most Western codifications of law,<sup>16</sup> the relation between persons and things "is one of instrumental domination, in the sense that the role of things is to serve or at least to belong to persons."<sup>17</sup> Moreover, the distinction doubles as a demarcation line separating persons from one another. Writing with a Marxist undertone, Esposito views, "things [to] serve to secure the relations between persons, dividing them into different categories . . . and roles."<sup>18</sup> In sum, Esposito argues that the person/thing distinction forms the bedrock for all Western legal systems<sup>19</sup> and that the concept of person, in particular, exhibits "lexical richness, semantic flexibility, and power to evoke" in a way that only a few other judicial concepts can.<sup>20</sup> Thus, in Esposito's scheme, personhood appears as a privilege and power that enables appropriation of the common.<sup>21</sup>

Against this backdrop, it is no wonder that the person/thing distinction does not cast some entities as persons and others as things per some inherent logic.<sup>22</sup> Instead, application of the distinction is contingent on essential political process which takes place through the

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<sup>13</sup> ESPOSITO, *supra* note 12 at 16–17.

<sup>14</sup> Here, Esposito points out that in ancient Rome, for instance, "nobody stayed a person for their whole life, from birth to death—everybody, for at least some period of time, passed through a condition not far removed from that of a possessed thing." *Id.* at 29. Thus, even an adult male Roman citizen, the quintessential person, "entered into the regime of personhood after a long internship in the entirely subordinate realm of sonship." See ROBERTO ESPOSITO, *THIRD PERSON: POLITICS OF LIFE AND PHILOSOPHY OF THE IMPERSONAL* 10 (2012).

<sup>15</sup> Gaius, *INSTITUTIONES OR INSTITUTES OF ROMAN LAW* (c. 170), (trans. Edward Poste, 4th ed. 1904).

<sup>16</sup> ESPOSITO, *supra* note 12 at 1–2, 16.

<sup>17</sup> *Id.* at 17.

<sup>18</sup> *Id.* at 69.

<sup>19</sup> *Id.* at 16.

<sup>20</sup> Roberto Esposito, *The Dispositif of the Person*, 8 L. CULTURE & HUMAN. 17–18 (2012).

<sup>21</sup> Roberto Esposito & Zakiya Hanafi, *Community, Immunity, Biopolitics*, 18 ANGELAKI 83, 88 (2013).

<sup>22</sup> See also Ukri Soirila chapter in this volume, 18 GERMAN L. J. (2017).

*dispositif* of the person.<sup>23</sup> The role of the *dispositif*, in short, is to divide beings into two categories made up of different qualities and to “create subjectivity through a process of subjection or objectivization.”<sup>24</sup> Best exemplified by treatment of slaves in Roman law, where a living human being was, in general, situated in the category of *res*, the *dispositif* emerges as a continuous performative process where persons are separated from things.<sup>25</sup> The example of the Roman slave highlights how abstract conceptual differentiation between persons and things has potential to lead to concrete procedures of exclusion and domination.<sup>26</sup>

Here, Esposito notes that the constitutive power of the *dispositif* “lies not so much in the normative demarcation it carves out between the different categories as in the zones of indistinguishability it creates at their boundaries.”<sup>27</sup> Thus, Esposito suggests that the *dispositif* exposes the porosity of personality and the ease with which a person can slip into a thing, and vice versa.<sup>28</sup> Moreover, the *dispositif* illustrates how personhood essentially feeds on “thinghood”: “[T]o experience personhood fully means to keep, or push, other living individuals to the edge of thingness.”<sup>29</sup> While illustrative, the condition of a slave is only the most visible tip of an “entire mechanism of social discipline, which works specifically by continuously shifting the categorial thresholds that define, or create, the status of all living beings” along the person/thing distinction.<sup>30</sup> A key theme running through his philosophy, then, attempts to tease out view of a third—whether a third person,<sup>31</sup> a body’s point of view<sup>32</sup> or the common,<sup>33</sup> that resists domination and subjugation stemming from

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<sup>23</sup> Esposito, *supra* note 20.

<sup>24</sup> *Id.* at 21. See also ESPOSITO, *supra* note 12 at 27.

<sup>25</sup> ESPOSITO, *supra* note 14 at 9. Similar distinctions appear also in the context of children (*fili in potestate*) and married women (*uxores in matrimonio*). See Esposito, *supra* note 20 at 23–24.

<sup>26</sup> ESPOSITO, *supra* note 14 at 9.

<sup>27</sup> *Id.* at 9.

<sup>28</sup> ESPOSITO, *supra* note 12 at 26.

<sup>29</sup> ESPOSITO, *supra* note 14 at 10.

<sup>30</sup> *Id.* at 9.

<sup>31</sup> ESPOSITO, *supra* note 14.

<sup>32</sup> ESPOSITO, *supra* note 12.

<sup>33</sup> ROBERTO ESPOSITO, *COMMUNITAS. THE ORIGIN AND DESTINY OF COMMUNITY* (2010).

the person/thing distinction which runs a risk of contaminating person with qualities of things and vice versa.<sup>34</sup>

## *II. Esposito Embedded*

Evidently, Esposito's work is extremely anthropocentric. Operating in biopolitical tradition, he is primarily interested in human life.<sup>35</sup> Regardless of Esposito's affinity with the person/thing distinction as it applies to human subjects, flesh and blood, neither economic institutions in general nor state ownership in particular, is alien to his political philosophy. Writing on property, for instance, he frames globalization and ownership as woven together with major implications for human life:

For a long period of time, yet to end, the concept of government property, as public property of the state, was not the opposite of private property but a complementary aspect of it. With what we usually define as globalization, this kind of "making public" [publicizzazione] of the private is increasingly intertwined with the inverse phenomenon of the privatization of the public in a manner that seems to exhaust, and even exclude something like a common good from the horizon of possibilities.<sup>36</sup>

Equally critical of original enclosure movement, where resources were appropriated by the public, and current privatization movement, Esposito advocates that the best route to wholesome community starts by "breaking the vise grip between public and private that threatens to crush the common, by seeking instead to expand the space of the common."<sup>37</sup> As such, the issues with both private and public ownership are cast in terms of seeking and strengthening the common, the third, which is often masked and dominated by the pervasive person/thing distinction.

These two concepts, the third and the person/thing distinction, make Esposito's language relevant for investigating the dynamics of legal personhood in SOE-related ITA proceedings.

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<sup>34</sup> Selkälä & Rajavuori, *supra* note 3; ESPOSITO, *supra* note 12 at 26, 33.

<sup>35</sup> See e.g., Timothy Campbell, "Enough of a Self": Esposito's Impersonal Biopolitics, 8 L. CULTURE & HUMAN. 31 (2012); Thomas F. Tierney, Roberto Esposito's "Affirmative Biopolitics" and the Gift, 33 THEORY CULTURE & SOC. 53 (2016).

<sup>36</sup> Esposito & Hanafi, *supra* note 21 at 89.

<sup>37</sup> *Id.* at 89.

As suggested in the Introduction to this Special Issue, one way to go past the myriad traditions, myths, and utopias of personhood is to reinstate the body at center of the discourse. Esposito's work provides a handy shortcut to this discussion. While his approach focuses on the material human body, SOEs can also be understood as corporate bodies constituting the third.<sup>38</sup> Other scholars interested in Esposito's framings have already embarked on similar paths, arguing that the notions of the person/thing distinction and the *dispositif* are instructive as to the creation and maintenance of legal persons in general. Barkan, for instance, has shown how Esposito's broad political philosophy can be applied to corporate bodies.<sup>39</sup> Soirila, likewise, has used Esposito's notions to analyze the changing international legal personality of states.<sup>40</sup> Thus, when removed from their anthropocentric origins, Esposito philosophy seems to provide an opening through which the dynamics of legal personality, its consequences in the real world and its theoretical permutations can be gleaned.

In the following, contemporary ITA proceedings are used as a case study highlighting politics, porosity, and ramifications of personhood.<sup>41</sup> Through juxtaposition of the modern ITA practice and Esposito's notions of the person/thing distinction, legal framework of investment law and international law doctrines used in ITA appear as sites where SOEs form a liminal category—a third—that provides a new perspective on the constitution of international legal persons in ITA. In particular, SOEs reveal the malleability of positive international law when they, as hybrid entities and, by proxy, their owner states, are made as international legal persons in ITA. At all times, however, the (neo)liberal framework of investment law operates very close to the classic Roman *dispositif* of the person whose ultimate product is the slave, another hybrid entity created, used and abused by the person/thing distinction.<sup>42</sup> Seen from this perspective, the ITA cases discussed below seem to open a distinct *dispositif* of a SOE as an instrument which both delineates the exact normative demarcation of the state as international legal person and creates pockets of indistinguishability and politics at its borders. This insight provides a new perspective on creation of international legal persons in ITA but, at the same time, it also adds a new dimension to Esposito's overarching framework resting on asymmetric relationship between persons and things.

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<sup>38</sup> Selkälä & Rajavuori, *supra* note 3.

<sup>39</sup> See Joshua Barkan, *Roberto Esposito's Political Biology and Corporate Forms of Life*, 8 L. CULTURE & HUMAN. 84 (2012); JOSHUA BARKAN, CORPORATE SOVEREIGNTY: LAW AND GOVERNMENT UNDER CAPITALISM 76–86 (2013).

<sup>40</sup> Soirila, *supra* note 22.

<sup>41</sup> See ESPOSITO, *supra* note 12.

<sup>42</sup> *Id.* at 9–10.



### C. Persons/Things in Investment Law: A Rough Sketch

This Section provides a brief account of the legal framework and key concepts that give shape to ITA. Focusing on international legal aspects of investment law, the Section draws on the recent *Tulip v. Turkey* case to introduce the system of bilateral investment treaties (BITs), the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),<sup>43</sup> and the law of state responsibility. The complex array of treaty law, customary international law, and arbitral practice is used to explain the status of SOEs which, by and large, escape easy definitions and, as such, provide a primer on dynamics of international legal personality. Drawing parallels between investment law and Esposito's notions of the person/thing distinction, the section notes how ITA proceedings are contingent on well-defined categories of host states (persons) and foreign investors (things) in asymmetric system. Unlike in Esposito's account, in ITA, foreign investors continuously push SOEs to the edge of personhood for the purposes of triggering state responsibility, thereby revealing how investment law essentially prizes thinghood over personhood.

#### I. *Building on Tulip v. Turkey*

*Tulip v. Turkey*, an ITA case decided in 2014, concerned a dispute arising from a real estate development project in Istanbul.<sup>44</sup> In 2006, a Dutch company, Tulip Real Estate Investment and Development Netherlands B.V (Tulip), had been awarded a tender to complete the project by Emlak Konut Gayrimenkul Yatirim Ortakligi A.S. (Emlak), a Turkish real estate investment trust. Emlak was 39% owned by TOKI, Turkey's Housing Development Organization, a state organ responsible for Turkey's public housing.

After winning the bid, Tulip set up several local companies and entered a revenue-sharing agreement with Emlak. The development project faced serious obstacles from the start. Initially, there were disputes over stamp duties and allegations of embezzlement, but as the project developed it became obvious that the construction could not be completed in the agreed timeframe. After complex negotiations, Emlak finally terminated the contract with

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<sup>43</sup> Int'l Ctr. for Settlement of Inv. Disputes, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Oct. 14, 1966, 575 U.N.T.S. 159 (ICSID Convention).

<sup>44</sup> Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Award (Mar. 10, 2014) [hereinafter *Tulip v. Turkey Award*].

Tulip in May 2010.<sup>45</sup> Unsatisfied with the result, Tulip commenced an ITA process against Turkey under the Netherlands-Turkey BIT.<sup>46</sup>

Tulip argued that its claims arose, among other things, out of Turkey's unlawful expropriation of rights under contract and unfair and inequitable treatment of its investment. More specifically, Tulip asserted that Turkey, "acting through various alleged state actors and/or entities operating under State control," engaged in a pattern of conduct that interfered with the development project and ultimately led to its termination.<sup>47</sup> As such, the claims focused on the role and conduct of Emlak and its majority shareholder TOKI. As an example of the argumentation, Tulip contended that the decision to terminate the contract "was made by Emlak under the control of TOKI for non-commercial purposes and in the exercise of State power."<sup>48</sup> Simply put, the claimant submitted that Emlak operated under the "presumption of statehood" and that its actions were in fact Turkey's actions.<sup>49</sup>

Ultimately, the arbitral tribunal rejected all claims pursued by Tulip.<sup>50</sup> In the process, however, the award and the separate decision on annulment<sup>51</sup> underscored two important dimensions of contemporary investment law that illuminate dynamics of international legal personality in ITA. These dimensions relate to the tribunal's jurisdiction under the Netherlands-Turkey BIT and the ICSID Convention, as well as to the law of state responsibility.<sup>52</sup> Crucially, these two streams of analysis pertain to the overarching argument

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<sup>45</sup> *Id.* at 152–54.

