State-Owned Enterprises and International Investment Treaties
When are State-Owned Entities and their Investments Protected?

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I. Introduction

The activity of Sovereign Wealth Funds (SWFs) and State-Owned Companies (SOCs), referred to collectively here as State-Owned Enterprises (SOEs), has been attracting intense scrutiny in recent years.[1] This is due in

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[1] Phillip Riblett, "A Legal Regime for State-Owned Companies in the Modern Era" (2008) 18:1 J. Transnat'l L. & Pol'y 1.

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part to the remarkably rapid growth in their size, number and influence as they participate with increasing significance in industries of political, economic and strategic importance. The increased scrutiny can also be partially attributed to the fact that many SOEs hail from regions that have at times experienced strained relationships with the Western states in which they conduct much of their investment. Consequently, while Western states are interested in attracting SOE investment, they are simultaneously intent on ensuring that this investment is conducted in a politically neutral manner.

Investment by SOEs is regulated in multiple ways, and at multiple levels. At the international level a number of guidelines have been developed by supra-national organizations. Aimed at easing the concerns of national regulators and politicians, these prescribe best practices for SOEs, including transparency mechanisms and disclosure practices.[2] At the national level various countries have amended their foreign investment legislation to account for SOE activity by inserting tests relating to national security that must be met by inbound foreign investment. SOE investment is also subject to a third form of law and regulation that in its application to SOEs has gone largely overlooked to this point,[3] namely international investment law of the kind contained in Bilateral or Multilateral Investment Treaties (BITs or MITs) such as Chapter Eleven of the *North American Free Trade Agreement* (*NAFTA*)[4] and the *Energy Charter Treaty* (*ECT*).[5]

The lack of scholarship on this point deserves remediation. While national investment review procedures screen proposed foreign SOE investment *ex ante*, international investment law applies to SOE investment *ex post*, when circumstances relating to the investment itself and to relevant national security issues may have changed substantially. Furthermore, international investment law was largely originally conceived and constructed to apply to foreign private investment rather than the foreign public investment carried out by SOEs. The application of international investment law to SOEs can therefore give rise to various legal ambiguities and conceptual difficulties. This is particularly the case with respect to the standing of SOEs to bring investment arbitration claims under International Investment Treaties (IITs) such as BITs and MITs. While the growing body of international investment law has generally been well received, it has also been the subject of controversy, not least for the often inconsistent rulings of

[2] See section II.1, below.

[3] At the time of writing the author is aware of only a handful of other publications dealing with the relationship between international investment law and SOE investment. While these articles contribute greatly to current discussions of the regulation of SOE activity, they pay only cursory attention to the jurisdictional law applicable to that activity. See Mathius Audit, "Is the Erecting of Barriers against Sovereign Wealth Funds Compatible with International Investment Law?" (2009) 10 J. World Investment & Trade 617; Locknie Hsu, "Multi-Sourced Norms Affecting Sovereign Wealth Funds: A Comparative View of National Laws, Cross-Border Treaties and Non-binding 'Codes'" (2009) 10 J. World Investment & Trade 793 [Hsu, "Comparative View"]; Locknie Hsu, "Sovereign Wealth Funds, Recent US Legislative Changes, and Treaty Obligations" (2009) 43 J. World Trade 451.

[4] 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 and 32 I.L.M. 605 (entered into force 1 January 1994).

[5] 17 December 1994, 2080 U.N.T.S. 100, 34 I.L.M. 360 (entered into force 16 April 1998).

investment arbitration tribunals.[6] It is therefore important that the law pertaining to the jurisdiction of investment arbitration tribunals over claims brought by SOEs is developed in a consistent and comprehensive fashion that respects the rights and obligations of not only the States parties to IITs, but also the SOEs intended to benefit from them.

This article will attempt to lay the framework for such a body of law.[7] In particular, as a roadmap for practitioners of international investment law, it will focus on some of the jurisdictional issues most likely to arise where SOEs pursue investment arbitration under IITs. This analysis will be composed of three parts. The next section will provide additional background on SOEs. It will examine their activities, the concerns that they have typically inspired in Western nations, and the domestic investment laws applicable to foreign SOEs that have been enacted partially in response to these concerns. Section three will then briefly review several concepts fundamental to the jurisdiction of investor-state tribunals, including the basic features and rationale of international investment law and arbitration. Section four then turns to the central analysis of the paper, focusing on two of the more problematic jurisdictional issues posed by SOEs' investment arbitration claims.

The first issue that may arise is whether or not investment by SOEs is protected by a particular IIT. Many IITs inadequately distinguish between privately and publically owned foreign investors. As such, in many instances it will not be immediately clear from the ordinary meaning of the IIT's terms whether a SOE has standing to bring arbitration. Where this is the case the relevant IIT must be interpreted on its own merits. The level of protection granted to SOEs is assessed by interpreting the jurisdictional provisions' ordinary meaning within the broader context of the IIT, as well as the larger objects and purposes underlying the agreement. This may include consideration of asymmetrical definitions of "investor" contained in the IIT, references to "public" or "private" investment in the IIT, and other provisions directly or indirectly referencing the participation of States parties or their agencies.

The second issue that may arise is whether the SOE has standing to bring its investment arbitration claim before the forum of its choice—typically the International Centre for the Settlement of Investment Disputes (ICSID),

[6] See Susan D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73 Fordham L. Rev. 1521.

[7] It must be noted that, although the regulation of SOEs under international investment law certainly raises a number of other very significant issues–such as the changing meaning of sovereignty and the division between the public and private domains–such issues are beyond the scope of the current paper. For enlightened discourse in this regard, see e.g. Larry Catá Backer, "Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State-Owned Enterprises, and the Chinese Experience" (2010) 19 Transnat'l L. & Contemp. Probs. 3 at 20 ("Responses to sovereign investment have focused on law and policy to protect the integrity and workings of domestic and international markets by decentering the sovereign element of sovereign investment. However, this response lacks much of a plausible conceptual center."); Micah Schwalb, "International Law & State Corporatism" (1 May 2008) at 73, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1350609> (Arguing that state corporatism is properly the subject of both "international and domestic law, and that international law must... evolve to recognize this particular aspect of international relations.").

pursuant to the *Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States* (*ICSID Convention*).[8] While investment arbitration before the ICSID has its advantages, it is also accompanied by added jurisdictional requirements. Most importantly for this article, ICSID arbitration is subject to the "Broches test" for jurisdiction, and is therefore unavailable to an SOE either "discharging an essentially governmental function" or "acting as an agent" of its home state. Moreover, although this two-pronged inquiry has been the accepted standard governing the availability of ICSID arbitration to SOEs for over 40 years, further analysis will reveal that its parameters remain rather insufficiently defined. This creates uncertainty as to the availability in different circumstances of ICSID arbitration to SOEs, demanding a review of the applicable law and commentary. In particular, these uncertainties demand a thorough inquiry into when a SOE will be considered to be "discharging essentially governmental functions," when a SOE will be considered to be "acting as an agent" of its home state, and which entities will be considered SOEs in respect of ICSID arbitration in the first place.

II. State-Owned Enterprises and Domestic Investment Law

This section will discuss how the growth of SOEs during recent decades, and the accompanying rise in concerns regarding their influence, has resulted in increasing domestic regulation of their activities. It will explain the increasingly significant scale of SOEs' activities, the intense domestic politics surrounding these activities, and the notable degree of ambiguity in much domestic investment law concerning SOEs. The discussion below does not directly relate to the jurisdictional issues in international investment law that are the focus of this article, but it does place these issues in context, and is essential to understanding why it is important to identify reliable legal principles to govern the standing of SOEs to bring investment claims under IITs.

1. *The Increasing Significance of Sovereign Wealth Funds and State-Owned Companies*

Sovereign wealth funds are defined by the United Nations Conference on Trade and Development (UNCTAD) as "a fund which is owned by the State or the Government and which is composed of financial assets such as stocks, bonds, property, gold, currencies and other investment vehicles."[9]

[8] 18 March 1965, 575 U.N.T.S. 159, 4 I.L.M. 532 (entered into force 14 October 1966). Investment arbitration tribunals can be constituted before a number of different international arbitration institutions, or under such independent arbitration rules such as the United Nations Commission on International Trade Law (UNCITRAL) *Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17, Annex 1 (1985), 24 I.L.M. 1312. For a number of procedural reasons, the *ICSID Convention* is typically preferred by disaffected foreign investors. For further analysis of these considerations, please see sub-sections IV.1 and IV.3, below.

[9] "The Protection of National Security in IIAs: UNCTAD Series on International Investment Policies for Development" (New York and Geneva: United Nations, 2009) at 19, online: <http://www.unctad.org/en/docs/diaeia20085_en.pdf> [UNCTAD, "National Security"]. See

The first SWFs were based in Middle Eastern countries,[10] but these have recently been joined by similar investment vehicles from China, Russia, Brazil, Algeria, Libya and Venezuela.[11] As this history suggests, the growth of most SWFs can be tied to the rapid escalation of oil prices over the last decade and the increasing foreign reserves accumulated by oil and gas exporting nations as a result.[12] The Abu Dhabi Investment Authority, thought to be the world's largest SWF, was in 2007 estimated to hold over US$875 billion in assets.[13] In total, in 2007 the world's SWFs were estimated to hold over US$15 trillion in assets, at least two thirds of which were international in nature.[14] Indeed, SWFs now collectively control more capital than the international hedge fund industry.[15]

The goals pursued by SWFs vary but may include securing access to natural resources (including energy and minerals), growing national brands into global leaders, and strengthening international relationships.[16] Specific interests prized by SWFs have traditionally included oil and gas properties, financial services, mining ventures and technology companies, but they have been diversifying their holdings as of late with ventures into the education, health and entertainment sectors.[17] The type of assets pursued by SWFs has also evolved, moving from bonds and other financial instruments to real estate, hedge funds and, most noticeably, to equity investments.[18] This includes greater participation in the mergers and acquisitions market, and lately the distressed assets markets, where high profile SWF action has included investments in Morgan Stanley, Merrill Lynch and Citigroup.[19] The moves made by SWFs have at times been dramatic and have involved some major Western institutions. In 2008 the investment and real estate arms of Dubai World acquired a 20% stake in Cirque du Soleil, the world's largest live entertainment business.[20] In 2007 Borse Dubai purchased a 19.9% share

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also Julius Melnitzer, "Cash Rules" *Lexpert: The Business Magazine for Lawyers* (October 2009) 83 at 83 (defining SWFs as "discrete pools of government-owned or controlled entities whose portfolios include international assets.").

[10] The first SWF is believed to have been established in Kuwait in the 1950s. See Hsu, Comparative View, *supra* note 3 at 793.

[11] See Gerard Lyons, "State Capitalism: The Rise of Sovereign Wealth Funds" (2008) 14 L. & Bus. Rev. Am. 179.

[12] Charles Kovacs, "Sovereign Wealth Funds: Much Ado About Some Money" (1 October 2009) 14 Columbia FDI Perspectives, online: <http://www.vcc.columbia.edu/content/sovereign-wealth-funds-much-ado-about-some-money>.

[13] Audit, *supra* note 3 at 618. See also UNCTAD, "National Security", *supra* note 9 at 18-19. Some of the other largest SWFs include those hailing from Kuwait, China, Singapore and Norway. See also UNCTAD, *World Investment Report 2008: Transnational Corporations and the Infrastructure Challenge* (New York and Geneva: United Nations, 2008) at 20-26, online: <http://www.unctad.org/en/docs/wir2008_en.pdf>.

[14] Melnitzer, *supra* note 9 at 83.

[15] Laura Badian & Gregory Harrington, "The Politics of Sovereign Wealth: Global Financial Markets Enter a New Era" *The International Economy* (Winter 2008) 52 at 52.

[16] Melnitzer, *supra* note 4 at 84.

[17] *Ibid*. at 83.

[18] *Ibid*.; See also Audit, *supra* note 3 at 618; Kovacs, *supra* note 12.

[19] Melnitzer, *ibid*.

[20] *Ibid*.

in the NASDAQ Stock Market while simultaneously acquiring NASDAQ's 28% interest in the London Stock Exchange.[21]

The emergence of SWFs has seen a roughly parallel growth in the size and importance of State-Owned Companies. These are not pools of sovereign capital, but commercial corporate entities controlled or owned by sovereign states and engaged in specific sectors of strategic importance to those states.[22] Unlike SWFs, SOCs are not a recent phenomenon and have experienced varying degrees of utilization across different historical and political boundaries.[23] However, like SWFs, the SOCs currently attracting the most attention are those involved in the energy sector.

This is the case for a number of reasons. First, national oil companies (NOCs) have grown into truly sophisticated international market players no longer dependent on the major international oil companies (IOCs) for the type of external technology, expertise and financing that they once were.[24] This has led to concern among certain economists that IOCs face an irreversible decline in size, number and clout.[25] Secondly, NOCs now hold over 90% of the world's known oil and gas reserves, while the four largest privately held and operated IOCs collectively hold less than 4%.[26] This has sparked anxiety among some economists that too much of conventional energy reserves rests in too few hands, and that politics rather than business interests could be the deciding factor in how and when these reserves are exploited.[27] Finally, certain NOCs, particularly those connected to China,[28]

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[21] Badian & Harrington, *supra* note 15 at 55. See also Chris Lalonde, "Dubai or not Dubai?: A Review of Foreign Investment and Acquisition Laws in the U.S. and Canada", Note, (2008) 41 Vand. J. Transnat'l L. 1475 at 1492-1494.

[22] Badian & Harrington, *ibid.* at 52.

[23] The US, for instance, has almost no tradition of government ownership and has historically looked upon direct public participation in the economy with scepticism and suspicion. See David E.M. Sappington & J. Gregory Sidak, "Competition Law for State-Owned Enterprises" (2003) 71 Antitrust L. J. 479; Mark E. Plotkin, "Foreign Direct Investment by Sovereign Wealth Funds: Using the Market and the Committee on Foreign Investment in the United States Together to Make the United States More Secure" (2008) 118 Yale L.J. Pocket Part 88 at 91. For a history of the Canadian government's participation in its oil industry through the creation and control of Petro-Canada, see Peter McKenzie Brown, "Melting Away" *Oilweek: Canada's Oil & Gas Authority* (November 2009) 58.

[24] Riblett, *supra* note 1 at 3, 25, citing Valérie Marcel, *Oil Titans: National Oil Companies in the Middle East* (Washington, D.C.: Brookings Institution Press, 2006) at 77, 80, 85, 228; Daniel Johnston, "Changing fiscal landscape" (2008) 1 J. World Energy L. Bus. 31 at 32.

[25] Carola Hoyos, "The New Seven Sisters: Oil and Gas Giants Dwarf Western Rivals" *Financial Times* (11 March 2007).

[26] Marcel, *supra* note 24; "National Oil Companies: Really Big Oil", *The Economist* (10 August 2006). Other sources claim that NOCs control only approximately 75% of the world's remaining oil reserves, depending on the calculation methods used. See Johnston, *supra* note 24. See also Hoyos, *supra* note 20 (The four largest IOCs in 2007 were, in decreasing order of reserves, ExxonMobil, BP, Chevron, and Royal Dutch Shell); Eric Reguly, "Mighty Big Oil No Match for Big Nationals" *The Globe and Mail* (12 January 2011).

[27] See Amy Myers Jaffe & Ronald Soligo, "Militarization of Energy: Geopolitical Threats to the Global Energy System" (Houston: The James A. Baker III Institute for Public Policy of Rice University, May 2008), online: <http://www.rice.edu/energy/publications/WorkingPapers/IEEJMilitarization.pdf>.

