***The Public-Private Distinction at the World Trade Organization: Fundamental Challenges to Determining the Meaning of ‘Public Body’***

*The distinction between the public and the private is a conceptual fault line in WTO law. The WTO regulates a range of public activities that impact the ability of private actors to engage freely in the market. Difficulties arise where the nature of the bodies that WTO law seeks to regulate is unclear. The Agreement on Subsidies and Countervailing Measures (‘SCM Agreement’) is a notable case in point. The regulation of subsidies at the WTO is of particular importance, structuring the relationship between governments and markets of WTO members, yet despite the wide scope and importance of the SCM Agreement, there exist theoretical deficiencies underpinning key terms. This paper examines the definition of ‘public body’ under the SCM Agreement as one such example. Moving beyond the competing interpretations offered by panel[[1]](#footnote-1) and Appellate Body reports[[2]](#footnote-2), this paper suggests that the underlying conceptual foundations of the term are inadequate and offers tentative suggestions to remedy this failing. Specifically, an approach based on the distinction between private and public aims is posited as an alternative. Identifying the importance that conceptions of the ‘public’ have in international law more generally, this paper argues for greater engagement with the conceptual underpinnings of terms such as ‘public body’ so as to provide a meaningful basis for some of the foundational terms in current international law.*

***Introduction***

The distinction between the public and the private is central to the way in which the World Trade Organization (‘WTO’) regulates international trade. The WTO regulates the behaviour of the Membership (principally States) directly: though private actors constitute the vast majority of traders, WTO rules do not apply to them but rather the Membership.[[3]](#footnote-3) Members are restricted in the ways in which they may affect the market from how they tax and regulate imports, exports or sale of goods and services, to the way in which they pursue ‘non-trade’ goals which may have an effect on competition in the market (whether intentionally or not).[[4]](#footnote-4)

By regulating one class of actor (public) but focussing on the outcomes for another (private), WTO law is required to engage with the distinction between the public and the private on a continual basis, a situation that becomes more complex in light of changes at both domestic and international levels.[[5]](#footnote-5) At the domestic level, many States are liberalising the provision of public services, blurring the line between public and private.[[6]](#footnote-6) At the international level, the distinction between public State action, and private commercial action is also becoming blurred.[[7]](#footnote-7) The proliferation of private standards which increasingly affect trade (at times to a greater extent than governmental standards) is one such example.[[8]](#footnote-8)

The debates over the definition of what constitutes a ‘public body’ for the purposes of the SCM Agreement at the WTO is an indicator of these difficulties. Echoing debates at the domestic level over the proper role of the ‘State’ and the ‘market’, or over the ‘public’ sphere and the ‘private’ sphere (including how we begin to define such terms),[[9]](#footnote-9) such challenges pose a challenge to the WTO that has until now been preoccupied with the relationship between itself and its Members or between itself and other legal regimes in international law.[[10]](#footnote-10)

Under the SCM Agreement, the existence of a subsidy is contingent on whether (*inter alia*) it is given ‘by a government or any public body within the territory of a Member’.[[11]](#footnote-11) This requirement distinguishes between a loan received on advantageous terms and a government subsidy. In the first instance, the recipient has got a good deal, and its competitors will (potentially) have to respond to the challenge. In the second instance, however, the recipient has been granted a subsidy and its competitors may then request the imposition of countervailing duties to offset this ‘unfair’ advantage. Thus, this raises the question: what constitutes a ‘public body’ for the purposes of Art 1.1(a)(1)? In particular, are State-Owned Enterprises (SOEs) or State-Owned Commercial Banks (SOCBs) to be considered as public bodies? Should government ownership or control determine their status? Or should the role that they play within the economy be determinative? The increasing role played by SOEs and SOCBs within post-economic crisis States, and their prevalence within China and other emerging economies has heightened concerns over their classification.[[12]](#footnote-12)

The focus of this paper is WTO law (specifically the law on subsidies) though the issues raised also have relevance for other areas of international law. Debates over the public-private distinction are increasingly present within questions of rights protection,[[13]](#footnote-13) or, indirectly, in the application of international rules by domestic courts as is the case with immunities.[[14]](#footnote-14) WTO law offers a number of advantages to examine this issue: its detailed set of legal rules, effective dispute settlement system, and near-universal Membership allow us to conduct an analysis in an institutionalised setting without complications relating to rule identification or jurisdictional issues.[[15]](#footnote-15) As identified above, WTO law is frequently required to examine the boundary between public and private spheres of action,[[16]](#footnote-16) yet the SCM Agreement is the most far reaching as it creates not only specific obligations but a ‘framework of rights and obligations’[[17]](#footnote-17) that serve to discipline and regulate the autonomy of the State to act within the market, thus creating a legal barrier between the public and private.

The paper proceeds in four parts from this Introduction: in Part I, the interpretation of ‘public body’ under the SCM Agreement is examined. Specifically, the approaches taken by the panels and Appellate Bodyin the *US – AD/CVDs (China)* and *US – Carbon Steel (India)* disputes are analysed, identifying the difficulties with the competing interpretations given at the WTO. Part II examines some of the key challenges facing the conceptualisation of a public-private relationship within international law and identifies the limitations of some of the most commonly used approaches.

In Part III, a framework is developed to examine the public-private distinction at an international level. It is suggested that the central challenge of acknowledging a plurality of differing structures of governance and the need for a uniform understanding of what constitutes ‘public’ in international law can be reframed by drawing on classical writings relating to the State and conceptions of political association. It is suggested that a teleological account of the ‘public’ that examines whether the aims of the body in question meet a set of criteria linked to the objectives of the political community offers an alternative approach.

Part IV then seeks to apply this approach to the WTO, identifying the aims of the State examined, and its relationship to the aims of the WTO. The examination, focussing on the object and purpose of the *polis* in question, rather than that of the relevant treaty, is used to determine how to understand the concept of ‘public’ in the SCM agreement.

***Part I – The concept of ‘public body’ at the WTO***

Should a SOE or SOCB constitute a ‘public body’ for the purposes of the SCM Agreement, thus potentially bringing its acts within the scope of the SCM Agreement?Though the *US – AD/CVDs (China)* dispute was the first major treatment of this issue by the Appellate Body, an analogous question had arisen previously, concerning the interpretation of ‘governments and their agencies’ under Art 9.1(a) Agreement on Agriculture in the *Canada – Dairy* dispute.[[18]](#footnote-18) Here the Appellate Body upheld the panel’s position that provincial milk marketing boards could constitute government agencies as they both performed governmental functions and were delegated the powers to do so by a governmental authority. This approach offers two requirements: a functional requirement (that is, the body performs a governmental function) and a source requirement (that the source of the powers is governmental).[[19]](#footnote-19)

This seemingly clear solution, however, presents challenges. With regard to the source requirement, it was considered relevant that the provincial milk marketing boards ‘operate within a framework set up by federal and provincial legislation.’[[20]](#footnote-20) Under English law, however, contracting private parties operate within a legal framework determined by Parliament and the common law. We would not consider contracting private parties to exercise any form of governmental authority, however.[[21]](#footnote-21) The Appellate Body’s definition of a government agency when examining the functional requirement is similarly problematic:

‘A "government agency" is, in our view, an entity which exercises powers vested in it by a "government" for the purpose of performing functions of a "governmental" character, that is, to "regulate", "restrain", "supervise" or "control" the conduct of private citizens.’[[22]](#footnote-22)

Many government functions do not depend on regulating, restraining, supervising or controlling the conduct of private citizens: the provision of healthcare, education, transport services, general infrastructure or welfare to name but a few. While elements of governmental oversight or control of these services may be understood through a supervision/regulation lens, the commitment can extend to provide and enable or empower citizens to act.[[23]](#footnote-23)

The *US – AD/CVDs (China)* dispute presented an opportunity for the WTO to reengage with the concept of a ‘public body.’ While previous panels had examined the requirement, it had not been the subject of significant debate with the panels in both *Korea – Commercial Vessels[[24]](#footnote-24)* and *EC – Large Civil Aircraft[[25]](#footnote-25)* applying a control test as the principal factor in determining whether the body in question constituted a ‘public body.’ In *US – AD/CVDs (China)*, however, the requirement took a central place within the reports.[[26]](#footnote-26)

One of the key disputes was the extent to which SOEs or SOCBs constituted public bodies for the purposes of Art 1.1(a)(1) SCM Agreement. If they are not public bodies, then the SOEs that provide raw materials to businesses, and the SOCBs that provide them with loans are merely other private actors engaged in the market place. However, if not, then these bodies constitute public bodies and the loans and raw materials become potential subsidies and the goods exported by the businesses become potential targets for protective measures (specifically countervailing duties, and in this instance, also anti-dumping duties).