<sup>46</sup> AGREEMENT ON RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENTS BETWEEN THE KINGDOM OF THE NETHERLANDS AND THE REPUBLIC OF TURKEY, (1986), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2090> [hereinafter the Netherlands-Turkey BIT].

<sup>47</sup> Tulip v. Turkey Award, ICSID Case No. ARB/11/28, para. 60 (Mar. 10, 2014).

<sup>48</sup> *Id.* at 249.

<sup>49</sup> *Id.* at 262.

<sup>50</sup> *Id.* at 369.

<sup>51</sup> Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Decision on Annulment (Dec. 30, 2015) [hereinafter Tulip v. Turkey Annulment].

<sup>52</sup> Tulip v. Turkey Award, ICSID Case No. ARB/11/28, para. 276 (Mar. 10, 2014). The third important dimension would be the differentiation of contractual and treaty claims, but for the sake of brevity this Article does not discuss these elements in detail. For comprehensive discussion, see, e.g., Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims*, 99 AM. J. INT'L L. 835 (2005); James Crawford, *Treaty and Contract in Investment Arbitration*, 24 ARB. INT'L 351 (2008); Stephan W. Schill, *Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18 MINN. J. INT'L L. 1 (2009); Michael Feit, *Attribution and the Umbrella Clause - Is there a Way out of the Deadlock?*, MINN. J. INT'L L. 21 (2012)

running through the *Tulip v. Turkey* case: To what extent does state ownership give rise to the “presumption of statehood”? Or, put differently, when does a separate legal entity—object, thing—assume sovereign qualities and merge with its owner-state—subject, person—in the eyes of investment law? In the following discussion, the doctrinal answer to these questions is approached with reference to Esposito’s theoretical framework in order to expose the dynamics of making persons and things in ITA.

## *II. The Basic Framework: Investment Treaties*

As discussed in the Introduction to this Special Issue, law is instrumental in solidifying the positions between persons and things.<sup>53</sup> Unlike in the Gaius’ *Institutes*, where the relationship between *persona* and *res* was clearly laid out, contemporary investment law regulates the roles of host states and foreign investors in a more dispersed way. The status of SOEs, in particular, escapes easy definition unless viewed against the complex array of treaty law, customary international law, and arbitral practice.

In general, investment law comprises three distinct bodies of law: International law, domestic law, and contract law. The international law dimension is expressed in substantive obligations included in investment treaties and customary international law, as well as their interpretation and application in concrete disputes by arbitral tribunals.<sup>54</sup> In *Tulip v. Turkey*, relevant international treaties were the Netherlands-Turkey BIT and the ICSID Convention. As to customary international law, it was acknowledged that the law of state responsibility applied to the dispute.<sup>55</sup> In relation to domestic law, the case revolved around Turkish Foreign Direct Investment Law and Corporate Law.<sup>56</sup> Contractually, the key instrument was

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and Shotaro Hamamoto, *Parties to the “Obligations” in the Obligations Observance (“Umbrella”) Clause*, 30 ICSID REV. 449 (2015).

<sup>53</sup> Selkälä & Rajavuori, *supra* note 3.

<sup>54</sup> Formally, neither international law nor investment law abide by strict adherence to precedent. In reality, however, parties to the dispute base their litigation strategies on earlier awards and judgements of other international courts and tribunals. In *Tulip v. Turkey*, for instance, the tribunal noted that “[e]ach Party refers the Tribunal to previous ICSID and investment treaty awards, and statements made in ICJ judgments. Although not bound by such citations, the Tribunal accepts that, as a matter of comity, it should have regard to earlier decisions of courts (particularly the ICJ) and of other international dispute tribunals engaged in the interpretation of the terms of a BIT.” *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdiction Issue, para. 45 (Mar. 5, 2013) [hereinafter *Tulip v. Turkey Jurisdiction*].

<sup>55</sup> *Tulip v. Turkey Award*, ICSID Case No. ARB/11/28, para. 281 (Mar. 10, 2014).

<sup>56</sup> *Id.* at 438.

the revenue-sharing contract between Tulip's Turkish subsidiaries and Emlak.<sup>57</sup> These three sets of instruments fixed the general framework for the dispute and marked the outer bounds of the tribunal's competence.<sup>58</sup>

Quite naturally, the single most important piece in the legal framework of *Tulip v. Turkey* was the Netherlands-Turkey BIT. Like most bilateral and multilateral investment treaties, the Netherlands-Turkey BIT is a state-to-state treaty which sets out terms and conditions for investment in one state by private companies and individuals of another state. Like other BITs, the Netherlands-Turkey BIT upholds a deeply asymmetric relationship between host states and foreign investors. Most importantly, the system grants investors many guarantees, such as fair and equitable treatment; full protection and security to the foreign investment; national treatment; most-favored nation treatment; and protection from investment expropriation except for a public purpose and against prompt, adequate, and effective compensation.<sup>59</sup> Premised on the idea that additional treaty protections will incentivize foreign direct investment (FDI) and improve economic growth and development,<sup>60</sup> BITs attempt to strike a balance between "the exercise of the sovereign rights of the State" and reasonable expectations of the foreign investors.<sup>61</sup>

The Netherlands-Turkey BIT is also instructive regarding the resolution of disputes arising from potential violations of investment guarantees. Conforming to a distinctive feature of BITs, the Netherlands-Turkey BIT enables foreign investors to submit the dispute to the International Centre for the Settlement of Investment Disputes (ICSID) for settlement by arbitration.<sup>62</sup> To be more precise, in the Netherlands-Turkey BIT, both state parties *consent* to the submission of an investment dispute to the ICSID reciprocally and *a priori*.<sup>63</sup> While

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<sup>57</sup> *Id.* at 58.

<sup>58</sup> Due to this Article's scope and aim, the following discussion will focus solely on the international law dimension.

<sup>59</sup> DOLZER & SCHREUER, *supra* note 5 at 119–93.

<sup>60</sup> See, e.g., Tim Büthe & Helen V. Milner, *The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI through International Trade Agreements?*, 52 AM. J. POL. SCI. 741 (2008) and Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment To Developing Countries?*, in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 226 (Karl P. Sauvant & Lisa E. Sachs eds., 2009). For a critical examination, see Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397 (2011).

<sup>61</sup> Compare with *S.S. Wimbledon* (U.K., Fr., Italy, Japan v. Germany), 1923 P.C.I.J. (ser. A) No. 1, at 25 (Judgment of Aug. 17). See also Crawford, *supra* note 52 at 354–55.

<sup>62</sup> The Netherlands-Turkey BIT, *supra* note 46 at Art. 8(2).

<sup>63</sup> *Id.* at Art. 8(3).

there are other ways for states to consent to ITA, such as a specific contractual clause or domestic legislation, in the majority of cases state consent is based on a general offer found in BITs or multilateral investment treaties.<sup>64</sup> Through BITs' dispute resolution clauses, states are understood to make a standing offer to arbitrate with foreign investors according to the substantive and procedural terms contained in the investment treaty.<sup>65</sup>

Through these provisions, the Netherlands-Turkey BIT illustrates key traits of the modern investment law framework, which consists of a complex web of bilateral investment treaties, multilateral investment treaties, and free trade agreements with investment chapters amounting to 3,400 individual treaties.<sup>66</sup> In particular, the Netherlands-Turkey BIT underscores how states have purposely exercised their sovereign prerogative to enter investment treaties with other states and, by doing so, purposely assigned foreign investors' additional substantive protections regarding their investments.<sup>67</sup> Moreover, states have provided foreign investors access to ITA through individualized claims—a distinctive, and highly polarized, feature of the BIT system.<sup>68</sup> Regardless of the extensive substantive and procedural protections allotted to foreign investors, the treaty-based structure of the investment system remains firmly embedded in a classic international law framework where states are still considered masters of the treaty universe. States can, for example, change the rules of investment law either by amending BITs or by exiting the regime altogether.<sup>69</sup>

Overall, in the eyes of investment law, states are clearly primary subjects while foreign investors still resemble objects to whom states have, for various reasons,<sup>70</sup> considered

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<sup>64</sup> CHRISTOPH SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY* 9 (2d ed. 2009).

<sup>65</sup> *Id.* at 9. See also Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 64 (2013). For similar expression in the case at hand, *Tulip v. Turkey Award*, ICSID Case No. ARB/11/28, para 176 (Mar. 10, 2014). For a classic text, see Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232 (1995).

<sup>66</sup> Out of these, roughly 2,600 are already in force. See UNCTAD, *INTERNATIONAL INVESTMENT AGREEMENTS NAVIGATOR* (2016), <http://investmentpolicyhub.unctad.org/IIA>.

<sup>67</sup> See generally Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 841 (2003).

<sup>68</sup> See, e.g., CATHARINE TITI, *THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW* (2014).

<sup>69</sup> Such actions may, however, take time. The Netherlands-Turkey BIT, for instance, remains in force for ten year periods and is tacitly extended for the same period, unless terminated. The Netherlands-Turkey BIT, *supra* note 46 at Art. 13(1)–13(2).

<sup>70</sup> See, e.g., SCHREUER ET AL., *supra* note 64 at 4. See also Gus Van Harten, *Five Justifications for Investment Treaties: A Critical Discussion*, 2 TRADE L. DEV. 19 (2010).

necessary to confer a highly-specific set of rights.<sup>71</sup> Thus, while states have attempted to reduce the gap between asymmetric participants through treaty regimes that protect foreign investors, from a systemic point of view investment law appears to adhere to classic binary structure of subject and objects—persons and things. In this way, the contemporary investment law system shares the most important characteristics with Esposito's tracing of asymmetric power relations encoded in the concept of legal personality.<sup>72</sup>

As with any legal system, however, there are shades of grey when distinguishing between subjects and objects, persons and things. For Esposito, the slave as both *persona* and *res* was a clear example of a hybrid entity straddling the person/thing distinction, often to its own detriment. In the investment law context, a similar category is that of a SOE.<sup>73</sup> As state-owned companies established as separate legal persons in their domestic jurisdictions,<sup>74</sup> SOEs are nevertheless often entrusted with carrying governmental policies, particularly in sensitive fields such as energy, telecommunications, infrastructure, and finance.<sup>75</sup> Even when SOEs operate clearly outside any governmental prerogative, states usually retain a high degree of influence and control over companies in shareholder capacities.<sup>76</sup> Moreover, in typical investment projects foreign investors often contract, interact, and co-operate with SOEs, ministries, municipalities, and other sub-state entities, rather than the state itself.<sup>77</sup> This allows flexibility and other advantages of the corporate form, such as segmentation and limitation of potential liabilities.<sup>78</sup> If, however, the investment project faces obstacles, such

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<sup>71</sup> Braun, *supra* note 6 at 106–08.

<sup>72</sup> See ESPOSITO, *supra* note 12 at 10. See also ESPOSITO, *supra* note 14 at 17.

<sup>73</sup> Compare with how “public undertakings” are understood in the EU law. See, e.g., Opinion of Advocate General Jacobs, Case C-482/99, 2001, E.C.R. I-4400, para. 32–56.

<sup>74</sup> For a succinct introduction to the issue, see ALBERT BADIA, *PIERCING THE VEIL OF STATE ENTERPRISES IN INTERNATIONAL ARBITRATION* 2–15 (2014).

<sup>75</sup> See, e.g., OECD, *GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES* (2015 ed.) 11–14, <http://www.oecd.org/daf/ca/OECD-Guidelines-Corporate-Governance-SOEs-2015.pdf>. See also Feit, *supra* note 52 at 21–23.

<sup>76</sup> In the OECD area, for instance, states have retained control of over 60% of *privatized* companies. Bernardo Bortolotti & Mara Faccio, *Government Control of Privatized Firms*, 22 *REV. FINANC. STUD.* 2907 (2009).

<sup>77</sup> Simon Olleson, *Attribution in Investment Treaty Arbitration*, 31 *ICSID REV.* 457–83, 461 (2016). See also Michael Feit, *Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity*, 28 *BERKELEY J. INT'L L.* 142–44 (2010).

<sup>78</sup> David Caron, *The Basis of Responsibility: Attribution and Other Transubstantive Rules*, in *THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY* 109, 165 (R.B. Lillich & D.B. Magraw eds., 1998).

as governmental interference, undercapitalization, or contractual breaches,<sup>79</sup> questions often emerge as to the responsibility and liability of the shareholder-state.<sup>80</sup>

Despite these issues, most investment treaties, including the Netherlands-Turkey BIT, remain silent on SOEs.<sup>81</sup> As a consequence, ITA tribunals have wide discretion when analyzing the status of a SOE against the substantive provision guaranteed in BITs. Because SOE-dominated sectors are often highly relevant for foreign investors, conduct of SOEs has spurred a substantial body of ITA case law where the relationship between SOEs and their owner-governments comes into focus. Because positive treaty law contained in BITs contributes only a little to the definition of SOE, other bodies of law are instrumental in mapping their status as persons or things, and the consequences that flow from such a characterization.