[28] Chinese NOCs include China National Petroleum Corporation (CNPC), PetroChina, China National Offshore Oil Corporation (CNOOC) and China Petrochemical Corporation (Sinopec), among others. Other prominent NOCs include NIOC (Iran), ADNOC (Abu Dhabi), Rosneft and

have recently begun an invigorated campaign to increase their reserve holdings by acquiring stakes in major oil and gas projects, including those in the United States and Canada.[29] This has given rise to concerns that these investments are made in furtherance of geopolitical interests rather than profit.[30]

It is difficult to ignore the increasingly heavy footsteps of these oil giants.[31] The Seven Sisters, the privately owned and run IOCs that dominated global energy trade following the Second World War, have been usurped by the new sovereign "Seven Sisters" of Saudi Aramco, Gazprom, CNPC/PetroChina, the National Oil Company of Iran, Petrobas, Petronas and Petróleos de Venezuela.[32] Saudi Aramco is widely considered to be the world's largest company but, as it is not publically traded, this cannot be verified.[33] Thirteen separate NOCs control more reserves than does ExxonMobil, the world's largest private oil company.[34] Some NOCs have grown so large they have been termed "states within states" at times capable of so dominating national politics that, rather than defending government interests, their agendas have come to direct government affairs.[35]

2. *Primary Concerns Regarding Sovereign Wealth Funds and State-Owned Companies*

As the activities of SOEs have grown in scale and expanded into an increasing number of industries of political, economic and strategic importance, their activities have in many states become (at least until quite recently) the focus of a rising level of political and regulatory concern. Because of their ties to their home states, investments made by SWFs and SOCs raise different considerations among regulators compared to those raised when purely private enterprises pursue similar investments. Chief among these considerations is that in conducting their business, SOEs might

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Gazprom (Russia), PDVSA (Venezuela), Kufpec (Kuwait), Petrobas (Brasil), Petronas (Malaysia), Sonotrach (Algeria), Statoil and Norsk Hydro (Norway), ONGC (India), ENI (Italy), Nippon Oil (Japan), CPC (Taiwan), EGPC (Egypt) and TPAO (Turkey).

[29] Sizhi Guo, "The Business Development of China's National Oil Companies: The Government to Business Relationship in China" (Houston: The James A. Baker III Institute for Public Policy of Rice University, March 2007), online: <http://www.rice.edu/energy/publications/docs/NOCs/Papers/NOC_Guo%20China.pdf>; Eurasia Group, "China's Overseas Investment in Oil and Gas Production" (New York: Eurasia Group, 16 October 2006), online: U.S.-China Economic and Security Review Commission, <www.uscc.gov/researchpapers/2006/oil_gas.pdf>; Maria Kielmas, "China's Foreign Energy Asset Acquisitions: From Shopping Spree to Fire Sale?" (2005) 3:3 The China and Eurasia F.Q. 27.

[30] Johnston, *supra* note 24 at 33. See also Jaffe & Soligo, *supra* note 27.

[31] See Marcel, *supra* note 24.

[32] Hoyos, supra note 25; Reguly, *supra* note 26.

[33] For a discussion of the sometimes opaque operating practices of Saudi Aramco, see Matthew R. Simmons, *Twilight in the Desert*: *The Coming Saudi Oil Shock and the World Economy* (Hoboken, NJ: John Wiley & Sons, 2005).

[34] Johnston, *supra* note 24 at 32.

[35] Paul Stevens, "National Oil Companies and International Oil Companies in the Middle East: Under the Shadow of Government and the Resource Nationalism Cycle" (2008) 1 J. World Energy L. Bus. 5 at 18 (referring to Mexico's Pemex). See also Backer, *supra* note 7 at 59 (arguing that sovereign investment has the potential to accomplish political goals through economic means).

consider subjugating market interests to political goals. As explained by the OECD:

> when governments undertake commercial activities, they remain answerable to a wide range of societal pressures that their governance structures are designed to take into account. For this reason, governments may encounter difficulties in making credible commitments to pursue only "commercial" objectives, since their *raison d'être* involves being sensitive to political pressures and to pursuing non-commercial objectives.[36]

Politicians, regulators, and other commentators are also concerned that politically motivated operations could lead to market inefficiencies, and that government linkages can increase the capacity of firms to act anti-competitively because they may not be fully exposed to market pressures.[37] In the case of SOCs, additional concerns are that these entities may pursue goals such as vertical integration, wealth distribution, and energy security, even if these specific government agendas conflict with the maximization of shareholder value.[38]

These apprehensions, whether reasonable or not, have manifested themselves in several high profile political controversies in the United States and Canada surrounding recent attempted acquisitions. Dubai Ports World, owned by the government of Dubai, attempted in 2007 to acquire various US port terminals owned by P&O Ports, a private international conglomerate. This alarmed some members of the U.S. Congress, who viewed the proposed transaction as a threat to national security. The deal was eventually withdrawn.[39] Members of Congress responded with similar apprehension in 2005 to the attempt of the China National Offshore Oil Corporation (CNOOC) to purchase Unocal, a US based oil and gas company with diverse natural gas holdings, including fields in Southeast Asia.[40] Although

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[36] Kathryn Gordon & April Tash, "Foreign Government-Controlled Investors and Recipient Country Investment Policies: A Scoping Paper" (Paris: OECD Investment Division, January 2009) at 10, online: <www.oecd.org/dataoecd/1/21/42022469.pdf>. For further discussion of the fears surrounding SWFs, see William Miracky *et al.*, "Assessing the Risks: The Behaviors of Sovereign Wealth Funds in the Global Economy" (Cambridge, MA: Monitor Group, June 2008), online: <http://www.monitor.com/Portals/0/MonitorContent/imported/MonitorUnitedStates/ Articles/PDFs/Monitor_SWF_report_final.pdf>.

[37] Badian & Harrington, *supra* note 15 at 55-56, 84; Antonio Capobianco, "Competition Law and Foreign-Government Controlled Investors" (Paris: OECD Investment Division, January 2009) at 3; Gordon & Tash, *ibid.* at 8; Plotkin, *supra* note 24 at 89; Kara Scannell, "Cox Cites Concerns over Sovereign Wealth Funds" *Wall Street Journal* (25 October 2007) A8; Ronald J. Gilson & Curtis J. Milhaupt, "Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism" (2008) 60 Stan. L. Rev. 1345 at 1362.

[38] Robert Pirog, "The Role of National Oil Companies in the International Oil Market: CRS Report for Congress" (Washington, D.C.: Congressional Research Service, 21 August 2007), online: Federation of American Scientists, < http://www.fas.org/sgp/crs/misc/RL34137.pdf>.

[39] These concerns focused on primarily on issues related to territorial security and the desirability of allowing a company controlled by a foreign state to have direct control over importation into the US of people and goods. See Lalonde, *supra* note 21 at 1491-1492; Deborah M. Mostaghel, "Dubai Ports World under Exon-Florio: A Threat to National Security or a Tempest in a Seaport?" (2007) 70 Alb. L. Rev. 583; Bashar H. Malkawi, "The Dubai Ports World Deal and U.S. Trade and Investment Policy in an Era of National Security" (2006) 7 J. World Investment & Trade 443. See also Bill Mongelluzzo, "Financial Crisis May Let DP World In" *The Journal of Commerce* (19 November 2008).

[40] See Joshua W. Casselman, "China's Latest 'Threat' to the United States: The Failed CNOOC-

CNOOC's offer exceeded ChevronTexaco's by US$2.1 billion and exceeded Unocal's value by approximately $1.5 billion (based on its share listing price on the New York Stock Exchange), the fierce opposition the bid inspired among members of the House of Representatives eventually caused it to be withdrawn.[41] In 2007 a similar reaction occurred amongst Canadian lawmakers when TAQA, Abu Dhabi's national energy company, sought to acquire Canadian based PrimeWest Energy Trust.[42] Although eventually approved, the deal "ignited concerns that the current system operated too leniently and curbed consideration of national security concerns under the ICA review process."[43]

Such controversies have recently become less common. While many governments still view SWFs and SOCs with distrust, the international economic downturn beginning in 2008, which was characterized by the tightening of credits markets and a dramatic decrease in investment flows, has caused many to re-evaluate their attitude toward inbound SOE capital,[44] and come to the conclusion that SOEs are capable of playing entirely positive roles in the global economy by providing equity injections into troubled institutions and stabilizing financial markets.[45] Indeed, rather than discouraging SOE international investment, leading Western-based corporations and governments are aggressively pursuing sovereign direct investment and "public calls for opening financial markets to SWFs now abound."[46] Many analysts argue that this correction is overdue and that SOEs have long been receiving an amount of attention disproportionate to their

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Unocal Merger and its Implications for Exon-Florio and CFIUS", Note, (2007) 17 Ind. Int'l & Comp. L. Rev. 155. See also Pirog, *supra* note 38 at 8-9; Friedrich Wu, "The Globalization of Corporate China" (2005) 16:3 NBR Analysis, online: National Bureau of Asian Research, <http://www.nbr.org/publications/issue.aspx?id=162> (describing the suspicion and hostility, predicated on national and economic security concerns, that often accompanies the activities of Chinese corporations).

[41] In this case, concerns related to possible negative effects on U.S. energy security. Guo, *supra* note 29 at 21-22; Steve Lohr, "Unocal Bid Denounced at Hearing" *The New York Times* (14 July 2005); "China Bashing: Giving China a Bloody Nose" *The Economist* (4 August 2005); David Olive, "US Seeing China Inc.: Reaction of US Lawmakers to Chinese Company's Bid to Buy Unocal is Not Only Hysterical, It's Foolhardy" *The Toronto Star* (3 July 2005) A18.

[42] Lalonde, *supra* note 39 at 1494-1496. For earlier discussion the ICA review process, see Steven Chase & Simon Tuck, "National Security Bill Not Aimed at Energy Takeovers: Emerson" *The Globe and Mail* (15 July 2005) B1; Simon Tuck & Steven Chase, "Feds Eye New Hand on Foreign Ownership" *The Globe and Mail* (15 May 2006) B1.

[43] Lalonde, *ibid*. at 1495. These concerns have been repeated by Canada's federal government as recently as April 2011. See Steve Chase, "Harper Cautious About Future Chinese Resource Bids" *The Globe and Mail* (6 April 2011).

[44] Veljko Fotak & William Megginson, "Are SWFs Welcome Now?" (21 July 2009) 9 Columbia FDI Perspectives, online: <http://www.vcc.columbia.edu/pubs/documents/FotakandMegginson-Final.pdf> (describing how in early 2008 SWFs contributed to a temporary rescue of the international financial system by buying approximately $60 billion of new equity issued by European and US banks).

[45] See Lyons, *supra* note 11.

[46] Fotak & Megginson, *supra* note 44, citing OECD, Investment Committee, "Sovereign Wealth Funds and Recipient Country Policies" (4 April 2008), online: <http://www.oecd.org/dataoecd/34/9/40408735.pdf>; Warren E. Buffet, "2008 Letter to the Shareholders of Berkshire Hathaway Inc." (27 February 2009), online: <http://www.berkshirehathaway.com/letters/2008ltr.pdf>. See also Luca Schicho, "Pride and Prejudice: How the Financial Crisis Made Us Reconsider SWFs" (2010) 2 Göttingen J. Int'l L. 63.

actual size and holdings in relation to the global economy at large.[47] Nevertheless, the political controversies triggered by SOE investment continue to play a critical role in SOE investment strategy and in the potential disputes that may arise between SOEs and host states.[48]

3. *National Investment Review Acts – the United States and Canada*

Numerous entities and scholars have sought to promote guidelines and policies dealing with SOE activity. All of these try to respond to the domestic political concerns and controversies discussed above by striking a balance between the need to attract capital, and the goal of avoiding undesired interference by foreign governments in the operation of domestic markets.[49] Some scholars advocate a minimalist approach that focuses exclusively on corporate governance and shareholder voting rights.[50] Other commentators have advocated making the commercial activity of sovereigns an issue of global trade law.[51] The Santiago Principles, developed by the International Monetary Fund together with the International Working Group of Sovereign Wealth Funds, are a code of conduct for SWFs themselves: a set of 24 voluntary principles that include basic governance and transparency standards.[52] These have since been embraced by many of the major SWFs and the principal Western nations that now seek SWF capital.[53] The OECD

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[47] See Kovacs, *supra* note 12 (argues that SWFs make good copy for the media due to their mysterious nature, the fact that they tend to hail from distant dictatorial regimes, and the fact that many of their transactions are otherwise newsworthy.).

[48] It has become increasingly common for SOEs to pursue alternatives to direct acquisitions, including joint venture arrangements. For example, when Sinochem considered mounting a rival bid to BHP Billiton's takeover attempt of Potash Corporation, speculation immediately began on whether the Chinese SOC would seek a local partner. See Jeffrey McCracken and Zachary Mider, "Sinochem Said to Be Likeliest Rival to BHP Potash Bid" *Bloomberg News* (27 September 2010), online: <http://www.bloomberg.com/news/2010-09-27/sinochem-said-to-emerge-as-likeliest-rival-to-bhp-s-potash-bid.html>. Unsurprisingly, the suggestion that the former Crown corporation could fall under the control of a foreign state also immediately sparked political concern. See "Sinochem Readying PotashCorp Bid: Report" *Associated Press* (16 September 2010), online: <http://www.cbc.ca/canada/saskatchewan/story/2010/09/16/potash-sinochem.html>.

[49] Anna Gelpern, "A Sovereign Wealth Turn" (Rutgers School of Law-Newark Research Paper Series No. 025, 23 September 2008), online: <http://ssrn.com/abstract=1272395> (Draft, cited with permission of author). For a review of some of these mechanisms, see Yvonne C.L. Lee, "A Reversal of Neo-Colonialism: The Pitfalls and Prospects of Sovereign Wealth Funds" (2008-2009) 40 Geo. J. of Int'l L. 1103; Yvonne C.L. Lee, "The Governance of Contemporary Sovereign Wealth Funds" (2010) 6 Hastings Bus. L.J. 197.

[50] Gilson & Milhaupt, *supra* note 37 (Suggesting that where SOEs obtain shares of private corporations in non-controlling amounts, the voting rights of those shares should be suspended so long as they remain the property of the SOE.).

[51] See Paul Rose, "Sovereigns as Shareholders" (2008) 87 N.C.L. Rev. 101 at 148-151 [Rose, "Sovereigns"]. For critical surveys of arguments that SWF investment should be made a matter of international trade regulation, see Bob Davis, "How Trade talks Could Tame Sovereign Wealth Funds" *Wall Street Journal* (29 October 2007) A2; Badian & Harrington, *supra* note 15 at 53.

[52] *Sovereign Wealth Funds: Generally Accepted Principles and Practices – The "Santiago Principles"* (October 2008), online: <http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf>. See Rose, "Sovereigns", *ibid.* at 153-165 (an evaluation of the likely effectiveness of the Santiago Principles.)

[53] Fotak & Megginson, *supra* note 44. It is also important to note that the Santiago Principles were

has advised SOEs seeking to increase confidence in their operations to establish autonomous management structures, to list on stock exchanges, to allow partial private ownership, and to adopt transparent board nomination procedures and transparent disclosure and reporting practices.[54] The OECD Council has also sought to influence domestic regulations through its *Guidelines for Recipient Country Investment Policies Relating to National Security*.[55]

However, the vast majority of regulation targeted at SOEs is maintained at a national level.[56] Under U.S. law, for example,[57] screening for national security purposes of foreign investment into the United States is a presidential power, and includes the authority to prohibit or suspend any foreign merger, acquisition or takeover of a U.S. enterprise that is identified as a threat to national security.[58] This power was delegated in 1988 to the Committee on Foreign Investment in the United States (CFIUS), a responsibility that remains with this administrative body.[59] In 1993 the responsibilities of CFIUS were expanded to include additional investigations where the acquiring entity is acting on behalf of or controlled by a foreign sovereign and the acquisition "could result in control of a person engaged in interstate commerce in the US that could affect the national security of the US."[60] In 2007 the *Foreign Investment and National Security Act*[61] (*FINSA*) extended the scope of national security reviews to include "transactions involving critical infrastructure and energy, and requires a second-stage review investigation of most proposed acquisitions by state-owned companies."[62] Notably, the 2008 Treasury Department regulations

crafted to apply to SWFS, and not necessarily to SOEs. See Backer, *supra* note 7 at 72.

