

is silent on the issue, or that the term 'state organ' has a very narrow meaning, as opposed to the broad meaning used in Article 4:1. In such situations, it would seem necessary to resort to a functional test to the effect that all bodies and entities that *in fact* exercise governmental authority are classified as state organs for purposes of attribution. This approach ultimately rests on the generally accepted tenet that a state cannot avoid responsibility under international law by referring to its internal law. In other words, just because a particular body is not characterized as a 'state organ' under internal law, this fact does not mean that it is not a state organ for purposes of attribution.¹⁷

The functional test is clearly spelt out in Article 5 of the ILC Articles. Article 5 reads:

Conduct of persons or entities exercising elements of governmental authority

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

Article 5 deals with the conduct of persons or entities which are *not de jure* state organs pursuant to Article 4, but which are empowered to exercise governmental authority. Such conduct is attributable to the state, provided the person or entity was acting in that capacity. Article 5 clarifies that the ultimate test is the *function* carried out by the person or entity, irrespective of its organizational or structural status. As long as, and to the extent that, governmental authority is exercised, the conduct in question is attributable to the state. This still leaves open, however, the question of how to define 'governmental authority'. Article 5 does not provide a definition. Generally speaking, however, any exercise of state authority is to be characterized as 'governmental authority' for the purposes of attribution. As pointed out in the Commentary to the ILC Articles, the precise and detailed definition will depend on the history and tradition of the state in question.¹⁸ Other factors to be taken into account include the way in which governmental authority has been conferred on the entity, the purpose of exercising state authority, and the extent to which the entity is accountable to the government.¹⁹ Consequently, beyond certain self-evident candidates, the characterization of activities as the exercise of state authority will depend on the circumstances of the individual case.

Mention must also be made of Article 8 of the ILC Articles. This article reads:

Conduct directed or controlled by a State

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.

¹⁷ Crawford, above n 1 at 98.

¹⁸ Ibid at 101.

¹⁹ Ibid.

This provision thus deals with conduct directed or controlled by a state. As a general rule under international law, the conduct of private persons or entities is not attributable to the state. However, if a private person or entity acts on the instructions of the state, such conduct is attributable to the state. It should be noted that in this situation it does not matter whether the conduct involves governmental activity. Once the conduct is authorized by the state, it will be attributable to the state. The other situation dealt with in Article 8 is where conduct has been carried out 'under the direction or control of' the state. This raises important and difficult issues with respect to the conduct of state-owned entities. The mere fact that a state establishes a corporate entity is not a sufficient basis for the attribution of subsequent conduct of the entity. However, if the entity exercises governmental authority, or elements thereof, as defined in Article 5 of the ILC Articles, such conduct is indeed attributable to the state, even if the entity is a separate legal person. It is true, of course, that international law does, as a matter of principle, acknowledge and accept the separateness of corporate entities at the municipal law level. On the other hand, it is equally well established that the corporate veil must be pierced when the separateness is used to evade obligations, abuse rights, or for other fraudulent purposes.²⁰

In *Maffezini v Kingdom of Spain*,²¹ issues of attribution arose with respect to the Spanish legal entity SODIGA (Sociedad para el Desarrollo Industrial de Galicia). Mr Emilio Augustin Maffezini, a citizen of Argentina, decided to make investments in the Spanish chemical products industry. He did so by establishing EAMSA (Emilio A Maffezini SA) together with SODIGA. After experiencing a number of difficulties, the investment and the project ultimately failed. Maffezini claimed that the failure was because of wrong advice given by SODIGA concerning the costs of the project and because SODIGA in his view had caused additional cost by making the investment prior to the conclusion of an environmental evaluation report.

On 25 January 2000, the tribunal rendered a decision on jurisdiction. The respondent challenged the jurisdiction of the tribunal on the ground that the dispute was not between the Kingdom of Spain and the claimant, but between the latter and a private corporation, that is SODIGA. In addressing this objection, the tribunal concluded that in fact two issues were involved: (i) is SODIGA a state entity for purposes of determining the jurisdiction of ICSID and the tribunal, and (ii) are the actions and omissions imputable to the state? The tribunal stated that the second issue could be dealt with together with the merits of the case, whereas the first was

²⁰ The leading case decided by the International Court of Justice is *Barcelona Traction, Light and Power Company, Ltd, Second Phase*, (1970) ICJ Reports 3. These and related issues have been extensively researched by Prof Böckstiegel; see eg *Der Staat als Vertragspartner ausländischer Privatunternehmen* (Frankfurt am Main, Athenäum Verlag, 1971) and *Arbitration and State Enterprises: A Survey on the National and International State of Law and Practice* (Deventer, Kluwer Publishing/ICC, 1984).

²¹ ICSID Case No. Arb/97/7. Decision on Objections to Jurisdiction, 25 January 2000, 16 ICSID Rev-FILJ 212 (2001); Award of 13 November 2000, 16 ICSID Rev-FILJ 248 (2001).

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CHAPTER 14

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INVESTMENT LAW**

Edited by

PETER MUCHLINSKI

FEDERICO ORTINO

AND

CHRISTOPH SCHREUER

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