### *III. The ICSID Convention*

A key piece in this process, and in the investment law framework generally, is the ICSID Convention. A procedural facility, the ICSID was intended to provide a depoliticized forum for investment disputes between host states and foreign investors.<sup>82</sup> Since its inception, most BITs have included a reference to ICSID as the principal forum for dispute resolution.<sup>83</sup> This is mostly due to the ICSID's several unique features, which include direct enforceability and institutional links with the World Bank that provide an incentive for states to accept and comply with the ICSID awards.<sup>84</sup> The Netherlands-Turkey BIT also opts for the ICSID as its preferred dispute resolution forum.<sup>85</sup>

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<sup>79</sup> See, e.g., BADIA, *supra* note 74 at 197–203.

<sup>80</sup> Karl-Heinz Böckstiegel, *Enterprise v. State: the New David and Goliath?*, 23 *ARB. INT'L.* 93, 99–103 (2007).

<sup>81</sup> Naturally, there are exceptions and some investment treaties do contain highly specific clauses on state-owned entities. The Energy Charter Treaty (ECT), for example, stipulates that “[e]ach Contracting Party shall ensure that any state enterprise which it maintains or establishes shall conduct its activities in relation to the sale or provision of goods and services in its Area in a manner consistent with the Contracting Party’s obligations under . . . this Treaty.” Art. 22(1) ECT. The North American Free Trade Agreement uses broadly similar language. The North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I. L. M. 289 art. 1503 (1993).

<sup>82</sup> See, e.g., Ibrahim Shihata, TOWARDS A GREATER DEPOLITICIZATION OF INVESTMENT DISPUTES: THE ROLES OF ICSID AND MIGA (1992), available at: <http://documents.worldbank.org/curated/en/335931468315286974/Towards-a-greater-depoliticization-of-investment-disputes-the-roles-of-ICSID-and-MIGA>.

<sup>83</sup> DOLZER & SCHREUER, *supra* note 5 at 19–21, 242–44.

<sup>84</sup> See, e.g., Feit, *supra* note 77 at 143–44.

<sup>85</sup> The Netherlands-Turkey BIT, *supra* note 46 at Art. 8(2).

Due to the popularity of the ICSID, jurisdictional requirements of the ICSID Convention have assumed a prominent gatekeeping role in ITA proceedings. In general, the ICSID's jurisdiction is contingent on a violation of an investment treaty provision. More specifically, the key provision is Article 25(1) of the ICSID Convention, which provides that the jurisdiction of the ICSID shall

extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

Understandably, definition, scope, and content of key terms such as “investment,” “consent,” “a Contracting State,” and “a national of another Contracting State” have all been thoroughly discussed in arbitral practice and scholarship.<sup>86</sup> These definitions are also relevant for *Tulip v. Turkey*. From the SOE-perspective, the most fundamental issue was whether there actually was “a dispute with a Contracting State, here Turkey, for the purposes of the BIT and Art 25 of the ICSID Convention.”<sup>87</sup> As the logic behind the ICSID Convention is to fill a particular procedural gap stemming from the asymmetric relationship between a host state and a foreign investor,<sup>88</sup> both “private vs. private and state vs. state disputes” are generally excluded from the ICSID's jurisdiction.<sup>89</sup> Thus, unless the acts of a SOE can be attributed to the state, ICSID does not have jurisdiction. Similarly, the focus in *Tulip v. Turkey* shifted to the relationship between Turkey, TOKI, and Emlak.<sup>90</sup> Ultimately, the tribunal held that Emlak's conduct was not attributable to Turkey and on that basis ruled the dispute “outside the remit of the Tribunal,”<sup>91</sup> that is, outside its “‘competence’ or ‘jurisdiction.’”<sup>92</sup>

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<sup>86</sup> For an overview, see SCHREUER ET AL., *supra* note 64 at 71–347.

<sup>87</sup> *Tulip v. Turkey Award*, ICSID Case No. ARB/11/28, para. 226–27, 276 (Mar. 10, 2014).

<sup>88</sup> SCHREUER ET AL., *supra* note 64, at 160.

<sup>89</sup> See, the views of the ICSID's principal architect, Aron Broches, in *The Convention on the Settlement of Investment Disputes Between States: Some Observations on Jurisdiction*, 5 COLUM. J. TRANSNAT'L L. 263, 267 (1966).

<sup>90</sup> *Tulip v. Turkey Award*, ICSID Case No. ARB/11/28, para. 276 (Mar. 10, 2014).

<sup>91</sup> *Id.* at 327.

<sup>92</sup> *Tulip v. Turkey Annulment*, ICSID Case No. ARB/11/28, para. 192–93 (Dec. 30, 2015). *Tulip v. Turkey* is by no means unique with regard to the complex delineation between the host state and its SOEs, or other instrumentalities, at the jurisdictional stage. For detailed discussion, see Luca Schicho, *The Relationship between a*



As the jurisdictional and procedural issues in *Tulip v. Turkey* reveal, investment disputes often arise precisely from the relationship between host states and their SOEs. Reflecting the fact that the specific BIT provisions pertaining to state-SOE relationship are rare, *Tulip v. Turkey* also indicates how broad substantive guarantees arising from individual investment treaties and the jurisdictional thresholds stemming from the ICSID Convention coalesce into a more extensive review where SOEs form a distinct category that straddles the division between the categories of a host state and a foreign investor. While treaty law contained in BITs and the ICSID Convention provides a rough outline for the ITA tribunals to cast SOEs as either persons or things in the asymmetric legal framework, these bodies of law do not have doctrinal tools to make the final distinction. In this context, the law of state responsibility and the doctrine of attribution emerge as crucial analytical tools delineating between the two categories—and making or breaking SOEs as persons and things in ITA.

#### IV. *The Law of State Responsibility*

The Netherlands-Turkey BIT does not contain any provisions pertaining to Emlak's or any other SOE's conduct. For this reason, SOE-related disputes recourse to the law of state responsibility, a specialized branch of customary international law, and especially the doctrine of attribution.<sup>93</sup> Attribution is a legal operation through which the conduct of a range of domestic law entities is treated as conduct of an international law entity, the state.<sup>94</sup> It refers to a process which aims to identify the conduct which may result in the state's international responsibility<sup>95</sup> and, as such, provides a critical element in shaping the legal personality of states.<sup>96</sup>

As discussed in *Tulip v. Turkey*, in investment law context the issue often boils down to identifying and potentially attributing the conduct of government-affiliated entities, which nevertheless have their own legal personality, to the state. Similar to establishing the tribunal's jurisdiction under Article 25(1) ICISD Convention, states can only be held liable for

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*State and State Entities: A Matter of Jurisdiction or of the Merits?*, in AUSTRIAN Y.B. INT'L ARB., 367 (Christian Klausegger et al. eds., 2011).

<sup>93</sup> Due to immense literature on the law of state responsibility, this Article focuses primarily on the ITA-related aspects of attribution doctrines. See Jure Vidmar, *Some Observations on Wrongfulness, Responsibility and Defences in International Law*, 63 NETH. INT'L L. REV. 335 (2016) and Outi Korhonen & Toni Selkälä, *Theorizing Responsibility*, in THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 844 (Anne Orford & Florian Hoffmann eds., 2016).

<sup>94</sup> Crawford, *supra* note 52, at 356.

<sup>95</sup> Olleson, *supra* note 77, at 457.

<sup>96</sup> Martti Koskenniemi, *Doctrines of State Responsibility*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 45, 46 (James Crawford, Alain Pellet, & Simon Olleson eds., 2010).

acts of its SOEs when their conduct is attributable to the state. If the act cannot be attributed to the state, it has no responsibility towards the investor.<sup>97</sup> Thus, in *Tulip v. Turkey*, the issue was whether “the acts of Emlak . . . are attributable to TOKI and therefore to the State of Turkey.”<sup>98</sup> While the tribunal ruled that Emlak’s conduct was not attributable and also generally quashed Tulip’s claims as incapable of amounting to violations of the Netherlands-Turkey BIT,<sup>99</sup> the award’s systematic analysis illustrates the basic mechanisms of attribution doctrines and the way they delineate SOEs as persons or things in the international law system.

Nowadays, state responsibility and attribution doctrines are most often discussed with reference to International Law Commission’s (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), a codification of customary international law completed in 2001.<sup>100</sup> Even though the ARSIWA is not binding as such, it is widely accepted as an accurate representation of the customary standards of state responsibility.<sup>101</sup> Despite the ARSIWA’s rather informal form, Caron suggested already in 2002 that it would likely attract more influence as a collection of principles than as a formal instrument such as a treaty.<sup>102</sup> Later research has mostly confirmed this prediction, and ITA tribunals, in particular, have been noted to rely more on the ARSIWA than on the ICJ’s jurisprudence.<sup>103</sup> Thus, in *Tulip v. Turkey* as well, both the parties and the tribunal accepted that “the ILC

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<sup>97</sup> Feit, *supra* note 77, at 152.

<sup>98</sup> *Tulip v. Turkey Award*, ICSID Case No. ARB/11/28, para. 232 (Mar. 10, 2014).

<sup>99</sup> *Id.* at 359.

<sup>100</sup> International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, [2001] 2 Y.B. INT’L L. COMM’N 31 [hereinafter ILC ARSIWA Commentary].

<sup>101</sup> In 2001, the U.N. General Assembly noted the ARSIWA and annexed them into its resolution, commending “them to the attention of Governments,” see U.N. GA Res 56/83, para. 4 (12 December 2001). For application of the ARSIWA in the ICJ’s jurisprudence, see especially the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), 2007 I.C.J. 43, para. 385 (Feb. 26).

<sup>102</sup> David Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority*, 96 AM. J. INT’L L. 857 (2002).

<sup>103</sup> Alain Pellet, *The Case Law of the ICJ in Investment Arbitration*, 28 ICSID REV. 223, 232–33 (2013). In the case at hand, the parties had divergent views on hierarchy between the ICJ and ITA tribunals’ decisions: “Respondent submits that the judgments of the ICJ are at the apex; whilst Claimant submits that decisions of previous ICSID tribunals are more relevant as they specifically concern investment treaty law, and the construction of BITs, as compared to general principles of international law.” *Tulip v. Turkey Jurisdiction*, ICSID Case No. ARB/11/28, para 45 (Mar. 5, 2013).

Articles constitute a codification of customary international law with respect to the issue of attribution of conduct to the State and apply to the present dispute.”<sup>104</sup>

In *Tulip v. Turkey*, one of the claimant’s key arguments was that the close connection between Emlak and the Turkish state meant that Emlak operated under “the presumption of statehood” and its acts were, by and large, attributable to Turkey.<sup>105</sup> Turkey did not deny links between Emlak and the state, but argued that under the law of state responsibility “even a close link . . . [did] not, in itself, provide a basis for attribution of the private company’s acts to the State.”<sup>106</sup> More specifically, both parties referred to three primary rules of attribution contained in ARSIWA. Accordingly, the *Tulip v. Turkey* award reflects and illustrates the basic structure of each rule expressed in Articles 4, 5, and 8 ARSIWA, in the ILC’s commentary and, to a lesser degree, in the ICJ’s jurisprudence.<sup>107</sup>

According to Article 4 ARSIWA, “the conduct of any State organ shall be considered an act of that State under international law,” where “an organ includes any person or entity which has that status in accordance with the internal law of the State.”<sup>108</sup> The commentary further notes, invoking the classic *imperium/dominium* distinction, that under Article 4, “it is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as ‘commercial’ or as *acta iure gestionis*.”<sup>109</sup> Under this rule of attribution, breaches arising from contract or other markedly private arrangements can trigger state responsibility if a SOE or other sub-state entity is considered an organ of the state.

In *Tulip v. Turkey*, the claimant used Article 4 ARSIWA to argue that Emlak was “an arm of the Turkish government” which worked “to fulfil an executive function of the Turkish State.”<sup>110</sup> Alternatively, it was argued that by being “majority-owned by TOKI, a State organ,”

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<sup>104</sup> *Tulip v. Turkey* Award, ICSID Case No. ARB/11/28, para 281 (Mar. 10, 2014). For similar approvals in other arbitral tribunals, see, e.g., *Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Award, para. 69 (Oct. 12, 2005), *MCI Power Group v. Ecuador*, ICSID Case No. ARB/03/6, Award, para. 42 (July 31, 2007) and *Hamester v. Ghana*, ICSID Case No. ARB/07/24, Award, para. 171 (June 18, 2010).

<sup>105</sup> *Tulip v. Turkey* Award, ICSID Case No. ARB/11/28, para. 235 ( Mar. 10, 2014).

<sup>106</sup> *Id.* at 258.

<sup>107</sup> JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 113–61 (2013). The ARSIWA does contain other rules of attribution but these are—Article 11 ARSIWA aside—less relevant for SOEs and ITA.

<sup>108</sup> For discussion on *de facto* organs, see *id.* at 124–26.

<sup>109</sup> ILC ARSIWA Commentary *supra* note 100 at Art. 4, para. 6.