[54] See OECD, *OECD Guidelines on Corporate Governance of State-owned Enterprises* (Paris, 2005), online: <http://www.oecd.org/dataoecd/46/51/34803211.pdf>.

[55] Recommendation adopted by the OECD Council (25 May 2009), online: <www.oecd.org/dataoecd/11/35/43384486.pdf>. For a discussion of foreign investment laws and codes see Ray August, *International Business Law: Texts, Cases, and Readings*, 4th ed. (Upper Saddle River, NJ: Prentice Hall/Pearson Education, 2004) at 244-265.

[56] Audit, *supra* note 3 at 621.

[57] This sub-section will examine examples of such regulation in the United States and Canada. However, these countries are not alone in integrating concerns over national security into legislation dealing with foreign investment. Germany, Australia, China and Russia, among others, have all adopted similar regulatory regimes. See Hsu, "Comparative View", *supra* note 3 at 804-817.

[58] See *Omnibus Trade and Competitiveness Act of 1988*, Pub. L. No. 100-418, §502, 102 Stat. 1107, amending *Defense Production Act of 1950*, Pub. L. No. 81-774, §721, 64 Stat. 698 (codified as amended at 50 U.S.C. App. §2061 *et seq.*). For a detailed history of CFIUS and investment law in the United States see David Bailey, "U.S. Policy Towards Inward FDI: CFIUS and Extension of the Concept of 'National Security'" (2003) 4 J. World Investment & Trade 867 (featuring at 872-878 a discussion of the Exon-Florio Amendment). See also Jose E. Alvarez, "Political Protectionism and United States International Investments Obligations in Conflict: The Hazards of Exon-Florio" (1989) 30 Va. J. Int'l L. 1 (critiques at 142-144 the failure of the CFIUS to subject Greenfield Investments to review).

[59] See *National Defense Authorization Act for Fiscal Year 1993*, Pub. L. No. 102-484, §837(a), 106 Stat. 2639 (1992), amending *Defense Production Act of 1950*, §721, *ibid.* See also Bailey, *ibid.* at 878-884.

[60] Audit, *supra* note 3 at 622, fn. 18.

[61] *Foreign Investment and National Security Act*, Pub. L. No. 110-49, §2, 121 Stat. 246 (2007) (codified at 50 U.S.C. App. §2170).

[62] Audit, supra note 3 at 622, fn. 18. See also Mark E. Plotkin & David N. Fagan, "The Revised National Security Review Process for FDI in the US" (7 January 2009) 2 Columbia FDI

implementing the *Act* define neither the concept of "control" by a foreign person, nor the contours of "national security."[63]

In Canada, the *Investment Canada Act*[64] (*ICA*) applies to the establishment of a new Canadian business, the direct acquisition of a Canadian business or the acquisition of an interest in or establishment of an entity carrying on all or any of its operations in Canada. The *ICA* is concerned with assessing whether a proposed transaction is "of net benefit to Canada," and requires authorities to consider whether a proposed transaction is likely to result in further economic growth and employment opportunities.[65] In December of 2007 the Canadian government issued special guidelines to be followed by authorities reviewing transactions involving state-owned enterprises.[66] Recommended considerations include the SOE's adherence to Canadian standards of corporate governance and transparency, as well as the nature and extend of foreign state control. The federal Minister of Energy at the time stated to the press that the government's concern with investment by SOEs was not "with the ownership of the foreign capital being invested in Canada; but, rather, with how that capital behaves in the marketplace and the issue of reciprocity among nations as to whether state owned enterprises are allowed to invest."[67] Like the *FINSA*, the *ICA* does not define "national security."

The evolution of these statutes has inspired lively discussion, reflecting the complex mixture of political and commercial concerns captured by the activities of SOEs. Many critics contend that the lack of definitions for the crucial concepts of "control" and "national security" injects too much uncertainty into the review process in the amount of discretion it bestows upon reviewing authorities.[68] Others note that it "opens the door" to the imposition of political pressure "under the guise of the national security

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Perspectives, online: <http://www.vcc.columbia.edu/pubs/documents/Perspective2-PlotkinandFagan.pdf>; George Stephanov Georgiev, "The Reformed CFIUS Regulatory Framework: Mediating Between Continued Openness to Foreign Investment and National Security" (2008) 25 Yale J. on Reg. 125.

[63] Plotkin & Fagan, *ibid.* For a discussion of the operations of CFIUS under the Obama administration, see Mark E. Plotkin & David N. Fagan, "Foreign Direct Investment and U.S. National Security: CFIUS under the Obama Administration" (7 June 2010) 24 Columbia FDI Perspectives, online: <http://www.vcc.columbia.edu/files/vale/print/Fagan_and_Plotkin-_Final_0.pdf>.

[64] R.S.C. 1985, (1st Supp.), c. 28, ss. 11(a), 11(b).

[65] *Ibid.*, s. 2. For a discussion of the *ICA*, see Christopher C. Nicholls, *Mergers, Acquisitions, and Other Changes of Corporate Control* (Toronto: Irwin Law, 2007) at 47-54. Note that, unlike the *FINSA*, the *ICA* can apply to Greenfield Investments: *ICA, ibid.*, s. 11(a). Competition issues related to Canadian investment transactions, whether or not foreign in nature, are reviewed under the *Competition Act*, R.S.C. 1985, c. C-34. For a discussion of this statute, see Nicholls, *ibid.* at 30-47.

[66] Issued pursuant to s.38 of the *ICA*, by the Minister responsible for the statute's administration. See "Investment Canada Act: All Guidelines" (updated 5 May 2011), online: Industry Canada, <www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html>.

[67] Robert T. Booth & Donald E. Greenfield, "Energy (Oil & Gas) – Corporate: Recent Developments of Importance," reprinted from the *2008 Lexpert/ALM Guide to the Leading 500 Lawyers in Canada*, online: <http://www.bennettjones.com/Images/Guides/update3331.pdf>.

[68] Rose, "Sovereigns", *supra* note 51 at 130-137. See also W. Robert Shearer, "The Exon-Florio Amendment: Protectionist Legislation Susceptible to Abuse", Comment, (1993) 30 Houston L. Rev. 1729.

rubric."[69] After all, "national security" is an amorphous concept that can plausibly be raised in a number of industry sectors, including military, pipelines, ports, aviation and anything energy related.[70] These criticisms highlight the potential for the unpredictable or even arbitrary application of such ambiguous standards.

Still others are concerned that the guidelines do not go far enough and subject foreign acquisitions to too little scrutiny. Certain acquisitions, it is argued, although significant in the influence they bestow on SWFs and SOCs, will not necessarily be subject to review guidelines because they will not immediately result in control of a company.[71] As described by the OECD, "minority shareholdings can have negative effects on competition, either by "reducing the minority shareholder's incentives to compete" or "by facilitating collusion."[72] How will the inevitable gray zone between "pure commercial motives and unacceptable political motives" be handled, others ask.[73] They emphasize that governments have various means of exercising control and that government participation can take many forms and can evolve over time.[74] This second set of criticisms highlights the risk that the regulatory regime applicable to SOE investment, with its perceived lacunae, may yet undergo significant changes aimed at subjecting SOE investment to considerably stricter supervision.

Therefore, in sum, foreign investment by SOEs occurs in a highly uncertain context. Due to their participation in strategically important economic sectors, including the energy sector, SOE investment is frequently the focus of intense political controversy. On the other hand, the domestic regulation of SOE investment activity remains characterized by a number of ambiguous tests and subjective standards. Together, the result is the

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[69] Melnitzer, *supra* note 9 at 85, quoting George Addy of Davies Ward Phillips & Vineberg LLP.
[70] *Ibid*. at 86, quoting Catherine Pawluch of Gowling Lafleur Henderson LLP; Audit, *supra* note 3 at 618.
[71] Badian & Harrington, *supra* note 15 at 54. Note also that certain foreign investment regulators and regulations recognize that "lack of control", as defined by securities law, does not mean a total absence of influence or "soft" power. The new rules regulating CFIUS examinations, for instance, provide for such power by stipulating that SWF control may be identified where the fund directs the company to engage in "certain important matters," including inducing a decision to reorganize, merge, sell assets, issue securities, or causing the appointment or dismissal of officers or senior managers. As such, even if a SWF doesn't attract CFIUS scrutiny upon its initial entry into the U.S., the possibility of a CFIUS investigation nonetheless constantly hovers above its interests so long as they remain. Furthermore, CFIUS has the ability to require that SOEs enter into "mitigation agreements" that may stipulate special audits or even that SWFs forego filling boardroom seats. See Paul Rose, "Sovereign Wealth Funds: Active or Passive Investors?" (2008) 118 Yale L.J. Pocket Part 104. [Rose, "Active or Passive"]; Rose, "Sovereigns", *supra* note 51 at 126-128.
[72] Capobianco, *supra* note 37 at 5-6.
[73] Gordon & Tash, *supra* note 36 at 9.
[74] *Ibid.* at 4, citing International Working Group of Sovereign Wealth Funds, "Sovereign Wealth Funds: Current Institutional and Operational Practices" (15 September 2008), online: <http://www.iwg-swf.org/pubs/eng/swfsurvey.pdf>. It has also been argued that, while countries such as the US and Canada have the ability to police the operation of SOEs within their borders, these same countries may nonetheless be indirectly harmed by SOE activity and the market distortions they can create in less regulated foreign jurisdictions. As Paul Rose highlights, strategic purchases of vital overseas energy reserves or commodity producers have the potential to threaten North American security interests more drastically than similar activity within the continent: "Sovereigns", *supra* note 51 at 106-107, 165.

continued and constant possibility that SOEs may be subject to discriminatory or arbitrary governmental, regulatory or administrative treatment motivated more by political considerations than by genuine cause to be concerned with the nature, scope or purpose of their operations. In this light, it is of immediate importance to determine the standing of SOEs to bring investment arbitration claims so that, where such illegitimate treatment is alleged to have occurred, the entitlement of SOEs to seek recourse under international law is clear.

III. International Investment Law in a Nutshell

Before turning to the specific jurisdictional issues in international investment law that are the focus of this paper, it is necessary to review some of the basic history and characteristics of this often complex area of law. The history of international investment law does not read completely dissimilarly to that of SOEs. Like the first SWF, the BITs and MITs that compose the body of contemporary international investment law first appeared in the late 1950s.[75] Following the Second World War a main concern of Western nations was to rebuild the international economy in a manner that would safeguard against renewed global conflict. Increasing the amount of international investment and trade was seen as central to this assignment, as this would lead to increased political and economic interdependence and act as a natural deterrent to aggressive actions.[76] At first it was hoped that a broadly signed multilateral treaty on investment could be achieved that would create a uniform body of international investment law.[77] However, when this proved to be too ambitious a diplomatic endeavour those nations most committed to the project fell back on bilateral and smaller multilateral efforts.[78] In time the investment treaty movement gathered momentum, with over 2600 BITs having been signed by the end of 2008.[79]

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[75] The first BIT was signed between West Germany and Pakistan in 1959. See *Treaty for the Protection of Investment*, 25 November 1959, 457 U.N.T.S. 23.

[76] Bernardo M. Cremades & David J.A. Cairns, "The Brave New World of Global Arbitration" (2002) 3 J. World Investment 173 at 175.

[77] See Franziska Tschofen, "Multilateral Approaches to the Treatment of Foreign Investment" (1992) 7 ICSID Rev. – F.I.L.J. 384.

[78] See *ibid.* For a discussion of multilateral approaches to investment in the context of international trade, see also Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade*, 3d ed. (London: Routledge, 2005); Cremades & Cairns, supra note 76 at 180; Glen Kelly, "Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations" (2001) 39 Colum. J. Transnat'l L. 483; S. Gudgeon, "US Bilateral Investment Treaties: Comments on Their Origins, Purposes and General Treatment Standards" (1986) 4 Int'l Tax & Bus. Law. 105 at 111.

[79] UNCTAD, "Recent Developments in International Investment Agreements (2008-June 2009)", IIA Monitor No.3 (2009), U.N. Doc. UNCTAD/WEB/DIAE/IA/2009/8, online: <http://www.unctad.org/en/docs/webdiaeia20098_en.pdf>. See also Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, "Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000" (2006) 60 Int'l Org. 811. Note that while investment treaties have been popular for several decades, it is only within the last 10 years that the arbitration provisions of these treaties have been relied on consistently by foreign investors.

Like the development of the largest SWFs and SOEs, much of the development of the investment treaty regime can be linked to the needs of the oil and gas industry. IITs are designed to promote cross-border investment flows in two main ways. First, they obligate host governments to provide certain protections to foreign investors. These include guarantees of National Treatment, Most Favoured Nation treatment, treatment in accordance with the International Minimum Standard, Fair and Equitable treatment, protection against performance requirements, and compensation in the event of expropriation or actions tantamount to expropriation.[80] Second, they provide a neutral and reliable forum for the settlement of disputes in which an investor alleges that a host government has breached one of these standards of protection.[81] Disputes are resolved by tribunals of independent arbitrators in neutral sites and not in the courts of the host state. The home state of the investor need not be involved in any way.[82] Such guarantees of protection and reliability of enforcement are of particular value in international energy projects, characterized as they are by long time horizons, large and immovable assets, and acute sensitivity to economic and political cycles.[83] Indeed, approximately 30% of investment disputes involve this sector.[84] These characteristics are, for similar reasons, also of particular value to SOEs—particularly in comparison to the relatively political domestic regulatory regimes discussed in the previous section.

Investment arbitrations can be conducted pursuant to the UNCITRAL Model Law or according to the Arbitration Rules of the ICSID,[85] a forum specifically dedicated to investor-State disputes.[86] Arbitrations may also take place under the auspices of a number of other arbitral institutions, including

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[80] The consistent appearance of these provisions across different IITs is primarily due to the popularity of standard form BITs, developed by international organizations such as the OECD. Furthermore, the protective provisions contained in these model treaties originate primarily in disputed principles of customary international law on foreign investment. See Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (The Hague: Kluwer Law International, 1995); Jeswald W. Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries" (1990) 24 Int'l Law. 655.

[81] Foreign investors have generally been concerned that local courts, particularly those located in developing or underdeveloped countries, would be unable to safeguard their concerns in a fair manner. They worried that the legal systems in these countries would lack the sophistication to handle in a predictable and timely manner the complex matters investment disputes can raise. They also worried that they could not rely on these forums to impartially decide their dispute without showing favour to the host government. See Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA* (Washington: ICSID, 1993); Gudgeon, *supra* note 78.

[82] Prior to the advent of investor-state arbitration the only recourse available to foreign investors was state-to-state adjudication before international courts, such as the ICJ. This required the investor to petition its home government for such advocacy, which was by no means guaranteed and in fact quite rare. See Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (The Hague: Kluwer Law International, 2009) at 3-18. [Newcombe & Paradell]

[83] See Thomas W. Waelde, "International Energy Investment" (1996) 17 Energy L. J. 191.