The US Department of Commerce had determined that the SOEs and SOCBs constituted public bodies, a finding upheld by the panel. The panel acknowledged that there was no clear definition for the term ‘public body’[[27]](#footnote-27) and identified the core challenge with such a term: namely, that different jurisdictions define what constitutes a ‘public body’ under their own law in numerous different ways. They pointed out that ‘[s]ome of these go well beyond government agencies or similar organs of government, and include, inter alia, government-owned or -controlled corporations providing goods and/or services.’[[28]](#footnote-28)

Having examined the relevant provisions in French and Spanish, the panel felt that the question that needed to be answered was whether SOEs or SOCBs were public or private bodies specifically for the purposes of the SCM Agreement.[[29]](#footnote-29) The focus was on the relationship between public and private, rather than between ‘public body’ and ‘government.’ In drawing the division in this manner, the panel framed the discussion in terms of the public-private relationship rather than, as the Appellate Body had done in *Canada – Dairy*, between governmental and non-governmental functions. In this instance, it led the panel to an interpretation centred on control as the key distinguishing factor: the ‘public sector’ as part of the economy though under State control, ‘private enterprise’ as part of the economy though privately controlled. [[30]](#footnote-30)

By identifying control as the standard, the panel excluded the need for the body to exercise governmental functions. It concluded on this point:

‘we consider that interpreting "any public body" to mean any entity that is controlled by the government best serves the object and purpose of the SCM Agreement.’[[31]](#footnote-31)

The Appellate Body did not reject the panel’s approach in its entirety: it accepted that there are times when governmental control could indicate that the body in question was to be viewed as a ‘public body’ for the purposes of the SCM Agreement.[[32]](#footnote-32) It did this with caution, identifying that this was relevant insofar as it demonstrated that there was a governmental function being exercised. Control was needed but was not sufficient; control was important where necessary to exercise a governmental function.[[33]](#footnote-33) Like the panel before it, the Appellate Body also sought guidance from dictionary definitions, though in this case the composite term ‘public body’ led to a focus on the exercise of functions that would be considered governmental in nature.[[34]](#footnote-34)

Clearly, a definition that depends on defining governmental authority presents considerable difficulties for administrative investigators, policy makers and judicial bodies. The Appellate Body expressed this challenge as follows:

‘just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case.’[[35]](#footnote-35)

Unlike the panel which sought to provide a clearer rule that would offer greater certainty, the Appellate Body offered an alternative test that is, by its very nature, flexible and indeterminate.[[36]](#footnote-36) The problem is not, however, in the Appellate Body’s willingness to provide a flexible test in the hope that this would satisfy the challenges presented by the plurality of governance structures within the WTO membership, but rather, with the underlying presumption that it is possible to determine what a governmental function *is* without engaging with its underlying meaning.

At a superficial level, the Appellate Body’s interpretation[[37]](#footnote-37) is deeply influenced by its understanding of the Articles on State Responsibility,[[38]](#footnote-38) in particular Article 5.[[39]](#footnote-39) The criticism to be made here, however, is not that the Articles on State Responsibility ought not have been examined, or were wrongly used (though there are strong arguments to be made in both cases)[[40]](#footnote-40) Rather, the principal problem here is that the Articles on State Responsibility themselves are insufficient; they provide an inadequate method for determining whether or not a ‘parastatal entity’ (in the Commentary’s terminology) is acting on the basis of governmental authority.[[41]](#footnote-41) The Commentary suggests (foreshadowing the Appellate Body’s approach):

‘Article 5 does not attempt to identify precisely the scope of “governmental authority” for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, what is regarded as “governmental” depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.’[[42]](#footnote-42)

At no point are we given any guidance as to how to determine the scope of the governmental. Instead, ‘[b]eyond a certain limit’ it depends on each case. In spite of this assertion, the Commentary is unclear, suggesting that there is an element of predetermination involved: there are types of action or authority that are *per se* governmental. The purpose of Article 5, according to the Commentary, is to deal with entities ‘which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.’[[43]](#footnote-43)

The implication is that the core nature of the power is self-evident, only the nature of its delivery or provision changes. Thus, though the entity may be private, it now exercises functions that were public and are, therefore, ‘governmental’. Conversely, where an entity is private, though majority owned and headed by government officials, it may well be free from oversight where it does not exercise authority considered to be governmental.[[44]](#footnote-44)

This raises considerable difficulties, most obviously, at what point in time and social development was the typical or ideal catalogue of government functions determined? Do we identify the fictional birth of the modern State in 1648 as our reference point?[[45]](#footnote-45) Or since the last traumatic international political and societal ‘reset’, 1945 perhaps, or 1991?[[46]](#footnote-46) If we identify powers we now consider governmental, a reappraisal in each of these times challenges our assumptions: police services (no/yes/yes), central banks (no/yes/yes), telecoms (inconceivable/yes/no). In light of this conceptual confusion, the preference for a case-by-case analysis under both the Articles and at the Appellate Body speaks more to an insecurity in accurately determining governmental function than any respect for the plurality of social structures globally.

There are interpretative difficulties with either approach also. If we use an ownership test, the scope of ‘public body’ becomes too wide, potentially capturing a number of bodies unintentionally (such as banks which have received bailouts, automotive manufacturers which have the government as a shareholder, legacy industries that have been privatised and are in transition). The control test duplicates the purpose of Article 1.1(a)(1)(iv) SCM which makes provision for private bodies which have been entrusted or directed to carry out the functions that constitute potential subsidies (such as transfer of funds).[[47]](#footnote-47) This provision performs the ‘anti-circumvention’ aim that would otherwise be attributed to the ‘public body’ definition.[[48]](#footnote-48) The source approach is similarly problematic (as the US identified during the *US – Carbon Steel (India)* dispute)[[49]](#footnote-49) as not all public acts stem from specific public law instruments, while many private acts do.[[50]](#footnote-50) Finally, a function test is inadequate as it overlaps with ‘government’ in the narrow sense (i.e. the first half of Article 1.1(a)(1): ‘government or any public body’) and thus unnecessarily confuses matters, as well as restricting the understanding of ‘government’.

***PART II – Difficulties with the public-private relationship in international Law***

The criticism developed thus far is not that the Appellate Body or WTO panels, or the International Law Commission, have failed to apply the correct definition of ‘public body’ or ‘governmental authority’ (or any other construction based on a public-private relationship). The concern here is an unwillingness to determine the specific content of the term in question (for example, ‘public body’).[[51]](#footnote-51) Part II now identifies the difficulties with understanding the relationship at the international level, before moving onto Part III where a possible approach is suggested (and then in Part IV, applied to the WTO).

There are two challenges to approaching the distinction between the public and private at an international level. The first is substantive, the second methodological. With regard to the substantive challenge to understanding the distinction between the public and private internationally, the traditional definitions, which are based on domestic legal systems and rest on conceptions of community or social groups, have a potentially distinct meaning or application when applied to groups of States or International Organizations. Further, international law has, in its modern form, traditionally been the law *of* States made *by* States. In this sense, public international law has been just that – public. Nonetheless, there are increasing challenges to this account of the international system.

The scope of investigation into the public-private distinction at the international level is not only the *international* dynamic of the relationship but also the international recognition or regulation of the *domestic* public-private relationship. This is the case with the SCM Agreement – an international body must identify which domestic entity constitutes a ‘public body’ in the eyes of international (WTO) law. Such an exercise is, as previously identified, fraught with difficulties, most notably the plurality of governance structures amongst States. Not only is this a conceptually difficult exercise but it is also politically contentious, touching as it does upon the appropriate deference that bodies such as the WTO should give to States in making such determinations.[[52]](#footnote-52)

Such a challenge could be resolved in different ways. We might create an international definition of what should be considered public or we might simply accept that the definition is to be determined by the host State of the parastatal entity. We might determine the entity’s nature by virtue of the source of its powers, the functions it exercises or the level of control exercised over it by central government.[[53]](#footnote-53) Alternatively, we might examine the extent to which certain groups are affected by the actions of this entity in an attempt to trace the public nature of its effect.

While a uniform definition may be preferable, given its ability to clarify questions across the board, in practice such a goal is extremely difficult. There is no consensus amongst States on the appropriate contours of the public-private relationship; indeed, there is rarely settled consensus *within* States as to the appropriate scope of the relationship. While this paper does not pretend to offer a uniform answer for such a challenge, it does attempt to offer a preliminary approach for consideration.[[54]](#footnote-54) The primary goal, therefore, is to set out a conceptual framework for the discussion.[[55]](#footnote-55)

The second challenge in determining the content of the ‘public’ is a methodological one, and which has already been touched upon. In the *US- AD/CVDs (China)* dispute, the panel and Appellate Body approached the question of defining a ‘public body’ as a question of treaty interpretation.[[56]](#footnote-56) There is no doubt that in cases of ambiguity, we are to look (in the WTO, for example) to the customary rules of treaty interpretation as represented by (in particular) Arts 31 and 32 of the Vienna Convention on the Law of Treaties. [[57]](#footnote-57) The difficulty is that we have yet to determine the content of the term, its ‘ordinary meaning.’ Indeed, we have yet to give it any meaning beyond a nebulous impression based on source-based or functional criteria. These are signposts of meaning, giving us an indication of where to look but they do not tell us what it means for something to *be* ‘public’.

