CLASH OF IDENTIFICATIONS: 'STATE ENTERPRISES' IN INTERNATIONAL LAW

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INTRODUCTION

A core issue of the recent U.S.-China trade war concerns Chinese state enterprises (SEs) and their dubious relationship with the government in international commercial activities. American international trade officials claim Chinese SEs are "public bodies" since they are controlled by the Chinese government. Thus, the United States believes it is legally justified to apply defensive trade duties on the imports related to these SEs. China, on the other hand, insists that its SEs are "autonomous market entities."[1] In China's party-leading context, it is tricky to define where the government ends and the private sector starts. The identification of SEs troubles not only the regulators, but also international legal institutions, which have developed various identifications of SEs in trade, investment, and related customary laws. The result is a clash of SEs' identities in international law.

This article contributes to the current studies in three ways. First, it analyzes the identification issue of SEs with a broader examination on different areas of international law. Whereas the existing scholarship usually discusses the issue of SEs' identity under a specific treaty or in a particular area of international law[2] without revealing chaos in the larger system. By depicting a more thorough legal landscape, this research reveals that trade, investment, and related public laws all suffer from the same identification problem as SEs that needs to be solved systematically.

Next, it establishes a unified six-element framework to evaluate and compares the competing identification rules of SEs in the above international areas. The identification rules established by international institutions can be deconstructed into six elements, which depict SEs' *ownership*, *control*, *authorization*, *organizational purpose*, *organizational function*, and *specific activity*. This article notes that each international law institution picks some of the six while excluding others to create its own SE definition. Without coordination between the institutions, the "mix-and-match" law-making causes a clash of identities and confusion in the international law system: an SE might be identified

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[1] Tom Miles, U.S. and China Clash at WTO Over Ideology, State's Role, REUTERS, (July 26, 2018, 7:31 AM), https://www.reuters.com/article/us-usa-trade-wto/u-s-and-china-clash-at-wto-over-ideology-states-role-idUSKBN1KG22G. *See also* Editorial, *Trade Blockage:* The World Trading System is Under Attack, THE ECONOMIST, July 21-27, 2018, at 15–17.

[2] See discussion *infra* Part I.

as a "public body" under one set of rules, yet as a "private company" under another.

Lastly, the six-element framework also sheds light on the current trade debate between the United States and China concerning the role of SEs and the possible reform of the World Trade Organization (WTO), which will largely depend on consensus among its members. This article attempts to apply the six-element analytical framework to the most recent domestic changes in both countries concerning SEs' global business, i.e. U.S Foreign Investment Risk Review Modernization Act of 2018, and China's "Pilot Reform of State-owned Capital Investing and Operating companies." By reviewing the domestic policy changes, we can better pinpoint the gaps between the two sides and discuss the possibilities and difficulties of a future international consensus on SEs' identification.

The article proceeds as follows: Part I provides a brief context to the current debate about the dubious status of SEs. Part II-IV apply the six-element framework to various areas of international law, both *legi generali* and *lex specialis*, and illustrate in detail that the existing clash of identities of SEs is due to mix-and-match rule-making in international law. Part V applies this six-element framework to the current debate between the U.S. and China at the WTO to evaluate the soundness of their legal arguments. It also discusses the possibility of reaching an international consensus on the identity of SEs in the context of new domestic policy changes in both countries.

I. THE DUBIOUS LEGAL STATUS OF SES

International law draws a black-and-white distinction between public states and private companies, yet the increasing presence of SEs creates shades of grey where states hybridize with companies. SEs are corporations affiliated with public states that can own or acquire firms as shareholders, and control or influence SEs through various channels. Modern states, faced by increasing global competition and domestic demand for better social welfare, intervene in the market at different levels via various types of SEs. Generally, states have three main types of motivations for fostering SEs: political, social, and economic.

First, the political motivation provides that states, by enlarging public properties, could bring about a fundamental change in the distribution of power within society by diminishing the power of private capital and increasing the power of labor. In other words, the nationalization process can be considered "an instrument for achieving 'genuine' industrial democracy."[3] Political motivations were once fundamental to the policies that led to collectivist economies of Communist countries in the history. They have also played a role in

[3] DIETER BÖS, PUBLIC ENTERPRISE ECONOMICS: THEORY AND APPLICATION 26 (1986).

nationalization programs of western countries after World War II.[4] Many SEs that were created during these periods are still operating today even though the original political motivations might have changed.

The second goal of state ownership is that states may want to pursue small-scale social policies through SEs. Such motives include "the desire to guarantee full employment, upgrade working conditions to the labor force, and improve industrial relations."[5] SEs are designed to overcome the weakness and provincialism of large private enterprises as well as their inability to deal with trade unions.[6] Economists formalized the so-called "social view" of SEs: these enterprises are created to address market failures whenever the social benefits of their activity exceed the costs.[7] Empirical evidence also shows that SEs are sometimes established as a way to increase tax revenue and employment rate, rather than to maximize profits.[8]

Lastly, modern states interfere in markets through SEs for more effective economic regulations and financial benefits. Classic economic theories claim that SEs are an important part of states' toolkits to fix market failures. SEs are believed to be necessary when "there is a lack of information" in the market.[9] SEs also play a large role in public utility sectors. In these industries, it is cheaper to produce goods by a monopoly, and the state is the most suitable monopoly.[10] Moreover, SEs are presumed to make business decisions on the basis of long-term considerations, as opposed to merely short-term and profit-minded ones.[11] Thus, SEs can be used to smooth the dramatic variations of the market. In extreme situations, SEs are preferable policy tools in industrial bailouts where a state needs to rescue an industry affected by an economic or financial crisis.[12] Additionally, SEs are used to fill the state treasury with their revenue.

The conflation between the state and the market has significant implications, not just for the economy, but for international law as well. States, international organizations, and international lawyers need to clarify whether SEs are public or private. This classification is vital for proper regulation and

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[4] Pier Angelo Toninelli, *The Rise and Fall of Public Enterprise: The Framework*, *in* THE RISE AND FALL OF STATE-OWNED ENTERPRISE IN THE WESTERN WORLD 6 (Pier Angelo Toninelli ed., 2000).

[5] *Id.* at 6–7.

[6] *Id.* at 7.

[7] ANTHONY BARNES ATKINSON & JOSEPH E. STIGLITZ, LECTURES ON PUBLIC ECONOMICS (2d ed. 1980).

[8] Paola Sapienza, *The Effects of Government Ownership on Bank Lending*, 72 J. FINANC. ECON. 357, 357–384 (2004).

[9] *See* A. Nove, *Efficiency Criteria for Nationalized Industries: Some Observations Based Upon British Experience*, 20 ACTA OECONOMICA 83, 102-05 (1978).

[10] *See* BÖS, *supra* note 3, at 27.

[11] NICHOLAS KALDOR, PUBLIC OR PRIVATE ENTERPRISE: THE ISSUES TO BE CONSIDERED 5 (1978).

[12] Toninelli, *supra* note 4, at 8–9.

treatment of their cross-border activities, but also for deciding on the jurisdiction and liability when their activities turn into disputes. Unfortunately, identifications of SEs tend to conflict with each other in different areas of international law.

One example is the international trade system. SEs "are a big challenge to the system, and it is hard to believe this will not shape some of the thinking about subsidies. . .".[13] Under the current Agreement on Subsidies and Countervailing Measures (ASCM) in WTO rules, if an SE is regarded as a "public body," its products and the products of domestic companies it transacts with will be presumed to have enjoyed certain subsidies that distort the market. This gives a claim to product-importing countries to legitimize their countervailing duties on these goods. The WTO, however, has not come up with a clear interpretation of "public body." To the contrary, different approaches have been adopted in the WTO disputes to interpret what is considered as a "public body."[14]

The international investment law system lacks a focal institution like the WTO, which leaves it with a more severe SE identification problem. In most cases, SEs are treated the same as private investors under investment treaties.[15] However, several countries have special rules for "government-controlled investors," including Australia, Canada, the United States, and Russian Federation, which are some of the major destinations for foreign capital and influential rule-makers in the international market[16] Whether SEs are regarded as public "government-controlled investor[s]" will determine how their investments are treated in these countries. The dubious identity of SEs is also one of the "major unsettled issues" facing international investment dispute institutions, especially the International Center for Settlement of Investment Disputes

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[13] John H. Jackson, *The Impact of China's Accession on the WTO*, *in* CHINA AND THE WORLD TRADING SYSTEM: ENTERING THE NEW MILLENNIUM 19, 26 (Deborah Z. Cass, Brett G. Williams & George Barker eds., 2003).

[14] *See* Philip I. Levy, *The Treatment of Chinese SOEs in China's WTO Protocol of Accession*, 16 WORLD TRADE REV. 635, 635–53 (2017); Ru Ding, "*Public Body*" *or Not: Chinese State-Owned Enterprise*, 48 J. WORLD TRADE 168, 173 (2014). Levy discusses three approaches to interpreting the term "public body." The first approach holds that government control is the criterion that determines whether an entity is a "public body." The second and the third approaches examine "government function" and "government authority," respectively, to decide the issue. *See also* Yueh-Ping Yang & Pin-Hsien Lee, *State Capitalism, State-Owned Banks, and WTO's Subsidy Regime: Proposing an Institution Theory*, 54 STAN. J. INT'L L. 117 (2018); Wentong Zheng, *Untangling the Market and the State*, 67 EMORY LAW J. 243 (2017).