[84] L.A. Ahee & R.E. Walck, "Investment Arbitration Update (As Of December 31, 2008)" [2009] 1 Transnat'l Disp. Management.

[85] See *ICSID Convention*, *supra* note 8.

[86] For a comparison of some of the differences between these systems of arbitration see Giorgio Sacerdoti, "Investment Arbitration under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards" (2004) 19 ICSID Review – F.I.L.J. 1.

the International Chamber of Commerce in Paris and the Stockholm Chamber of Commerce. Each forum and set of rules has its own particular characteristics and related appeal for disputing parties,[87] but the ICSID system incorporates two particular advantages for investors that are unmatched by its peers. First, ICSID awards are not subject to review by the courts of the jurisdiction in which they have been rendered.[88] Secondly, awards rendered by ICSID tribunals are enforceable in countries that have signed the *ICSID Convention* as though they are final awards of such states' domestic legal systems.[89] For these reasons, investors will typically elect to pursue investment arbitration before an ICSID tribunal over another arbitral forum, where ICSID arbitration is available to them. However, for this to be the case both the home government of the investor and the host government must have ratified the *ICSID Convention*.[90]

In discussing the application of international investment law to transactions involving SWFs and SOCs it is necessary to distinguish between the pre-investment and post-investment phases.[91] Most IITs afford protection only to post-investment activities.[92] This means that, generally speaking, the decision made by national investment authorities screening proposed inbound foreign investment by SWFs and SOCs will not be subject to review by investment arbitration tribunals. This may be explicitly stated in an IIT. For example, under *NAFTA* Art. 2102 the States parties have the right to deny inward bound foreign investment on the ground of national security concerns. Furthermore, pursuant to Art. 1138(1), such a decision is exempt from review. Other IITs, such as the *ECT*, distinguish between pre-investment and post-investment phases to impose binding obligations on

[87] For example, Stockholm has historically been a popular venue for disputes between Western nations and states from the former Communist bloc, particularly for the latter.
[88] This effectively protects ICSID awards from review at the point of execution. See Sacerdoti, *supra* note 86.
[89] This effectively protects ICSID awards from review at the point of enforcement. See *ibid*.
[90] Investment arbitration awards rendered by non-ICSID tribunals are almost always enforced pursuant to the terms of the *New York Convention on the Recognition and Enforcement of Arbitral Awards*, 10 June 1958, 330 U.N.T.S. 38 (entered into force 7 June 1959).
[91] The distinction between pre- and post-investment activities is not always easy to draw. For example, in *Mihaly International Corporation v. Sri Lanka* (Award of 15 March 2002), ICSID Case No. ARB/00/2, 17 ICSID Rev. 142, 41 I.L.M. 867, the facts required the tribunal to decide whether expenditures made in preparation for a "build-own-transfer" contract for a power plant constituted an investment made in Sri Lanka. See also Robert N. Hornick, "The Mihaly Arbitration Pre-Investment Expenditure as a Basis for ICSID Jurisdiction" (2003) 20 J. Int'l Arb. 189; C. Chatterjee, "When Pre-investment or Development Costs May or May Not be Regarded as Part of 'Investment' under Article 25(1) of the ICSID Convention – The Mihaly Case" (2003) 4 J. World Investment 909.
[92] See Anna Joubin-Bret, "Admission and Establishment in the Context of Investment Protection" in A. Reinisch, ed., *Standards of Investment Protection* (New York: Oxford University Press, 2008) 9 at 10-11; UNCTAD, "National Security", *supra* note 9 at 28-29. Where IITs do protect pre-establishment activities, they normally do so through similar provisions used to protect post-establishment assets and activities, including non-discrimination, national treatment and most-favoured nation treatment. Note that it has been argued that, regardless of whether or not an IIT protects pre-investment expenditures, disputes based on these actions cannot be brought before ICSID due to the *ICSID Convention*'s internal 'definition' of investment. See Christoph H. Schreuer, *The ICSID Convention: A Commentary*, 1st ed. (Cambridge: Cambridge University Press, 2001) at Art. 25, para 101.

host states solely in relation to the latter.[93] The situation is similar under customary international law. Absent any binding commitment to the contrary it is the sovereign right of states to decide who and what, including capital and legal entities, is allowed entry into their territory, whether physically or otherwise.[94]

Therefore, should SOEs consider bringing international investment arbitration claims against the states in which they have invested, it is far more likely that they will bring such claims in relation to government actions that have occurred some time into that investment's lifespan rather than at the point of entry. As mentioned, depending on the terms of the particular IIT at play, this could be, *inter alia*, for treatment the SOE believes is discriminatory, for treatment that the SOE believes is less favourable than that afforded to similar national enterprises, or for treatment that is less than fair and equitable.[95] In fact, because of the broad nature of most foreign investment protection provisions, the possible range of government action capable of triggering an investment claim is beyond description.[96]

In contrast, the range of jurisdictional issues raised by potential investment arbitration claims by SOEs is far more capable of precise portrayal. Every such dispute will inevitably be unique, but the jurisdictional requirements encountered by them will not. IITs have developed a standard form over time from which only relatively moderate deviation is made,[97] and SOEs have to date been addressed by these in a relatively limited number of ways. That does not mean that the jurisdictional issues raised by SOEs are simple, however. The remainder of this article is devoted to addressing these clearly defined—yet significantly complex—jurisdictional issues.

IV. State-Owned Enterprises and the Jurisdiction of Investment Arbitration Tribunals

This section will focus on two of the more problematic jurisdictional issues that arise under IITs in connection with investment claims brought by SOEs. Before turning to each of these issues, however, the section will review the basic principles of arbitration tribunal jurisdiction and the complex preliminary issue of investor standing—whether a tribunal arbitrating pursuant to a particular IIT will have jurisdiction over a particular SOE.

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[93] The former is only subject to a "soft" regime of "best endeavour" obligations. See *ECT*, *supra* note 5, Art. 10(1), (2); Kaj Hobér, "The Energy Charter Treaty: An Overview" (2003) 8 J. World Investment & Trade 323 at 325, 327-328.

[94] See Joubin-Bret, *supra* note 92 at 10.

[95] For a comprehensive treatment of the various standards of protection included in IITs, see Newcombe & Paradell, *supra* note 82.

[96] International investors tend to applaud this reality. Others are far more critical. In particular, opponents of international investment law frequently cite the "regulatory chill" that can result from administrators fearful of infringing obligations assumed in investment treaties. See generally Gus van Harten, "Private Authority and Transnational Governance: The Contours of the International System of Investor State Protection" (2005) 12 Rev. of Int'l Pol. Economy 600; Lyuba Zarsky, "From Regulatory Chill to Deep Freeze?" (2006) 6 Int'l Envntl. Agreements 395.

[97] See Dolzer & Stevens, *supra* note 80 at 54. See also Kenneth J. Vandevelde, "A Brief History of International Investment Agreements" (2005) U.C. Davis J. Int'l L. & Pol'y 162.

1. *SOEs and International Investment Treaties*

IITs typically contain two main jurisdictional requirements. First, the investor must have made an investment in the territory of the host state. This provides an investment tribunal with jurisdiction *ratione materiae*, also known as subject matter jurisdiction. The definition of "investment" included in most IITs is typically broad and encompasses such interests as shares, contractual rights, and rights to profits.[98] Secondly, the investor must be a national of a State party to the IIT under which the investor is making its claim. This provides an investment tribunal with jurisdiction *ratione personae*, or jurisdiction over the person. In the case of an investor that is a natural person, most IITs will generally focus on whether or not that person is a citizen of the home state.[99] In the case of an investor that is a juridical entity, such as a corporation, most IITs will focus on certain characteristics of that entity's formation.[100] Some treaties require simply that the entity is constituted in accordance with the laws of a state.[101] Other treaties may require that the entity is both incorporated in the jurisdiction and have its place of effective management there.[102]

The particular tests for both jurisdiction *ratione materiae* and jurisdiction *ratione personae*—the tests each "investment" and "investor" will respectively have to meet—will depend on the wording of each particular IIT. However, if arbitration with respect to a particular IIT is pursued under the *ICSID Convention*, the additional definitions of "investment" and "investor" under that treaty will also have to be met.[103] Conversely, if the investor wishes to avoid the added jurisdictional requirements of the *ICSID Convention* it can simply proceed under or before any alternative rules or forum available.[104]

When an SOE is involved in an investment dispute under an IIT, questions surrounding the jurisdiction *ratione personae* of a tribunal are likely

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[98] Barton Legum, "Defining Investment and Investor: Who is Entitled to Claim?" (2006) 22 Arb. Int'l 521. For a description of some of the more controversial issues to arise in relation to "investment" requirements see Sébastien Manciaux, "The Notion of Investment: New Controversies" (2008) 9 J. World Investment & Trade 443.

[99] Catharine Yannaca-Small, "Definition of Investor and Investment in International Investment Agreements", in *International Investment Law: Understanding Concepts and Tracking Innovations* (Paris: OECD, 2008) 7 at 10-17, online: <http://www.oecd.org/dataoecd/3/7/40471468.pdf>.

[100] *Ibid*. at 17-38.

[101] For example, the Greece-Cuba BIT defines investors with regard to either Contracting Party as "legal persons constituted in accordance with the laws of that Contracting Party." See *Agreement between the Government of the Hellenic Republic and the Government of the Republic of Cuba on the Promotion and Reciprocal Protection of Investments*, 18 June 1996, Art. 1(3), online: <http://www.unctadxi.org/templates/DocSearch.aspx?id=779>.

[102] For example, article 3(b) the Germany-China BIT defines German investors to include "any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany." See *Agreement between the Federal Republic of Germany and the People's Republic of China concerning the encouragement and reciprocal protection of investments*, 7 October 1983, 1475 U.N.T.S. 262, online: <http://untreaty.un.org/unts/60001_120000/23/21/00045007.pdf>. This more robust requirement effectively prohibits shell companies from gaining standing under such treaties.

[103] Yannaca-Small, *supra* note 99 at 14-17, 33-38, and 59-61.

[104] Although, as mentioned, this would mean sacrificing the benefits of the *ICSID Convention* regarding the enforcement and execution of awards as well as the judicial review of awards.

to raise more complicated issues than questions surrounding its jurisdiction *ratione materiae.* Definitions of investment in IITs turn on the nature of participation in the domestic economy by a purported foreign investor; the nature of the participant is typically irrelevant.[105] Since the nature of SOEs' investments is largely indistinguishable from that of purely private entities, the issue of a tribunal's jurisdiction *ratione materiae* should thus not be complicated by the fact that the investment at issue was engaged in by a state-owned entity.

By contrast, the fact that an investor is owned or controlled by a sovereign state could very well prove decisive in determining whether the tribunal has jurisdiction *ratione personae*. IITs were not originally designed with SOEs in mind. Attracting and protecting private investment was at the forefront of negotiators' minds, rather than facilitating transnational flows of sovereign capital.[106] This is particularly the case in regards to the *ICSID Convention*, one of the express purposes of which was to depoliticize investment disputes.[107] As a result, IITs, including their definitions of "investor," are often ambiguous with respect to the standing of SOEs and claims levied by such entities will do much to test the limits of investment arbitration under these treaties and the *ICSID Convention*.[108]

Practitioners will therefore face a number of uncertainties in assessing the jurisdiction *ratione personae* of an arbitration tribunal over a particular SOE. First, what steps should be followed in interpreting the extent of a tribunal's jurisdiction *ratione personae* pursuant to an IIT in respect of a SOE claimant? In particular, how should contextual sources be deployed in the event an IIT does not clearly provide for claims by SOEs? Secondly, in what circumstances will an SOE be denied standing to bring an investment arbitration claim before the ICSID, due to the operation of either branch of the "Broches test"? In particular, which SOEs will be considered to be "discharging an essentially governmental function" of their home states, in what circumstances will an SOE be considered to be "acting as an agent" of its home state, and when will an entity be considered an SOE for the purpose

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[105] See e.g. *NAFTA*, supra note 4, Art. 1139 (defines investment through reference to a list of various means of participating in economic activity, including equity, debt, loans, real estate or other property, and various forms of contractual relations such as concessions. The nature of the investor involved in the transaction is not material.).

[106] "Report of the Executive Directors on the Convention of the Settlement of Investment Disputes between States and Nationals of Other States, 1965" (1993) 1 ICSID Rep. 23.

[107] See Shihata, *supra* note 81; Schreuer, *supra* note 92, Art. 25, para 270.

[108] For a brief treatment of these issues, see Michael D. Nolan & Frédéric G. Sourgens, "State-controlled Entities as Claimants in International Investment Arbitration: An Early Assessment" (2 December 2010) 32 Columbia FDI Perspectives, online: <http://www.vcc.columbia.edu/files/vale/print/Perspectives_-_Nolan_Sourgens_Final_0.pdf>. As noted by the authors, SOEs already frequently act as claimants in contractual commercial arbitrations. However, examples of SOEs as claimants in investment arbitration are to date far less common, and raise complex issues. See *Telenor Mobile Communications A.S. v. Republic of Hungary* (Award of 13 September 2006), ICSID Case No. ARB/04/15, online: <http://www.iisd.org/pdf/2006/itn_telenor_hungary.pdf>; *CDC Group plc v. Republic of the Seychelles* (Award of 17 December 2003) ICSID Case No. ARB/02/14. In both of these cases the investor had close ties to the government of the home state; in neither case, however, did the Respondent state object to these ties at the jurisdictional phase of the proceedings.

of these tests in the first place? The remainder of this article is dedicated to addressing in detail these important jurisdictional uncertainties.

2. *Jurisdictional Issue #1: Does an SOE have Standing under an IIT?*

According to Art. 31(1) of the *Vienna Convention on the Law of Treaties* (*VCLT*),[109] "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." Where an investment tribunal is tasked with determining whether an SOE has standing to institute investment arbitration under a particular IIT, this interpretive analysis will not always be a difficult exercise. Many IITs do contain express provisions protecting SOE investment.

Article 201(1) of *NAFTA*, for example, defines "enterprise" as "any entity constituted or organized under applicable law, whether or not for profit, and *whether privately-owned or governmentally-owned*, including any corporation, trust, partnership, sole proprietorship, joint venture or other association" [emphasis added]. Identical language also appears in both the 2004 *Model U.S. Bilateral Investment Treaty*,[110] and Canada's 2004 model for Foreign Investment Promotion and Protection Agreements.[111] Similarly, Art. 13(a)(iii) of the *Convention establishing the Multilateral Investment Guarantee Agency*[112] includes within the definition of investor legal entities "whether or not privately owned." Other IITs specifically extend protection not only to government controlled entities but also to the home government itself. The BIT between the Czech Republic and Kuwait, for example, defines "investor" to include, "with respect to either Contracting State, the Government of that Contracting State."[113] Furthermore, this express inclusion of the States parties in the definition of "investor" is in addition to a host of other possible government organs or appendages, including "institutions, development funds, authorities, foundations, establishments [and] agencies."[114]

Where the protection of an IIT is expressly extended to SOEs, the ordinary meaning of the IIT pursuant to Art. 31 *VCLT* will largely settle the interpretive issue. Further examination of the IIT's context and object and purpose will rarely (if ever) over-ride the effect of explicit provisions protecting SOEs. Absent any express provision to the contrary the SOE will be entitled to the exact same treatment as a purely private investor, regardless of its quasi-public nature. However, this is not the case where an IIT is more ambiguous as to its treatment of investors of a sovereign nature—in other words, where the plain meaning of the IIT is less informative. In

[109] (23 May 1969), 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force 27 January 1980) [*VCLT*].
[110] Online: <http://www.state.gov/documents/organization/117601.pdf>.
[111] Online: < http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf>.
[112] 11 October 1985, 24 I.L.M. 1598 (entered into force 12 April 1988).
[113] *Agreement between the Czech Republic and the State of Kuwait for the Promotion and Protection of Investments*, 8 January 1996, Art. 1(2)(b), online: <http://www.unctad.org/sections/dite/iia/docs/bits/czech_kuwait.pdf>.
[114] *Ibid*.

these circumstances, it will be necessary to rely on the latter two interpretive sources set out in Art. 31(1) of the *VCLT*, and assess whether protection for SOE investors is implied either by the context or by the object and purpose of the IIT. [115] This may prove a thorny undertaking.