When we seek to know whether a ‘public body’ is a public body, we have to understand the core meaning *before* conducting the customary exercise of interpreting this term. Without knowing what the ‘ordinary meaning’ is, we cannot interpret the treaty ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ The question, therefore, is not whether or not to give priority to the ordinary meaning or the object and purpose of the treaty, but rather, to identify the ordinary meaning beyond the limited appreciation we have for such a term thus far. The purpose of the following Part is to begin the exercise of identifying the meaning of this term. It is argued that for us to understand the core of what it means for something to be ’public’, we have to understand the purpose of the public in question. It is a teleological examination, not of the treaty but of the political association that gives rise to the potential ‘public body’.

***PART III – A teleological approach to distinguish the public from the private***

In order to develop a framework to understand the contours of the public-private relationship, certain challenges must be faced. The principal of these is how we can produce a concept of ‘public’ that functions at international and domestic levels, and in the face of profound variations and lack of uniformity. In this Part, it is argued that such a variety of State structures and an appreciation for the differing roles of appropriate public engagement is not new. By returning to the writings of Aristotle and Cicero in particular,[[58]](#footnote-58) we can identify two separate though related approaches to acknowledging a plurality of government structures and the most effective way to understand the proper role of public structures in such circumstances.[[59]](#footnote-59)

The worlds of Aristotle and Cicero were, of course, profoundly different to our own: the nature of international relations, the role of international law and preconceptions over what might be considered ‘public’ action were dramatically different to those identifiable today. [[60]](#footnote-60) Nonetheless, the aim is not to transpose these writers’ views wholesale but rather draw insights from them vis-à-vis the public-private relationship today.

Both Aristotle and Cicero wrote during a period of pluralism in State structures: amongst Greek city-States, some were oligarchic (such as Sparta or Crete[[61]](#footnote-61)) others democratic in varying forms (Athens most notably). They also shared their geographic area with Egyptians and (increasingly) Macedonians who used monarchical models. Cicero, identifying a similar range of systems within his own political world[[62]](#footnote-62) could also add the ‘mixed’ model of republican Rome, which shared characteristics of the democracy, oligarchy and monarchy. Each was therefore adept at understanding that different societies could structure themselves in very different ways, much as we can identify a wide range of State structures, even amongst those that share a superficial veneer of market-democracy.[[63]](#footnote-63)

Considerable attention is given by both Aristotle and Cicero to the relationship between different models of governance (building on Plato’s cycle of regimes from aristocracy to tyranny[[64]](#footnote-64)), which further ingrains the inherent flexibility and mutability of the nature of a State structure (something our contemporary analyses of the public fail to do).[[65]](#footnote-65) For Cicero this is the ‘instability of simple forms’ – the fluid relationship between models of governance.[[66]](#footnote-66)

While focus is given to the merits of the different models, neither Aristotle nor Cicero seek to answer which system works most effectively without a purpose in mind. For Aristotle, he is clear:

‘Observation shows us, first, that every city-State [*polis*] is a species of association [*koinonia*], and, secondly, that all associations come into being for the sake of some good – for all men do all their acts with a view of achieving something which is, in their view, a good. It is clear therefore that all associations aim at some good, and that the particular association which is the most sovereign of all, and includes all the rest, will pursue this aim most, and will thus be directed to the most sovereign of all goods. This most sovereign and inclusive association is the city-State [or *polis*], as it is called, or the political association.’[[67]](#footnote-67)

It is worth noting that the term here translated by Barker as ‘association’ (*koinonia*) has with it a sense of sharing and participation,[[68]](#footnote-68) thus in the original *koinonia* can be applied to more than a city-State.[[69]](#footnote-69) Key in Aristotle’s introduction is the teleological examination of the political association.[[70]](#footnote-70) He is careful not to give all the same aim or objective (*telos*)– note the qualification, ‘all men do all their acts with a view of achieving something which is, *in their view*, a good.’[[71]](#footnote-71) Nor does he fall into the trap of considering the aims of the monarch (for example) as being equal to the aim of the political association. The statesman is limited both by the rules of statesmanship as well as the impossibility of being outside of the political system: ‘one who rules and is ruled in turn.’[[72]](#footnote-72)

This objective or aim both guides the political association as an objective but is also a constituting factor: were it not for this objective, the association would not exist. Further, where there are disagreements over the appropriate form of, or policy to be taken by, an association, it is only by understanding the aim (*telos*) of the political association that we can decide on the appropriate course of action.[[73]](#footnote-73) The teleological examination is thus necessary to resolve debates over the appropriate form and policies of a political association.

In order to understand a social structure we need, therefore, to understand the *why* of a social structure. At a fundamental level, the aim of the association is the reason for its existence; without that purpose, it would not have been constituted. The *telos* of the association is thus a defining element of its existence – and the association cannot be understood without knowing it.[[74]](#footnote-74)

Aristotle then turns to the aim or objective of the political association that, in turn, leads him to examine the objectives of the best constitution. This is, in his view, the pursuit of a life of goodness.[[75]](#footnote-75) The political association is to allow the fullest development of the good life by its citizens: ‘any city which is truly so called, and is not merely one in name, must devote itself to the end of encouraging goodness.’[[76]](#footnote-76)

When determining which forms of government can best contribute to this aim, it is worth noting a key distinction that Aristotle makes with regard to the good (‘right’) forms of constitution as opposed to the wrong (‘perverse’) forms of constitution. He states:

‘[T]hose constitutions which consider the common interest are right constitutions, judged by the standard of absolute justice. Those constitutions which consider only the personal interests of the rulers are all wrong constitutions, or perversions of the right forms.’[[77]](#footnote-77)

An elision is made here, connecting the common interest to the appropriate aim of the political association, and discarding the pursuit of private interest from the right aim of the association. The distinction drawn between common interest and private interest underpins an early appreciation of the public-private relationship. Thus for Aristotle, the common interest serves the public, not only the many: ‘Tyranny is a government by a single person directed to the interests of that person. Oligarchy is directed to the interest of the well-to-do; Democracy is directed to the interest of the poor. None of these benefits the common interest.’[[78]](#footnote-78)

Cicero’s approach to examining the purpose of the political association takes an interesting tack. Taking a similar position to Aristotle, claiming that a community’s aim is to provide citizens with ‘a happy and honourable life. For that is the primary purpose of forming a community, and that must be achieved for human beings by the state, partly through its institutions and partly through its laws.’[[79]](#footnote-79) The purpose of the *polis* is thus to encourage happiness, which is to say the ‘greatest good’ in Aristotelian terms. Both Aristotle and Cicero identify education as a key form of delivering on this goal.[[80]](#footnote-80) Aristotle in particular identifies the ability to reflect and practice philosophy as necessary to fulfilling a complete life (hence his lack of esteem for traders, labourers or other individuals whose greatest contribution is to ensure that those capable of pursuing higher interests are capable to do so).[[81]](#footnote-81) While they identify formal educational practices and styles, the focus on education is instrumental: to live the good life, a citizen requires training, support or guidance. Though they have different interpretations of the exact content of what is good, they are both nonetheless committed to the facilitation of this pursuit as the objective of the State.

Cicero continues that in pursuing the good life, one might be tempted to prioritise that which is expedient or useful (*utile*) over that which is honourable (*honestum*). ‘Useful’ here (*utile*) carries greater weight than mere utility; it is something that is worthwhile in the sense of serving a good.[[82]](#footnote-82) He gives numerous examples of where a useful act was nonetheless rejected in order to satisfy honour,[[83]](#footnote-83) and gives general principles to ensure that the pursuit of utility is not used to undermine the importance of honour.[[84]](#footnote-84) What these discussions give us is a more detailed understanding of what Cicero perceived of as the great Roman addition to their Greek philosophical heritage: a sense of duty and honour, *fides*, which serves to limit a manipulation or conflict no matter how irreducible it may seem.

The sense of duty directly relates to the maintenance of obligations and the distinction between public and private spheres of action. For Cicero, the pursuit of the good life was intrinsically linked to the maintenance of obligations. Thus he stated:

‘…there is no aspect of life public or private, civic or domestic, which can be without its obligation, whether in our individual concerns or in relations with our neighbour. Honourable behaviour lies entirely in the performance of such obligations, and likewise base conduct lies in neglecting them.’[[85]](#footnote-85)

He continues, stating that the ‘foundation of justice, is good faith [*fides*], in other words truthfully abiding by our words and agreements.’[[86]](#footnote-86)

For Cicero the pursuit of the good, is bound to the duty to act in good faith – that is, maintaining obligations arising from one’s public or private life. The Ciceronian stress on *fides* compliments the teleological examination of the aim or object of the *polis* in question, by ensuring that acts in the pursuit of the good life, in the common interest are those to be praised, not those conducted in one’s own interest.[[87]](#footnote-87)

Cicero states that there can be no conflict between the useful and the honourable but rather that they are twinned, each through justice, so that: ‘what is just is also useful, and again what is honourable is also just.’[[88]](#footnote-88) For our discussion, the concern with the just and justice offers a particularly interesting development, as Cicero relates the purpose of justice specifically to the distinction between the private and the public:

‘The primary function of justice is to ensure that no one harms his neighbour unless he has himself been unjustly attacked. Its second concern is that communal property should serve communal interests, and private property private interests.