[15] This information can be found in a 2015 OECD working report based on a survey of over 1813 investment treaties. *See* YURI SHIMA, THE POLICY LANDSCAPE FOR INTERNATIONAL INVESTMENT BY GOVERNMENT-CONTROLLED INVESTORS: A FACT FINDING SURVEY 8 (2015), https://www.oecd-ilibrary.org/finance-and-investment/the-policy-landscape-for-international-investment-by-government-controlled-investors_5js7svp0jkns-en.

[16] An example is the Trans-Pacific Partnership, a mega-regional trade-investment treaty initiated by the United States. *See* Raj Bhala, *Exposing the Forgotten TPP Chapter: Chapter 17 as a Model for Future International Trade Disciplines on SOEs*, 14 MANCHESTER J. INT'L ECON. L. 2 (2017).

(ICSID).[17] Whether an SE is a public body will influence the jurisdiction of an ICSID tribunal, as well as the international responsibility of the SE's home state. The practice and scholarship in investment law, however, lack the consensus to draw non-controversial conclusions.[18]

In the more general public international law sphere, the identification of SEs also remains troublesome.[19] When dealing with international economic disputes, international tribunals increasingly refer to the International Law Commission's Draft Articles on State Responsibility (ILC's Draft) if the case lacks specific rules regarding the relationship between SEs and their home states. This draft is widely regarded as a successful codification of customary international law in discussing the boundary between public states and private persons. Unfortunately, not all applications of ILC's Draft in cases involving SEs square with the original architecture set forth in the draft.[20]

In sum, the above international law institutions have developed competing tests to determine SEs' legal status, which make the identities of SEs all the more confusing. The problem is that an SE may be identified as a public body under one set of rules and a private company under another. The lack of a unified identification rule creates unpredictability for SEs and inconsistency among regulators.

To better understand and compare the competing legal identifications of SEs, this article establishes a six-element analytical framework. Those elements describe the six aspects of an entity: 1) *ownership*: whether states have shares as a shareholder of the company, regardless of any actual or constructive control; 2) *control*: states' direct or indirect power to govern or oversee the management and policies of the company, whether through ownership, voting, contract, or other processes; 3) *authorization*: the content and process of a governmental permission to the SE, whether general authorizations to the company, or specific authorizations to certain activities of the company, e.g. permission from the

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[17] Albert Badia, *Chapter 6: Attribution of Conducts of State-Owned Enterprise Based on Control by the State*, *in* ICSID CONVENTION AFTER 50 YEARS: UNSETTLED ISSUES, 189–208 (Crina Baltag & Kluwer Online eds., 2017).

[18] *See* Walid Ben Hamida, *Sovereign FDI and International Investment Agreements: Questions Relating to the Qualification of Sovereign Entities and the Admission of Their Investments Under Investment Agreements*, 9 LAW PRACT. INT. COURTS TRIB. 17–36 (2010). *See also* Christopher Beus, *Sovereign Wealth Funds in the ICSID: A New Approach to Standing*, 1 INDONES. J. INT'L & COMP. LAW 543 (2014); Paul Blyschak, *State-Owned Enterprises and International Investment Treaties: When Are State-Owned Entities and Their Investments Protected?*, 6 J. INT'L. LAW & INT'L. REL. 1–52 (2010).

[19] Ines Willemyns, *Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?*, 19 J. INT'L. ECON. L. 657, 657–80 (2016).

[20] Jaemin Lee, *State Responsibility and Government-Affiliated Entities in International Economic Law: The Danger of Blurring the Chinese Wall Between 'State Organ' and 'Non-State Organ' as Designed in the ILC Draft Articles*, 49 J. WORLD TRADE 117, 117–151 (2015).

Department of Energy for a company to mine natural resources; 4) *organizational purpose*: the *de jure* aims claimed or demonstrated by the company; 5) *organizational function*: the *de facto* role of the company in the market; and 6) *specific activity*: whether the specific activity in question is commercial or governmental in its nature.

In the following parts, this analytical framework will be applied to international trade law and investment law respectively, followed by the observation of customary international law. As a general legal principle, the special rules repeal the general ones ("*lex specialis derogat legi generali*"). In international law, trade and investment agreements are special rules and should apply first when applicable. If the special rules are unclear or missing, however, the general rules would often be referred or applied directly. The following comparisons of special and general rules expose a systematic policy problem: different international law institutions select some elements and emphasize them at different levels which create inconsistent identifications of SEs and the clash of their identities in international law system.

II. INTERNATIONAL TRADE LAW

International Trade Law has long been regarded as a central focus – some might say *the* central focus — of international law.[21] One reason is that it established an internationally centralized legal institution, the World Trade Organization (WTO), to implement a whole system of rules that govern global trade activities and has been rather effective.[22] The WTO rules cover the trade of goods, services, and intellectual property. Several legal documents address the identity issue of SEs in the WTO framework, including General Agreement on Tariffs and Trade (GATT), Agreement on Subsidies and Countervailing Measures (SCM), and General Agreement on Trade in Services (GATS). As for trade in goods, GATT is the general rule with SCM serving as a special rule dealing with subsidies and countervailing measures. As for trade in services, GATS is the governing rule. The identification clauses of SEs in those multinational agreements are quite consistent, with only slight variations in the six elements as specified in the previous section. The WTO, however, allows its members to have special regional or bilateral arrangements, and the more recent efforts to identify SEs in some influential regional trade agreements are not aligned with this world's largest multinational trade system.

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[21] OONA A. HATHAWAY & HAROLD HONGJU KOH, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS 272 (2005).

[22] *What is the WTO?*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/thewto_e.htm (last visited Feb. 4, 2018).

A. GATT Article XVII: Specific Activity + Authorization + Function

Article XVII of GATT establishes the principal rules governing state trading enterprises involved in international trade.[23] The history of this article, from early drafting to the current WTO rules after 1994, shows that the identification of SEs has changed over time.

The Anglo-American Negotiation started immediately after the two world wars, which witnessed international trade stifled under the pressure of protectionist measures during the 1920-30s. Although both the U.S. and the U.K had great interest in pursuing liberal trade policies to reduce trade barriers, the two major leaders of GATT disagreed on many substantive details. In the 1944 U.S. Draft Charter, the U.S. proposed *control* as the sole determinant for an SE.[24] In 1946, certain delegates at the London session of the Preparatory Committee hoped to add a reference to "effective control over the trading operations of such enterprise," but others "considered that in such circumstances it would be proper that the government conferring the exclusive or special privileges should assume the responsibility of exercising effective control. . ."[25] It appeared that the delegates at the London session did not support an inclusion of all government-controlled enterprises as SEs, but instead suggested *authorization* as the element to determine SE status.

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[23] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 190 [hereinafter GATT 1994].
Article XVII:

> (a) Each contracting party undertakes that if it establishes or maintains a State enterprise, [. . .]such enterprise shall . . . act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.
>
> (b) [S]uch enterprises shall . . . make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.
>
> (c) No contracting party shall prevent any enterprise . . . under its jurisdiction from acting in accordance with the principles of subparagraphs (a) and (b) of this paragraph.

[24] *See* General Agreement on Tariffs and Trade (GATT) 1994, WTO ANALYTICAL INDEX: GUIDE TO WTO LAW AND PRACTICE (2019), https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_e.htm ("The US Draft Charter of GATT 1947 contained a definition of state enterprise in the section on state trading: 'For the purposes of this Article, a State enterprise shall be understood to be any enterprise over whose operations a Member government exercises, directly or indirectly, a substantial measure of control.'").

[25] *Id.*

A clear definition of SE was deleted in GATT1947 at the Geneva Conference with the view that "such enterprises are defined as precisely as practicable in sub-paragraph 1(a)."[26] The article put SEs and any other firms with special privileges from governments in the same position, separate from private firms. Its Sub-Committee in Havana explained that "the term 'state enterprise' in the text of Article XVII did not require any special definition; it was the general understanding that the term includes [. . .] any agency of government that engages in purchasing or selling."[27] Although sub-paragraph 1(a) did not provide a definition of SE, sub-paragraph 1(b) shed some light on SEs' *specific activities*. It required the decisions of imports or exports by SEs to be guided by commercial considerations.[28]

From 1948 to 1994, GATT1947 provided the rules for much of world trade and saw increasing trade in both developed and emerging markets. The application of GATT1947 created several identifying factors of SEs during this period.

In 1959-1960, a WTO Panel was established to discuss the SEs and their subsidies. The Panel limited the scope of SEs in GATT1947 by re-emphasizing *authorization* of the government and adding *organizational function* as an element to evaluate SEs' market power. It wrote in its report that "the word 'enterprise' is not to mean any instrumentality of government. . .The term 'enterprise' was used to refer either to an instrumentality of government which has the power to buy or sell, or to a nongovernmental body with such power and to which the government has granted exclusive or special privileges."[29]

In 1964, the Committee on the Legal and Institutional Framework of GATT in Relation to Less-Developed Countries responded to a request to interpret Article XVII. The Committee agreed that GATT does not sanction discrimination against SEs differently from private corporations merely because they are publicly owned or endowed with certain public purposes, nor does it prevent a state from establishing or maintaining its SEs in its early stage of development to overcome difficulties.[30]

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[26] GATT Secretariat, *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment,* GATT Doc. E/P/CT/160 (Aug. 9, 1947).

[27] *Id.*

[28] GATT, Oct. 10, 1947, 55 U.N.T.S. 187, *provisionally entered into force on* Jan. 1, 1948, *superseded by* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14, 33 I.L.M. 1143, on Jan. 1, 1995.

[29] Panel on Subsidies and State Trading Report, *Final Report on State Trading*, WTO Doc. L/1146, (May 24, 1960).