It has been suggested by UNCTAD that a presumption in favour of extending protection to SOEs should apply.[116] This interpretation is said to follow from a "plain meaning" approach to the term "legal entity": according to UNCTAD, the term "is usually broadly understood as any kind of juridical entity constituted or organized under the applicable laws of a party. This means that, unless the [IIT] states something to the contrary, State enterprises... are normally protected under the [IIT]."[117] However, further investigation reveals this simplifying proposition to be of somewhat limited utility in the highly context-dependent area of international investment law. While it is reasonably arguable that the mere term "legal entity" should be construed to include state-owned legal entities, it is important to recognize that IITs can contradict this proposition in ways not immediately apparent: locating express and implied contradictions of SOE standing will often require consideration of various other provisions commonly included in IITs, including not only those related to the definition of "investor," but also those not immediately related to this term. A brief review of several IITs concluded by various countries is illustrative of provisions that potentially contradict the proposed UNCTAD presumption, as well as the interpretive issues they raise.

One possibility is that an IIT may contain multiple definitions of investor that diverge significantly in their treatment of SOEs. The BIT between China and Qatar, for example, defines "investor" in respect of Qatar to include "legal persons including companies, general corporations, *public organizations, public and semi-public entities* constituted in accordance with the legislation of... Qatar and domiciled in its territory."[118] However, the same article defines "investor" in respect of China to include only "economic entities established in accordance with the laws... of China and domiciled in the territory of... China."[119] A similar asymmetry exists in China's BIT with Ghana, where an identical definition of "investor" in respect of China is provided while a Ghanaian "investor" is defined to include "*state corporations*

[115] For example, the "intentions" school was relied on to determine the scope of consent in both *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (Decision on Jurisdiction of 2 August 2006), ICSID Case No. ARB/03/26 at paras. 177-178 [*Inceysa v. El Salvador*], and *Amco Asia Corp. v. Republic of Indonesia* (Award of 25 September 1983) ICSID Case No. ARB/81/1 at para 14. See also *The Rompetrol Group N.V. v. Romania*, (Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008), ICSID Case No. ARB/06/3 [*Rompetrol v. Romania*] at para. 107 (holding that where confusion as to the intention of the parties arises, the best means available to attempt to safeguard those intentions is "the unequivocal terms of the treaty text on which they formally agreed" as "that is the approach which the Vienna Convention requires.").
[116] UNCTAD, "National Security", *supra* note 9 at 43.
[117] *Ibid.*
[118] *Agreement Between the Government of the People's Republic of China and the Government of the State of Qatar Concerning the Encouragement and Reciprocal Protection of Investments*, April 1999, Art. 1(2)(b), online: <http://www.unctad.org/sections/dite/iia/docs/bits/china_qatar.pdf> [emphasis added].
[119] *Ibid.*

and agencies and companies registered under the laws of Ghana which invest or trade abroad."[120] Therefore, while the definitions of Chinese investors under these treaties do nothing to expressly exclude the standing of Chinese SOEs, the express inclusion of SOEs within the definitions of Qatari and Ghanaian investors suggests that perhaps Chinese SOEs were not intended to be granted standing. Stated differently, the express inclusion of SOEs within the definitions of Qatari and Ghanaian investors suggests that, had the parties intended to give standing to Chinese SOEs, they would have included similar language in respect of these entities.

Another possibility is that an IIT may contain multiple definitions of "investor" that diverge significantly in their construction, but which are all immediately silent as to their treatment of SOEs. The BIT between China and Peru, for example, defines "investor" in respect of Peru to include "all juridical persons established in accordance with the laws of... Peru and domiciled in... Peru, including civil and commercial companies and other associations with or without a legally acknowledged existence that perform an economic activity within the sphere of this Agreement and which are directly or indirectly controlled by nationals of... Peru."[121] On the other hand, the same article defines "investor" in respect of China to include merely "economic entities established in accordance with the laws of... China and domiciled in... China."[122]

These two asymmetrical approaches can be contrasted with BITs which provide the exact same definition of "investors" for each party, such as in China's BIT with Trinidad and Tobago.[123] Therefore, where such a divergent approach is taken to the definitions of "investor" included in an IIT, an investment tribunal should pause to examine why this is the case, including the possibility that the parties intended to include or exclude different types of investors from the provisions of the BIT, including SOEs. Such an investigation could include a comparison of the different definitions of

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[120] *Agreement between the Government of the People's Republic of China and the Government of the Republic of Ghana Concerning the Encouragement and Reciprocal Protection of Investments*, 12 October 1989, Art. 1(b), online: <http://www.unctad.org/sections/dite/iia/docs/bits/china_ghana.pdf> [emphasis added].

[121] *Agreement between the Government of the Republic of Peru and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments*, 8 June 1994, Art. 1(2), online: <http://www.unctad.org/sections/dite/iia/docs/bits/peru_china.pdf>.

[122] *Ibid*. For another Chinese BIT defining "investor" differently in respect of China and its counterparty state, but which is also silent as to the inclusion of SOEs within these, see *Agreement between the Government of the People's Republic of China and the Government of the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investments*, 2 December 1993, Art. 1(2), online: <http://www.unctad.org/sections/dite/iia/docs/bits/china_uruguay.pdf>.

[123] This BIT defines "investors" other than natural persons—in respect of both parties—to include "economic entities, including companies, corporations, associations, partnerships and other organizations, incorporated and constituted under the laws and regulations of either Contracting Party and which have their seats in that Contracting Party." See *Agreement between the Government of the Republic of Trinidad and Tobago and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments*, Art. 1(2), online: <http://www.unctad.org/sections/dite/iia/docs/bits/china_trinidad.pdf> (date of signature not available).

investor included in the BIT to the domestic law and legislation of the two parties dealing with companies and their incorporation, including the parties' domestic law and legislation dealing with SOEs. For example, it could be that the domestic laws of Peru specifically provide for "civil and commercial companies and other associations" in a manner which excludes SOEs or similar entities from the ambit of these terms.

An investigation into the standing of SOEs in the face of otherwise neutral definitions of "investor" could also include consideration of various other provisions included in an IIT that are capable of indirectly evidencing the parties' intentions. Like the BIT between China and Trinidad and Tobago, China's agreements with Uganda[124] and with Egypt[125] both adopt uniform definitions of "investor" which are silent as to the standing of SOEs. However, each of these three treaties also contains another provision potentially indirectly relevant to the standing of SOEs. This is the "subrogation clause," which establishes the right of an investor to allow a third party to bring a claim on its behalf, in respect of matters to which the subrogation applies.[126] These clauses are often constructed to extend subrogation rights only to private entities, such as an investor's insurance company.[127] However, subrogation clauses in the three treaties identified above take a different approach: they extend subrogation rights to Contracting Parties or any "designated agency." This strict focus on the subrogation rights of contracting states and any "designated agencies" is of potential significance. In particular, it suggests that where the States parties intended to provide standing to states and certain state "agencies," they did so expressly. It therefore also suggests that when the IIT does not expressly extend standing to states and certain "state agencies," this was intentional, and such entities were not intended to be given standing to bring investment arbitration claims. Of course, whether or not an implied intention to deny standing to state *agencies* except in certain circumstances can be extended to equal an implied intention not to give similar standing to state-owned

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[124] *Agreement between the Government of the People's Republic of China and the Government of the Republic of Uganda on the Reciprocal Promotion and Protection of Investments*, 27 May 2004, Art. 1(2), online: <http://www.unctad.org/sections/dite/iia/docs/bits/Uganda_China.pdf> (defines "investor" in respect of both States parties to include "legal entities, including company, association, partnership and other organization, incorporated or constituted under the laws and regulations of either Contracting Party and having their headquarters in that Contracting Party.").

[125] *Agreement between the Government of the Arab Republic of Egypt and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments*, 21 April 1994, Art. 1(2)(b), online: <http://www.unctad.org/sections/dite/iia/docs/bits/egypt_china.pdf> (defines "investor" in respect of both States parties to include "economic entities established in accordance with the laws of that Contracting Party and domiciled in its territory.").

[126] See China-Egypt BIT, *ibid.* Art. 7; China-Uganda BIT, *supra* note 124, Art. 6; China-Trinidad and Tobago BIT, *supra* note 123, Art. 9.

[127] See *Agreement on reciprocal promotion and protection of investments between the Government of the Republic of Kazakhstan and the Government of the Islamic Republic of Iran*, January 1996, Art. 9(1), online: <http://www.unctad.org/sections/dite/iia/docs/bits/egypt_china.pdf>. For a subrogation clause which specifically establishes subrogation rights in respect of both private entities as well as home governments and their agencies see the Czech Republic-Kuwait BIT, supra note 113, Art. 8(1).

enterprises is an entirely different proposition, and one which would likely require significantly more support.

Depending on the IIT, such further evidence may be available in the Preamble, which under Art. 31(2) *VCLT* forms part of the interpretive context of a treaty. Take the BIT between Germany and Iran.[128] Here, the definitions provision defines German investing "companies" as including "any juristic person as well as any commercial or other company or association." On the other hand, Iranian investing "companies" are defined to include "any legal personality or corporation or institution." Both of these are wide and inclusive definitions which can very reasonably be argued to provide standing to SOEs. This is particularly the case in respect of Iranian companies because of the inclusion of the term "institution," an expression often invoked to refer to public rather than private bodies. However, any implied standing of German or Iranian SOEs to bring investment claims under the Germany-Iran BIT is partially contradicted by the Preamble to the BIT, which specifically provides that the Treaty was intended to "stimulate *private* business initiative."[129] This is not an outright rejection of the ability of SOEs from either country to bring claims under the BIT, but it does imply that any "public" investment made by such entities was not intended to be afforded protection.

In total, there is merit to UNCTAD's abovementioned argument that a presumption in favour of the standing of SOEs should apply in the absence of evidence to the contrary: where an IIT definition of "investor" speaks solely of any or all "legal entities" it is reasonable to conclude that this should include both privately and publically held companies. However, two important caveats to this analysis must be raised. First, presumptions in favour of jurisdiction are inappropriate in investment arbitration. As held in *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, respecting the will of the States parties to an IIT requires that the scope of their consent to arbitration is scrutinized on an individual basis, free and clear of any presumption either for or against jurisdiction.[130] Secondly, evidence arguing against the standing of SOEs to bring arbitration under an IIT need not necessarily appear in the relevant definition of investor in the IIT, nor need it be express. It may be found in any other provision of the IIT. It may be either express or arise by implication. It may also bear on the relevant definition of investor

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[128] *Treaty between the Federal Republic of Germany and the Empire of Iran concerning the Promotion and Reciprocal Protection of Investments*, 11 November 1965, online: <http://www.unctad.org/sections/dite/iia/docs/bits/germany_iran_eng_gr.pdf>.

[129] *Ibid.*, Preamble [emphasis added].

[130] A similar IIT-specific approach to intention has been followed in other areas. According to the tribunal in *Inceysa v. El Salvador*, *supra* note 115 at para. 176, any investigation into the scope of consent to arbitration given by the States parties to an IIT should proceed free from any presumptions in favour of or against jurisdiction. See also *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad* (Decision on Jurisdiction, 5 March 2008), ICSID Case No. ARB/05/12 at paras. 195-197 [*Noble v. Ecuador*]; *RosInvestCo UK Ltd. v. The Russian Federation* (Award on Jurisdiction, October 2007), SCC Case No. Arb. V079/2005 at para. 44 (Arbitration Institute of the Stockholm Chamber of Commerce) [*RosInvestCo v. Russia*].

either directly or indirectly. Therefore, while at first glance an otherwise neutral definition of "investor" may appear to grant standing to a SOE, it is important to verify that such standing is not substantially contradicted by other provisions of the IIT either expressly or by implication. Not all such contradictory evidence will be of identical persuasive value, however. A reference to "private" investment in a Preamble or the asymmetrical treatment of SOEs in two definitions of "investor," for example, may weigh somewhat heavily against SOE standing. A state-centred subrogation clause, on the other hand, will likely hold minimal weight at best. Nonetheless, it is clear that in sufficient strength, evidence of this kind could amount to a persuasive implication that SOEs were not intended to be granted standing under an IIT otherwise silent on this point.

Considering these realities of interpretation, a presumption in favour of standing risks being of limited utility at best, and—to the extent that it could distract from real interpretive deliberation—counter-productive at worst. Perhaps it would be more useful instead to specify a general foundation for understanding the object and purpose of IITs. Tribunals should proceed in this inquiry on the basis that, as reviewed above, the general goal of the international investment arbitration regime is to stimulate cross border flows of capital. However, this should be balanced with the fact that many investment protection treaties, at least initially, were also designed with the intention of depoliticizing disputes between states. Once again, these considerations would only be a general framework for each particular IIT: tribunals should take into account the fact that different states likely placed different emphases on these separate goals at different times in their respective histories.

However, at no time during this inquiry should investment arbitration tribunals exceed the interpretive boundaries prescribed by the *VCLT*. While it is important to outline which interpretive practices a Tribunal should adopt when considering the standing of SOEs, attention should also be drawn to interpretive practices which should be avoided. One such undesirable practice is the attribution of undue importance to other IITs executed by the same States parties to the present dispute. In circumstances where even after Art. 31 *VCLT* interpretation the meaning of an IIT is "ambiguous or obscure," Art. 32 *VCLT* calls for tribunals to refer to supplementary means of interpretation, "including the preparatory work of the treaty and the circumstances of its conclusion." This may include numerous sources, including drafts of the IIT and related official correspondence between the States parties. Therefore, where the standing of an SOE under an IIT is unclear, tribunals may be tempted in their consideration of supplementary sources to compare the IIT before them to other IITs signed by the same States parties. For example, were a Tribunal investigating the standing of a Saudi Arabian SOE to bring a claim under the BIT between Saudi Arabia and the Belgo-Luxembourg Economic Union (BLEU),[131] it might consider turning for guidance to the terms of Saudi

[131] *Agreement between the Kingdom of Saudi Arabia and the Belgo-Luxembourg Economic Union (B.L.E.U.) Concerning the Reciprocal Promotion and Protection of Investments*, 22 April 2001, online:

Arabia's BIT with Malaysia.[132] In particular, it might seek to compare the former's definition of a Saudi Arabian investor, which includes "any legal entity *having or not having legal personality*"[133], with the latter's definition of a Saudi Arabian investor, which includes merely "any legal entity"[134], to establish that Saudi Arabia intended to provide for a wider class of Saudi investors in the later *Saudi Arabia-BLEU BIT* than it did in the earlier *Saudi Arabia-Malaysia BIT*. However, any such attempt would be misguided. As stated by the tribunal in *Aguas del Tunari, S.A. v. Republic of Bolivia*:

> [t]he practice of a state as regards the conclusion of BITs other than the particular BIT involved in a dispute is not of direct value to the task of interpretation under Article 31 of the Vienna Convention. The fact that a pattern might exist in the content of the BITs entered into by a particular state does not mean that a specific BIT by that state should be understood as necessarily conforming to that pattern rather than constituting an exception to that pattern.[135]

This warning is repeated by the Tribunal in *Rompetrol v. Romania*, where it held that there is "nothing in the *Vienna Convention* that would authorize an interpreter to bring in as interpretive aids when constructing the meaning of one bilateral treaty the provisions of other treaties concluded with other partner States."[136]

3. *Jurisdictional Issue #2: Does an SOE have standing under the ICSID Convention?*

Even after an investment tribunal determines that an IIT *does* in fact extend its protection to SOEs, additional barriers will exist where the tribunal has been constituted pursuant to the *ICSID Convention*. The *ICSID Convention* does not allow for the arbitration of disputes between states.[137] Allowing for the arbitration of such disputes was expressly considered by the drafters of the Convention and firmly rejected.[138] Furthermore, while the drafters of the Convention decided to grant access to ICSID arbitration to

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<http://www.unctad.org/sections/dite/iia/docs/bits/saudi_belg_lux.pdf> [*Saudi-BLEU BIT*].