<sup>110</sup> *Tulip v. Turkey* Award, ICSID Case No. ARB/11/28, para. 235 (Mar. 10, 2014). Note, however, that the tribunal found that the claimant changed its target entity from Emlak to TOKI in the course of the proceedings. *Id.* at 283.

Emlak operated under “the presumption of statehood.”<sup>111</sup> The tribunal disagreed. Relying on Emlak’s status as a separate company operating under the Turkish Commercial Code, it was contended that Emlak did not fulfill the requirement of being an organ under the internal law of the state. Emlak was not a “quasi-state’ organ.”<sup>112</sup> Moreover, the tribunal explicitly denied that

ownership of a corporate entity by the State triggers the presumption of statehood. The position of the Tribunal is that, whilst state ownership may, in certain circumstances, be a factor relevant to the question of attribution, it does not convert a separate corporate entity into an ‘organ’ of the State.<sup>113</sup>

Under the Article 5 ARSIWA, the conduct of a person or entity which is empowered by the law of the 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.” The commentary takes SOEs explicitly into account as it holds that “the existence of a greater or lesser State participation in [entity’s] capital, or, more generally, in the ownership of its assets” are not decisive criteria for attributing conduct.<sup>114</sup>

Following the rationale of Article 5, Tulip argued that Emlak was empowered to exercise “power under Turkey’s zoning laws and with respect to land acquisition from TOKI’s land banks”<sup>115</sup> and that Emlak was “publicly characterised by TOKI as an affiliate of this organ of the state.”<sup>116</sup> Again, the tribunal disagreed. The tribunal reasoned that the statutes cited by Tulip granted certain preferential treatment, “but [did] nothing to empower Emlak actually to exercise any kind of governmental authority.”<sup>117</sup> Moreover, Emlak’s contractual dealings

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<sup>111</sup> *Id.* at 235.

<sup>112</sup> *Id.* at 288.

<sup>113</sup> *Id.* at 289. Other tribunals have ruled differently on this issue. *See, e.g.*, Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, para 96-97 (Jan. 25, 2000) and Salini Construttori S.P.A. & Italstrade S.P.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/04, Decision on Jurisdiction, paras. 32–35 (July 23, 2001). Note, however, that these cases predate the ARSIWA.

<sup>114</sup> ILC ARSIWA Commentary *supra* note 100, at Art. 5, para. 3.

<sup>115</sup> Tulip v. Turkey Award, ICSID Case No. ARB/11/28, para. 237 (Mar. 10, 2014).

<sup>116</sup> *Id.* at 242.

<sup>117</sup> *Id.* at 293.

with Tulip showed no signs of exercising governmental authority in particular instances, such as its termination of the revenue-sharing contract.<sup>118</sup>

The most detailed probe into the relationship between Emlak and the state was conducted under Article 8 ARSIWA, which holds that 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 acting on the instructions of, or under the direction or control of, that state in carrying out the conduct. Here, the commentary notes very directly that “corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable.”<sup>119</sup> When there “was evidence that the corporation was exercising public powers, or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result,” however, attribution is possible.<sup>120</sup>

Under the framework of Article 8 ARSIWA, Tulip argued that “TOKI exercised ‘an extraordinary level of control over every aspect of Emlak’s operations,’” chiefly through controlling voting and appointing directors to Emlak’s board.<sup>121</sup> Moreover, the claimant contended that the specific decision to “terminate the Contract was made by Emlak under the control of TOKI for non-commercial purposes and in the exercise of State power.”<sup>122</sup> The tribunal rejected, by majority, Tulip’s claims.<sup>123</sup> Considering all relevant elements of under Article 8—instructions, direction, and control—the tribunal accepted that “from an ordinary company law perspective, Emlak was subject to the control of TOKI and, therefore, the Turkish State.”<sup>124</sup> Nevertheless, there was no indication as to Emlak being directed by TOKI “with respect to the specific activity of administering the Contract with Tulip JV in the sense of sovereign direction instruction or control rather than the ordinary control exercised by a majority shareholder acting in the company’s perceived commercial best interests.”<sup>125</sup> In the view of the tribunal, there was no “improper usurpation of the Claimant’s rights by the

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<sup>118</sup> *Id.* at 299.

<sup>119</sup> ILC ARSIWA Commentary *supra* note 100 at Art. 8, para. 6.

<sup>120</sup> *Id.*

<sup>121</sup> Tulip v. Turkey Award, ICSID Case No. ARB/11/28, para. 243 (Mar. 10, 2014).

<sup>122</sup> *Id.* at 249.

<sup>123</sup> *Id.* at 301.

<sup>124</sup> *Id.* at 307.

<sup>125</sup> *Id.* at 309–11.

'invisible' hand of the State."<sup>126</sup> Rather, Emlak acted "in what it perceived to be its commercial best interest in terminating the Contract."<sup>127</sup> Thus, even though one arbitrator argued that Emlak's decision to terminate the contract was "guided—if not fully directed—by the sovereign's hand,"<sup>128</sup> the majority held that its decisions were based on viable commercial grounds. Moreover, the tribunal noted that even if Emlak's actions were attributable, they would not amount to violation of the Netherlands-Turkey BIT.<sup>129</sup>

In sum, the deliberation in *Tulip v. Turkey* seems to affirm the "fundamental precept in international law that attribution should not follow state ownership because of separate legal personality."<sup>130</sup> Thus, in order to construe SOEs as entities capable of triggering state responsibility in ITA, claimants have to show—with reference to their statutory position, governmental authority, or control—that they were, in fact, filled with sovereign spirit.<sup>131</sup> To gain compensation, SOEs need to be made persons and not things. This idea provides the rationale and drive behind much of SOE-related ITA proceedings, but it also connects the highly-specialized doctrines of investment law to Esposito's notion of the person/things distinction and opens a distinct *dispositif* of a SOE.

#### *V. Lessons of Tulip v. Turkey: Of SOEs and Slaves*

*Tulip v. Turkey* provides a handy illustration of legal and political dimensions of modern investment law and ITA. In terms of law, the case highlights interdependence between BITs' substantive protections, the ICSID Convention's jurisdictional provisions, and the law of state responsibility. Politically, the case sheds light on the polarized environment of FDI where the possibility to commence individualized claims against a host state is a staple in a foreign

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<sup>126</sup> *Id.* at 321.

<sup>127</sup> *Id.* at 324.

<sup>128</sup> *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Separate Opinion of Michael Evan Jaffe, para. 8 (Mar. 10, 2014) [hereinafter *Tulip v. Turkey Separate Opinion*].

<sup>129</sup> *Tulip v. Turkey Award*, ICSID Case No. ARB/11/28, paras. 367–69 (Mar. 10, 2014).

<sup>130</sup> Kristen Boon, *Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines*, 15 MELB. J. INT'L L. 1, 17 (2014). See also CRAWFORD, *supra* note 107 at 161-165. For a critique of the tribunal's conclusions, see Albert Badia, *Attribution of Conducts of State-Owned Enterprises Based on Control by the State*, in ICSID CONVENTION AFTER 50 YEARS: UNSETTLED ISSUES 189, 200–01, 207–08 (Crina Baltag ed., 2016).

<sup>131</sup> Compare this requirement for claimants with the findings in *Khan Resources v. The Government of Mongolia*, PCA Case No. 2011-09, Award, para. 189 (Mar. 2, 2015).

investors toolbox.<sup>132</sup> Underneath these established debates impinging on ITA's pros and cons, however, *Tulip v. Turkey* has doubled as an introduction to dynamics and ramifications of international legal personality in ITA.

In *Tulip v. Turkey*, the tribunal rejected all claims arising from the contractual dispute between the claimant and Emlak, a state-owned entity. Throughout the proceedings, the status of Emlak was under spotlight. Was it a state organ? Did it exercise governmental authority? Did Turkey control Emlak and use its ownership to specifically terminate to contract? While not confined to ITA,<sup>133</sup> *Tulip v. Turkey* demonstrates how well-rehearsed these argumentative patterns are. As a general rule, foreign investors tend to argue that the host state is responsible for a breach traceable to a SOE. At the same time, respondent states will point to the separate legal personality of the SOE, underscore its independent decision-making, and emphasize inherent counterparty risks present in any investment decision.<sup>134</sup> Thus, in *Tulip v. Turkey*, the claimant based its argument on Emlak's presumed statehood, and the respondent on its corporatehood—or, in Esposito's terms, its status as a person or a thing. While technical, these arguments illuminate the stakes in construing proper parties to arbitral proceedings. Further, they provide a clear window to the dynamics of making or breaking international legal persons.

Ultimately, the factual circumstances in *Tulip v. Turkey* were such that state responsibility over the conduct of Emlak was not triggered and the dispute was viewed to fall outside the tribunal's jurisdiction. Thus, in *Tulip v. Turkey*, attribution emerged as crucial doctrinal platform where the conduct of Emlak was rendered illegible in the eyes of investment law: Because the separate personality of Emlak was upheld, there was no case to be made against the host state.<sup>135</sup> In many other cases, however, the outcome has been different. Apposite

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<sup>132</sup> Many critical commentators would not hesitate to interpret the knockout victory of Turkey both at the merits and the annulment stages as reinforcing the notion that ITA proceedings are a site for adventurous litigation by foreign investors.

<sup>133</sup> Similar patterns emerge when states are parties to international commercial arbitration. See, e.g., Veijo Heiskanen, *State As a Private: The Participation of States in International Commercial Arbitration*, 7 *TRANSNAT'L DISP. MGMT.* 1 (2010).

<sup>134</sup> See Feit, *supra* note 77 at 143–44.

<sup>135</sup> Compare with delineation processes in the practice of human rights treaty bodies, particularly the European Court of Human Rights. Mikko Rajavuori, *How Should States Own? Heinisch v. Germany and the Emergence of Human Rights-sensitive State Ownership Function*, 26 *EUR. J. INT'L L.* 727, 732–37 (2015).

ITA awards range from energy development<sup>136</sup> to disputes arising from duty-free shops,<sup>137</sup> cocoa bean processing,<sup>138</sup> hotel development,<sup>139</sup> waste management,<sup>140</sup> and financial hedging agreements.<sup>141</sup> Moreover, many high-profile disputes have stemmed from failed privatizations<sup>142</sup> and large-scale nationalizations.<sup>143</sup> Appropriately, even the single largest ITA award to date, *Yukos v. Russia*, contains an important attribution-dimension in SOE context.<sup>144</sup> In these cases, and many others,<sup>145</sup> the exact bounds and definitions of the host state greatly affect the outcome of proceedings. If the respondent is construed in a way that excludes SOEs and other sub-state entities, claimants often face an uphill battle. If, on the other hand, the respondent is construed expansively to include its instrumentalities, the claimant has more avenues to pursue compensation over alleged infringements of substantive investment treaty provisions.<sup>146</sup>

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<sup>136</sup> See, e.g., *EnCana Corp. v. Ecuador*, LCIA Case UN3481, Award (Feb. 3, 2006) and *Limited Liability Company AMTO v. Ukraine*, SCC Arbitration No. 80/2005, Final Award (Mar. 26, 2008).

<sup>137</sup> See, e.g., *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009) and *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (Apr. 8, 2013).

<sup>138</sup> See, e.g., *Gustav F.W. Hamester GmbH & Co. KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, para. 143 (June 18, 2010).

<sup>139</sup> See, e.g., *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (Dec. 8, 2000) and *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, (Nov. 8, 2010).

<sup>140</sup> See, e.g., *Waste Management Inc v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004).

<sup>141</sup> See, e.g., *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award (Oct. 31, 2012).

<sup>142</sup> See, e.g., *Eureko B.V. v. Republic of Poland*, Partial Award, UNCITRAL (Aug. 19, 2005) and *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (Oct. 12, 2005).

<sup>143</sup> See, e.g., *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (Aug. 22, 2016).

<sup>144</sup> *Yukos Universal Limited v. The Russian Federation*, PCA Case No. AA 227, Final Award, para. 1450–80 (July 18, 2014).

<sup>145</sup> For good overviews of SOE-related ITA cases, see Schicho, *supra* note 92 at 369-70 and Badia, *supra* note 130.

<sup>146</sup> Note, however, that even SOE-related ITA claims often impinge on various substantive protections where attribution is not necessary. See Georgios 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 REV. 262, 269–72 (2013).



While distributional impacts of such exclusionary/inclusionary dynamics are obvious,<sup>147</sup> for the purposes of this Article it is more important to note the impact of attribution doctrines on creation and maintenance of international legal personality in ITA. Viewed against Esposito's person/thing distinction, the basic framework of investment law—BITS, the ICSID Convention, the law of state responsibility—emerges as a stable legal environment where the roles of host states as persons and foreign investors as things are well-defined. In this framework, sovereign persons make and maintain investment law while foreign investor things use the system's substantive and procedural protections as a spring board to accelerate both their own and the host states' economic development through increased FDI. Contrary to Esposito's account of the Roman *Institutes*, however, the legal environment of investment law essentially privileges thinghood. On one hand, only private foreign investors have access to BITS' protective embrace.<sup>148</sup> On the other hand, the system incentivizes them to define host states as expansively as possible.<sup>149</sup> While making exclusionary/inclusionary host states parties to the dispute takes place in a system states have themselves created, the dynamics of ITA leave it to foreign investors to construe applicable definitions of the host state through creative litigation. The asymmetric structure of investment law is calibrated so that things make persons for the purposes of establishing jurisdiction and, ultimately, triggering state responsibility and liability.