[30] Committee on Legal and Institutional Framework of the GATT in Relation to Less-Developed Countries, WTO Doc. L/2281, (Oct. 28, 1964) (referring to Secretariat Note, *Proposed Chapter on Trade and Development – Comparative Provisions of Five Submissions*, WTO Doc. L/2147, (Feb. 24, 1964)). The proposal, made during the preliminary work on the drafting of Part IV of the General Agreement, was designed to ensure that "in interpreting the provisions contained in

The 1989 Panel on *Republic of Korea-U.S. (Restrictions on Imports of Beef)* denied government *control* as the sole determinant to identify SEs, while at the same time emphasizing their *specific activity*. The panel held the view that "the mere existence of producer-controlled import monopolies could not be considered as a separate import restriction inconsistent with the General Agreement." The panel noted, however, that "the activities of such enterprises had to conform to a number of rules contained in the General Agreement."[31]

The Uruguay Round of Negotiation established WTO and GATT1994, which inherited the rules concerning SEs in GATT1947 that emphasized their *specific activity*. The Uruguay negotiation also concluded many other agreements, including "Understanding on the Interpretation of Article XVII of GATT1994." This understanding provides a definition of "state trading enterprises" when determining whether an entity should follow GATT principles. It does not emphasize the *ownership* of SEs, but focuses on the *authorization* ("have been granted exclusive or special rights or privileges, including statutory or constitutional powers") and their *function* in the domestic market ("in the exercise of which they influence through their purchases or sales the level or direction of imports or exports").[32]

The combination of *specific activity*, *authorization*, and *function* in SE identification is followed by the WTO Appellate Body with respect to domestic diversity. In *Canada-Wheat Exports and Grain Imports*, the Appellate Body interpreted the purpose of Article XVII as keeping a balance between domestic regulation and international practice. According to the Appbellate Body, Article XVII respects state sovereignty in the domestic market on the one hand, recognizing that "members may establish or maintain state enterprises or grant exclusive or special privileges [comparing] to private enterprises"; on the other hand, this article identifies certain activities that should comply with the WTO principles and "be with commercial consideration."[33] The "commercial consideration" clause in the Article requires that the role of SEs in international

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Article XVII of the General Agreement, contracting parties should give sympathetic consideration to the need for developing contracting parties to make use of State-trading enterprises as one means of overcoming their difficulties in their early stages of development." *WTO Analytical Index: Guide to WTO Law and Practice*, WORLD TRADE. ORG., https://www.wto.org/english/res_e/publications_e/ai17_e/ai17_e.htm (last visited Feb. 4, 2019).

[31] Report of the Panel, *Republic of Korea*, ¶ 114-15, L/6503 (Nov. 7, 1989), GATT B.I.S.D. 36S/268 (1989).

[32] GATT 1994, *supra* note 23 ("Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.").

[33] Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WTO Doc. WT/DS276/AB/R (DS276), ¶ 85 (Sept. 27, 2004) [hereinafter *Canada-Wheat Exports and Grain Imports*].

trade shall be interpreted "on a case-by-case basis, and must involve careful analysis of the relevant market . . . as well as how those considerations influence the actions of participants."[34]

The evolution of rules concerning SEs in GATT shows that the identification of SEs has changed its determinant elements over time: while the early Anglo-American Negotiations mainly emphasized the *control* and *authorization* elements, the phrasing of GATT1947 implies examination of *specific activity* of SEs. Thereafter, with more diverse practice and increasing number of members, GATT1994 progressively developed a combination of *activity*, *authorization*, and *function* to regulate SEs, without much attention on their *ownership, control,* or *public purposes*.

B. SCM: Function + Authorization + Activities

Although SEs' trading activities are regulated under GATT Article XVII, they could still be the intermediaries of governmental subsidies due to their close relationship with governments. With this concern, states reformed the general rules on subsidies in GATT1947 in the Uruguay round of negotiations, and the result is an annex to the WTO package, the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

In Article 1 of the SCM Agreement, a subsidy exists if "there is a financial contribution by a government or any public body . . . where a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions . . .which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments."[35] This Article implies two conditions to identify whether an SE is a "public body": first, whether the SE in question carries out governmental *function*, and second, whether the SE's *activity* would typically be considered government behavior.

The two-prong test is further illustrated and developed by the Appellate Body in several trade disputes where SEs were accused of providing subsidies.[36] *US-Anti-Dumping and Countervailing Duties (China)* is a key case in that it comprehensively discusses the issue of whether Chinese state-owned commercial banks are a "public body" as identified in the SCM Agreement.

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[34] *Id.*

[35] Agreement on Subsidies and Countervailing Measures April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].

[36] These cases include but are not limited to: Secretariat Summary, *Canada – Dairy*, WTO Doc. WT/DS103/33 (May 2003); Secretariat Summary, *US–Anti-Dumping and Countervailing Duties (China)*, WTO Doc. WT/DS379/12/Add.7 (Aug. 21, 2012); Secretariat Summary, *US – Countervailing Measures (China)*, WTO Doc. WT/DS437/26 (June 27, 2018).

The U.S. analyzed the Chinese banks on a rule of majority *ownership* and *government control*, "principally based on the fact that the SEs are majority government-owned."[37] Comparatively, China defined a "public body" not based on ownership, but whether the entity "exercises *authority* vested in it by the government for the purpose of performing *functions* of a governmental character."[38]

The Panel interpreted the term "public body" in the SCM Agreement to mean "any entity *controlled* by a government."[39] The Panel further considered "government *ownership* to be highly relevant and potentially dispositive evidence of government control"[40] and, on that basis, upheld the U.S.'s argument that the Chinese state-owned banks constituted "public bodies" as identified in the SCM Agreement.

The Appellate Body then rejected the Panel's interpretation of the "public body." It found that the essence of government is derived "in part, from the *functions* performed by a government and, in part, from the government having *the powers and authority* to perform those functions."[41] By denying "ownership" and "control" as the determinants of "public body," the Appellate Body instead proposed a combination of "authority" and "function" to determine whether state-owned banks are "public bodies." In the following paragraphs, the Appellate Body reasoned in length about how to decide the function of SEs. The Appellate Body suggested that both "the functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member" and "the classification and functions of entities within all WTO Members generally" should be evaluated when answering the questions of what features are normally exhibited by public bodies.[42] Unlike GATT's approach that mainly focuses on the specific activity of the SE involved with a particular context of the SE's parent state, the test of SEs in the SCM cases considers a broader picture that includes both the specific context of the state involved, as well as the general practices of other WTO members.

The identification in the above case was reaffirmed in *US-CVD Hot-Rolled Carbon Steel Flat Products from India*. The Appellate Body held that *ownership* is merely one type of evidence that may be relevant when determining the public status of an SE in question, but the more vital determinants should be:

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[37] Panel Report, *Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc. WT/DS379/R ¶ 8.127 (Oct. 22, 2010) [hereinafter *US-Anti-Dumping and Countervailing Duties (China)*].

[38] *Id.* at ¶ 16.

[39] *Id.* at ¶ 8.94.

[40] *Id.* at ¶ 8.134.

[41] Appellate Body Report, *US-Anti-Dumping and Countervailing Duties (China),* WTO Doc. WT/DS379/AB/R, ¶ 290 (Mar. 11, 2011).

[42] *Id.* at ¶ 297.

whether the SE has governmental function, whether the SE has been vested with governmental authority, and the evidence of its specific activities.[43]

In short, to determine whether an SE constitutes a "public body," the SCM Agreement requires an analysis of the SE's *function* and *activity*, while the relevant case law examines the SE's *functions*, *activities*, as well as the *authorization* of its function. It is relatively consistent with the identification in GATT, yet with a broader consideration of general practices of the WTO members.

C. GATS: Function/Purpose + Ownership/Control + Activity

GATS is the general agreement that regulates trade in services. One of its annexes, the Annex on Financial Services, explicitly lists the elements to identify a "public entity" in the financial sector. According to this definition, if an SE in financial service "*owned or controlled* by the state" is principally engaged in *activities* that are "carrying out governmental *functions* or for governmental *purposes*," then such an SE can be treated as a "public entity" in financial services under GATS.[44]

Unlike the methods provided in GATT and the SCM Agreement, the test in GATS does not evaluate the "authorization process" to decide upon SEs' legal status. Instead, it adds "governmental purpose" and "state control" as variables in the identification process.

D. TPP as an Example of Regional Designs: Specific Activities + Ownership/Control

Facing the increasing presence of SEs globally and the geopolitical power they may represent, many states have growing concerns about state capitalism and have thus created new norms to change the existing global trade system. A recent important attempt that addresses the concerns of SEs is the Trans-Pacific Partnership (TPP), the first mega-regional Free Trade Agreement that has a stand-

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[43] Appellate Body Report, *Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WTO Doc. WT/DS436/AB/R ¶ 4.52 (Dec. 8, 2014) [hereinafter *US-Carbon Steel (India)*] ("[A] determination of whether a particular conduct is that of a public body 'must be made by evaluating the core features of the entity and its relationship to government' and 'must focus on evidence relevant to the question of whether the entity is vested with or exercises governmental authority.").