[132] *Agreement between the Government of the Kingdom of Saudi Arabia and the Government of Malaysia Concerning the Promotion and Reciprocal Protection of Investments*, 25 October 2000, online: <http://www.unctad.org/sections/dite/iia/docs/bits/saudi_malaysia.pdf> [*Saudi-Malaysia BIT*].

[133] *Saudi-BLEU BIT*, supra note 131, Art. 1(3)(a)(II) [emphasis added].

[134] *Saudi-Malaysia BIT*, supra note 132, Art. 1(3)(b)(ii).

[135] (Decision on Jurisdiction, 21 October 2005), ICSID Case No. ARB/02/3 at para. 291, online: <http://www.iisd.org/pdf/2005/AdT_Decision-en.pdf> [*AdT v. Bolivia*]. However, the tribunal does go on to note that a state's practice in negotiating BITs may be of assistance in "testing the assertions of parties as to the general policies" of an IIT's States parties and in "testing assumptions a tribunal may make regarding BITs." See *ibid.* at para. 292.

[136] *Supra* note 115 at para. 108. However, one must question whether the situation is the same with Model BITs used by states in negotiating investment agreements, such as the 2004 *Model U.S. Bilateral Investment Treaty*, *supra* note 110, and Canada's 2004 model for Foreign Investment Promotion and Protection Agreements, *supra* note 111. In particular, as both of these model treaties include publicly-owned entities within their definition of investor, the absence of such language in later BITs could indicate that they did not intend to extend protection to state-owned businesses in these later instruments.

[137] See *ICSID Convention*, *supra* note 8, Art. 25.

[138] Schreuer, *supra* note 92, Art. 25, para. 270.

SOEs, they simultaneously decided to limit the circumstances in which this would be done.[139] The remainder of this article will explore the parameters of such constraints. Sub-section (i) will examine the circumstances in which the application of the "Broches test" will deny standing to an SOE under *ICSID Convention* Art. 25: what does it mean for an SOE to "discharge an essentially governmental function," or "act as an agent for the government"? Sub-section (ii) will examine how SOEs are defined and/or identified for the purposes of the *ICSID Convention* and the Broches test—the ultimate question being how a tribunal will determine whether or not the Broches test should be applied in the first place. Both of these analyses will be made with reference to previous investment arbitration case law as well as other relevant sources of international law. Both of these analyses will also criticize such precedent where it has been lacking in either substance or scope.

Art. 25 of the *ICSID Convention* and the "Broches Test"

As mentioned, a tribunal constituted in relation to an investment dispute under an IIT must confirm its jurisdiction not only under the IIT but also under the arbitration rules specific to it. Therefore, where the tribunal has been constituted before the International Chamber of Commerce's International Court of Arbitration or under the UNCITRAL Model Rules, it will be necessary for the tribunal to determine whether the jurisdictional provisions of these rules have been complied with. As these forums were designed to administer commercial disputes between private parties, their jurisdictional provisions are generally concerned with confirming that the parties have properly consented to arbitration and that the arbitral tribunal has been properly formed. However, tribunals constituted under the *ICSID Convention* will not only have to address these same issues of consent and formation; they will also have to deal with issues specific to ICSID's role as a forum designed to adjudicate disputes between private investors and sovereign states. Art. 25 of the *ICSID Convention* establishes the jurisdictional requirements for ICSID tribunals. Under Art. 25(1), "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State... and a national of another Contracting State."

The leading decision in respect of the standing of SOEs to bring arbitration under the *ICSID Convention* is currently the award of the Tribunal in *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*.[140] At the time of the claim, CSOB was a bank owned by the government of the Czech Republic.[141] In 1993, CSOB entered into a series of agreements with the Slovak Republic, the Czech Republic, and two collection companies: one established in each of the involved states. In addition, CSOB entered into a loan agreement with the Slovak collection company; the obligations of the collection company were guaranteed by the Slovak Republic. When the

[139] *Ibid*., Art. 25, paras. 270-271.
[140] (Decision on Jurisdiction, 24 May 1999), ICSID Case No. ARB/97/4, 14 ICSID Rev.-F.I.L.J. 25, online: <http://ita.law.uvic.ca/documents/CSOB-Jurisdiction1999_000.pdf> [*CSOB v. Slovak Republic*].
[141] *Ibid*. at para. 18.

Slovak collection company failed to honour its obligations under the loan and the Slovak Republic in turn failed to fulfil its guarantee, CSOB filed a claim for arbitration by an ICSID tribunal under the BIT between the Czech Republic and the Slovak Republic.[142] Several objections to the tribunal's jurisdiction under the BIT and the *ICSID Convention* were raised by the Slovak Republic.[143] Most important here, it was argued that CSOB did not qualify as an *ICSID Convention* Art. 25 "national of another Contracting State," and was in fact an organ of the Czech state.[144]

The tribunal in *CSOB v. Slovakia* began its analysis of the Slovak Republic's objection by stating that Art. 25 leaves no doubt that ICSID tribunals have no jurisdiction over disputes between two Contracting States.[145] However, this did not mean that the *ICSID Convention* was available only to privately owned companies.[146] Rather, citing the legislative history of the *ICSID Convention* and a study made by its principal drafter, Aron Broches, the Tribunal held 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."[147] Notably, both the Claimant and the Respondent accepted that this test—which has subsequently come to be known as the "Broches test"—was determinative.[148]

The Broches Test: "discharging an essentially governmental function"

In applying the Broches test to the facts of the case, the Tribunal made two observations. First, the Tribunal noted that 65% of CSOB was owned by the Czech Republic and that, according to the respondent, this majority ownership resulted in the bank being under the "absolute control" of its home state.[149] Second, the Tribunal took note of the fact that over the course of its existence most of the CSOB's work was undertaken on behalf of the Czech Republic, including facilitating foreign commercial operations and executing international banking transactions at the State's behest.[150]

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[142] *Agreement between the Government of the Slovak Republic and the Government of the Czech Republic Regarding the Promotion and Reciprocal Protection of Investments*, 23 November 1992; *CSOB v. Slovak Republic*, *ibid.* at paras. 1-3.
[143] *Ibid.* at paras. 10-12.
[144] *Ibid.* at paras. 10, 15.
[145] *Ibid.* at para. 16. This assertion is now generally accepted: *Emilio Agustin Maffezini v. The Kingdom of Spain* (Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000), ICSID Case No. ARB/97/7 at para. 74, online: < http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction-English_001.pdf> [*Maffezini v. Spain*].
[146] *CSOB v. Slovak Republic*, *supra* note 140 at para. 16.
[147] *Ibid.* at para. 17, citing Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1972) 135 Hague Rec. d. Cours 331 at 354-355. Mr. Broches served as both General Counsel to the World Bank, and as Secretary General of the ICSID.
[148] *CSOB v. Slovak Republic*, *supra* note 140 at para. 17.
[149] *Ibid.* at para. 18.
[150] *Ibid.* at para. 20.

However, the Tribunal emphasized that, in light of the Broches test, these observations could not be determinative. Rather, it held that assessing whether SOE investment represented the discharge of an "essentially governmental function" necessitated a focus on the *nature* of the acts rather than their *purpose*.[151] In other words, the Tribunal held that regardless of whether or not CSOB's actions functioned to "promote the government policies or purposes" of the Czech Republic, the ultimately crucial issue was whether the actions themselves "were essentially commercial rather than governmental in nature."[152]

Focussing exclusively on how to characterize the nature of the particular investment activity at issue, the Tribunal concluded that it mattered little that CSOB was publically owned and controlled.[153] Such public ownership and control was already provided for and accommodated by the *ICSID Convention* itself, as discussed above. What mattered was whether, in conducting its investment, the activities of CSOB ever crossed the line between those exercised by private commercial entities, and those exercised primarily by entities of a public nature. Therefore, it mattered not that CSOB's actions might be "driven by state policies,"[154] nor that CSOB's activities were benefitting from the Czech government's policies and subsidies.[155] Instead, the determinative fact was that CSOB was not itself engaged in policy making or development, or in legislative or administrative action;[156] rather, its actions, strictly speaking and divorced from their greater context, were within the competency of a private commercial entity. Since they were not within the special and exclusive competency of a sovereign, its sub-state entities or state organs, it could not be said that CSOB's investments were the discharge of an essentially governmental function.

The Tribunal's decision in *CSOB v. Slovak Republic* represents a significant expansion of established international investment law, elaborating substantially on the requirements of Article 25 of the *ICSID Convention*. By concentrating entirely on the nature of the entity's activities without any consideration of their purpose, the Tribunal elevated form over substance, presumably in search of a bright-line test. This approach does have its advantages, among them greater certainty and predictability. The nature of an entity's investments will often be more easily determined than the purpose underlying those investments. This is particularly the case where one seeks merely to categorize investments as either public or private. It would appear that most if not all actions undertaken by a private entity that are not accompanied by some sort of *puissance publique* or public authority will be just that—private. The motivations or purposes behind investment, on the other hand, can be much more difficult to decipher: they can be masked, and there will often be multiple motivations underlying any one action. The issue of underlying motivation can also pose serious

[151] *Ibid*.
[152] *Ibid*.
[153] *Ibid.* at para. 18.
[154] *Ibid.* at para. 21.
[155] *Ibid.* at para. 23.
[156] *Ibid*.

evidentiary problems, since much of the most pertinent information will be controlled by the entity that is the subject of the inquiry.

Nonetheless, for two reasons the bright-line "nature" test established in *CSOB v. Slovak Republic* should not receive unconditional acceptance by tribunals as the appropriate test for Art. 25 jurisdiction over SOEs. First, the decision is not entirely persuasive. The "commercial transaction" test has long been the accepted standard in the domestic law of many states for determining the jurisdiction of courts over the actions of foreign states and their instrumentalities: only where the activities of such entities are deemed to be "commercial" or non-sovereign (*jure gestionis*) rather than sovereign (*jure imperii*) will courts exercise jurisdiction over them.[157] The aim of this inquiry is in many respects analogous to the Broches test and its "essentially governmental function" limb. The "commercial transaction" test prevents courts from exercising jurisdiction over a state entity except where it is acting in a non-sovereign or commercial manner. Similarly, the "essentially governmental function" restricts the standing of SOEs before the ICSID to those circumstances where their investments have been conducted in a comparably non-sovereign or commercial manner. While it has previously been customary for courts to solely consider the nature of a state-controlled entity's activities when applying the "commercial transaction" test, it has more recently become the norm to consider both the nature *and* purpose of the entity's activities where appropriate. Article 2(2) of the United Nations *Convention on Jurisdictional Immunities of States and their Property*,[158] which has not yet entered into force but is nevertheless considered by many to be an expression of international consensus on the matter,[159] provides that:

> In determining whether a contract or transaction is a "commercial transaction"... 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 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.

This follows the approach of many notable domestic courts in recent decades, which have increasingly recognized that consideration of the greater context in which activities take place, including their purpose, may

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[157] Malcolm N. Shaw, *International Law*, 6th ed. (New York: Cambridge University Press, 2008) at 708-714. For earlier treatments of this topic see e.g. Bernard Fensterwald, Jr., "Sovereign Immunity and Soviet State Trading" (1949-1950) 63 Harv. L. Rev. 614; "Sovereign Immunity of States Engaged in Commercial Activities", Unsigned Note, (1965) 65 Colum. L. Rev. 1086.

[158] New York, 2 December 2004, U.N. Doc. A/59/508 (Not yet in force. As of 30 April 2011, 28 signatories and 11 States parties).

[159] Hazel Fox, *The Law of State Immunity*, 2d ed. (New York: Oxford University Press, 2008) at 167 (The *Convention* is an "authoritative written codification of the international law relating to state immunity" that "represents a coherent statement of the current international law based on State practice"); David Gaukrodger, "Foreign State Immunity and Foreign Government Controlled Investors" (2010) 2 *OECD Working Papers on International Investment* (Paris: OECD Publishing) at 12, online: <http://www.oecd.org/dataoecd/21/32/45036449.pdf>, citing *Jones v. Ministry of Interior of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270 ("[d]espite its embryonic status, this Convention is the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases.").

be necessary to accurately determine their sovereign or non-sovereign nature.[160] As held by the Supreme Court of Canada, "an antiseptic distillation of a 'once-and-for-all' characterization of the activity in question, entirely divorced from its purpose," is "to attempt the impossible."[161] According to the U.S. Court of Appeals for the Fifth Circuit, in *De Sanchez v. Banco Central de Nicaragua and Others*, "unless we can inquire into the purpose of [certain] acts, we cannot determine their nature."[162] Similarly, the Australian Law Commission has written that the conceptual distinction between the purpose and nature of an activity is impossible to sustain: "It is not possible to classify the nature of any human activity without reference to its purpose... The classifications 'governmental' and 'commercial' are themselves purposive."[163]

In this light, the difficulty involved in investigating the purpose behind the activities of an SOE operating in a foreign state does not diminish the potential relevance of such purpose in determining the jurisdiction of an ICSID tribunal. In fact, contemporary concerns related to SOEs reveal that the potential relevance of an SOE's motivations is quite high, and there will be political pressures to take these motivations into account. As discussed, the main concern surrounding modern SOEs is that they may engage in behaviour motivated by political concerns rather than strictly commercial concerns—in other words, adopt the appearance of a private enterprise in order to further otherwise political objectives. These concerns are not related to the type or nature of activity that SOEs may engage in. They are related to the purposes and objections behind such activities. As such, they are not addressed in the test adopted by the *CSOB* tribunal. This is a deficiency that is not likely to sit well with countries interested in closely policing the activity of SWFs and SOEs within their borders. They will rightly argue that SOEs and the governments that control them are entirely capable of cloaking politically motivated decisions and strategies in otherwise commercial actions, and that the test advocated in *CSOB v. Slovak Republic* would allow such behaviour to be protected by the *ICSID Convention* even where the end goal is one contrary to the interests of the host state. ICSID tribunals should not overlook this.