In sum, the condition of a SOE highlights the exclusive nature of international personality in ITA. Unlike many theories on gradual personality suggest,<sup>150</sup> SOEs assume the role of either a person or that of a thing in ITA and, due to the dearth of primary treaty law concerning sub-state entities, the role of attribution doctrines is crucial in making the distinction. Much like slaves in ancient Rome, SOEs straddle the two conceptual categories and constantly risk being cast either as functional part of the state (person) or separate legal persons (thing). Amidst these doctrinally-entrenched positions, the treatment of SOEs acts within a continuous performative process, the *dispositif*, where persons are separated from things.<sup>151</sup> Treatment of Emlak in *Tulip v. Turkey* provides a clear view on legal techniques that shape

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<sup>147</sup> James Crawford & Paul Mertenskötter, *The Use of the ILC's Attribution Rules in Investment Arbitration*, in BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 27, 33 (Meg Kinnear et al. eds., 2015). See also *Eureko B.V. v. Republic of Poland*, Dissenting Opinion of Jerzy Rajski, para. 11 (Aug. 19, 2005).

<sup>148</sup> Naturally, tough questions regarding the exact definition of "a foreign investor" emerge. For a major case concerning the investor's nationality, see *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr. 29, 2004). For a case involving a state-owned claimant, see *Ceskoslovenska obchodni banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Award (Dec. 29, 2004).

<sup>149</sup> Compare with Danielle Morris, *The Regulatory State and the Duty of Consistency*, in THE ROLE OF THE STATE IN INVESTOR-STATE ARBITRATION 49 (Shaheez Lalani & Rodrigo Polanco Lazo eds., 2015).

<sup>150</sup> Selkälä & Rajavuori, *supra* note 3.

<sup>151</sup> ESPOSITO, *supra* note 12 at 9 And Esposito, *supra* note 20, at 23–24.

the process. While the ultimate characterization depends on the many variables unique to each case, it is important to note how foreign investors continuously push SOEs to the edge of personhood and how easily SOEs may slip into one category from another. Illustratively, the *Tulip v. Turkey* tribunal cast Emlak as a thing by a close 2-1 vote. Thus, like the *dispositif* of the person in Esposito's political philosophy, the *dispositif* of a SOE emerges as an instrument that exposes the malleability of host states and foreign investors along the person/thing distinction.<sup>152</sup>

In the following section, the analytical lens is widened to discern how the status of SOEs along ITA's person/thing distinction delineates the exact normative demarcation of the state as international legal person and creates pockets of indistinguishability and politics at its borders. Much like slaves in Esposito's framework, SOEs appear as a category vulnerable to use and abuse when their and their owner states' international legal personality is construed in ITA, particularly in the North/South relations that shaped the contemporary theorization of the legal person.<sup>153</sup>

#### **D. Politics, Porosity, and Ramifications of International Legal Personality in ITA**

The previous section sketched the basic legal framework of investment law which rests on stable asymmetric relationships between host states (persons) and foreign investors (things). The law of state responsibility was further identified as a key site for making context-sensitive distinctions between state and non-state in an otherwise strictly binary system. In the case of Emlak and other SOEs, ITA tribunals cast state-owned companies as persons or things per the logic of attribution doctrine codified in the ARSIWA. Against this backdrop, this section follows Esposito's idea of indistinguishability and uses *dispositif* of a SOE to highlight politics, porosity, and ramifications of international legal personality in ITA. Two arguments, largely based on the North/South relations, are pursued. In the bottom-up approach, irregularities in ITA tribunals' application of attribution doctrines are used to illustrate conflicts in defining the limits of international legal personality. In the top-down approach, dynamics of international legal personality are juxtaposed with the concept of quasi-sovereignty developed in postcolonial theory. Together, these micro- and macro-level arguments suggest SOEs emerge as a liminal category straddling the person/thing distinction—a process which enables the use and abuse of SOEs as instruments of exclusion and domination with severe implications in the real-world. To illustrate the relevance of this discussion, the section starts by reviewing three cases that highlight variations when ITA tribunals make or break international legal persons.

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<sup>152</sup> ESPOSITO, *supra* note 12, at 26, 33.

<sup>153</sup> Selkälä & Rajavuori, *supra* note 3.

*I. Personal Anxieties: The Case of Petrobangla*

While multilayered and complex, the framework of investment law is generally viewed as stable. Accordingly, the system is also expected to lead to broadly consistent and foreseeable outcomes in individual cases. Naturally, however, the reality is more complicated.<sup>154</sup> Consider the case of Bangladesh Oil Gas and Mineral Corporation Petrobangla (Petrobangla). Over the past decade, Bangladesh has been drawn into three ITA proceedings that emanate from Petrobangla's actions vis-a-vis its contractual counterparts. While the cases have stemmed from unique contractual schemes and have been arbitrated under different BITs, it is important to note how each tribunal has viewed the position of Petrobangla differently.

In *Saipem v. Bangladesh*, the tribunal accepted that "at first sight at least, Petrobangla appears to be part of the State under Bangladeshi law" at the jurisdictional stage.<sup>155</sup> On the merits, however, Petrobangla's conduct was likened to a rational market participant acting in its commercial self-interest, leading the tribunal to find no treaty breach with respect to Petrobangla and its conduct non-attributable to Bangladesh.<sup>156</sup>

By contrast, in *Chevron Bangladesh Blocks Thirteen and Fourteen v. Bangladesh*, the tribunal launched an extensive investigation into Petrobangla's status at the jurisdictional stage, ruling that Petrobangla was a public statutory body and, as such, an organ of the state under the Article 4 ARSIWA.<sup>157</sup> Thus, all Petrobangla's actions were "attributable to Bangladesh."<sup>158</sup> At the merits, Petrobangla was also considered to fall under the requirements set in Articles 5 and 8 ARSIWA due to its statutory creation, operation in a highly-regulated field, supervision, and funding.<sup>159</sup>

Finally, in *Niko Resources v. Bangladesh, Bapex and Petrobangla*, the tribunal found that Petrobangla, regardless of its statutory origin and exclusive competencies, remained an

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<sup>154</sup> See, e.g., Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521 (2005).

<sup>155</sup> *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, para. 145 (Mar. 21, 2007).

<sup>156</sup> *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, para. 131, 148 (June 30, 2009).

<sup>157</sup> *Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v The People's Republic of Bangladesh*, ICSID Case No. ARB/06/10, Award, para 147–49 (May 17, 2010) [hereinafter *Chevron v. Bangladesh*, Award].

<sup>158</sup> *Id.* at 148–49.

<sup>159</sup> *Id.* at 171.

entity separate from the state.<sup>160</sup> Thus, the tribunal concluded that it lacked jurisdiction over Bangladesh.<sup>161</sup> Based on a special rule in the Article 25(1) ICSID Convention, however, the tribunal viewed Bangladesh to have “designated, implicitly but necessarily . . . Petrobangla as [an] agenc[y].”<sup>162</sup> The decision was informed by the status of Petrobangla as a proxy of Bangladesh’s mineral policy and by the government’s involvement in contract negotiations.<sup>163</sup> Accordingly, Petrobangla was properly conferred “limited international capacity,”<sup>164</sup> making it, and not the owner-state, bound by the arbitration clauses.<sup>165</sup>

Unique legal frameworks—whether BIT, domestic law, or contract—and factual circumstances aside, in each case ITA tribunals provided a different ruling on the relationship between Bangladesh and Petrobangla. In *Saipem*, Petrobangla was not deemed a functional part of the state. In *Chevron*, it was. In *Niko*, an intermediate position based on a special rule in the ICSID Convention was used to keep the state and the company in separate containers but, at the same, the close relationship between the two bound the company in arbitral proceedings as an implicitly designated entity. Thus, each tribunal used a variation of the *dispositif* of a SOE to construe the respondent state differently—although one should note that each case resulted in compensation to the foreign investor. In the following, Petrobangla’s personal anxieties are gleaned through two perspectives—the doctrinal ambiguity of attribution and postcolonial theory—that highlight politics, porosity, and the ramifications of international legal personality, particularly in the North/South relations.

## *II. Bottom-up Approach: Instabilities and Politics of Attribution Doctrines*

Three renditions of Petrobangla by different ITA tribunals illustrate the variations that ensue when the law of state responsibility and attribution doctrines are applied to concrete cases. In the first instance, however, they draw attention to wider ramifications of making

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<sup>160</sup> *Niko Resources v. The People’s Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil, Gas and Mineral Corporation*, ICSID Case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, paras. 220–27, 235 (Aug. 19, 2013) [hereinafter *Niko v. Bangladesh, Bapex and Petrobangla, Jurisdiction*].

<sup>161</sup> *Id.* at 256.

<sup>162</sup> *Id.* at 345. For discussion on distinguishing “designation” from “attribution,” see SCHREUER ET AL., *supra* note 64, at 150–51.

<sup>163</sup> *Niko v. Bangladesh, Bapex and Petrobangla, Jurisdiction*, ICSID Case No. ARB/10/11 and ARB/10/18, paras. 330–45 (Aug. 19, 2013).

<sup>164</sup> *Id.* at 329.

<sup>165</sup> *Id.* at 348.

international legal persons in ITA. Condorelli and Kress, for example, make a direct connection between attribution doctrines and the wider political economy of the state

[considering that] the international principles relating to attribution contribute to the delimitation of the public domain for the purposes of international responsibility, in distinguishing it from what is essentially the private sphere, it has hardly surprising that . . . attribution [has generated] . . . divergent views which are based on different conceptions of general legal policy.<sup>166</sup>

The significance of attribution doctrines to the form and function of a sovereign state is particularly pertinent in North/South relations. As was the case with Petrobangla, the vast majority of all ITA proceedings involve investors from developed countries litigating against developing country governments.<sup>167</sup> Moreover, most SOE cases referenced in this Article have been lodged against countries such as Bangladesh, Ecuador, Egypt, Ghana, Oman, Sri Lanka, and Venezuela, as well as European transition economies like Poland, Romania, Ukraine, and Russia.<sup>168</sup>

In these circumstances, the system-level ramifications of attribution doctrines are easily drawn to the fore. Crawford and Mertenskötter make this point clear when they argue that “[e]specially in an international context where BIT claims are still, albeit decreasingly, dominated by companies representing affluent investors against States with low GDPs per capita, the distributive effects of extending attribution rules in the context of international investment law may be significant.”<sup>169</sup>

While the role of attribution doctrines sustaining the global distributional asymmetry is acknowledged, their political dimension is usually toned down by referring to the law of state responsibility as an inter-state bargain, an agreement between equal international persons. According to one notable commentator, for instance, “[a]dmittedly, the rules [of

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<sup>166</sup> Luigi Condorelli & Claus Kress, *The Rules of Attribution: General Considerations*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 221, 226 (James Crawford, Alain Pellet, & Simon Olleson eds., 2010).

<sup>167</sup> The ICSID Caseload - Statistics (Issue 2017-1), [https://icsid.worldbank.org/en/Documents/resources/ICSID Web Stats 2017-1 \(English\) Final.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf).

<sup>168</sup> For a notable exception, however, see *United Parcel Service of America, Inc v. Government of Canada, Award on the Merits (24 May 2007)*, 46 I. L. M. 922 (2007).

<sup>169</sup> Crawford & Mertenskötter, *supra* note 147 at 33.

attribution] are far-reaching . . . [h]owever, as the Romans said: *dura lex, sed lex*.<sup>170</sup> Because the law of state responsibility is stable and clear, or so goes the argument, the distributional consequences of attribution doctrines are built into the core of the investment law regime. Here, the ARSIWA emerges as a finely-tuned instrument that carefully delineates the state sector from the non-state sector for the purposes of responsibility.<sup>171</sup> Moreover, the ARSIWA explicitly limits its applicability to issues of state responsibility as “the rules concerning attribution . . . are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its Government.”<sup>172</sup> Thus, argue Crawford et al.,

international law of attribution exists for a particular purpose, viz. to determine whether conduct said to breach an international obligation of a State is in truth conduct of the State in the context of an inquiry into responsibility. It is not its function to delineate the content of a State’s obligations, or to aggregate the State as an entity for other purposes or in other contexts.<sup>173</sup>

In reality, however, both the scope and content of attribution doctrines under the ARSIWA are more malleable. To some extent, discrepancies between different ITA awards are expected because the ARSIWA is still a relatively young instrument.<sup>174</sup> In this regard, Hobér has pinpointed attribution doctrines as the chief culprits

[i]n the new era of investment arbitration there is one particular aspect of the law of state responsibility which has become increasingly important, namely, the attribution of conduct to states. The rules and principles pertaining to the attribution of conduct to states have come to play an important role, partly because states and their representatives often seem to be unaware of

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<sup>170</sup> Kaj Hobér, *State Responsibility and Attribution*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 549, 552 (Peter Muchlinski, Federico Ortino, & Christoph Schreuer eds., 2008).