[44] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex on Financial Services 5 (c), 1869 U.N.T.S. 183 (1994) [hereinafter GATS] ("[A] government, a central bank or a monetary authority, of a Member, or an entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms . . . .").

alone chapter on the subject. It aims to regulate comprehensively the commercial activities of state-owned enterprises that compete with private companies in international trade and investment. TPP was initiated by the United States during Obama's presidency, but later abandoned by president Trump. Nevertheless, the agreement of TPP is inherited by The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) among other parties of the TPP and many post-TPP regional trade agreements adopt TPP-like identifications of SEs. TPP thus has a huge referential influence on future trade negotiations, at least providing a useful benchmark, blueprint, and reference.[45]

The TPP Chapter 17 contains a clear definition of SEs that describes three aspects of these entities. First, their *specific activities* are principally commercial in nature. Second, their majority shares are under state*ownership.* Third, a state percent can take *control of the entity* either through ownership interests or the power of personnel management.[46]

Other regional trade agreements, especially the ones involving TPP negotiating parties, adopt a similar approach. For example, the textual proposal by the European Union in Transatlantic Trade Investment Partnership (TTIP) with United States defines SEs as any enterprise "involved in a commercial activity," and influenced by states by ownership, votes attached to the ownership, or managerial control.[47] Also in USMCA, United States-Mexico-Canada Agreement, "state enterprise" is defined as an enterprise owned or controlled by a member state and principally engaged in commercial activities.[48]

Scholars consider the SE chapter in the TPP a significant shift from the WTO approach.[49] This observation is true in that the TPP includes *ownership* and *control* as determinants in SE identification whereas the WTO system places more emphasis on *function* and *authorization* of the government.[50] Also, the

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[45] *See generally* Minwoo Kim, *Regulating the Visible Hands: Development of Rules on State-Owned Enterprises in Trade Agreements Note*, 58 HARV. INT'L. L.J. 225 (2017).

[46] *TPP Full Text*, OFFICE OF THE U.S. TRADE REP., https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text (last visited Feb. 25, 2019).

[47] Possible Provisions on State Enterprises and Enterprises Granted Special or Exclusive Rights or Privileges, EU- U.S., Jan. 7, 2015, http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153030.pdf.

[48] United States-Mexico-Canada Agreement, Can.-Mex.-U.S., art. I, § 4, pg. 1–5, art. 22, § 1, pg. 22–23, Nov. 30, 2018, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement.

[49] *See, e.g.*, Kim, *supra* note 45.

[50] With that said, although TPP does not include examinations on *governmental authorization* or *organizational purposes* in SE's definition, it does allow its party members to carve out some entities that might fall within the scope. In other words, governments can still authorize ex ante what entities should not be treated as SEs when they join the TPP. Annex IV to the TPP includes extensive carve-outs for a sub-set of parties, which include almost all of the negotiating states. Moreover, TPP's interpretation of "commercial activities" and "commercial consideration"

elements in TPP's definition of SEs are not necessarily accumulative with the aim to expand its application to foreign SEs doing business in the member states; on the contrary, the WTO avoids overreaching the scope of SEs and treating all the SEs the same. Moreover, SEs that act commercially will be held as non-private firms under the TPP and will be regulated differently, while under the WTO rules they would be treated the same as private actors. Thus, in this sense, TPP's definition of SEs dramatically changes the identifications in the WTO. In short, the rules in the WTO system imply examinations on an SE's *specific activity*, whether it has governmental *authorization*, and whether it exercises governmental *function* for SE identifications. While these rules are quite consistently applied, they are not absolute. Some WTO members form regional agreements to better serve their domestic goals. TPP and more recent mega treaties focuses on the SE identification subject, creates another set of criteria that pays more attention on the *ownership* and *control* elements of SEs to identify their status.

III. INTERNATIONAL INVESTMENT LAW

The tests in international investment law concerning SEs' identities are even more diverse, due to a lack of a central legal institution in this area. Unlike international trade law, which has the WTO at its center, international investment law consists of thousands of bilateral and regional investment agreements, and has not yet formed a centralized judiciary body similar to the Dispute Settlement Body in the WTO. Nonetheless, there are key documents in international investment law that attempt to generate an international consensus on how to clarify SEs' identities. Among the most important ones are the ICSID Convention that deals with investment disputes and the Santiago Principles which provide guidance for sovereign wealth funds and their financial investment.

A. International Investment Agreements

The main body of international investment law is International Investment Agreements (IIAs). The majority of IIAs, however, does not specifically include identification clauses of SEs. Among a total of 1813 IIAs surveyed by OECD in 2015,[51] 1524 of them (84%) do not explicitly mention either type of SEs.[52] This means that the majority of the IIAs do not differentiate

involves an examination of the *purpose* of the SE's business decisions and its de facto effects in the relevant markets. *See TPP Full Text*, *supra* note 46, at Ch. 17.1.

[51] The surveyed 1,813 treaties were concluded by 46 countries (34 OECD members, 5 OECD key partners, and 7 other countries) regardless of whether the treaties are in force or not. The survey covers states that are major markets of international investment. *See* SHIMA, *supra* note 15, at 10.

[52] *Id.* at 11.

SEs from private investors, let alone regulate them seperately. However, more recent IIAs tend to contain specific references to SEs, concerning their expanding investment and increasing importance during and after the 2008 crisis.[53]

Among the IIAs that explicitly mention SEs,[54] the majority defines SEs based on their public *ownership* or government *control,* as "governmentally owned" or "governmentally owned or controlled" entities. Expressions such as "public institutions," "state corporations and agencies," "governmental institutions" are also used. The second group of IIAs places more weight on the nature of *specific activities* rather than state ownership or control. The Multilateral Investment Guarantee Agency Convention, for example, clearly treats SEs equally as private investors if it operates on a commercial basis," regardless of "whether or not it is privately owned."[55] The third group of IIAs, although in a small number, explicitly provides that public states can be qualified as "investors" under the agreement and their investments will be protected.[56] These IIAs do not differentiate ownership at all.

A brief glace at IIAs shows that these bilateral or regional treaties do not usually contain specific identification clauses of SEs, suggesting that most states do not differentiate SEs from private firms. IIAs that have special rules governing SEs' investment still lack an unified idenfitication of these entities.

B. Investment Dispute and the ICSID Convention

The distinction of public states and private corporations is especially important for the International Center for Settlement of Investments Disputes (ICSID), which originated to protect private investment.[57] The identification issue raises legal challenges to the investment dispute resolution mechanisms, which differentiate between private companies and public states.

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[53] *Id.* at 12.

[54] 287 of the 1,813 IIAs surveyed specify that SEs are covered investments and three specify that SEs are not covered investments in the IIAs. Those three are the Panama–Germany BIT (1983), the Panama–Switzerland BIT (1983) and the Panama–United Kingdom BIT (1983). *Id.* at 12–13.

[55] Convention Establishing the Multilateral Investment Guarantee Agency art. 13(a)(iii), Oct. 11, 1985, 27 I.L.M. 1228 [hereinafter MIGA Convention].

[56] "This approach has clearly been taken in agreements involving countries where the government itself often plays a direct role as an international investor, such as Kuwait, Qatar, United Arab Emirates (UAE), and Saudi Arabia." SHIMA, *supra* note 15, at 13–14.

[57] The International Centre for Settlement of Investment Disputes [hereinafter ICSID] was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. It was established as part of the World Bank Group after World War II in promoting the settlement of investment disputes between state members and foreign investors. *See* ANTONIO R. PARRA, THE HISTORY OF ICSID 1 (Vicky Putnam et al. eds., 2012). *See also* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 1–7 (Oxford Univ. Press, 2d ed. 2012).

Article 25 of the ICSID Convention lays down the general guideline for a case that can be filed with the ICSID for dispute resolution: the respondent of a dispute must be "a Contracting State" and the claimant "a national of another Contracting State."[58] Since SEs have characteristics of both public states and private corporations, their roles can potentially be identified as either claimants or respondents. When SEs take on different roles in the arbitration, the ICSID Convention establishes two different tests to identify their lawsuit qualifications.

1. SEs as Potential Respondents/State Agents: Authorization + Specific Activity

SEs that behave on behalf of states and illegally take investment of foreign investors may be respondents in the ICSID proceedings, which gives foreign investors access to seek remedies. Yet, the text in Article 25(1) of the ICSID Convention imposes two restrictions against treating all SEs alike as agents of their parent governments.

Firstly, only SEs that are designated by the states can be regarded as their agents. The parenthetical sentenceparentheses in Article 25 explicitly demands examination on the "*authorization* of state," to keep the gate of the ICSID open, yet not too wide.

Secondly, the drafting history of the ICSID Convention, traveaux preparatoire*,* implies a distinction between different types of SEs according to their *specific activities*. During the early drafting of the Convention, some state representatives suggested that investors cannot bring an SE to the ICSID proceedings by arguing that the SE is an alter ego of the state due to its public ownership or governmental authorization. The state representatives eventually agreed that the claimant needs to further prove that the SE in question is acting according to the allocated authority in the dispute.[59] The traveaux implies that a tribunal needs to examine the alleged conduct of the SE in question and its authorization from the parent state on a case-by-case basis, to decide whether the SE is an agent of the government.

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[58] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25, Mar. 18, 1965, 17 U.S.T. 1270 [hereinafter ICSID Convention] ("The jurisdiction of the Centre 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.").

[59] WORLD BANK GRP., HISTORY OF THE ICSID CONVENTION 858 (1968).

2. SEs as Potential Claimants/Investors: Function + Activity

While the elements to idenfity SEs as their parent states are clear-cut in the ICSID Convention, the elements to identify SEs as investors or claimants are not mentioned. In 1972, then Secretary of the ICSID Mr. Broches attempted to fill this gap. His suggestions have been well received by many scholars and arbitrators as the best guidelines to determine whether an SE can be regarded as "a national" or "an investor" in a dispute.[60]

This so-called "Broches Test" does not emphasize distinctions between ownership of investors. Instead, it recognizes the separation between the SEs and their shareholder states, treating SEs, and other investors alike by default. Except when an SE "is acting as an agent for the governmental or is discharging an essentially governmental function."[61] In addition to the inquiry of *functions*, the Broches Test implicitly suggested an analysis of *activities* in the specific context. It used the words in the present continuous tense (e.g."is acting," "is discharging") rather than the simple present (e.g. "acts," "discharges") or the simple past tense (e.g "acted," "discharged"). The subtle difference between the tenses suggests that the analyzed activities should be limited to the disputing case and not unrelated to previous or general activities. That is to say, whether an SE has been previously or generally serving public functions shall not be the main concern of their legal identity; the key issue is whether their specific activities in the dispute bear governmental functions.