Private property has been endowed not by nature, but by long-standing occupancy in the case of those who settled long ago on empty land; or by victory in the case of those who gained it in war; or by law[[[89]](#footnote-89)] or bargain or contract or lot.’[[90]](#footnote-90)

The distinction between the public and the private was fundamental for Cicero. The vehemence with which he attacks the corrupt former governor Verres in his prosecutorial speeches is a testament to this. Verres had (amongst other offences) extorted and embezzled from the province of Sicily during his governorship. In his second speech, Cicero stated:

‘As governor, it never occurred to you that those rods and axes,[[[91]](#footnote-91)] the absolute power of your office, and all those symbols of rank and prestige had not been given to you simply to allow you to break down every barrier of duty and restraint, to view everybody’s property as plunder for yourself, and to make it impossible for anyone’s possessions to be safe, anyone’s home secure, anyone’s life protected, or anyone’s chastity guarded against your greed and wickedness.’[[92]](#footnote-92)

We can see here, Cicero’s identification of the betrayal involved, the elision of the public (that which is in the common interest) and the private (Verres’ own wealth and pleasure). In this way, Cicero offers an approach to understanding the nature of the State and public authority, echoing Aristotle, in two key ways: the first is a teleological basis, identify the pursuit of the highest good as the aim; and second, ensuring the distinction between the public and private as a way of supporting such a pursuit (going so far as tying it to the very concept of justice).

What does this mean for examining the contours of the public-private relationship at the WTO? The concerns over the appropriate function of the political association speak to how we are to understand the public sphere – those acts or institutions which pursue the aim of the political association, in the common interest, are those we consider public. We identify the aim of our political association and from this point identify what is the public (that which contributes) or the private (that which does not).

Taking a teleological approach is not new: John Finnis has argued strongly for an Aristotelian acknowledgement of the purpose of law in order to understand it (though he interprets Aristotle in a Scholastic vein which produces very different outcomes);[[93]](#footnote-93) and Nick Barber has also identified elements of this approach in advocating the importance of an ‘ethical framework,’ which includes acknowledging the purpose of the State, in order to understand it.[[94]](#footnote-94) One can also find reflection within international law itself. For example, as discussed above, the Vienna Convention on the Law of Treaties encourages the identification of the object and purpose of a treaty,[[95]](#footnote-95) though the concern in that instance is more narrow as it examines the treaty itself, rather than the political association it came from. Indeed, this is a key difference: the VCLT encourages interpreting a term in light of the text within which it if found, looking outside only for subsidiary means, and always in light of the object or purpose *of the* *treaty*. The approach posited here is for the term (in our case, ‘public body’) to be interpreted in light of the object or purpose *of the political association* as this constitutes its meaning (and thus, in VCLT terms, the ‘ordinary meaning’).

The following section applies this rationale to the case of the WTO and the challenge of the ‘public body’ interpretation. In it, it posits the WTO as a political association that includes States. It is argued that the WTO is no ‘mere alliance’ of self-interested Members but rather a part of a *shared* political association that allows the identification of commonalities in the objectives of individuals, societies and international organizations.

***PART IV – The WTO as a political association***

Our role then, in the context of the WTO is to identify what we mean by ‘public body’ which, as discussed above, requires identifying the *telos* of the political association in question. This presents particular challenges for the WTO: to determine what is public, we must identify the aim or objective of the State. Further, as our preoccupation is the recognition of such a conception by a separate yet related institution (the WTO), must the aim of the State chime with the aim of the WTO? Or is there a relationship between these political associations? In part, therefore, we are to ask: what is the purpose of the WTO? And, more challenging still, what is the purpose of the State and how do they relate?

There are further difficulties. If we are to suggest a *telos* looking at (principally) the WTO, are we not making the old claim that the international is to take precedence over the domestic? That the International Law Commission, General Assembly or Ministerial Conference, or worse, the abstractions of academics should replace any international consensus on what the ‘public’ is? In the case of conflict, are we then to prioritise the international? And if so, how does this not differ from a Kelsenian conception of Monism?[[96]](#footnote-96) Alternatively, should we prioritise the purpose of the State, focussing on this over the others, granting States the sort of deference that some might find appealing when related to their own affairs, but less so when seeking to enforce their rights vis-à-vis others under the SCM Agreement.[[97]](#footnote-97)

The alternative, posited here, is to acknowledge the shared space between the two *poleis:* the WTO and the State, identifying the *telos* that they share. The objective in all instances will not always be identical (States have specific obligations to their citizens that are not owed to others, for example), though there is still an overlap. There is a consistency in such a position, as we must work on the premise that States intend to become Members of bodies that do not conflict with their fundamental aims.[[98]](#footnote-98)

It is suggested that this is not as insurmountable a challenge as may appear: the Aristotelian and Ciceronian models share a sense of uniformity in social organization. While Aristotle extrapolates the necessity of a *polis* from the family unit through the individual,[[99]](#footnote-99) Cicero goes further and begins with a single individual.[[100]](#footnote-100) In our current situation this posits the ability to identify commonalities across the domestic and international spheres, acknowledging an underlying *telos* that is reflected in both State and WTO. It is a recognition that these are communities of human beings, that the social (and thus political) world is one constituted by people, and that at the heart of all of this, there is an aim in mind: the pursuit of an objective which serves the common interest over individual interests.[[101]](#footnote-101)

Does the WTO then constitute a *polis*? There are many forms of association that need not have the higher aim of encouraging goodness as in the *polis.* Aristotle identifies other forms of association or relationship which do not rise to the level of a *polis:* only the city-State (in his view) is capable of achieving the goal of encouraging goodness. For this reason he argues:

‘…it is not the end of the city-State to provide an alliance for mutual defence against all injury, nor does it exist for the purpose of exchange or [commercial] dealing. If that had been the end, the Etruscans and the Carthaginians would be in the position of belonging to a single city-State; and the same would be true to all peoples who have commercial treaties with one another. It is true that such peoples have agreements about imports; treaties to ensure just conduct; and written terms of alliance for mutual defence. On the other hand, they have no common offices to deal with these matters: each, on the contrary, has its own offices, confined to itself.’[[102]](#footnote-102)

He does not accept that the existence of these international arrangements might constitute the sort of political association that the State constitutes. We can note, however, that exactly the sort of common offices or institutions referred to do exist. Furthermore, if we take into account the WTO’s concern for development,[[103]](#footnote-103) its interest in a system that encourages compliance and the rule of law amongst all members,[[104]](#footnote-104) and its concern for the wellbeing of the membership *as a whole*,[[105]](#footnote-105) his further points seem inapplicable:

‘Neither party concerns itself to ensure a proper quality of character among the members of the other; neither of them seeks to ensure that all who are included in the scope of the treaties are just and free from any form of vice; and they do not go beyond the aim of preventing their own members from committing injustice against one another.’[[106]](#footnote-106)

The rejection of a political association forming beyond the city-State (in his view) no longer seems tenable. This is especially the case where we identify the motivation for the very existence of the *polis* in Aristotle’s view. Though a city-State may offer mutual protection and a site on which to live, these are ‘conditions which must be present before a city-State can exist; but the presence of all these conditions is not enough, in itself, to constitute a city-State.’[[107]](#footnote-107) The true basis of the *polis,* is the pursuit of the good life, ‘for the sake of attaining a perfect and self-sufficing existence.’[[108]](#footnote-108)Such an existence is, if not impossible without international coordination and action, certainly more achievable with.[[109]](#footnote-109) The origins of international law are often traced to the need to respond to challenges that States are otherwise incapable of resolving themselves.[[110]](#footnote-110) The State as an association thus overlaps with the WTO, both institutions seeking to permit the fulfilment of the good life. Those acts or bodies in the pursuit of such an objective are those we consider ‘public.’[[111]](#footnote-111)

***Part V – Public Bodies: the pursuit of the common good in the common interest***

The discussion thus far has avoided developing the exact content of the test outlined. The primary purpose of this paper has been to draw attention to alternative methodologies to reframe an issue that, it is argued, has yet to be fully and properly confronted. In this way, rather than offering a complete answer, the aim has been to problematize as a means of drawing attention to what is considered to be an unwillingness to think about the core terms underpinning WTO law (and indeed, international law more generally).[[112]](#footnote-112)

Nonetheless, what follows is a possible suggestion based on an alternative analysis based on aims or objectives of the political association and bodies’ contribution to this, rather than on the basis of other tests such as control or direction. To return to the *US – China AV/CVD* dispute as an example, rather than examining the level of control or oversight exercised by a government, or the nature of the function exercised by the SOE or SOCB, it is argued that to answer whether SOEs or SOCBs constitute a ‘public body’ the following questions must be asked. First, what is the aim or objective of the political association (that encompasses both State and WTO)? Second, does the SOE or SOCB seek to pursue this aim or objective? Third, in doing so, does it seek to prefer private or common interests? These tests require elaboration.