Second, there are numerous reasons why future tribunals may feel free to expand on the inadequate reasoning of the Tribunal in *CSOB v. Slovak Republic*. Like all international investment arbitration decisions, it is not binding on future investment tribunals.[164] It is true that there is very good cause to consider and give great weight to the determinations of previous

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[160] See Shaw, *supra* note 157 at 710-712.
[161] *United States of America v. The Public Service Alliance of Canada and others (Re Canada Labour Code)*, [1992] 2 S.C.R. 50 at para. 28 [*Re Canada Labour Code*]. See also the ruling of Wilberforce L.J. in *I Congreso del Partido*, [1983] 1 A.C. 244 (H.L.) (heavily relied on in *Re Canada Labour Code*).
[162] *De Sanchez v. Banco Central de Nicaragua and Others*, 770 F.2d 1385 at 1393 (5th Cir. 1985), 88 I.L.R. 75 at 83.
[163] Australian Law Reform Commission, *Report No. 24: Foreign State Immunity* (1984), online: <http://www.austlii.edu.au/au/other/alrc/publications/reports/24/>.
[164] See *RosInvestCo v. Russia*, *supra* note 130 at para. 49; *Noble v. Ecuador*, *supra* note 130 at paras. 49-50; Gabrielle Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?" (2007) 23 Arb. Int'l 357; Jeffrey P. Commission, "Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence" (2007) 24 J. Int'l Arb. 129.

investment tribunals. As noted in *Burlington Resources Inc. v. Republic of Ecuador*, tribunals should "pay due consideration to earlier decisions of international tribunals" and, "subject to compelling contrary grounds... [should] adopt solutions established in a series of consistent cases."[165] This is in order to "contribute to the harmonious development of investment law" and to thereby "meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law."[166] However, as recognized by the *Burlington Resources* tribunal, "compelling contrary grounds" should cause a tribunal to depart from this approach. The decision of the tribunal in *CSOB v. Slovak Republic* is one such case. As argued above, the argument articulated by the tribunal is not particularly persuasive in its outright dismissal of the relevance of "purpose" when examining SOE activities. Furthermore, the decision's lack of comprehensiveness will make it easier for other tribunals to depart from the tribunal's approach. *CSOB* was one of the earliest decisions on jurisdiction by an ICSID tribunal. It followed only a handful of previous awards and was decided without the benefit of the avalanche of investment arbitration awards and associated academic discussion that has since ensued. Whereas contemporary decisions on jurisdiction in investment disputes consistently result in lengthy awards numbering hundreds of pages and citing large numbers of authorities and legal instruments, the *CSOB* decision on this point produced only twelve paragraphs and referenced only a single source. Perhaps most importantly, *CSOB v. Slovak Republic* was also decided prior to the recent increase in the size, number and influence of SWFs and SOCs, and the effect of these SOEs on the investment policies of many IIT States parties.

In this regard, it is clear that a more balanced approach is needed to determine whether or not an SOE is "discharging an essentially governmental function" for the purpose of ICSID tribunal Art. 25: one that represents the likely intention of the jurisdictional provision, that recognizes the legitimate concerns with respect to SOEs of the States parties to the *ICSID Convention*, that reflects the increasing comprehensiveness of ICSID jurisprudence and academic commentary, and that is designed to deal with the current realities of complex SOE investment.

It is submitted that such a test for "essentially governmental functions" is one that considers the nature of an SOE's activities as well as the purpose behind those activities where appropriate. While it is true that this will involve a more extensive examination than focusing merely on the nature of an SOE's activities, and that the result of this examination may be more

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[165] (Decision on Jurisdiction, 2 June 2010), ICSID Case No. ARB/08/05 at para. 100, online: <http://ita.law.uvic.ca/documents/BurlingtonResourcesInc_v_Ecuador_Jurisdiction_Eng.pdf> [*Burlington Resources*]. See also *Saipem S.p.A. v. The People's Republic of Bangladesh* (Decision on Jurisdiction, 21 March 2007), ICSID Case No. ARB/05/07 at paras. 66-67, online: <http://ita.law.uvic.ca/documents/Saipem-Bangladesh-Jurisdiction.pdf>; *Saba Fakes v. Republic of Turkey* (Award, 14 July 2010), ICSID Case No. ARB/07/20 at para. 96; *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (Award, 9 May 2008), ICSID Case No. ARB/98/2 at para. 119.

[166] *Burlington Resources, ibid*.

difficult for disputing parties to predict beforehand, it is nonetheless the analysis which is the most likely to produce a fair and reasonable outcome.

The benefits of this alternative approach can be seen by returning to the example of *CSOB v. Slovak Republic.* The dispute arose in unique circumstances. The Soviet Bloc had only recently collapsed and Eastern Europe, including the Czech Republic, was hurtling through a drastic transformation from state-controlled economies to free markets. The agreements entered into by CSOB were directly related to this transition, concluded in major part for the purpose of privatizing CSOB itself.[167] This aspect of public or governmental purpose underlying CSOB's activities appeared to trouble both the bank and the tribunal. In particular, it appears from the text of the award that CSOB was concerned that if its participation in the loan agreement could be framed as the implementation of government policy, the obedience of the bank in this regard would be sufficient to characterize its actions as "essentially governmental." As such, CSOB seemed eager to dissociate its actions from the greater political, economic and ideological shift in which they occurred by concentrating on the fundamentally private nature of the financial transactions themselves. But CSOB's concerns in this regard would not necessarily be justified under the alternative approach proposed here. While it is true that CSOB was taking its orders from the Czech state when it negotiated the loan agreement, the fundamental objective of those directives was the disconnection and disassociation of CSOB from the Czech state.[168] Stated differently, the true purpose of CSOB's actions was not to advance government policy but to ensure that, going forward, it could in no way function as or be considered to be an arm of the Czech state. This is hardly an agenda that threatens the philosophy of the ICSID system or the principles of its foundation. Therefore, had the tribunal in *CSOB v. Slovak Republic* been willing to depart from a formalistic analysis to examine both the nature and purpose of CSOB's activities in the larger context in which they occurred, and to consider the ultimate goal of the government objectives being advanced, it could have been sensitive to these realities.

A test that considers both nature and purpose is also the approach best suited to analyze the potentially complex operations of today's large and often very powerful SOEs. If the *ICSID Convention* is not intended to protect SOEs operating as an appendage of their home states, then it is only appropriate that the totality of an SOE's operations be evaluated to decide whether or not they represent an extension of those states' policy or agenda. This approach will allow tribunals to determine the true geopolitical or economic ramifications of otherwise superficially commercial transactions. More so than the *CSOB* test, this approach will allow tribunals to determine whether an SOE has crossed the line from behaviour motivated purely by

[167] For a critical analysis of the Czech Republic's privatization program at this time, see George Bogdan, "The Economic and Political Logic of Mass Privatization in Czechoslovakia and Poland" (1996) 4 Cardozo J. Int'l & Comp. L. 43.

[168] The *CSOB* Tribunal even seemed to recognize this argument. See *CSOB v. Slovak Republic*, *supra* note 140 at para. 23.

commercial objectives to behaviour motivated totally or in part by the greater political, economic and social concerns of the state that created and controls it.

The Broches Test: "acting as an agent for the government"

In addition to the deficiencies of the *CSOB* Tribunal's ruling on the "essentially governmental function" limb of the Broches test, the decision suffers from another notable weakness: the Tribunal's failure to sufficiently address the "government agent" prong of the Broches test. As discussed, the Broches test provides 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."[169] The two branches of the test are disjunctive, being separated by the word "or"; therefore, the test clearly imposes two separate and distinct inquiries. First it asks whether the claimant SOE is acting as an "agent for the government." It then asks whether the claimant SOE is "discharging an essentially governmental function." If either of these branches are satisfied, then the *ICSID Convention* will not apply to protect the relevant SOE investment. The *CSOB v. Slovak Republic* Tribunal clearly turned its attention to the second of these limbs (although its analysis on this point should be questioned, as argued above). However, its treatment of the "government agent" branch of the Broches test is even more suspect.

The Tribunal acknowledges twice that the Slovak Republic contends that the "CSOB is... an agent of the Czech Republic,"[170] but ultimately does not give the "government agent" limb the same attention accorded to the "essentially governmental function" limb. Rather, it appears to conflate the two, failing to recognize that the "government agent" branch is a conceptually distinct component of the Broches test. It does this in two separate passages.[171] First, it states that:

> It cannot be denied that for much of its existence, CSOB *acted on behalf* of the State in facilitating or executing the international banking transactions and foreign commercial operations the State wished to support and that *the State's control of CSOB required it to do the State's bidding* in that regard. *But in determining whether CSOB, in discharging these functions, exercised governmental functions, the focus must be on the nature of these activities and not their purpose*.

Second, it states that:

> ... even if one were to conclude that the non-performing assets derived from *activities conducted by CSOB as an agent of the State*, the measures taken by CSOB to remove them from its books in order to improve its balance and consolidate its financial position in accordance with the provisions of the Consolidation Agreement, *must be deemed to be commercial in character*.

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[169] Broches, *supra* note 147.
[170] *CSOB v. Slovak Republic*, supra note 140 at para 10. See also para. 19.
[171] *Ibid.* at paras. 20-21 [emphases added].

This confusion is unfortunate. There is no suggestion inherent to the Broches test that either limb is superior to the other: they are put on exactly level ground. There is therefore no reason why the *CSOB* Tribunal should have predominantly focused its reasoning on the "essentially governmental function" limb to the exclusion of the "government agent" limb. There is also therefore no reason why the tribunal should have implied, as it did in the passages cited above, that an *ICSID Convention* tribunal can take jurisdiction as long as the SOE is not performing an "essentially governmental function." This was a disservice to the Slovak Republic. It remains a distinct possibility that, had the Tribunal given both limbs equal attention and significance, it would have held that the "acting as an agent for the government" branch was an independent basis to deny jurisdiction over CSOB's claims.

This raises the following two critical and interrelated questions. First, under what circumstances will an SOE be "acting as an agent of the government" for the purpose of *ICSID Convention* Art. 25? Secondly, how is this test conceptually distinct from the "essentially governmental function" branch that was the focus of the Tribunal in *CSOB v. Slovak Republic*?

One readily available source for understanding what it means to act as a government agent may be Art. 8 of the International Law Commission's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*.[172] Similar to the latter branch of the Broches test, Art. 8 is concerned with whether the conduct of a non-state actor should be attributed to a state. According to Art. 8:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[173]

The official ILC Commentary to Art. 8 explains that while, "as a general principle, the conduct of... entities is not attributable to [a] State under international law... [c]ircumstances may arise... where such conduct is nevertheless attributable to the State because there exists a specific factual relationship between the... entity engaging in the conduct and the State."[174] The ILC Commentary further explains that Art. 8 is intended to apply to two different situations. The first is where private persons or entities act "on the instructions of the State in carrying out the... conduct."[175] The second is "the more general situation where private persons act under the State's direction or control."[176] The ILC Commentary also makes clear that, in "the text of

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[172] *Report of the ILC on the Work of its Fifty-third Session*, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001) 43 [*Draft Articles*]. Articles 4, 5 and 8 of the *Draft Articles* are considered a codification of the customary international law of attribution: Srilal M. Perera, "State Responsibility: Ascertaining the Liability of States in Foreign Investment Disputes" (2005) 6 J. World Investment & Trade 499.

[173] *Draft Articles, ibid.*, Art. 8.

[174] International Law Commission, "Responsibility of States for Internationally Wrongful Acts: General Commentary", in *Report of the International Law Commission on the work of its fifty-third session*, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. No. A/56/10 (2001) 31 at 47, online: <http://untreaty.un.org/ilc/reports/2001/2001report.htm> [ILC Commentary].

[175] *Ibid*.

[176] *Ibid*. at 48.

article 8, the three terms 'instructions', 'direction' and 'control' are disjunctive; it is sufficient to establish any one of them."[177]

These inquiries share obvious parallels with the "government agent" limb of the Broches test: all are on their face concerned with establishing whether or not an entity should be considered an agent of a state in certain circumstances. As such, case law and commentary developed in connection with ILC Art. 8 should serve as a valuable reference to any tribunal tackling the "government agent" limb of the Broches test for a number of reasons.

First, they provide valuable insight into a number of questions that can arise when investigating the relationship between a state and a purported state agent under the "government agent" limb of the Broches test. These include the degree of specificity a state's directions to a purported agent must meet, whether states are responsible for acts that go beyond the scope of the state's authorization of an agent, and the degree of control a state must exercise over an agent's activities.[178] For example, the ILC Commentary confirms that the "attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence."[179] The ILC Commentary also explains that, where questions arise as to whether "conduct was carried out 'under the direction or control' of a State... such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation."[180]

Secondly, the ILC Commentary specifically contemplates the operation of Art. 8 in the context of SOEs, and thereby provides some valuable first principles: "[b]earing in mind the important role played by the principle of effectiveness in international law, it is necessary to take into account in both cases the existence of a real link between the person or group performing the act and the State machinery."[181] In this regard, the ILC Commentary makes a clear distinction between establishing agency between a state and entities unrelated to the state and establishing agency between a state and "companies or enterprises which are State-owned and controlled."[182] The ILC Commentary first confirms that "international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the 'corporate veil' is a mere device or a vehicle for fraud or evasion."[183] As such, the ILC Commentary then goes on to confirm that the mere "fact that [a] State initially establishes a corporate entity... is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity."[184] However, it is simultaneously recognized that where there is evidence that a "State was using its ownership interest in or control of a

[177] *Ibid*.
[178] *Ibid*, at 47-49.
[179] *Ibid*. at 47, citing, among others, the *Zafiro Case (D. Earnshaw and Others (Great Britain) v. United States)* (1925), 6 R.I.A.A. 160, (1926) 20 Am. J. Int'l L. 385.
[180] ILC Commentary, *ibid.*
[181] *Ibid*.
[182] *Ibid*. at 48.
[183] *Ibid*.
[184] *Ibid*.

corporation specifically in order to achieve a particular result" the conduct in question may be attributable to the State.[185]

Lastly, the utility of Art. 8 for international investment law has already been acknowledged—and further developed—in a growing body of arbitration case law invoking ILC Art. 8 when considering the conduct of state-owned or controlled entities. The following examples are illustrative. The tribunal in *EDF (Services) Limited v. Romania* referred to Art. 8 when considering whether Romania was liable for the acts of two separate entities owned by the Romanian government, including the country's national airline company, Compania de Transportationuri Aeriene Romane Tarom S.A. (TAROM).[186] The state entities had entered into joint ventures with the claimant, EDF, in respect of duty free services at a Romanian international airport as well as during flights to and from the airport. In bringing the claim before the *ICSID Convention* tribunal, EDF accused Romania of acting through the state-owned entities to indirectly undermine its investment.[187] The tribunal agreed, attributing the conduct of the state-owned entities to Romania with reference to the principles of Art. 8.[188] In particular, it held that Romania had, through a number mandates and directives, effectively used its ownership and control of the entities to achieve results within its own interests.[189]

In *Bayindir v. Pakistan*, the Tribunal applied Art. 8 to hold Pakistan responsible for the activities of that country's National Highway Authority (NHA).[190] Bayindir had been commissioned by the NHA to provide construction services in respect of new a six-lane motorway between Islamabad and Peshawar, and works ancillary to it. After several delays and revisions to the project, Bayindir instituted arbitration claiming that Pakistan had, *inter alia*, failed to provide it fair and equitable treatment through illegitimate pressure, coercion, the denial of due process and a government conspiracy to expel the corporation and transfer the work to local competitors.[191] The Tribunal recognized that the NHA was a public corporation and body corporate under Pakistani law, created by statute with the right to sue and be sued in its own name.[192] However, as various

[185] *Ibid*. On this point the ILC commentary refers to two decisions of the Iran-United States Claims Tribunal: *Foremost Tehran, Inc. v. The Government of the Islamic Republic of Iran* (1986), 10 Iran-U.S. C.T.R. 228 (Iran was ultimately responsible for the non-payment of dividends to American shareholders of an Iranian dairy company indirectly controlled by it through various state agencies); *American Bell International Inc. v. The Islamic Republic of Iran* (1986), 12 Iran-U.S. C.T.R. 170 (Iran was responsible for the failure of an Iranian private telecommunications company controlled by it to pay invoices and other costs incurred by a local subsidiary of AT&T).
[186] *EDF (Services) Limited v. Romania* (Award, 8 October 2009), ICSID Case No. ARB/05/13, online: <http://ita.law.uvic.ca/documents/EDFAwardandDissent.pdf> [*EDF v. Romania*].
[187] *Ibid*. at paras. 45-64, 66-111.
[188] *Ibid*. at para. 213.
[189] *Ibid*. at paras. 201-214.
[190] *Bayindir Insaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan* (Award, 27 August 2009), ICSID Case No. ARB/03/29, online: <http://ita.law.uvic.ca/documents/Bayandiraward.pdf> [*Bayindir v. Pakistan*].
[191] *Ibid*. at paras. 96-100.
[192] *Ibid*. at para. 9.