The above interpretation of the Broches Test, the combination of *function* and *activity* elements in SEs' identification, did not emerge from nothing. Rather, it is well supported by Broches himself. He frowned upon a clear distinction between different types of ownership: "[I]n today's world the classical distinction between private and public investment, based on the source of the capital, is no longer meaningful, if not outdated."[62] He thinks both types of investment may have commercial goals and can act the same: "[t]here are many companies which combine capital from private and governmental sources and corporations all of whose shares are owned by the government, but who are practically indistinguishable from the completely privately owned enterprise both in their legal characteristics and in their activities."[63] Thus, it is clear that the Broches

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[60] *See* CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 160 (Cambridge Univ. Press, 2d ed. 2009).

[61] Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, *in* 136 Recueil des Cours 354, 355 (Academie de Droit International de la Ha, 1972) ("It would seem . . . that for purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function.").

[62] SCHREUER, *supra* note 60, at 161.

[63] Broches, *supra* note 61.

Test proposes examination of the function and specific activities of SEs, without emphasizing their ownership.

C. Financial Investment and Santiago Principles of Sovereign Wealth Funds: Ownership + Activity + Purpose

Sovereign wealth funds (SWFs) are state-owned special-purpose investment funds or arrangements.[64] They invest in another country's monetary and financial system to acquire financial assets, such as stocks, bonds, etc., which are usually regulated separately from direct investment aimed at acquiring companies or a fixed asset.[65] Due to the special characteristics of SWFs, the International Monetary Fund initiated a working group of 26 member countries in 2007 and coordinated a set of principles that guide the practices of the SWFs called the "Santiago Principles." The identifying characteristics of SWFs in the Santiago Principles are a mixture of "public ownership," "nature of activity" and "domestic purposes."

The first identifying element is *ownership*. Santiago Principles identifies SWFs as funds owned by the government, including both the central government and subnational governments. The concept of "ownership" is interpreted quite flexibly in the clauses, and involves all "legal arrangement through which the assets can be invested" and may "vary in their institutional arrangements" or "differ depending on their individual circumstances."[66]

Specific activity is the second element that is used to define an SWF, in that its activities should include "investment in foreign financial assets." The key articles in Santiago Principles require SWFs to establish good corporate governance and increase accountability, with much attention given to their conduct of investment and risk management.[67]

Thirdly, Santiago Principles in particular recognize the importance of domestic *purpose* of SWFs when determining their legal identity. SWFs are defined as entities "for macroeconomic purposes" and seek "to achieve financial objectives."[68] However, even if the purposes of the entity involve something other than economic or financial considerations, the entity can still be defined as an SWF under Santiago Principles. This is allowed so long as these non-economic goals are "clearly and publicly disclosed."[69]

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[64] INT'L FORUM OF SOVEREIGN WEALTH FUNDS, SOVEREIGN WEALTH FUNDS: GENERALLY ACCEPTED PRINCIPLES AND PRACTICES: "SANTIAGO PRINCIPLES" 3 (2008), https://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf [hereinafter "GAPP" or "Santiago Principles"].

[65] *See generally id*. at 3–4, 27.

[66] *Id.* at n.41.

[67] *Id.* at 5.

[68] *Id.* at app. I.

[69] The explanation of this principle provides that: "SWFs may exclude certain investments for various reasons, including legally binding international sanctions and social, ethical, or religious

Although these three elements, *ownership*, *activity*, and *purpose*, are accumulative to define SEs under Santiago Principles, the element of activity plays a larger role than the others. The Santiago Principles do not regard SWFs as public states or governmental agencies merely because they are publicly owned or endowed with certain public purposes that fall outside of economic or financial considerations. Instead, it places more emphasis on the activities of SWFs and requires them to be transparent and accountable.

The above observations of international investment law reveal an extremely diverse landscape of legal definitions of SEs in this area. While most IIAs that explicitly mention SEs define these entities according to their *ownership* or *control*, the ICSID Convention includes SEs as investors by analyzing their *function*, *authority* and *specific activity*. Alternatively, the Santiago Principles emphasize the elements of *ownership*, *activity* and *purpose*. More problematicaly, many existing investment treaties leave the identification of SEs as an open issue.

IV. THE LANDSCAPE OF CUSTOMARY INTERNATIONAL LAW

When the special rules leave the identification issue of SEs open, the general rules of international law step in to play an important role. The most cited rules governing the relationship between the states and SEs include the International Law Commission's Draft Articles on Responsibility of State for Internationally Wrongful Acts, and The United Nations Convention on Jurisdictional Immunities of States and Their Property.

A. The International Law Commission's Draft Articles

The International Law Commission's Draft Articles on Responsibility of State for Internationally Wrongful Acts (the ILC Articles), were published in 2001 after decades of discussion. They are widely considered a codification of customary international law, the peremptory norms, and obligations of states in the international community.[70] The ILC Articles establish the fundamental principle of "objective responsibility of states"[71] in Article 2. It specifies that only under international law certain activities of non-state actors can be attributed to

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reasons. More broadly, some SWFs may address social, environmental, or other factors in their investment policy. If so, these reasons and factors should be publicly disclosed." *Id.* at 22.

[70] In 1948, the United Nation General Assembly established the International Law Commission [hereinafter ILC], as a step towards fulfilling the UN Charter mandate of "encouraging the progressive development of international law and its codification." ILC established several work programs and selected fourteen topics, including state responsibility. The preparation for the ILC Articles started in 1956, yet it took 40 years for the first draft to finally be released in 1996.

[71] JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES, 12 (United Nations & Crawford eds., 2002).

the state and trigger state responsibilities.[72] The *activity* element is fundamental when determining the relationship between states and non-state actors. This is accompanied by supplement elements in Article 5 and Article 8, which are the most relevant rules to identify SEs.

1. Default Element: Specific Activity

Article 2 of the ILC Articles establishes the principle of objective responsibility. This principle dictates that states will take responsibilities for non-state actors, including SEs, only when their conduct was attributable was attributable to the state.[73] There is no distinct or separate requirement of fault or *purpose* of non-state actors.[74] The identification gives priority to the element of *activities* for two considerations. The first is to limit responsibility for objective conducts which engage the states as sovereign organizations." The second is "to recognize the autonomy of persons or entities acting on their account and not at the instigation of a public authority."[75] The other approach, in which conducts of any persons, entities, corporations or collectivities linked to a state could be attributed to the state," is explicitly avoided in international law.[76] This article identifies non-state actors, SEs included, according to their specific activities.

The drafting history of this article also implies that the *function* element does not weigh much in the identification of SEs as it explains that "the structure of a state and the functions of its organs are not, in general, governed by international law."[77] If a state chooses to separate the legal identities of its corporations from the government in its domestic law, international law will recognize such a separation.[78] In other words, international law respects a state's sovereignty and leaves it to the states to decide how their SEs are to be structured and what functions are to be assumed by the government.

Note, however, that the *specific activity* is not the only element that determines the relationship between SEs and states. The downside of such an approach is that a state might avoid its international responsibilities through a simple process of internal sub-division. For instance, a state can create legally independent SEs, order them to implement governmental schemes, and allege that whatever these entities do has no connection with the government.

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72 *Id.* at 91–93.
73 *Id.* at 4.
74 *Id.* at 12. Article 2 also notes that certain international rules may require examination of the purpose of non-state actors' activities. *Id.*
75 *Id.* at 91.
76 *Id*.
77 *Id.* at 92.
78 *Id.*

To address this potential abuse, the ILC Articles further include, in Chapter II, a list of conditions under which specific conduct of a non-state party can be attributed to the State. This somewhat limited and exclusive list[79] of activities aims to strike a balance. On the one hand, states should enjoy the freedom to maintain SEs as policy tools under domestic laws. On the other hand, states should not be allowed to circumvent international obligations by deploying SEs as fig leaves of their illegal behaviors under the international law. The most relevant articles concerning the identification of SEs are Articles 5 and 8. Each includes different elements.

2. Article 5: Specific Activity + Authorization + Function

Article 5 in Chapter II deals with the situation where specific activities of SEs are of governmental authority. For example, a state might delegate certain governmental functions to its airline companies on immigration control, custom, and quarantine, and oil companies may need to reserve certain portion of an oil field for military purposes. In those situations, "the conduct of a person or entity . . .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."[80]

According to the identification in Article 5, an SE will be regarded as a public body only when the following three conditions are met. First, the SE is "to exercise elements of the governmental authority," or public function that are typically enjoyed by the organs of that particular state.[81] Second, the SE in question can exercise such public function for it is empowered by the law of that State. Third, the SE in reality "is acting in that capacity in the particular instance," which means that the specific activities of the SE involved in a dispute must relate to the exercise of the governmental authority concerned. These three legal elements, "*authorization*," "*organizational function*," and "*specific activity*," are accumulative as provided in Article 5. This does not inquire examination on "*ownership*," "*control*," or the "*purposes*" of SEs.

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[79] *Id.* at 93.

[80] Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 42 (2001).

[81] Article 5 does not attempt to establish a precise definition of "governmental authority." Its commentaries suggest that what is included as governmental authority depends on a particular society's history and traditions. *See* CRAWFORD, *supra* note 71, at 101.