At its heart, the first question relates to the reason why the association exists.[[113]](#footnote-113) The necessity of international interaction for the fulfilment of a political community’s promise was identified above.[[114]](#footnote-114) In the context of trade this is especially apposite. One suggestion is that ‘the point or common good of such an all-round association… [is] the securing of a whole ensemble of material and other conditions that tend to favour the realization, by each individual in the community, of his or her personal development.’[[115]](#footnote-115) Such an objective is intimately tied to the need for trade and the international need for trade regulation.

The rationale for trade has long been that it offers great benefits to society (as a whole). It is not necessary to repeat here the extensively reproduced arguments that introduce numerous texts on WTO law relating to the potential benefits of trade: increasing standards of living, improving health indicators and reduce mortality rates,[[116]](#footnote-116) and encouraging interdependence that in turn may prevent conflict or strife.[[117]](#footnote-117) The legal texts of the WTO similarly set out such objectives,[[118]](#footnote-118) while policy-makers at the national[[119]](#footnote-119) and international[[120]](#footnote-120) levels also identify the benefits of trade.

None of these benefits are ends, however. The benefits of trade are twinned to conceptions of human flourishing and opportunity. Note, for example, then Director General Lamy’s concern over ‘how to ensure trade benefits are shared more fairly among nations… [and] how to ensure a better distribution of the benefits stemming from trade within a nation.’[[121]](#footnote-121) This concern[[122]](#footnote-122) reflects the utility of the benefits from trade for individuals, otherwise there would be no disquiet with aggregate gains that are unevenly distributed. These benefits provide the conditions for individuals to realise their lives as they might wish and thus to pursue a good life.

This leads us to the second question: does the provision of inputs by SOEs or loans by SOCBs, for example, seek to contribute to the common good? To answer this question we must examine, not the nature of the authority exercised by the SOE or SOCB, nor who holds controlling shares (which it has been argued are arbitrarily determined at a static point in time), but instead the extent to which their objective is to facilitate the pursuit of the good life.

If we accept that the benefits from trade can be widespread and necessary for the common good, does this not elide the distinction between public and private? In a large part, individuals trade, not States, and if encouraging trade is a part of the aims of the State and WTO, does all economic activity not then contribute to the aims of the political association? A bank lends money to a business, receives a good return on its investment, and this business, in turn, increases its productivity and profitability – does this not then contribute to the potential flourishing of individuals who would be in a materially stronger position to pursue a good life? It is at this point that we return to the distinction between the pursuit of the common good in the common interest as opposed to private interest,[[123]](#footnote-123) and the third question: does the SOE or SOCB seek to privilege private interests or common interests?

There will be instances where acts are in the common interest and nonetheless benefit an individual privately. The difference is in the *objective*: is the aim to act in the common interest? Or is this a separate and perhaps unintentional result (as would be the case with our example of the lender in the previous paragraph)? If the objective of the act is in the pursuit of the common good and in the common interest, then we have an understanding of what it is that we mean by naming something a ‘public body’. The outcomes may also give us an indication of this answer. We may ask, to what extent were benefits (if any) felt by those who were intended to benefit from them? And to what extent did the provision of materials by SOEs or loans by SOCBs benefit private interests *over* common interests?[[124]](#footnote-124) Yet this helps us identify aims or objectives not effects – the determination of whether a benefit is actually conferred is a separate exercise under Article 1.1(b).

Another example can further help illustrate how this three-limbed test might function. In a recent dispute over US countervailing duties on a number of Chinese goods in response to alleged subsidisation, [[125]](#footnote-125) the US claimed that Chinese solar panel manufacturers were subsidised by Chinese SOEs through the provision of polysilicon for ‘less then adequate remuneration’, i.e. that the Government of China (through an SOE) provided materials at less than market value to its solar panel manufacturers.[[126]](#footnote-126) During the dispute at the WTO, the US and China repeated many of their claims from previous disputes.In the US’ case, that control (understood widely as including majority-ownership) was a better determinant of whether an SOE was a ‘public body’ while China argued that it was necessary to identify whether the SOE had been ‘vested with, and exercising, authority to perform governmental functions’.[[127]](#footnote-127) The panel responded by repeating the analysis of the Appellate Body in *US – AD/CVDs (China)*, finding that while China had erred in suggesting that ‘authority to perform governmental functions’ was to be understood in strict legal terms (i.e. a specific grant of legal authority) the US had nonetheless failed to investigate sufficiently the nature of the SOEs, resting on their majority-ownership.[[128]](#footnote-128)

None of these options are doctrinally appealing. Note how the Chinese position seeks to elide ‘government or any public body’ into a single term, ignoring the difference placed on them in the text. Meanwhile, the US’ position either broadens the meaning of ‘public body’ so extensively through simple majority-ownership that it would catch a far wider number of bodies than intended, or if expressed in its control variant, would undermine the meaning of the ‘entrusts or directs’ provision under Article I.1(1)(a)(iv). The panel’s recitation of the Appellate Body test that public bodies are those ‘vested with… governmental functions’ does not give any tool to know what the governmental function *is*.[[129]](#footnote-129)

The test proposed here would be different. What is the relevant objective of the State and WTO in this instance and to what extent do the SOEs in question (i.e. those that have supplied the polysilicate) seek to contribute to them? It may seem clear that they do not, and are thus not to be a ‘public body’ for the purposes of the SCM Agreement. The onus would then be on the US to demonstrate entrustment or direction of a private body under Article 1.1(1)(a)(iv), which is exactly the situation that provision was meant to address. However, solar panels offer an interesting example as we may consider their role in encouraging the use of renewable technologies (and potentially sustainable development) fitting more neatly with objectives of the State, which also find expression at the WTO.[[130]](#footnote-130) Where such a determination were made, the third limb of the test (identifying the privileging of private over common interests or not) would enable the SCM Agreement to ensure that the provision of these goods was in the common interest and not merely a façade.

Such an approach would limit the scope of what constitutes a ‘public body’ but it would not necessarily limit the application of the SCM Agreement. Note, that ‘government’ (in the narrow sense) is still covered, as are private bodies that have been ‘entrust[ed] or direct[ed]’.[[131]](#footnote-131) What it would do is clarify the limited application of the SCM Agreement to bodies which are public yet non-governmental unless they acted in a way which we think of as truly *public* – that is, for the common good in the common interest.

Nor would this approach undermine the SCM Agreement. While the Agreement seeks to regulate those bodies with a public dimension to limit their impact on trade,[[132]](#footnote-132) the idea of interference in the market place (which underpins the SCM Agreement) does not relate directly to governmental involvement in private economic action.[[133]](#footnote-133) This is part of the issue but it approaches the dynamic between public and private in instrumental terms which, in turn, is premised on determined conceptions of the public and private which underpin the previously identified ‘functional’ and ‘source’ approaches.[[134]](#footnote-134) Instead, it is the aims of government involvement in the market that are key: action taken for the common good in the common interest should not seek to advantage[[135]](#footnote-135) some actors over others.[[136]](#footnote-136)

Further, we recall that the ‘public body’ (or government or private body) criterion alone does not determine whether or not a subsidy exists; the requirements that a benefit be conferred and (in the case of actionable subsidies) the subsidy be specific to an industry or region ensure that the ‘public body’ analysis is only one part of the examination.[[137]](#footnote-137) It does, however, set out the key defining features of what constitutes a public body (and thus a non-governmental entity that may be subject to WTO regulation). The public nature of the entity is determined not by the arbitrary classification of the functions it carries out, nor by whether it is owned by government, but by its objectives and the extent to which they are shared by the wider *polis*.[[138]](#footnote-138)

Such a suggestion is far from problematic, with the most notable question left begging: who decides what the common good in the common interest is? A legal perspective may well instinctively seek a legal source: judges (or panellists or Appellate Body members) as the arbiters of such questions. If they are to do so, do we not then run the risk of a prioritised interpretation? One skewed, perhaps unconsciously, towards the interests of an elite that claims to speak for the ‘common’ or at least, to a world view that is built on certain political presumptions.[[139]](#footnote-139) This need not be the case, however. There are other options, expressions of the *polis* communicated through common institutional forums (the Ministerial Conference or General Assembly), though we may well ask how we are to ensure that the ‘common’ is not supplanted by the majority (as cautioned earlier). Yet in spite of these challenges, there is hope that solutions may be well be found.