<sup>171</sup> Condorelli & Kress, *supra* note 166, at 224.

<sup>172</sup> ILC ARSIWA Commentary, *supra* note 100, at chapter II, para. 5.

<sup>173</sup> Crawford and Mertenskötter, *supra* note 146, at 41.

<sup>174</sup> Hobér, *supra* note 170, at 582.

their existence. States are surprised when an opposing party invokes the rules so as to hold the state responsible for certain conduct.<sup>175</sup>

In the ITA context, “surprising” dimensions of the law of state responsibility are not particularly new. On the contrary, a long-standing debate in investment law has concentrated on the fact that states are often taken by surprise by the wide-ranging commitments they have assumed under investment treaties.<sup>176</sup>

The same holds for cases involving SOEs. Writing in the context of state participation in international commercial arbitration, Heiskanen, for instance, admits that “when acting as a private, the State may surprise not only the other party, but also itself.”<sup>177</sup> As a consequence, governments may be stunned when ITA panels demarcate the exact boundaries of the state by using far-reaching attribution doctrines.<sup>178</sup> This has led some commentators to doubt whether rules of state responsibility “developed in the context of reciprocal legal relations among states” are an ideal fit for asymmetric systems such as investment law.<sup>179</sup> While these arguments are generally dismissed,<sup>180</sup> instabilities in the application of the ARSIWA have been flagged as potential issues by investment law scholars.<sup>181</sup>

Caron suggested in 2002 that the ARSIWA would likely spawn problems due to its overuse and misapplication by future arbitral tribunals, and later research has mostly confirmed his hypothesis.<sup>182</sup> Crawford, for instance, has noted “a slight paradox in the way certain

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<sup>175</sup> *Id.* at 550.

<sup>176</sup> See, e.g., Lauge N Skovgaard Poulsen & Emma Aisbett, *When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning*, 65 *WORLD POL.* 273 (2013).

<sup>177</sup> Heiskanen, *supra* note 132 at 13. For van Harten’s similar point about ICC arbitration, see Gus van Harten, *TWAIL and the Dabhol Arbitration*, 3 *TRADE L. DEV.* 131, 148–49 (2011) [http://www.lalive.ch/data/publications/vhe\\_State\\_as\\_a\\_Private;\\_The\\_Participation\\_of\\_States\\_in\\_International\\_Commercial\\_Arbitration.pdf](http://www.lalive.ch/data/publications/vhe_State_as_a_Private;_The_Participation_of_States_in_International_Commercial_Arbitration.pdf).

<sup>178</sup> Hobér, *supra* note 170 at 552.

<sup>179</sup> GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* 105–09 (2008).

<sup>180</sup> Hobér, *supra* note 170 at 552.

<sup>181</sup> James Crawford, *Investment Arbitration and the ILC Articles on State Responsibility*, 25 *ICSID REV.* 127–28 (2010).

<sup>182</sup> Caron, *supra* note 102 at 857.

investment treaty tribunals have tended to refer to the ILC Articles.”<sup>183</sup> Turning to specific cases, Schicho has criticized “undifferentiated application of the rules of attribution” in several arbitral proceedings,<sup>184</sup> and empathetically contended that

the ILC ASR should be the primary reference point for arbitral tribunals dealing with questions of attribution [because they] . . . provide a clear framework of rules founded on a relatively consistent and steadily growing jurisprudence . . . [and] cover all relevant factual elements that can play a role in deciding upon the “close link” that characterizes the determination of attribution.<sup>185</sup>

In a similar vein but in the trade law context, Lee has warned that “actual disputes of international economic law discussing this issue seem to blur the intended distinction [of the ARSIWA] and instead mingle the analyses.”<sup>186</sup> In Lee’s view, “[c]onsidering the sensitivity the state responsibility jurisprudence may raise with respect to state sovereignty, it is imperative that the basic architecture of the ILC Draft Articles be preserved as it is originally designed.”<sup>187</sup> Badia has viewed especially the “test of the ILC Article 8 . . . a hard nut to crack” and criticized several ITA tribunals for using “unconvincing” and “entirely naïf” interpretative standards when applying attribution doctrines to SOEs.<sup>188</sup> Olleson, in turn, has ascribed misapplication of the law of the state responsibility on the fact that “the rules of attribution . . . are well known and are easily accessible [and] there is a risk that they may be inappropriately applied to issues to which, on analysis, they are of no relevance.”<sup>189</sup>

Clearly, all critical positions juxtapose the ARSIWA’s intended conceptual framework and the way they are applied by ITA tribunals. Nevertheless, when critics draw attention to expansive and doctrinally misconstrued use of the ARSIWA’s rules of attribution in an SOE-context,

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<sup>183</sup> Crawford, *supra* note 181, at 128.

<sup>184</sup> Luca Schicho, *Attribution and State Entities: Diverging Approaches in Investment Arbitration*, 12 J. WORLD INVEST. TRADE 283, 295–97 (2011).

<sup>185</sup> *Id.* at 298.

<sup>186</sup> Jaemin Lee, *State Responsibility and Government-Affiliated Entities in International Economic Law The Danger of Blurring the Chinese Wall between*, 49 J. WORLD TRADE 117, 122 (2015).

<sup>187</sup> *Id.* at 151.

<sup>188</sup> Badia, *supra* note 130 at 207.

<sup>189</sup> Olleson, *supra* note 77 at 457.



they also expose the general role and ramifications of international legal personality. Variation and inter-tribunal dynamics in ITA tribunals' conceptualization of Petrobangla is a case in point. The *Chevron Bangladesh Blocks Thirteen and Fourteen v. Bangladesh* tribunal, for instance, built directly on the findings of the *Saipem v. Bangladesh* tribunal when it characterized Petrobangla as "a de jure organ of the State" at the jurisdictional stage.<sup>190</sup> By contrast, the *Niko Resources v. Bangladesh, Bapex and Petrobangla* tribunal explicitly rejected the *Chevron* tribunal's approach on attribution.<sup>191</sup> Commenting on dynamics between the tribunals, Olleson considers the approach pursued by the *Niko* tribunal correct as it rightly interprets the *Chevron* ruling as misusing the attribution doctrine "in determining the question of whether the State had consented to arbitrate" at the jurisdictional stage.<sup>192</sup> As technical as they are, these doctrinal arguments undergird the construction of proper parties to arbitral proceedings and, by proxy, states as international legal persons.<sup>193</sup>

While the three recent cases against Bangladesh stem from unique legal and factual circumstances, irregularities in applying the law of state responsibility expose more general tensions when used to define the exact limits of the state either as a party to the ITA proceedings or for liability purposes. In concrete cases, particularly those that focus on political economies very different from stable Western liberal democracies, attribution doctrines may lead to overly exclusionary or inclusionary conceptions of the state, or rulings where attributability of a SOEs conduct is essentially predetermined at the jurisdictional stage. In both instances, seemingly neutral application of seemingly consistent law of state responsibility exposes the fault lines and stakes when *ad hoc* arbitrators make or break international legal persons. Belonging on a longer continuum of criticism over instable application of attribution, the treatment of Petrobangla illustrates how different ITA tribunals, applying the same analytical and interpretative tools arising from the ARSIWA, can readily cast the same SOE both as a functional part of the host state (person) and as an independent company (thing).

Instead of coming across as a stable codification of customary international law, the rules contained in the ARSIWA emerge rife with ambiguities and political tensions that illuminate pockets of indistinguishability around the boundaries of a SOE. As such, attribution doctrines as applied to SOEs—much like slaves in ancient Rome—exemplify the ease with which SOEs oscillate between the categories of persons and things, and also underscore the concrete

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<sup>190</sup> *Chevron v. Bangladesh*, Award, ICSID Case No. ARB/06/10, paras. 143–49 (May 17, 2010).

<sup>191</sup> *Niko v. Bangladesh, Bapex and Petrobangla*, Jurisdiction, ICSID Case No. ARB/10/11 and ARB/10/18, paras. 242–48 (Aug. 19, 2013).

<sup>192</sup> Olleson, *supra* note 77 at 465.

<sup>193</sup> Compare with Koskenniemi, *supra* note 96, at 46.

modes of exclusion and domination the person/thing distinction produces.<sup>194</sup> Thus, when applied to SOEs, the process of casting state-affiliated entities as persons or things per the ARSIWA's logical rules appears less convincing than what the basic framework of investment law seems to suggest.

Moreover, Petrobangla's personal anxieties resonate with broader contemporary theorization of legal personality. Writing in the context of machine rights, Calverley, for instance, notes how exercise of "positive law, expressed in making, defining, and formalizing" different institutions and categories operates primarily "through the manipulation of the definition of the legal concept of person."<sup>195</sup> In the case of SOEs, the plasticity of customary international law rules of attribution along the person/thing distinction certainly evoke similar pattern.<sup>196</sup>

Against this backdrop, the fluidity of the ARSIWA's scope and content in SOE-related disputes resonates with long-standing criticism of the ITA system.<sup>197</sup> In this regard, van Harten, for instance, does not consider the fact that the process where arbitrators define the reach of the state "in the foggy borderland between the worlds of public and private" particularly surprising.<sup>198</sup> Just as domestic and supra-national courts have rendered countless rulings defining exact limits of state for the purposes of liability, ITA tribunals, on occasion, need to delineate between government and corporation to decide a case.<sup>199</sup> Instead, in van Harten's view, "[w]hat is exceptional is that private contractors rather than tenured judges are left to manage the legal construction of the public sphere"<sup>200</sup> and thus

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<sup>194</sup> ESPOSITO, *supra* note 12 at 9–10. Soirila poignantly refers to this phenomenon as "the person/thing machine." Soirila, *supra* note 22 at 2.

<sup>195</sup> David J. Calverley, *Legal Rights for Machines: Some Fundamental Concepts*, in MACHINE ETHICS 213, 218–19 (Michael Anderson & Susan Leigh Anderson eds., 2011).

<sup>196</sup> Selkälä & Rajavuori, *supra* note 3.

<sup>197</sup> See, e.g., VAN HARTEN, *supra* note 179, SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION (2009) and Stephan Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57 (2011). For critique, see José E Alvarez, *Is Investor-State Arbitration "Public"?*, 7 J. INT'L DISP. SETTLEMENT 534 (2016).

<sup>198</sup> Gus van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 INT'L & COMP. L. Q. 371–94 (2007).

<sup>199</sup> See, e.g., CAROL HARLOW, STATE LIABILITY: TORT LAW AND BEYOND (2004) and FRANCESCO DE CECCO, STATE AID AND THE EUROPEAN ECONOMIC CONSTITUTION (2013).

<sup>200</sup> van Harten, *supra* note 198, at 393.

“[t]he ultimate authority to determine what juridical sovereignty means is itself privatized.”<sup>201</sup>

Considering the perceived rift in arbitrators’ epistemic communities, where one side of arbitrators emphasize ITA as commercial dispute settlement and the other as essentially public adjudication,<sup>202</sup> the variance in applying attribution doctrines appears essentially as a process where arbitrators’ “emotive associations” are brought to the foreground.<sup>203</sup> Here, it has been suggested that “arbitration involves the creation of subjectivities which come to exert a controlling effect on the imagination of its practitioners,” thus projecting a particular political vision of the proper balance between state/non-state and public/private onto ITA proceedings.<sup>204</sup> As the malleability of attribution doctrines suggest, the *dispositif* of a SOE may provide a view to an even longer historical continuum structured around the person/thing distinction that continues to sustain the use and abuse of legal personhood and subjectivity in ITA.<sup>205</sup>

### *III. Top-down Approach: Postcolonial Theory and Bound Personality*

In addition to such a doctrine-bound bottom-up approach that illuminates ramifications of international legal personality, the growth of ITA has spawned intensive debate on the impact of the concept of sovereignty on international legal personality.<sup>206</sup> Dynamics between these concepts are closely intertwined, and their link to state responsibility is clearly acknowledged. In this regard, Koskenniemi, for instance, contends that “‘State responsibility’ is a necessary aspect of international law’s being ‘law’, perhaps an indispensable element of the legal personality of States.”<sup>207</sup> Similarly, Pellet describes the dynamics of sovereignty, responsibility, and personality in the following way:

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<sup>201</sup> *Id.* at 393.

<sup>202</sup> Roberts, *supra* note 65, at 58–63.

<sup>203</sup> Julie A. Maupin, *Public and Private in International Investment Law: An Integrated Systems Approach*, 54 VA. J. INT’L L. 367, 413–16 (2013).