3. Article 8: Specific Activity + Authorization/Control

Besides *activities*, Article 8 of the ILC Articles establishes two other identifications of SEs that focus on explicit *authorization* and implicit *control* respectively. The conduct of an SE will be considered an act of the parent state "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."[82]

The two identifications as provided in this article are designed for two different situations. In the first, SEs act on the explicit "instruction of the state" in carrying out wrongful conduct. Scholars suggest that the examination on the "instruction" requires a demonstration of the existence of a real link between SEs' performance of the act and the state's *authorization*.[83] This is because the agent, while carrying out authorized instructions or directions, an SE may engage in some activities which fall outside its authorization. To resolve this agent-principal problem, each case shall depend on its own facts. In particular the relationship between the governmental instructions imposed on SEs and the SEs' specific conduct complained of in the dispute,[84] and inquiry on whether the alleged wrongful conducts of the SE were really necessary to the authorized task or if the conduct was excessive in scope.[85]

In the second situation, the relationship between the entity and the state is much more implicit. The interpretation of "*control*" has attracted much discussion with respect to conduct of state-owned companies. It is indisputable that a majority of ownership, 50 percent plus 1 share, is control. However, scholars disagree on the meaning of control when public ownership is below fifty percent.[86] The existing international law cases that involve SEs have denied ownership as the only determinant of control since "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 to the State. . ." [87] Thus the inquiry of control is left open for case-by-case analyses.

In sum, the identifications in the ILC Articles, read in light of its drafting history, attached commentaries, and the well-accepted interpretations, do not merely take a quick glance at domestic motivations and ownership sturctures of

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[82] Int'l Law Comm'n, *supra* note 80, at 47.
[83] CRAWFORD, *supra* note 71, at 110.
[84] *Id.* at 113.
[85] *Id.*
[86] *Id.* at 112; *see* Blyschak, *supra* note 18; Hamida, *supra* note 18; *see also* Sonia Yeashou Chen, *Positioning Sovereign Wealth Funds as Claimants in Investor-State Arbitration*, 6 CONTEMP. ASIA ARB. J. 299, 316–17 (2013).
[87] CRAWFORD, *supra* note 71, at 112; *see, e.g.*, Eastman Kodak Co. v. Islamic Republic of Iran, 17 Iran-U.S.C.T.R. 153 (1987); Otis Elevator Co. v. Islamic Republic of Iran, 14 Iran-U.S.C.T.R. 283 (1987); Schering Corp. v. Islamic Republic of Iran, 5 Iran-U.S.C.T.R. 361 (1984).

SEs when determining their international legal status. Instead, they highlight the nature of specific activity in a particular context as the default element, with supplementary examinations on *authorization* and *function* elements in Article 5, and *authorization* or *control* in Article 8.

B. United Nations Convention on Jurisdictional Immunities of States and Their Property: Specific Activity (As Fundamental) + Purpose (As Exception)

Compared with the ILC Articles, United Nations Convention on Jurisdictional Immunities of States and Their Property (the UN Convention) is a more recent rule concerning the identity issue of SEs. It is adopted by the General Assembly of the United Nations on December 2nd, 2004. It is considered a codification of the "restrictive theory of [foreign state] immunity,"[88] which changes the traditional doctrine that one state is not subject to either the force of rules applicable or the jurisdiction of a national court in another state. Yet, as states become more involved in commercial activities, e.g. establishing SEs and doing business globally, many jurisdictions have started to apply the restrictive theory of the traditional doctrine. Under this restrictive approach, when foreign states are involved in transnational business, local courts continue to recognize the immunity for foreign sovereign acts, but deny immunity for foreign commercial acts.

The shift from the traditional doctrine to the restrictive theory of state immunity led to Article 10 of the Convention, which focuses on *specific activities* of SEs when determining their roles in international civil cases.[89] Two different categories of SEs' acts are differentiated under this article and they have distinct legal status: if an SE conducts an act that is of an inherently sovereign characteristic (*acta jure imperii),* it can be immunized and the SE in this category enjoys the same immunity as its parent state; comparatively, the commercial transactions performed by SEs (*acta jure gestionis*) are not protected by state

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[88] David Gaukrodger, *Foreign State Immunity and Foreign Government Controlled Investors* (Org. Econ. Co-Operation & Dev., Working Paper No. 2010/02, 2010).

[89] U.N. Convention on Jurisdictional Immunities of States and Their Property, U.N. Doc. A/RES/59/38, at 5 (Dec. 2, 2004).

Article 10 Commercial transactions . . .

> 3. Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of:
>
> (a) suing or being sued; and
>
> (b) acquiring, owning or possessing and disposing of property, including property which that State has authorized it to operate or manage, is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected.

immunity under the Convention. An SE that falls into the latter category is thus considered a private firm, not a public body. In other words, whether or not the activities of an SE are commercial transactions will determine the status of the SE in a foreign jurisdiction.

But what are "commercial transactions"? This question has been intensely debated during the drafting of Article 2.2 of the Convention, which specifies its definition.[90] The debate was between two camps: one camp proposed "the purpose of the transaction" as the determinant, while the other gave priority to "the nature of the conduct."[91] Eventually, Article 2.2 included both elements in its definition, but does not place them on equal footing. It explicitly expresses that the reference should be made "primarily to the nature of the contract or transaction."[92] The purpose of the transaction can be considered only under certain conditions, where the parties to the transaction have agreed so, or the examination on the purpose is mandatory according to the court with competent jurisdiction. Under the Article 2's definition, the *nature of specific activity* is the fundamental determinant to identify SEs' legal status, while the *purpose of the transaction* is an exception.

The impact of the UN Convention is difficult to determine since it is not yet in force. Additionally, state immunity continues to be an unsettled area of law because it depends largely on how a particular state treats other states and their enterprises. Nevertheless, the convention presents an internationally recognized approach to identify SEs and has become an indispensable part of customary international law, which emphasizes the *specific activity* of SEs in their legal identifications with considerations on one or more additional other aspects, including *state control*, *authorization*, *function*, or *purposes*.

C. A Clash of Identities Due to a Clash of Legal Identifications

By applying the six-element framework to the rules concerning SEs' dubious legal status in international trade, investment, and customary

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[90] THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY: A COMMENTARY I, art. 2.2 (Roger O'Keefe, Christian J. Tams, & Antonios Tzanakopoulos eds., 2013).

[91] *Id.*

[92] *Id.* at 2–3.

Article 2 Use of Terms . . .

> 2. In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.

international laws, we now get a table that compares and summarizes the identifications of SEs according to these six-elements:

		Ownership	Control	Authorization	Organization Purpose	Actual Function	Specific Activity
Trade Law	GATT1994			√		√	√
	SCM			√		√	√
	GATS	√	√		√	√	√
	TPP/CPTPP	√	√				√
Investment Law	IIAs (if mentioned SEs)	Majority	Majority				Some
	ICSID-Respondent			√			√
	ICSID-Claimant					√	√
	Santiago Principles	√			√		√
Customary Inl. Law	ILC Article 5			√		√	√
	ILC Article 8		√	√			√
	UN Convention on Jurisdictional Immunities				Exception		√

The most significant observation of this table is the conflicting identifications that international legal institutions have developed concerning SEs legal status. This conflict is caused by "mix-and-match" law-makings where different international institutions pick different elements to create their own definitions of SEs. The risk of the mix-and-match law-makings is systematic, in the sense that each international law body, in its own endeavor to clarify the complexity of SEs' legal identity without proper coordination, ironically creates more chaos and confusion about these entities in the system. An SE may be treated as a public body under one set of rules while regarded as a private market player under another. It is neither predictable, nor consistent.

Interestingly though, this table also reveals that some elements are more popular than others. This descriptive table provides valuable references for future law-makers, as well as international judges and arbitrators when they need to clarify SEs' legal personae. It also sheds light on the current debate between the U.S. and China about the role of governments in the market and possible reforms in the WTO.

V. FROM A CLASH TO A FUTURE CONSENSUS

The current trade war between the U.S and China shows a deep divide between the two ideologies concerning the identification of SEs and role of government in the market. This part will first summarize the gap between the two

trade giants in the WTO and clarify the divergences under the six-element framework. It will then discuss the possibility of a future consensus in the context of domestic policy changes in the two countries concerning SEs global practice.

A. The Current US-China Debate in the WTO

The U.S. and China have very different perspectives concerning SEs' roles in international trade. The trade ambassador of the U.S. in the WTO publicly claimed during a recent WTO meeting that Chinese SEs should be treated as "public bodies" for three main reasons.

First, the U.S. trade ambassador argues that Chinese SEs are *controlled* by the Chinese government. He alleges the government and the Communist Party exercise control through the appointment of key executives and the provision of preferential access to land, energy, and capita as well as other important inputs, among other means.[93] The control perspective, as he implies, should be the major determinant to define "public bodies" under the WTO law.

Second, the U.S. trade ambassador criticizes that the *general purposes* of Chinese SEs are not market-oriented. He claims that "since joining the WTO, China has repeatedly signaled that it is pursuing economic reform . . . Unfortunately, China's use of the term 'reform' differs from the type of reform that a country would be pursuing if it were embracing market-oriented principles. For China, economic reform means perfecting the government's and the [Communist] Party's management of the economy and strengthening the state sector, particularly state-owned enterprises."[94] His rationale is that since Chinese government and the party ultimately aims at promoting the ability of state management and strengthening public sector for economic development, the purpose of Chinese SEs cannot be market-oriented, regardless of the fact that market-oriented principles are publicly established and repeatedly emphasized in China's economic reform.