***Conclusion***

International law and WTO law in particular has paid insufficient attention to the underlying content of some of its key terms. Attention has been drawn to one such term, ‘public body’ though in doing so other conceptually related terms such as ‘governmental authority’ have also been identified. The approaches taken in interpreting these terms have produced superficially acceptable results, built on conceptually unstable grounds. It has been argued here that genuine engagement with the core of what we mean by ‘public’ and ‘governmental’ in international law must take place. The increasing scope of international governance and changing nature of State structures is set to challenge our ossified understanding of the traditional State with ‘typical’ governmental functions or relationship to the market.

The alternative proposed seeks to remedy both the doctrinal and philosophical problems identified with the panels’ Appellate Body’s interpretations thus far. By focussing on the aims of the body in question, and whether they correspond to those of the State and WTO, we are free to both give the structure of Article 1 SCM Agreement meaning, as well as clarify the purpose of the world trade system and its objectives. This final point clearly has normative aspirations.

Terms which have conceptually complex roots cannot be understood simply by applying the rules of treaty interpretation as currently understood, nor is there a requirement to do so. There is a prior analysis, the determination of a term *before* it is necessarily subject to treaty interpretation as understood in international law. Indeed, the suggestion here is that if this type of exercise were concluded more thoroughly and more often, such debates would be less commonplace at the international level and possibly present fewer challenges.