<sup>204</sup> Amr Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT’L L. J. 419, 455 (2000). The public/private distinction, in particular, lies at the heart of many critiques mounted against ITA. For recent scholarship, see especially Maupin, *supra* note 202, at 387–400 and René Urueña, *Subsidiarity and the Public-Private Distinction in Investment Treaty Arbitration*, 79 L. CONTEMP. PROBS. 99, 104–07, 119–21 (2016).

<sup>205</sup> Selkälä & Rajavuori, *supra* note 3. Esposito, *supra* note 20, at 21. See also ESPOSITO, *supra* note 12, at 27.

<sup>206</sup> See, e.g., DOLZER & SCHREUER, *supra* note 5, at 8–11.

<sup>207</sup> Koskenniemi, *supra* note 96, at 46.

[r]esponsibility interacts with the notion of sovereignty, and affects its definition, while, reciprocally, the omnipresence of sovereignty in international relations inevitably influences the conception of international responsibility . . . . [Further,] the very notion of responsibility has been drastically modified . . . it is no longer reserved only for States, and has become an attribution of the international legal personality of other subjects of international law.<sup>208</sup>

While there are multiple ways to conceptualize macro-level interrelatedness of these concepts, the following opts for the lens of the Third World approaches to international law (TWAIL). The use of such a macro lens flows naturally from the development of new modes of legal personhood under the 21<sup>st</sup> century globalization as very different political economies have converged. Much of this process owes to the success of international economic law regimes, investment law included, that have expanded certain forms of state and corporate personhood to cover the entire globe.<sup>209</sup> As such, the TWAIL framing of SOEs along the person/thing distinction serves a litmus test indicating the ways international legal personality of (mostly developing) states is construed, and thus complements the above discussion on concentration of SOE proceedings against developing states whose state-company-relationship differs from the standards of (Western) liberal law.<sup>210</sup>

Part of a larger trajectory of postcolonial theory,<sup>211</sup> TWAIL is a research tradition that investigates creation, maintenance, and renewal of imbalances between developed and Third World societies through international law.<sup>212</sup> Within international economic law, for instance, TWAIL approach is used to expose entrenched and uneven structures in legal regimes that manage tensions of international commerce for the benefit of the Global North.<sup>213</sup> In the specific context of investment law, Sornarajah has argued that “the

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<sup>208</sup> Alain Pellet, *The Definition of Responsibility in International Law*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 3, 6 (James Crawford, Alain Pellet, & Simon Olleson eds., 2010).

<sup>209</sup> Selkälä & Rajavuori, *supra* note 3. See also BARKAN, *supra* note 39.

<sup>210</sup> Compare with Aldo Musacchio, Sergio Lazzarini & Ruth Aguilera, *New Varieties of State Capitalism: Strategic and Governance Implications*, 29 *ACAD. MGMT. PERSP.* 115 (2015).

<sup>211</sup> See, e.g., ACHILLE MBEMBE, *ON THE POSTCOLONY* (2001).

<sup>212</sup> For an introduction, see, e.g., Makau Mutua, *What is TWAIL?*, 94 *ASIL PROC.* 31 (2000).

<sup>213</sup> James Thuo Gathii, *Third World Approaches to International Economic Governance*, in *INTERNATIONAL LAW AND THE THIRD WORLD* 255, 263-64 (Richard Falk, Balakrishnan Rajagopal, & Jacqueline Stevens eds., 2008).

arbitration system . . . involve itself in ideological predisposition towards favourable stances to particular interest groups,” predominantly multinational enterprises from traditional capital-exporting states.<sup>214</sup>

Importantly, the ramifications of the perceived bias are reflected in the doctrines of international law relevant to ITA, such as expansive interpretation of “jurisdiction” or “investment.”<sup>215</sup> Even though attribution doctrines have not been systematically investigated under TWAIL approach, discussion in the previous section suggests that exclusionary or inclusionary definition of the host state in SOE context may come across as such a platform. The characterization of Petrobangla as a functional part of the state under each major rule of attribution in *Chevron Bangladesh Blocks Thirteen and Fourteen v. Bangladesh*, for instance, could well point to such direction.<sup>216</sup>

While the ultimate merits of such claims are not important for the purposes of this Article,<sup>217</sup> the TWAIL approach provides a useful lens to investigate the creation of international legal persons in general and quasi-sovereign persons in particular. Quite naturally, the concept of quasi-sovereignty suggests that not all sovereign legal persons are alike; instead, there are important distinctions between quintessential Western sovereigns and those hailing from the developing world.<sup>218</sup> Just as slaves were construed as “no longer humans like *all others*”<sup>219</sup> and bestowed “rather a distinct humanity—one whose very humanity was (and

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<sup>214</sup> M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 26–27 (2015).

<sup>215</sup> M. Sornarajah, *The Neo-Liberal Agenda in Investment Arbitration: Its Rise, Retreat and Impact on State Sovereignty*, in REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW 199, 210–22 (Wenhua Shan, Penelope Simons, & Dalvinder Singh eds., 2008).

<sup>216</sup> Naturally, resource-rich developing states are often plagued by corruption and governmental rent-seeking that appropriates oil and gas revenues to small elite groups. See, e.g., Guillermo Garcia Sanchez, *The Hydrocarbon Industry’s Challenge to International Investment Law: A Critical Approach*, 57 HARV. INT’L L. J. 475 (2016).

<sup>217</sup> Recent studies in the history of investment law seem to affirm many propositions made by TWAIL scholars over the years. See, especially, KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW (2013).

<sup>218</sup> See ROBERT JACKSON, SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD (1990). For a powerful critique, see SIBA N’ZATIOLA GROVOGUI, SOVEREIGNS, QUASI SOVEREIGNS, AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW (1996). For general discussion, see Selkälä & Rajavuori, *supra* note 3.

<sup>219</sup> ACHILLE MBEMBE, CRITIQUE OF BLACK REASON (2017). Chapter One, Section “Fantasy and the Closing of the Spirit.” [NOTE: The Author have access only to ebook which does not contain original page numbering, references pinpointed at chapter/section titles]

still is) in question”<sup>220</sup> from ancient Rome to the 18<sup>th</sup> Century U.S., Third World sovereignty, too, is often seen distinct, fragile, suspect, and ridden with shades of grey.<sup>221</sup>

Best illustrated by Anghie, the broader idea behind quasi-sovereignty emphasizes how the legal conceptualization of sovereignty was shaped in “colonial encounter” that tied “native ‘sovereignty’ or ‘personality’.”<sup>222</sup> This development primarily took place through a process “where that personality enable[d] the native to transfer title, to grant rights—whether trading, to territory, or to sovereignty itself.”<sup>223</sup> Anghie’s argument suggests that while Third World societies were construed as legal persons able to contract with traditional European sovereigns on an equal plane, such a bestowal of sovereignty only produced rights of “dispossession . . . ability to alienate its lands and rights.”<sup>224</sup> The “native,” argues Anghie, was “granted personality in order to be bound.”<sup>225</sup> Viewed against general postcolonial theory, these legal operations have striking similarities with the concept of colonial gaze,<sup>226</sup> a cultural process where non-European peoples were essentially turned into observed objects whose representations determined and fixed their status as colonized subjects.<sup>227</sup> Thus, according to Mbembe,

[p]ower in the colony . . . consists fundamentally in the power to see or not to see, to remain indifferent, to render invisible what one wishes not to see . . . in the colony those who decide what is visible and what must remain invisible are sovereign.<sup>228</sup>

Applied to Anghie’s account of quasi-sovereignty, assigning Third World societies with legal personality emerges as an effort to render them visible in international law only for a moment and only for the purposes of appropriation and subjugation. Like slaves, quasi-

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<sup>220</sup> *Id.* at Chapter One, Section “Fantasy and the Closing of the Spirit.”

<sup>221</sup> Compare with the concept of semi-sovereignty developed in Matthew Craven, *Statehood, Self-determination, and Recognition*, in *INTERNATIONAL LAW 203* (Malcom D. Evans ed., 3rd ed. 2010).

<sup>222</sup> ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 6, 105 (2004).

<sup>223</sup> *Id.* at 6, 105.

<sup>224</sup> *Id.* at 105.

<sup>225</sup> *Id.* at 105.

<sup>226</sup> See, e.g., EDWARD W. SAID, *ORIENTALISM* (5th ed. 2003).

<sup>227</sup> Gaze, Colonial, in *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* (2008), <http://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/gaze-colonial>.

<sup>228</sup> MBEMBE, *supra* note 219 at Chapter Four, Section “The Enigmatic Mirror”.

sovereign Third World states represent a caricature of “the *principle of exteriority* (as opposed to the principle of inclusion).”<sup>229</sup> Parallels with Esposito’s framing are obvious. A product of the person/thing distinction, quasi-sovereignty appears as a mechanism where Third World society is briefly pushed to the edge of personhood with the sole intent of discipline.<sup>230</sup>

Crucially, these techniques also surface in international arbitration. Analyzing oil disputes arising from decolonization-era nationalizations in the 1960s and 1970s, Anghie uncovers a broadly similar dynamic where “Third World sovereignty [was] . . . rendered uniquely vulnerable and dependent by international law.”<sup>231</sup> In these arbitrations, oil concession contracts between Third World states and Western multinational companies were identified as quasi-treaties that granted companies extensive protections against expropriation. The key takeaway from such quasi-treaties was how a “Third World state, by contracting with the corporation, was providing it with a quasi-sovereign status—which gave it significant powers, not least of which was an elevation of its status to the international plane.”<sup>232</sup> As such, early oil arbitrations displayed a curious double movement where “on one hand, the Third World state elevated the corporation to the international level, and the concession was a quasi-treaty. On the other, the state, by entering into these concessions, is taken to have acted almost as a strictly private party, dealing with equals.”<sup>233</sup>

Thus, the Third World state was understood to turn a private company, at that time clearly an object (thing) of international law, into a quasi-subject (person) of that system through an internationalized contract.<sup>234</sup> Participation in arbitral proceedings against a sovereign state was possible only because international legal personality of the company was construed in a particular way. Analyzing the same case law as Anghie, Shalakany, too, notes how the *Texaco awards*,<sup>235</sup> in particular, exposed the dynamics of Third World sovereign personality. In Shalakany’s view, public/private distinction was the key in understanding the process:

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<sup>229</sup> *Id.* at Chapter Two, Section “The Black of the White and the White of the Black.” Emphasis in original.

<sup>230</sup> ESPOSITO, *supra* note 12, at 9–10.

<sup>231</sup> ANGHIE, *supra* note 222, at 6.

<sup>232</sup> *Id.* at 233.

<sup>233</sup> *Id.* at 234–35.

<sup>234</sup> *Id.* at 233.

<sup>235</sup> *Awards on the Merits in Dispute between Texaco Overseas Petrol. Co./California Asiatic Oil Co. and the Gov’t of the Libyan Arab Republic (Compensation for Nationalized Property)*, 17 I. L. M. 1 (1978).

What ensued was a dual legal identity for the Libyan state: On the one hand, Libya had to act in its public law capacity as a participant in a highly politicized U.N. debate over the NIEO . . . and, on the other hand, it had to act in its private law capacity as a participant in high-stakes oil concession arbitration proceedings (a process widely understood as a means to resolve disputes between private actors).<sup>236</sup>

With the advent of BITs and ICSID facilities, many elements displayed in the early oil arbitrations already belong to legal history.<sup>237</sup> BITs' dispute resolution provisions and the ICSID convention allow foreign investors to commence arbitral proceedings without the doctrinal heavy lifting often required in the past. Regardless, both Anghie's and Shalakany's accounts of allotting international legal personality to Third World societies for the purpose of alienating their property rights bears close resemblance to modern ITA practice in the SOE context. Attribution doctrines are an obvious parallel. As discussed above, attribution as a legal technique is crucial for rendering a SOE's breach of a BIT's substantive protections visible in the eyes of investment law. Due to development of investment law, contemporary foreign investors need not to impress tribunals with their quasi-sovereign personality under internationalized contracts. Instead, they need to convince arbitrators to hold SOEs as sovereign entities, as products of the "person/thing machine," if only for a moment.<sup>238</sup> SOEs, to use Anghie's terminology, are thus granted international legal personality to be bound—and in order to bind their owner-states.<sup>239</sup>

Similarities between TWAIL conceptualization of foreign investors as elevated subjects and Third World states as downgraded quasi-sovereigns go beyond attribution doctrines. While foreign investors are increasingly considered elevated "to a partial subject in international law,"<sup>240</sup> on the host state side, the *Tulip v. Turkey* tribunal, for instance, evoked language and argumentation strikingly close to TWAIL when it analyzed if Emlak amounted to a

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<sup>236</sup> Shalakany, *supra* note 203 at 456.

<sup>237</sup> Compare, however, with umbrella clauses that have been noted "to 'lower' [some investment] relationships to the private law level (by emphasizing the private-law nature of the relevant undertakings), and to 'elevate' their protection to the international level." Mosche Hirsch, *Human Rights & Investment Tribunals Jurisprudence Along The Private/Public Divide*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW* 5, 11–12 (Todd Weiler & Freya Baetens eds., 2011). For more thorough discussion, see works cited in *supra* note 52.