The U.S. trade ambassador's third argument asserts that Chinese SEs could not *act* independently in a party-lead-all environment. In his view, Chinese SEs cannot do business without maintaining a good-terms relationship with the government/party, and thus their acts cannot be completely commercial or independent. For example, he asserts that China's judicial system treats law as an instrument of the state because it is used to facilitate the government's industrial policy goals and to secure discrete economic outcomes. He thereby denies the possibility of enterprises to act independently of approved industrial policies on a

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[93] China's Trade-Disruptive Economic Model, *Communication From the United States*, WTO Doc. WT/GC/W/745, at 3 (July 11, 2018).

[94] *Id.* at 8. Similarly, Robert Lighthizer, the United States Trade Representative (USTR) claims that, "when WTO negotiations agreed that China should join in 2001, they expected it to evolve towards Western-style capitalism." *See* Editorial, *Trade Blockage*, *supra* note 1, at 16.

systemic or consistent basis.[95] Accordingly, the U.S. trade ambassador believes that the U.S. has good reasons to treat Chinese SEs as "public bodies" in the WTO and therefore, as targets for defensive trade duties on their exports.

On the other side of the debate, China denies the above allegations, though from a slightly different perspective. China's trade ambassador contends that Chinese SEs have been independent market entities that have their decision-making power over their operation and management as explicitly defined in Chinese constitution[96] since 1993. Moreover, he states these practices and policies have remained unchanged since then. In his view, Chinese SEs are not *authorized* to perform governmental *functions* under the PRC's Constitution. He further points out that the U.S.' denial of SEs' independence in their management *activities* is not supported and, "failed to provide evidence to prove that the government intervenes in the normal operations of the enterprises." The Chinese trade ambassador is embittered by the U.S.' rationale behind treating Chinese SOEs as public bodies in the WTO.[97]

As a matter of fact, one major change of the 1993 Amendments to the PRC's Constitution is the removal of the article that requires SEs to obey the governments' economic plans and guidance.[98] Despite this, the U.S. trade representative insists that "so long as enterprises are controlled by the government, they assume and perform parts of government functions" and, therefore, should be deemed as "public bodies" and undertake obligations in the WTO agreements.[99]

The current debate between the U.S and China is partly due to the legal problem discussed in this paper: the WTO members have formed two very different identification methods concerning SEs' legal status.[100] On the one side, the U.S. selects *ownership*, *control,* and *purpose* elements as determinants; while on the other side, China picks *authority*, *function,* and *specific activities*. The U.S. emphasizes the general characteristics of the institution in the domestic eco-political environment whereas China suggests ad hoc analyses of power-designation in specific activities of these entities, regardless of domestic political context. Simply, one side asks, "who are they?," and the other focuses on, "what are they doing?"

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[95] China's Trade-Disruptive Economic Model, *supra* note 93, at 6.

[96] XIANFA art. 16 [CONSTITUTION] (1993) (China).

[97] Tom Miles, *U.S. and China Clash at WTO Over Ideology, State's Role*, BUS. NEWS (July 26, 2018), https://www.reuters.com/article/us-usa-trade-wto/u-s-and-china-clash-at-wto-over-ideology-states-role-idUSKBN1KG22G.

[98] XIANFA art. 8 (1993) (China).

[99] WORLD TRADE ORG., GENERAL COUNCIL: MEETING OF JULY 26 PROPOSED AGENDA (2018), https://www.wto.org/english/thewto_e/gcounc_e/meet_jul18_e.htm.

[100] Appellant Submission of China, *US-Anti-Dumping and Countervailing Duties (China) (DS379)*, ¶ 16; Panel Report, *US-Anti-Dumping and Countervailing Duties (China) (DS379)*, ¶ 8.127.

The identity problem has appeared in several WTO cases involving SEs, including *United States-Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*,[101] *US-AD&CVD (China)*,[102] and *Canada–Renewable Energy/Canada–Feed-In Tariff Program*[103] Scholars have found that different identifications of SEs are adopted by the Panel or supported by different party members in these trade disputes.[104]

The clash of identifications of SEs not only confuses states, but may eventually jeopardize the WTO itself. In *US-AD&CVD (China)*, where the two trade giants had an open fight over the issue, the Panel adopted the U.S. approach yet the Appellate Body, the system's Supreme Court, endorsed China's interpretation of "public body." This outcome has generated huge disappointment and dissatisfaction in the U.S. Moreover, it has progressively turned into one major excuse for President Trump to exit the WTO and to refuse approving new judges on the Appellate Body.[105] As vacancies are arising on the Appellate Body, there will be fewer judges than the minimum required to hear a case in late 2019.[106] The clash of SEs' identifications, in this sense, needs to be moderated quickly and jointly by WTO members, or more generally, by international society, if the rules-based international order is to survive.

The next two parts will turn to examine the current domestic efforts in the U.S and China concerning the SEs practices. By applying the six-element analytical framework to the domestic reforms respectively, we can get a better sense of the legal implications of these policy changes, and where are the gaps for a future consensus.

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[101] Appellate Body Report, *United States - Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, WTO Doc. WT/DS296/AB/R (adopted Jul. 20, 2005).

[102] Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products From China*, WTO Doc. WT/DS379/AB/R (adopted Mar. 11, 2011).

[103] Appellate Body Report, *Canada – Certain Measures Affecting the Renewable Energy Generation* Sector, WTO Doc. WT/DS412 /AB/R (adopted May 6, 2013); Appellate Body Report, *Canada – Measures Relating to the Feed-In Tariff*, WTO Doc. WT/DS426 /AB/R (adopted May 6, 2013).

[104] *See* Ding, *supra* note 14, at 167. Ding's article categorizes three approaches in WTO, i.e. "control approach," "function approach," and "authority approach." *See* Zheng, supra note 14, at 243–92. The author summarizes four tests appeared in the WTO case law, and name them as "ownership-based," "control-based," "function-based," and "role-based" test. *See also* Yueh-Ping Yang & Pin-Hsien Lee, *State Capitalism, State-Owned Banks, and WTO's Subsidy Regime: Proposing an Institution Theory*, 54 STAN. J. INT'L. L. 117–58 (2018). Their article summarizes two versions of SEs definition, i.e. the "control version" and the "function version." The writers agree with the recognition of the legal elements of SEs in the WTO. However, they disagree that each rule/case represents only one certain type of test/approach. As this article illustrated in Part II, each rule/case actually involves several elements.

[105] *See* Editorial, *Trade Blockage*, *supra* note 1.

[106] *Id.* at 16.

B. US's Reform in FIRRMA: Expanding Identifications

In mid-2017, U.S Senator John Cornyn sponsored a legislative amendment to section 721 of the Defense Production Act of 1950, the old national security law.[107] The amendment, called Foreign Investment Risk Review Modernization Act (FIRRMA 2017), was proposed after the passage of the Foreign Investment and National Security Act of 2007.[108] This amendment aims at improving the US national security review system, especially the administrative power of the President and Committee on Foreign Investment in the United States (CFIUS), to counter national security threats posed by foreign-government investment. In August 2018, the proposed amendment gained bipartisan support in the Senate and the House and was soon signed by the President on August 13 as FIRRMA 2018.[109] FIRRMA 2018 significantly expands the criteria of SEs' identification as illustrated below so that the CFIUS can extend its jurisdiction over SEs' investment to the U.S.

According to the new amendment, the national security investigation is mainly based on the analysis of *control* of the foreign investor. In this context "control of a foreign investor" is not limited to foreign SEs that are controlled by foreign governments. This also includes non-SEs whose investment will result in a controlling *position* in the U.S. market, whether or not in the interstate commerce.[110] The definition of "control" requires an analysis of *power,*[111] but the definition of "foreign government-controlled transaction" implies another examination on the *authority*.[112] Although FIRRMA 2018 provides a definition of "control" for the first time in this law, its identification remains wide and vague.

Next, FIRRMA 2018 mandates that transaction parties must report to the CFIUS any "covered transaction" where a foreign government has a "substantial

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[107] *See* Foreign Investment Risk Review Modernization Act of 2017, H.R. 4311, 115th Cong. (1st Sess. 2017) [hereinafter FIRRMA 2017].

[108] *Id.*

[109] *See* Foreign Investment Risk Review Modernization Act of 2018, S. 2098, 115th Cong. (2d Sess. 2018) [hereinafter FIRRMA 2018].

[110] Under the old rule, CFIUS reviews three types of transactions in interstate commerce, including but not limited to "foreign government-controlled transaction" and transactions that "would result in control of any critical infrastructure of or within the United States by or on behalf of any foreign person." FIRRMA 2018 stretches the rule's scope by deleting the "interstate commerce" requirement. It also provides a more complete list and empowers CFIUS to define its jurisdiction. *See id.* at Sec. 3.

[111] *Id.* at Sec. 3(3) ("Control. ―The Term 'control' means the power to determine, direct, or decide important matters affecting an entity . . . .").

[112] *Id.* at Sec. 3(9) ("Foreign Government-Controlled Transaction. ― The term 'foreign government-controlled transaction' means any covered transaction that could result in the control of any United States business by a foreign government or an entity controlled by or **acting on behalf of** a foreign government.").

interest."[113] FIRRMA directs CFIUS to further define "substantial interest" with special attention to the means by which "a foreign government could influence the actions of the foreign person, including through board membership, ownership interest or shareholder rights."[114] It seems that the mandatory report rules in FIRRMA suggest special considerations be given to *ownership* and its influence on *specific activities* of the SE's investment.