1. In particular: *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Panel Report (22 October 2010) WT/DS379/R; *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, Panel Report (14 July 2014) WT/DS436/R. [↑](#footnote-ref-1)
2. In particular: *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Report of the Appellate Body (11 March 2011) WT/DS379/AB/R; *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, Report of the Appellate Body (8 December 2014) WT/DS436/AB/R. [↑](#footnote-ref-2)
3. How far this may change is open to discussion, such as the case of private standard setting bodies (see n8). [↑](#footnote-ref-3)
4. For a general overview: P Van den Bossche & W Zdouc, *The Law and Policy of the World Trade Organization* (CUP 3rd ed 2013). [↑](#footnote-ref-4)
5. There is an increasing interest in the public-private distinction at an international or, more commonly, transnational level: M de Bellis, ‘Public law and private regulators in the global legal space’ 9 *ICON* 2 (2011) 425; A Supiot, ‘The public-private relation in the context of today’s refeudalization’ 11 *ICON* 1 (2013) 129; M Goldmann, ‘A Matter of Perspective: Global Governance and the Distinction between Public and Private Authority (and Not Law)’ (November 4, 2013) available at <http://ssrn.com/abstract=2260293> [↑](#footnote-ref-5)
6. Most notably through Public-Private Partnerships and Private Finance Initiatives, though for other discussions: M Rosenfeld, ‘Rethinking the boundaries between public law and private law for the twenty first century: An introduction’, 11 *ICON* 1 (2013) 125, J Resnik, ‘Globalization(s), privatization(s), constitutionalization, and statization: Icons and experiences of sovereignty in the 21st century’, 11 *ICON* 1 (2013) 162. [↑](#footnote-ref-6)
7. Various different frameworks speak to this development such as transnational legal process, the *lex mercatoria*, International Public Authority, and Global Administrative Law. See, for example: H Koh ‘Transnational Legal Process’, 75 *Nebraska Law Review* (1996) 181; A von Bogdandy & I Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (OUP 2014); B Kingsbury ‘The Concept of “Law” in Global Administrative Law’, 20 *European Journal of International Law* 1 (2009) 23. [↑](#footnote-ref-7)
8. See: Note by the Secretariat, ‘Proposed Working Definition On SPS-Related Private Standards’ (6 March 2012) G/SPS/W/265; A Arcuri, ‘The TBT Agreement and private standards’, in M Trebilcock & T Epps (eds) *Research Handbook on the TBT Agreement* (Edward Elgar 2013). [↑](#footnote-ref-8)
9. See below at n14, regarding discussions relating to the definition of a ‘public authority’ for the purposes of the UK Human Rights Act 1998, [↑](#footnote-ref-9)
10. For example: E-U Petersmann, ‘Time for a United Nations “Global Compact” for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration’, 13 *EJIL* (2002) 621, P Alston, ‘Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann’, 13 *EJIL* (2002) 815 [↑](#footnote-ref-10)
11. Art 1.1(a)(1) SCM Agreement. [↑](#footnote-ref-11)
12. Similar difficulties arise in relation to the status of Sovereign Wealth Funds and their status within domestic legal orders: *AIG Capital Partners Inc & Anr v Kazakhstan & Ors*[2005] APP.L.R. 10/20. [↑](#footnote-ref-12)
13. For example, the particularly prescient article: C Chinkin, ‘A Critique of the Public/Private Dimension’, 10 *European Journal of International Law* 2 (1999) 387 [↑](#footnote-ref-13)
14. Specifically, within the law of state immunity the appropriate application of a restrictive approach to immunities and the distinction between *acta jure imperii* and *acta jure gestionis*. See: J Crawford, ‘International Law and Foreign Sovereigns: Distinguishing Imune Transactions’, 53 *British Yearbook of International Law* 2 (1982) 75, H Fox and P Webb, *The Law of State Immunity* (3rd ed, OUP 2013), chapter 13. There are also reflections of this debate within the application of Convention Rights within the English legal system. See: House of Lords & House of Commons, Joint Committee on Human Rights,‘The Meaning of Public Authority under the Human Rights Act’, Seventh Report of Session 2003–04, HL Paper 39 HC 382, 3 March 2004, D Oliver, ‘The frontiers of the State: public authorities and public functions under the Human Rights Act’, *Public Law* (2000) 476 [↑](#footnote-ref-14)
15. Cf., respectively: *Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) [2003] ICJ Rep 161, Separate Opinion of Judge Owada, paras 41–52; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1984] ICJ Rep 392. [↑](#footnote-ref-15)
16. n8 and accompanying text. [↑](#footnote-ref-16)
17. *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, Report of the Appellate Body (28 November 2002) WT/DS213/AB/R, para 74. [↑](#footnote-ref-17)
18. In particular: *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Report of the Appellate Body (13 October 1999) WT/DS103-113/AB/R. [↑](#footnote-ref-18)
19. *Ibid*. para.98. [↑](#footnote-ref-19)
20. *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, panel report (17 May 1999) WT/DS103-113/R, para.7.76. [↑](#footnote-ref-20)
21. Save limited circumstances: *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 [↑](#footnote-ref-21)
22. *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Report of the Appellate Body (13 October 1999) WT/DS103-113/AB/R, para.97. [↑](#footnote-ref-22)
23. The opposite is also the case: an absence of authority to direct private actors does not *necessarily* exclude these bodies from being considered governmental: see the arguments of the US in *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, Report of the Appellate Body (8 December 2014) WT/DS436/AB/R, para. 4.23. [↑](#footnote-ref-23)
24. *Korea – Measures Affecting Trade in Commercial Vessels*, Panel Report (7 March 2005) WT/DS273/R, para.7.50. [↑](#footnote-ref-24)
25. *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* (30 June 2010) WT/DS316/R, para.7.1359. [↑](#footnote-ref-25)
26. The *US – Carbon Steel (India)* dispute is also discussed though the work of the panel and Appellate Body in this case built on the Appellate Body report in *US – AD/CVDs (China)*. [↑](#footnote-ref-26)
27. *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Panel Report (22 October 2010) WT/DS379/R, para.8.59. [↑](#footnote-ref-27)
28. *Ibid.* at para.8.60. The panel also examined municipal law of numerous jurisdictions including Scots law and the law of Quebec. [↑](#footnote-ref-28)
29. *Ibid*. at para.8.68. [↑](#footnote-ref-29)
30. *Ibid*. at para.8.69, asserting that ‘[t]his is fully in keeping with the everyday notions of "private" meaning unrelated to the government, and "public" meaning governmental in some sense.’ [↑](#footnote-ref-30)
31. *Ibid*. at para.8.94. [↑](#footnote-ref-31)
32. *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Report of the Appellate Body (11 March 2011) WT/DS379/AB/R, para.318. [↑](#footnote-ref-32)
33. Reaffirmed in *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, Report of the Appellate Body (8 December 2014) WT/DS436/AB/R, para.4.37. [↑](#footnote-ref-33)
34. *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Report of the Appellate Body (11 March 2011) WT/DS379/AB/R, para.285. [↑](#footnote-ref-34)
35. *Ibid.* at para.317. [↑](#footnote-ref-35)
36. Note the US request for clarity on this test and its relation to the ‘control’ criterion: *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, Report of the Appellate Body (8 December 2014) WT/DS436/AB/R, para.4.6. [↑](#footnote-ref-36)
37. *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Report of the Appellate Body (11 March 2011) WT/DS379/AB/R, para.310 [↑](#footnote-ref-37)
38. Articles on Responsibility of States of Internationally Wrongful Acts (2001) GAOR 56th Session Supp 10, 43. For a short comment on the Appellate Body’s use of the ASR in the *US – AD/CVDs (China)* dispute: J Pauwelyn, ‘Treaty Interpretation or Activism? Comment on the AB Report on *United States – ADs and CVDs on Certain Products from China*’, 12 *World Trade Review* 2 (2013) 235, 235-237. [↑](#footnote-ref-38)
39. ‘The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.’ [↑](#footnote-ref-39)
40. J Pauwelyn n38. [↑](#footnote-ref-40)
41. Though they nonetheless may inspire domestic judicial reasoning: *La Générale des Carrières et des Mines v F.G. Hemisphere Associates LLC*, [2012] UKPC 27. [↑](#footnote-ref-41)
42. General commentary to Articles on Responsibility of States of Internationally Wrongful Acts (2001), p.43. [↑](#footnote-ref-42)
43. Ibid., p.42. [↑](#footnote-ref-43)
44. The relevant test at this point then concerning itself with the level of control of the State over the entity under Article 8, Articles of State Responsibility. [↑](#footnote-ref-44)
45. On the fiction: A Osiander, ‘Sovereignty, International Relations, and the Westphalian Myth’ 55 *International Organization* 2 (2001) 251. [↑](#footnote-ref-45)
46. Each corresponding to ‘epochal’ moments: the end of the Thirty Years War, the end of the Second World War, and the end of the Cold War respectively. [↑](#footnote-ref-46)
47. In doing so, depriving a provision of the Agreement meaning. [↑](#footnote-ref-47)
48. *US — Countervailing Duty Investigation on DRAMS from Korea*, Report of the Appellate Body (27 June 2005) WT/DS296/AB/R, para. 113. [↑](#footnote-ref-48)
49. n26. [↑](#footnote-ref-49)
50. Ibid and accompanying text. [↑](#footnote-ref-50)
51. There has been detailed consideration of the alternatives posited thus far, see for example, Ming Du, ‘China’s State Capitalism and World Trade Law’, 63 *ICLQ* 2 (2014) 409. [↑](#footnote-ref-51)
52. For a fuller discussion of this issue: R Becroft, *The Standard of Review in WTO Dispute Settlement: Critique and Development* (Edward Elgar 2012). [↑](#footnote-ref-52)
53. As the panel and Appellate Body had done in the *US – AD/CVDs (China)* dispute. [↑](#footnote-ref-53)
54. Unwisely succumbing to the temptation warned of by Lord Bingham: ‘…there is no single test of universal application to determine whether a function is of a public nature. A number of factors may be relevant, but none is likely to be determinative on its own and the weight of different factors will vary from case to case. Tempting as it is to try and formulate a general test applicable to all cases which may arise, I think there are serious dangers in doing so.’ *YL (by her litigation friend the Official Solicitor) (FC) (Appellant) v. Birmingham City Council and others (Respondents)* [2007] UKHL 27, para. 5. [↑](#footnote-ref-54)
55. For an alternative approach: M Goldmann, n5. [↑](#footnote-ref-55)
56. E.g., *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Panel Report (22 October 2010) WT/DS379/R, para.8.94. [↑](#footnote-ref-56)
57. UNTS, vol. 1155, p. 331 (‘VCLT’). *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body (29 April 1996) WT/DS2/AB/R, 17. [↑](#footnote-ref-57)
58. The translations of the principal texts used here are: Aristotle, *Politics* (tr. E Barker, ed. R F Stalley, OUP 2009), Cicero, *The Republic* and *The Laws* (tr. N Rudd, OUP 2008), Cicero, *On Obligations* (tr. P.G Walsh, OUP 2000). [↑](#footnote-ref-58)
59. Though writing later, Cicero was keenly influenced by Greek scholarship by virtue of having studied at Athens. He was noted for his fluency in Greek and support for Stoic philosophical traditions within Rome. See: J.G.F Powell (ed.), *Cicero the Philosopher* (Oxford Clarendon Press 1995). [↑](#footnote-ref-59)
60. Nonetheless, in support of drawing lessons in international affairs from antiquity: D Bederman, *International Law in Antiquity* (CUP 2001) chapter 2; see also, R Ago, ‘The First International Communities in the Mediterranean World’, *British Yearbook of International Law* (1983) 213, exclaiming ‘How many legal theorists and protagonists of international relations are still convinced of the alleged 'newness' of international law!’ [↑](#footnote-ref-60)
61. Aristotle, *Politics,* II.1, 1269a29-1272b1. [↑](#footnote-ref-61)
62. Cicero, *The Republic,* I.33-65. [↑](#footnote-ref-62)
63. C Molyneux, *Domestic Structures and International Trade* (Hart Publishing, 2001) 9. [↑](#footnote-ref-63)
64. Plato, *Republic,* II.543a-576b (tr. R Waterfield, OUP 1998) 277-319. [↑](#footnote-ref-64)
65. Note the criticism above at n45 and corresponding text. [↑](#footnote-ref-65)