<sup>238</sup> Compare with Soirila, *supra* note 22, at 2.

<sup>239</sup> ESPOSITO, *supra* note 12, at 9–10.

<sup>240</sup> Braun, *supra* note 6, at 116.



“‘quasi-state’ organ”<sup>241</sup>—a category unknown to the ARSIWA. Likewise, Petrobangla was conferred “limited international capacity”<sup>242</sup> in *Niko Resources v. Bangladesh, Bapex and Petrobangla*. In both cases, SOEs essentially formed a liminal category that allowed the tribunals to liken them with both the host state (person) and the foreign investor (thing). Crucially, when making claims on SOEs’ identity and casting them as persons (as in *Chevron* and *Niko*) or things (as in *Tulip* and *Saipem*), ITA tribunals also make sweeping assessments of international legal personality and its ramifications.

The disagreement in the *Tulip v. Turkey* award is illustrative. In the majority’s view, Emlak was not an extension of the “‘invisible’ hand of the State,”<sup>243</sup> while the minority considered it being “guided—if not fully directed—by the sovereign’s hand.”<sup>244</sup> Similarly, many other SOE cases boil down to simple binary positions where ITA tribunals differentiate between sovereign and shareholder actions.<sup>245</sup> Judged against TWAIL, these characterizations may tell more about ITA tribunals’ perception of appropriate forms and functions of sovereign legal persons and less about SOEs themselves. In many ways, then, contemporary SOE-related ITA cases resemble the dynamics of the *Texaco* case, where:

Libya did not lose . . . merely because it “breached the law;” it lost . . . despite the doctrinal anomalies, in part because its actions were seen as political and, as such, uncongenial to the disciplinary sensibility of the deciding arbitrators. Once Libya’s actions were associated with politics and the coercive exercise of sovereign powers in an unequal relationship, Libya was simply denied access to a whole set of legal interpretations that could have been more favorable to its position.<sup>246</sup>

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<sup>241</sup> *Tulip v. Turkey Award*, ICSID Case No. ARB/11/28, para. 288 (Mar. 10, 2014).

<sup>242</sup> *Niko v. Bangladesh, Bapex and Petrobangla, Jurisdiction*, ICSID Case No. ARB/10/11 and ARB/10/18, para. 329 (Aug. 19, 2013).

<sup>243</sup> *Tulip v. Turkey Award*, ICSID Case No. ARB/11/28, para. 321 (Mar. 10, 2014).

<sup>244</sup> *Tulip v. Turkey Separate Opinion*, ICSID Case No. ARB/11/28, para. 8 (Mar. 10, 2014).

<sup>245</sup> Compare with Carsten Gerner-Beuerle, *Shareholder between the Market and the State. The VW Law and Other Interventions in the Market Economy*, 49 COMMON MKT. L. REV. 97 (2012).

<sup>246</sup> Shalakany, *supra* note 204, at 455–56.

In sum, micro-level analysis discussed in the previous section suggested that the application of attribution doctrines by the ITA tribunals stem from the need to give shape to a host state as an international legal person. As evidenced by SOE-related ITA proceedings, when deciding a concrete case, questions of state responsibility and liability are often contingent on the exclusionary or inclusionary definition of the state. In many critical narratives, creation and maintenance of such international legal persons is understood to take place in a fundamentally skewed framework which, allegedly, grants significant rights to foreign investors (things) vis-à-vis host states (persons) and, simultaneously, limits the governments' ability to regulate their domestic societies in ways that might impair foreign investment.<sup>247</sup> Similarly, the macro-level analysis of TWAIL suggests that the concepts of sovereignty and international legal personality are inexplicably connected, and that this link continues to render Third World sovereignty as vulnerable and dependent also in ITA.<sup>248</sup> Contrary to postcolonial theorization on quasi-sovereignty, however, modern ITA does not cast SOEs in roles characterized by property, legal incapacity, and non-personality.<sup>249</sup> Instead, SOEs display inversed vulnerability where TWAIL-related processes of appropriation and subjugation are buttressed by granting them international legal personality. In both cases, the *dispositif* of a SOE exposes the porosity of international legal personality and its consequences in the real-world, particularly for developing states and those pursuing different models of political economy.

### E. Conclusion

SOEs straddle key conceptual dichotomies—such as government/market and public/private—that continue to shape investment law as a species of (neo)liberal law. This Article has investigated treatment of SOEs in ITA as an upshot of yet another dichotomy: The person/thing distinction. Using Roberto Esposito's terminology, I have suggested that through the *dispositif* of a SOE we gain a new perspective to assess and understand politics, porosity, and ramifications of international legal personality and open the highly-specialized area of investment law to broader trajectories of political and social theory. Due to the centrality of investment law in contemporary global economic architecture, these changes impinge on fundamental concepts of legal personhood that give shape to international relations and international law more broadly.

Applied to ITA, Esposito's political philosophy connects the core concepts of investment law, the host state and foreign investor, to categories of persons and things that form the

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<sup>247</sup> Cutler, *supra* note 7, at 110.

<sup>248</sup> ANGHIE, *supra* note 221, at 6.

<sup>249</sup> MBEMBE, *supra* note 218, at Chapter One, Section "Fantasy and the Closing of the Spirit."

“bedrock for all legal systems.”<sup>250</sup> When a dispute involving a host state SOE is considered to pass the *prima facie* test at the jurisdictional stage or when a SOE’s conduct is understood to encroach upon state responsibility, ITA becomes a site for casting SOEs as persons and things. Due to the built-in dynamics of investment law, however, asymmetries between persons (sovereign states, including their SOEs) and things (foreign investors) are effectively inverted.<sup>251</sup> In ITA, the logic of the person/thing distinction, whether gazed along its long historical development<sup>252</sup> or through Esposito’s contemporary political theory,<sup>253</sup> is destabilized. Thus, foreign investors actively cling to their thinghood and attempt to push SOEs—often their contractual counterparts, other things—to the edge of personhood for the purposes of triggering state liability, if only for a fleeting moment. The *dispositif* of a SOE, structured by BITs and customary international law, arises amidst these forces.

The *dispositif* of a SOE provides a view into making or breaking persons and things in ITA and it has relevance beyond the confines of investment law. As micro-level analysis pertaining to instabilities of attribution doctrines and macro-level exploration of quasi-sovereign personality indicate, SOEs form a liminal category that oscillates between the state and the non-state, statehood and corporatehood, personhood and thinghood. Viewed against broader contemporary theorization of legal personhood, the case of SOEs highlights the malleability of positive law and the leeway it grants to adjudicators—a condition that sets the dispersed investment law regime apart from legal systems giving rise to the original *dispositif*, the Gaius’ *Institutes*. Another key difference deals with the relative positions of persons and things. Contrary to Esposito’s example of legal characterization of Roman slaves, Mbembe’s vision of slavery in postcolonial theory or Anghie’s notions of quasi-sovereignty in TWAIL, SOEs operate in a system that essentially prizes thinghood.

Regardless, the ITA process comes primarily across as what Esposito terms a “mechanism of social discipline” where the thresholds between different categories are constantly defined, negotiated and shifted.<sup>254</sup> While disciplinary dimensions of a SOE being cast as a person instead of a thing are, on the surface, mostly financial, the ramifications of granting SOEs personhood impinge fundamental prerogatives of a sovereign state, as evidenced by the

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<sup>250</sup> ESPOSITO, *supra* note 12, at 16.

<sup>251</sup> Compare, however, with the idea of multinational companies gaining a distinct “corporate sovereignty” with the globalization of liberal legal regimes. See, especially, BARKAN, *supra* note f39 and Turkuler Isiksel, *The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights*, 38 HUM. RTS. Q. 294 (2016).

<sup>252</sup> Selkälä & Rajavuori, *supra* note 3.

<sup>253</sup> ESPOSITO, *supra* note 12.

<sup>254</sup> *Id.* at 9.

“right to regulate” movement.<sup>255</sup> Due to the systemic importance of many SOEs, whether operating in utilities, energy development, or finance, their characterization sends ripple effects across domestic political economies. In this sense, the *dispositif* of a SOE approaches Esposito’s understanding of the *dispositif* of a person, and abstract doctrines of international law can be seen to generate biopolitical effects at the scale of whole societies.

Even though the Article has documented instability of attribution doctrines, framed SOE-related disputes in TWAAIL terms and highlighted ramifications of international legal personality for domestic political economies, it has refrained from taking a clear normative position on the way SOEs ought to be appraised in investment law. To be sure, treatment of SOEs in ITA can be read as an expansion of neoliberal legality that displaces non-Western forms of political economy.<sup>256</sup> At the same time, however, the large number of ITA cases lodged against developing economy SOEs corroborates the dominant interpretation of state ownership as inefficient, corrupt, and prone to elite rent-seeking.<sup>257</sup> Instead, this Article’s primary intervention has focused on the doctrinal processes through which the SOE personhood and, by extension, personhood of host states and foreign investors, are made.<sup>258</sup> Crucially, ambivalence on the pros and cons of investment law and ITA fits in with broader outlines of Esposito’s philosophy and suggests possible application for his political theory when navigating contemporary traditions, myths, and utopias of personhood.<sup>259</sup>

The bulk of the doctrinal exposition in this Article has documented the use and abuse of SOE personhood or thinghood as a litigation strategy in concrete ITA disputes. The arguments pursued by both parties in *Tulip*, *Saipem*, *Chevron*, and *Niko* utilize the flexibility that flows from SOEs straddling the person/thing distinction. In doing so, these arguments essentially reproduce the classic Roman *dispositif* where persons are separated from things for the purposes of exclusion and domination. Under this reading, then, the condition of a SOE approaches that of a slave, and the significance of Esposito’s framework is to underscore politics, porosity, and ramifications of the dualist conception of personhood.<sup>260</sup> But the treatment of SOEs enables also another reading couched in Esposito’s language, one that is increasingly supported by the changes in the world economy. Prompted by changing forms

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<sup>255</sup> See, e.g., TITI, *supra* note 68.

<sup>256</sup> Compare with Nicolas M. Perrone, *The International Investment Regime After the Global Crisis of Neoliberalism: Rupture or Continuity?*, 23 INDEP. J. GLOBAL LEGAL STUD. 603 (2016).

<sup>257</sup> See, e.g., Nadeja Victor & Inna Sayfer, *Gazprom: the Struggle for Power*, in OIL AND GOVERNANCE: STATE-OWNED ENTERPRISES AND THE WORLD ENERGY SUPPLY 655 (David Victor, David Hults, & Mark Thurber eds., 2012).

<sup>258</sup> Selkälä & Rajavuori, *supra* note 3.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

and the increasing significance of state capitalism,<sup>261</sup> various research traditions including management, business studies, and critical geography have started to problematize the hybrid character of SOEs in recent years.<sup>262</sup> Within investment law framework, ITA tribunals are only starting to confront a greater number of proceedings where SOEs act as claimants seeking protection under investment treaties and play the person/thing distinction to their own, and not necessarily their owner-states', advantage.<sup>263</sup> Esposito's search of the third person can be seen to reflect this reality where SOEs emerge as unique corporate bodies penetrating into the core of investment law system and, perhaps, reconfiguring SOEs' international legal personality in their own terms and not that of a slave.<sup>264</sup>

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<sup>261</sup> See, especially, ALDO MUSACCHIO & SERGIO LAZZARINI, REINVENTING STATE CAPITALISM. LEVIATHAN IN BUSINESS, BRAZIL AND BEYOND (2014); UNCTAD, WORLD INVESTMENT REPORT 2014 (2014), [http://unctad.org/en/PublicationsLibrary/wir2014\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf); and Przemyslaw Kowalski & Kateryna Perepechay, INTERNATIONAL TRADE AND INVESTMENT BY STATE ENTERPRISES (2015), <http://dx.doi.org/10.1787/18166873%0A>.

<sup>262</sup> See, e.g., Alvaro Cuervo-Cazurra et al., *Governments as owners: State-owned multinational companies*, 45 J. INT. BUS. STUD. 919 (2014); Garry D Bruton, Mike W Peng & Kehan Xu, *State-Owned Enterprises Around the World As Hybrid Organizations*, 29 ACAD. MGMT. PERSP. 92 (2015); Adam D Dixon & Ashby H B Monk, *Rethinking the Sovereign in Sovereign Wealth Funds*, 37 TRANSNAT'L. INST. BRITISH GEOR. 104 (2012); and Curtis Milhaupt & Mariana Pargendler, *Governance Challenges of Listed State-Owned Enterprises around the World: National Experiences and a Framework for Reform*, CORNELL INT'L L. J. (forthcoming).

<sup>263</sup> See, e.g., Mark Feldman, *State-Owned Enterprises as Claimants in International Investment Arbitration*, 31 ICSID Rev. 24 (2016).

<sup>264</sup> Selkälä & Rajavuori, *supra* note 3.