Last, FIRRMA explicitly establishes *nationality* and *industry* as important variables to consider when targeting investment connected with foreign governments. The initially proposed FIRRMA 2017 distinguishes investment according to their home countries by asking whether the investment is from a "country with special concerns."[115] Although FIRRMA 2018 does not adopt the exact phrase, it still requires the Secretary of Commerce to produce a biannual report about information on all foreign direct investment from Chinese companies until 2026.[116] FIRRMA 2018 requires this report to mark whether the investment is governmental, and whether it is aligned with the Chinese domestic industrial policy called "Made in China 2025."[117] These amendments will result in increasing reviews of investment from China, regardless of whether the investor is owned or controlled by the state. Under these standards, private companies could also be easily labeled as SEs if they invest in certain industries.

By introducing different identification elements to the law, FIRRMA successfully expands the definition of SEs as well as the administrative power in the name of national security. The increasing administrative power may well defend US national security. The potential risk, however, is whether or not this expanding identification of SEs will also scare away potential investors, and whether the increasing administrative power without checks can be harnessed properly.

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113 *Id.* at Sec. 6(v)(iv).

114 *Id.* at Sec 5.

115 The draft of FIRRMA 2017 defines such countries as "a country that poses a significant threat to the national security interests of the United States." However, it does not require CFIUS to maintain such a list, at least for the public. *See* FIRRMA 2017, *supra* note 107, at Sec. 3(4), 15. The final version of FIRRMA 2018, however, omit these clauses, but still includes the expression of "country of special concern" in the first section. *See* FIRRMA 2018, supra note 109, at Sec. 5.

116 *Id.* at Sec. 18(b).

117 "Made in China 2025" is a Chinese government-proposed policy initiative to upgrade Chinese industry. The stated objective of the program is for China to become a major competitor in advanced manufacturing, a goal that will bring the country increasingly into direct competition with the United States. *See* Kristen Hopewell, *What is 'Made in China 2025' — and Why is it a Threat to Trump's Trade Goals?*, WASH. POST (May 3, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/03/what-is-made-in-china-2025-and-why-is-it-a-threat-to-trumps-trade-goals/?noredirect=on&utm_term=.33afaaaf7468.

C. China's New Reform in SEs: Easier to Clarify Legal Identity of Chinese SEs?

As the U.S broadens the classification of SEs in order to include more investment under national security reviews, China has been separating state power and SEs' operations. On August 24th, 2015, China's State Council announced a nationwide reform of SEs.[118] This reform aims at decreasing governmental interference in SEs' management and increasing their efficiency and market performances.[119] The State Council published a detailed plan on July 30th, 2018, which will establish state-owned capital investing companies and state-owned capital operating companies as shareholders to represent state ownership in the SEs. Establishing professional institutions to represent the state in SEs could disconnect state ownership and its attached management rights of daily operations. The plan is expected to be implemented soon, for it was initiated at meetings of the highest level of the CPC in 2013 and has been in discussion for a long time.[120] It was also tried first at provincial level for policy experiments,[121] which is a typical foretelling of further legislative changes in China.[122] The reform will impact future legal identifications of SEs if carried out successfully.

First, it would seem easier to identify the *purposes* of Chinese SEs according to the type of their public shareholders. As stated in the plan, the newly established state-owned capital investment and operations companies will be the shareholders that represent "state capital in SEs and professional platforms for market-based operations of state-owned capital."[123] The two "shareholders" have different purposes in SEs' management. The goal of state-owned capital investment companies is to "serve the national strategy, optimize state-owned capital distribution, enhance industrial competitiveness, and promote industrial structure in major areas and industries concerning national security and economy."[124] On the other hand, the goal of state-owned capital operations companies is simply to "enhance operations effectiveness of state-owned capital,

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118 Press Release, The State Council, Pilot Reform of State-Owned Capital Investing, Operating Companies, (July 30, 2018), http://english.gov.cn/policies/latest_releases/2018/07/30/content_281476242418612.htm.

119 *Id.*

120 *See* Guidelines of the CPC Central Committee and State Council on Deepening the Reform of State-*O*wned Enterprises (Aug. 24, 2015), http://en.pkulaw.cn/display.aspx?cgid=26c39a43ea095fcebdfb&lib=law [hereinafter Guidelines].

121 For instance, Shanghai established its own state capital operating platform in 2012. *See Shanghai Introduced 20 State-Owned Enterprise Reforms*, PEOPLE, http://finance.people.com.cn/GB/8215/356561/372583/index.html (last visited Feb. 26, 2019).

122 *See* generally Yanying Bi, *Experimentalist Approach of Chinese Legislation Model: From Passive Response to Institutional Design*, 3 THEORY PRAC. LEGIS. 141, 141-67 (2015); RONALD H. COASE & NING WANG, HOW CHINA BECAME CAPITALIST (2012).

123 *See* Press Release, *supra* note 118; *see also* Guidelines*, supra* note 120, at Part IV.

124 *See* Press Release, *supra* note 118.

and increase returns on state-owned capital."[125] The former represent the state in their invested SEs, trying to align the decisions of SEs with national strategy via the power of capital. The latter invest in SEs as passive investors, expecting profitability for public ownership.

The distinction between the state shareholders suggests that SEs which only have state-owned capital operations companies as shareholders should be regarded as commercial market players since they are not involved in national strategy. By contrast, SEs that have state-owned capital investment companies as shareholders would be more likely to be considered public bodies, because their shareholders explicitly aim at achieving national strategic goals through these entities.

Secondly, the reform will categorize Chinese SEs by *their function in industries* and regulate accordingly.[126] One type is called "public services SEs," whose products or services are usually provided by the government as public goods, such as electricity and water.[127] The second type consists of commercial SEs in sectors concerning national security.[128] The third category includes commercial SEs that usually operate in competing industries and will be treated as equal to other players in the market.[129] It will be comparatively easy to identify the third type as commercial companies based on their functions. However, it is not easy to tag the first and the second group because both accomplish some public or strategic functions.

The third key part of the reform focuses on the *control* of SEs, and adopts a market-oriented approach with "a Chinese characteristic."[130] On the one hand, the reform emphasizes the western model of corporate governance in SEs' management. On the other, it explicitly highlights the leading role of the CPC in Chinese SEs. For example, the reform promotes the independence and prominence of the board of directors, emphasizing and reassuring their expertise in the decision-making process.[131] Yet the reform also empowers the CPC branch in SEs as the "core in dealing the political affairs."[132] The reform maintains the tradition that the CPC approves SEs' top leaders, yet at the same time increases the quota for directors that are professional managers and those selected from market competition.[133] It seems that the reform tries to promote both market-oriented corporate governance as well as party-controlled political awareness in

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125 *Id.*
126 *See* Guidelines, *supra* note 120, at Part II, ¶ 4.
127 *Id.* at Part II, ¶ 6.
128 *Id.* at Part II, ¶ 5.
129 *Id.* at Part II, ¶ 6.
130 *Id.* at Preamble.
131 *Id.* at Part I, ¶ 2-3.
132 *Id.* at Part III, ¶ 8, Part VII, ¶ 24.
133 *Id.* at Part III, ¶ 9, Part VII, ¶ 25.

Chinese SEs. These two policy goals would definitely make the legal identification of control in SEs more difficult, if even possible.

Ownership is the fourth element concerned. The reform encourages "mix-ownerships," the merger between capital of SEs and other companies in the market, including foreign private firms.[134] It purports to "make the best use of different types of capital,"[135] however, it will result in an even blurrier line between the public and private ownership if carried out successfully.

By applying the six-element framework to the recent domestic changes in SEs' regulations, we can now better pinpoint the gaps between the U.S. and China on the issue. U.S.'s FIRRMA defines *control* widely, whereas China's reform aims at decreasing the government's interference in SEs' managements while maintaining the Party's influence in SEs' political affairs. U.S. regulators assume that public *ownership* represent a special interest of the government and would result in its increasing influence on SEs' *activities*. While Chinese policy makers have established new institutions to disconnect state ownership and management rights of the enterprises. This is in order to attract other types of capital to invest in highly indebted SEs and allow public capital to invest in highly profitable private firms. Although both the U.S. and China make it clear that *industry* will be an important policy element to identify SEs, China differentiates SEs largely based on the nature of the industries, whereas the U.S., by contrast focuses on the importance of the industries to its national interests and whether it has leadership in the industries.

CONCLUSION

While the current U.S-China WTO conflict over the messy roles of state enterprises (SEs) is largely an economic and political one, this article rises above it. It creates a six-element framework to compile and utilize competing rules concerning SEs' legal status in international trade, investment, and customary international laws. These somewhat conflicting identifications of SEs are caused by "mix-and-match" law-makings, where various international institutions pick and combine different elements, including *ownership*, *control*, *authorization*, *organizational purpose*, *organizational function*, and *specific activity*, to create their own definitions of SEs. The risk of the mix-and-match law-makings is systematic: one SE might be considered a public body under one set of rules and a private player under another. Messy rules contribute to their messy roles.

Interestingly, this systematic legal review suggests that some elements are more popular than others. The six-element framework not only summarizes descriptive characteristics of the existing rules, but also provides valuable

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134 *Id*. at Part V, ¶ 17.

135 *Id.* at Part V, ¶ 17–18.

references for future law-makers, international judges, and arbitrators to help clarify SEs' legal identity. A clear standard to identify SEs in international law is needed simply because it is the very first step to regulate their increasing international activities in a legally consistent manner.

My findings in this paper are also relevant to the current policy changes in the U.S. and China concerning the relationship between the states and their enterprises. New changes in either country's domestic policies should not breach their international obligations. Reviewing domestic legislative and policy changes under the six-element framework would enable us better pinpoint the gaps between the U.S. and China on the issue. Future reforms of international law concerning SEs identity require some coordination between the domestic policies, if rule-based international order is to survive.