66. Cicero, *The Republic,* I.65-71. [↑](#footnote-ref-66)
67. Aristotle, *Politics,* I.1, 1252a1. NB: Asterisks omitted, square brackets in the original. Here the translation has been modified, thus *polis* reads as city-State rather than city. In a specifically political-legal context, the importance of the State-like unit is sufficient to stress the sovereign nature of the *polis* (tr. E Barker, OUP 2009) 7. [↑](#footnote-ref-67)
68. R.F. Stalley, ‘Introduction’, in Aristotle, *Politics* (tr. E Barker, OUP 2009) xix. [↑](#footnote-ref-68)
69. Alternatively translated as ‘society’, e.g. *A Treatise on Government, or, The Politics of Aristotle* (tr. W Ellis, Everyman’s Library 1912). [↑](#footnote-ref-69)
70. Though *polis* has no direct translation other than city-State, the connotations extend further as a unit of social association of a political nature established for a purpose. [↑](#footnote-ref-70)
71. Aristotle, *Politics,* I.1,1252a1, emphasis added. [↑](#footnote-ref-71)
72. Aristotle, *Politics,* I.1,1252a7. [↑](#footnote-ref-72)
73. R.F. Stalley, ‘Introduction’, in Aristotle, *Politics* (tr. E Barker, OUP 2009) xxiii. [↑](#footnote-ref-73)
74. The aim of the association is thus a cause of its existence: Aristotle, *Metaphysics* II, (J Warrington, trans. & ed. Everyman’s Library 1966) 4. [↑](#footnote-ref-74)
75. Aristotle, *Politics* VII.1, 1323a14-1325b14. [↑](#footnote-ref-75)
76. Aristotle, *Politics,* III.9, 1280b6. [↑](#footnote-ref-76)
77. Aristotle, *Politics,* III.6, 1279a8. [↑](#footnote-ref-77)
78. Aristotle, *Politics,* III.7, 1279b4. [↑](#footnote-ref-78)
79. Cicero, *The Republic,* IV.3, also in the context of the ideal statesman, at V.8. [↑](#footnote-ref-79)
80. Aristotle, *Politics*, VII.13, 1331b24-1342b17, Cicero, *The Republic,* IV.1-13. [↑](#footnote-ref-80)
81. Aristotle, *Politics*, VII.8, 1328a21-1328b2. [↑](#footnote-ref-81)
82. Cicero, *On Obligations,* II.10. [↑](#footnote-ref-82)
83. Cicero, *On Obligations,* III.40-50. [↑](#footnote-ref-83)
84. Cicero, *On Obligations,* III.19-39. [↑](#footnote-ref-84)
85. Cicero, *On Obligations,* I.4. [↑](#footnote-ref-85)
86. Cicero, *On Obligations*, I.23. [↑](#footnote-ref-86)
87. Though there will often be instances where no conflict exists. [↑](#footnote-ref-87)
88. Cicero, *On Obligations,* II.10. [↑](#footnote-ref-88)
89. In the original, ‘lege*’*. ‘Lex’ has a more specific meaning, relating to a specific law rather than a more general right. [↑](#footnote-ref-89)
90. Cicero, *On Obligations,* I.20-21. [↑](#footnote-ref-90)
91. The *fasces*, a physical representation of official power. [↑](#footnote-ref-91)
92. Cicero, *In Verrem,* II.5, 39. Translation in: Cicero, *Political Speeches* (tr. D.H Berry, OUP 2011), 44. [↑](#footnote-ref-92)
93. J Finnis, *Aquinas* (OUP 1998) 11. [↑](#footnote-ref-93)
94. N.W Barber, *The Constitutional State* (OUP 2012) 11ff. [↑](#footnote-ref-94)
95. n57 and accompanying text. The Articles in question are: 18, 19(c), 41(b)(ii), 58(b)(ii), 60(b) and most notably, 31(1): ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. [↑](#footnote-ref-95)
96. For a concise analysis of Kelsen’s theories on monism: F Rigaux, ‘Hans Kelsen on International Law’, 9 *European Journal of International Law* (1998) 325. [↑](#footnote-ref-96)
97. Reflections of this result can be seen in the ‘public purpose’ requirement for lawful expropriation under international investment law: ‘That limitation, however, has not figured prominently in international claims practice, perhaps because the concept of public purpose is broad and not subject to effective re-examination by other states.’ American Law Institute, *Restatement of the Law Third, Foreign Relations Law of the United States* (1987) Vol. II, 200. [↑](#footnote-ref-97)
98. This is an echo of the logic underpinning the opinion of Lord Browne-Wilkinson in *R v Bow Street Magistrates ex p Pinochet* [2000] 1 A.C. 147. HL. [↑](#footnote-ref-98)
99. Aristotle, *Politics*, I.3, 1253b1-1260b8. [↑](#footnote-ref-99)
100. ‘We must clarify the *nature* of justice, and that has to be deduced from the nature of man. Then we must consider the laws by which states ought to be governed, and finally deal with the laws and enactments which peoples have compiled and written down.’ Cicero, *The Laws*, I.17. [↑](#footnote-ref-100)
101. n92 and corresponding text. [↑](#footnote-ref-101)
102. Aristotle, *Politics,* III.9, 1280a25. [↑](#footnote-ref-102)
103. Note the designation of Doha as a ‘development’ round and the numerous commitments and specific provisions under the covered agreements. For a detailed analysis: S Rolland, *Development at the WTO* (OUP 2012). The success or otherwise of the WTO in achieving these aims is, of course, subject to debate. [↑](#footnote-ref-103)
104. For example, Marrakesh Declaration of 15 April 1994, paragraph 1, identifying ‘the stronger and clearer legal framework [Members] have adopted for the conduct of international trade, including a more effective and reliable dispute settlement system’. [↑](#footnote-ref-104)
105. See, for example, the Doha Ministerial Declaration: ‘We recognize the need for *all our peoples* to benefit from the increased opportunities and welfare gains that the multilateral trading system generates.’ WT/MIN(01)/DEC/1 20 November 2001, emphasis added. [↑](#footnote-ref-105)
106. Aristotle, *Politics,* III.9, 1280a25. [↑](#footnote-ref-106)
107. Aristotle, *Politics,* III.9, 1280b29. [↑](#footnote-ref-107)
108. *Ibid*. [↑](#footnote-ref-108)
109. Thus Finnis’ critique: ‘we must conclude that the claim of the national state to be a complete community is unwarranted and the postulate of the national legal order, that it is supreme and comprehensive and an exclusive source of legal obligation, is increasingly what lawyers would call a “legal fiction”.’ J Finnis, *Natural Law & Natural Rights* (2nd ed. OUP 2011) 150. [↑](#footnote-ref-109)
110. V Lowe, *International Law* (OUP 2007) 1: ‘The world needs international law, because no State acting alone can achieve its aims.’ [↑](#footnote-ref-110)
111. That the political concept of what constitutes the ‘public’ span jurisdictional borders and the boundaries between legal systems need not surprise. Phillip Allott’s critique of the Vattelian move in international law, permitting the distinction between the individual and acts done in the name of a legal fiction, the State, expresses the fundamental disquiet with both the artificiality of the separation as well as its consequences: P Allott, *Eunomia: A New Order for a New World* (OUP 2001) 243-253. [↑](#footnote-ref-111)
112. A notable exception is Matthias Goldmann’s working paper (*supra* n5) where he examines the distinction between public and private authority though the lens of discourse theory. [↑](#footnote-ref-112)
113. The *telos* as a cause of the association, a reason for its existence, *supra* n74. [↑](#footnote-ref-113)
114. *Supra* n110 and corresponding text. [↑](#footnote-ref-114)
115. J Finnis, *Natural Law & Natural Rights* (2nd ed. OUP 2011) 154. [↑](#footnote-ref-115)
116. *Inter alia,* R Baldwin, ‘The Case for a Multilateral Trade Organization’, in A Narlikar, M Daunton & R Stern (eds.), *The Oxford Handbook on the World Trade Organization* (OUP 2012), M Trebilcock & R Howse, *The Regulation of International Trade* (3rd ed. Routledge 2005) chapter 1, A Lowenfeld, *International Economic Law* (2nd ed. OUP 2008) chapter 1, S Lester, B Mercurio & A Davies, *World Trade Law: Texts, Materials and Commentary* (2nd ed. Hart 2012) chapter 1, P Van den Bossche & W Zdouc, *The Law and Policy of the World Trade Organization* (3rd ed. CUP 2013), chapter 1. [↑](#footnote-ref-116)
117. For such motivations in the context of the GATT, see: Irwin, Mavroidis & Sykes, *The Genesis of the GATT* (CUP 2009) 11. [↑](#footnote-ref-117)
118. *Supra* n104 and corresponding text. [↑](#footnote-ref-118)
119. Note the United States Trade Representative’s Mission Statement: ‘USTR seeks to contribute to U.S. economic growth, competitiveness and prosperity by opening markets and reducing trade and investment barriers around the world to create new commercial opportunities for U.S. goods and services industries, workers, ranchers and farmers.’ USTR Strategic Plan, FY 2007-2012 [↑](#footnote-ref-119)
120. For example, a joint EU/China statement ‘ensuring that their economies remain key drivers for global economic growth and providing prosperity for all.’ *Joint Statement: Deepening the EU-China Comprehensive Strategic Partnership for mutual benefit*, Brussels 31 March 2014. [↑](#footnote-ref-120)
121. P Lamy, Speech: *Trends and Issues Facing Global Trade,* Kuala Lumpur 17 August 2007. [↑](#footnote-ref-121)
122. Also reflected more widely in popular discourse: for example, both J Stiglitz, *Making Globalization Work* (Penguin 2006) and J Bhagwati, *In Defense of Globalization* (2nd ed. OUP 2007) are, with different suggestions, preoccupied with making sure that the gains from trade are felt by populations at large. [↑](#footnote-ref-122)
123. This difference is reflected in other substantive areas of law: see, D Oliver, ‘The frontiers of the State: public authorities and public functions under the Human Rights Act’, *Public Law* (2000) 488, referring to the old English law concept of ‘common callings’ as businesses ‘affected with a public interest’ and the EU concept of a ‘service of general interest’ (now ‘service of general economic interest’). [↑](#footnote-ref-123)
124. Such outcomes would be indicative not determinative as the opposite may be true and yet still aim to benefit private interests over public interests. [↑](#footnote-ref-124)
125. *US – Countervailing Duty Measures on Certain Products from China*, DS437. [↑](#footnote-ref-125)
126. For the US investigation: Solar Panels, Preliminary Affirmative Countervailing Duty Determination, Federal Register, Vol. 77, No. 58, 26 March 2012. [↑](#footnote-ref-126)
127. See: *US – Countervailing Duty Measures on Certain Products from China*, panel report (14 July 2014) WT/DS437/R, paras 7.34-7.49. [↑](#footnote-ref-127)
128. Ibid, para 7.75. [↑](#footnote-ref-128)
129. n47-50 and accompanying text. See also, the difficulties faced by the Court in *AIG v Kazakhstan* (n14). [↑](#footnote-ref-129)
130. E.g., Principle 3, Rio Declaration on Environment and Development (3-14 June 1992) A/Conf.151/26 (Vol. I). [↑](#footnote-ref-130)
131. Article 1.1(a)(iv) SCM Agreement. [↑](#footnote-ref-131)
132. Contrast with the GATS where the use of ‘governmental authority’ as a concept is designed to exclude the application of the Agreement to sectors which Members did not intend to liberalise: Article I.3(b) General Agreement on Trade in Services (15th April 1994) LT/UR/A-1B/S/1. [↑](#footnote-ref-132)
133. See: *United States – Measures Treating Export Restraints as Subsidies*, panel report (29 June 2001) WT/DS194/R, para. 8.63. [↑](#footnote-ref-133)
134. *Supra* n19 and corresponding text. [↑](#footnote-ref-134)
135. In the terminology of the SCM Agreement: confer a benefit. Article 1.1(b) SCM Agreement. [↑](#footnote-ref-135)
136. Reflected in the specificity test under Art 2 SCM Agreement. See the discussion on the detail in the *US – AD/CVDs (China)* Appellate Body report at para.361ff. [↑](#footnote-ref-136)
137. Under Article 2, specificity is framed in terms of ‘an enterprise or industry or group of enterprises or industries’ or ‘within a designated geographical region within the jurisdiction of the granting authority’ - which is to say not in terms of a particular political community or *polis*. The analysis for each of the other criteria is thus separate to the public body analysis which necessarily precedes the act of legal interpretation *strictu sensu*: n56 and accompanying text. [↑](#footnote-ref-137)
138. It is worth noting that ‘control’ or direction are still relevant but as part of a different analysis: rather than understanding control as being part of the nature of the entity (i.e. public or private) this test instead relates to whether or not the entity is acting under the instruction of the State. Under the Articles of State Responsibility, Article 8 and under Art 1.1(a)(1)(iv) SCM Agreement. [↑](#footnote-ref-138)
139. In this case, an approach built upon a specifically Western liberal tradition. [↑](#footnote-ref-139)