pertinent decisions of the Pakistan government were implemented through the NHA, and as various important decisions of the NHA were not executed prior to express governmental approval, the Tribunal concluded that the actions of the NHA could be attributed to Pakistan for the purposes of Bayindir's claims.[193]

However, regardless of these parallels, it should be remembered that investigations under the "government agent" limb of the Broches test arise in substantially different circumstances than do investigations under Art. 8 of the ILC *Draft Articles* and the question of state attribution in general. This distinction may reduce the value of the Art. 8 jurisprudence to interpretations and applications of the Broches test. International tribunals turn to the principles of state attribution when trying to determine whether or not a state should be held responsible for the conduct of a third party entity. In other words, the attribution problem arises when a defendant state has been accused of infringing through a third party agent the rights of another entity or another state. Such reference to the principles of state attribution may occur in a number of institutional contexts: before the International Court of Justice, in assessing state responsibility for the conduct of foreign guerrilla forces;[194] before special purpose international tribunals, such as the Iran-U.S. Claims Tribunal, in assessing state responsibility for various public and private liabilities;[195] and in investment arbitration convened before an ICSID tribunal or some other arbitral body, in assessing whether the actions of an SOE can be attributed to the investor's host state.[196]

On the other hand, the Broches test is designed to be invoked where an SOE attempts to bring an investment arbitration claim before a tribunal instituted under the *ICSID Convention*, and the respondent state seeks to deny the standing of the investor SOE because of its state-owned or state-

[193] *Ibid*. at paras. 114, 125-128. Note, however, that while the Tribunal found that the NHA's conduct could be attributed to Pakistan, it did not find the attributed conduct to amount to a breach of Pakistan's obligations. See page 140. Interestingly, the tribunal further noted that certain principles applicable in attributing conduct to states under Art. 8 of the ILC *Draft Articles* will not necessarily be applicable to the investment activities of SOEs. It particular, it distinguished between situations where attribution is being claimed amid commercial relations and in other situations such as political conflict. It commented at para. 130 that:

> The Tribunal is aware that the levels of control required for a finding of attribution under Article 8 in other factual contexts, such as foreign armed intervention or international criminal responsibility, may be different. It believes, however, that the approach developed in such areas of international law is not always adapted to the realities of international economic law and that they should not prevent a finding of attribution if the specific facts of an investment dispute so warrant.

While the Tribunal clearly offers that different considerations may be warranted in these circumstances, it does not go so far as to opine on whether the corresponding standard of attribution applied would be any higher or lower.

[194] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 51 at para. 86.

[195] *Foremost Tehran, supra* note 185; *American Bell International, supra* note 185. For a discussion of the relevance of the jurisprudence of the Iran-United States Claims Tribunal to international investment arbitration, see Christopher S. Gibson and Christopher R. Drahozal, "Iran-U.S. Claims Tribunal Precedent in Investor-State Arbitration", in Drahozal & Gibson, eds., *The Iran-U.S. Claims Tribunal at 25: The Cases Everyone Needs to Know for Investor-State & International Arbitration* (New York: Oxford University Press, 2007) 1.

[196] *EDF v. Romania, supra* note 186; *Bayindir v. Pakistan, supra* note 190.

controlled nature. This is different than arguing agency for liability purposes and may involve significantly different considerations. When agency is argued for liability purposes, it may only be necessary to link certain specific conduct back to the purportedly controlling state—that conduct which constituted a violation of an entity's rights. In *EDF v. Romania*, for example, it was only necessary for EDF to attribute the cancellation of the duty-free contract by TAROM back to Romania. It was not necessary for EDF to tie the general operations, or other specific operations, of TAROM back to Romania. Similarly, in *Bayindir v. Pakistan* it was only necessary for Bayindir to connect back to Pakistan the actions of NHA related to the Islamabad-Peshawar highway contract and its eventual demise. It was not necessary for Bayindir to address the involvement of Pakistan in any other project undertaken by the NHA.

However, where the "government agent" limb of the Broches test is invoked, a far broader analysis may be warranted. In particular, it may not be sufficient in order to deny standing to an SOE to merely establish that certain aspects of a SOE's investment activities and behaviour are attributable to its home state. Rather, as occurred in *CSOB v. Slovak Republic*, it will likely be necessary to engage in a more general analysis of the SOE's activities and objectives. Foreign investment projects can easily be large and complicated endeavours with multiple interdependent operations. They may involve long times frames with multiple stages. They may also evolve significantly over time to take on characteristics and operations different from those initially intended. As such, tribunals applying the "government agent" limb of the Broches test may be forced to make difficult decisions regarding which periods of an investment's history the "government agent" test should be applied to. Should the test be applied to the circumstances of the SOE's initial investment decision and entry and/or establishment? Should the test be applied to the entirety of the SOE investment's lifecycle in a more general manner? Or, should the test be more selectively applied to certain periods of the SOE's investment or certain important decisions taken by the SOE in relation thereto? The answers are not immediately apparent. It is likely that whichever direction a tribunal takes on these decisions will be at least moderately context-dependent. However, it is also clear that questions such as these do not immediately arise in the context of state attribution, which generally involves sovereign liability for more discrete conduct.[197]

[197] This alone is an important ground on which to proceed with caution in the application of principles developed in connection with Art. 8 of the ILC *Draft Articles* to the 'government agent' limb of the Broches test. However, it is also important to note that various tribunals and publicists have already balked at the idea that the ILC *Draft Articles*, including Art. 8, are appropriate in contexts other than the attribution of conduct for determining state liability under international law.
For example, investors and publicists have on a number of occasions argued that, in addition to the attribution of liability, the ILC *Draft Articles* may be used to attribute other matters to states such as contractual undertakings. These arguments have arisen when investors have sought to establish privity between themselves and a state purportedly standing behind the named counterparty to a contract, in order to bring a breach of contract claim against the state rather than, or in addition to, the named counterparty. See Newcombe & Paradell, *supra* note 82 at 461, fn. 133; Nick Gallus, "An Umbrella Just for Two? BIT Obligations Observance Clauses and the

Nonetheless, reference to ILC Art. 8 and related case law and commentary begins to provide a basic framework for the application of the "government agent" limb of the Broches test. First, as international law clearly acknowledges the separate status of corporate entities at the national level, a relatively strict standard is likely warranted to find an SOE to be acting as an agent of the state. This conclusion is reinforced by the fact that, as foreign investments may be complex undertakings with long time horizons, a tribunal will want to ensure that agency is identified in respect of the wider investment itself rather than merely in respect of non-material discrete actions or decisions taken or made within the larger investment venture. From this starting point, the framework developed in connection to Art. 8 can guide the analysis. A tribunal should then aspire to unequivocally confirm that the SOE was acting on the instructions of or under the direct control of its home state in making and steering the investment. It should look to identify specific directions evidencing a high degree of control over critical investment decisions. It should look to identify clear manifestations of the links between the SOE and its home state and the means through which control over the investment is exercised. It should also look to identify whether such control was exercised to achieve a particular important result in respect of the investment. Similar to *EDF v. Romania*, such agency may be manifested by state mandates, directives, legislation or decrees specifically directing the investment. On the other hand, similar to *Bayindir v. Pakistan,* such agency may be manifested by significant guiding decisions made by senior members of the home state's executive or by the requirement of senior executive approval of such decisions.

These considerations target a relationship between a SOE and its home state that is different than what is addressed by the "essentially governmental function" limb of the Broches test. In particular, while the "essentially governmental function" limb focuses on the degree to which a SOE may be performing investment activities with elements of governmental or regulatory *authority*, the "government agent" limb focuses on the degree to which the state has *directed* a SOE's investment actions or investment activities. This does not mean that a SOE investment cannot satisfy both of these standards simultaneously. For example, in *EDF v. Romania*, even though the tribunal had determined that TAROM had been acting as an agent of the state in respect of the duty free contracts, it was also careful to consider whether or not the SOE could also be considered to be exercising

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Parties to a Contract" (2008) 24 Arb. Int'l 157 at 167. See also *EDF v. Romania*, *supra* note 186 at paras. 317-319; *Consortium Groupement L.E.S.I.-DIPENTA v. Algeria* (Award, 10 January 2005), ICSID Case No. ARB/03/08 at II.2.3, para. 16; *Nykomb Synergies Technology Holding A.B. v. Republic of Latvia* (Award, 16 December 2003), S.C.C. Case No. 118/2003 at para. 4.2 (Arbitration Institute of the Stockholm Chamber of Commerce).

However, others strongly disagree with this analysis and maintain that attribution and privity are different things. They highlight that the fact that the actions of an entity may be attributable to a state for liability purposes does not mean that contracts entered into by such entities are state contracts. See James Crawford, "Treaty and Contract in Investment Arbitration" (2008) 24 Arb. Int'l 351 at 356. The ILC Commentary, to which Crawford contributed, also clearly supports this proposition. See ILC Commentary, *supra* note 174 at 39, para. 5.

"essentially governmental functions" in respect of its overall engagement of EDF in the project.[198] However, the conceptual distinction between the "essentially governmental function" and the "government agent" limbs of the Broches test does mean that the Tribunal in *CSOB v. Slovak Republic* made an error. Where an ICSID tribunal is confronted by a SOE claimant, care should be taken to adequately and distinctly engage with both of these standards.

State Ownership and State Control under the Broches Test

As the above discussions illustrate, much remains to be resolved in respect of the proper application of both the "essentially governmental function" and the "government agent" limbs of the Broches test. Clearly, this article cannot discuss all of these ambiguities. However, there remains one further issue that should be addressed here in respect of the Broches test. This is not *how* the Broches test should be applied, but *when* it should be applied. More specifically, is the Broches test activated solely by state-*owned* entities, or is it equally activated by entities which, although not necessarily owned by a state, are none the less *controlled* by the state? Furthermore, what sources of state control should be considered? The remainder of this article will be dedicated to answering these questions.

Ownership and Control

As discussed, it is clear that the drafters of the *ICSID Convention* did not intend to give standing to investor states. However, as noted by Schreuer, "[t]he situation is less clear when it comes to wholly or partly government controlled companies (or other entities, such as funds responsible for investing sovereign wealth)." The official comment to the preliminary draft of the *ICSID Convention* stated:

> It will be noted that the term "national" is not restricted to privately-owned companies, thus permitting a wholly or partially government-owned company to be a party to proceedings brought by or against a foreign State.[199]

However, as noted by Schreuer, this position was not repeated in the executive director's report to the Convention.[200] Therefore, when examining the circumstances in which the Broches test will be triggered we are not immediately left with more than the test itself. In other words, immediate guidance is limited to Broches' employment of the expression "mixed economy company or government-owned corporation."

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[198] *EDF v. Romania*, supra note 186 at paras. 191-198. However, it must again be noted that the *EDF* tribunal was considering these matters in respect of attributing conduct potentially in breach of Romania's obligations under an IIT by a SOE to Romania rather than in respect of attributing an investment by a Romanian SOE to Romania in connection with the "essentially governmental function" limb of the Broches test.

[199] *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Washington, DC: ICSID, 1968) vol. 2 at 230 [*History*].

[200] Schreuer, *supra* note 92, Art. 25, para. 271.

At first glance this articulation may appear to limit the application of the Broches test to entities owned by the government. It expressly refers to government ownership, and the term "mixed economy" also appears to refer to the nature of the capital underlying the entity; i.e. a mixture of public and private investment. However, there is good cause to strongly doubt this analysis and conclude that government controlled entities are caught as well. First, that Broches employed the term "mixed economy company" in addition to the term "government-owned corporation" implies that it was intended to capture entities that are not strictly "government-owned corporations." This can be taken to mean that the expression was being used not to refer to entities composed of both public and private capital, but rather to government-*related* entities of a broader species, perhaps including government-controlled entities.

This conclusion—that the Broches test should be engaged by government controlled entities as well as government-owned entities—is also generally supported by related international law and investment arbitration state case law. The author is unaware of any case law specifically examining what will constitute a state-owned or state-controlled entity for the purposes of the Broches test and Art. 25 of the *ICSID Convention*. However, for other purposes under international investment law, there are a number of cases which have examined both state ownership and state control in determining whether the business activities of a non-state entity should be attributed to the state.

Perhaps the best known of these is *Maffezini v. Spain*.[201] Maffezini had incorporated a Spanish company to engage in the production and distribution of chemical products in the Galicia region of Spain. Maffezini owned 70% of the company, and the remaining 30% was owned by the Sociedad para el Desarrollo Industrial de Galicia (SODIGA), an entity charged with furthering economic development in Galicia. When the project floundered because of large cost overruns, Maffezini instituted proceedings against SODIGA under the *ICSID Convention*, alleging that SODIGA's ill conceived advice in the planning of the enterprise directly lead to its demise, in a fashion which violated his rights under the Argentine-Spain BIT. Spain contested the jurisdiction of the ICSID tribunal, arguing that Maffezini's dispute lay not with it but solely with SODIGA. The tribunal therefore undertook to determine "whether or not SODIGA is a State entity for the purpose of determining the jurisdiction of the Centre and the competence of the Tribunal."[202]

The tribunal first noted that the *ICSID Convention* itself provided no "guiding principles" on this issue. As such, the tribunal held there was no other recourse but to consult "the applicable rules of international law." These, it noted, "have evolved and been applied in the context of the law of State responsibility," and required consideration of "various factors,"

[201] *Supra* note 145.
[202] *Ibid.* at para. 75.

including *both* "ownership" and "control."[203] To do this it would examine SODIGA from a "formal or structural point of view": if SODIGA was held to be either directly or indirectly owned by Spain, or directly or indirectly controlled by Spain, this would "give rise to a rebuttable presumption that it is a State entity." [204]

The approach of the tribunal in *Maffezini v. Spain* was endorsed in 2001 by the tribunal in *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*.[205] In this case two Italian construction companies submitted a joint tender for the construction of a section of a planned highway in Morocco from Rabat to Fès following an international invitation by the Société Nationale des Autoroutes du Maroc (the ADM), a limited liability company active in the construction of building, maintaining and operating roadways in accordance with a concession agreement concluded with the Minister of Infrastructure.[206] The companies were awarded the contract and proceeded to complete the planned construction, though four months behind schedule.[207] When ADM failed to satisfy all amounts due on the basis of the delay, the Italian parties commenced investment arbitration.[208] Asked to decide whether ADM was a state entity, the *Salini v. Morocco* tribunal referred favourably to the *Maffezini* decision and held that, "[g]enerally, any commercial entity *dominated or predominantly controlled* by the State or by State institutions, whether it has legal personality or not, is considered to be a State-owned company."[209]

Although some investment arbitration tribunals have declined to refer to international law to determine whether an entity qualifies as state-owned or state-controlled, these decisions are of limited relevance to *ICSID Convention* claims grounded in violations of BITs or MITs. For example, in *Impregilo S.p.A. v. Islamic Republic of Pakistan*,[210] the Tribunal referred to the municipal law of Pakistan to determine whether Pakistan's Water and Power Development Authority (WAPDA) was sufficiently owned or controlled by

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[203] *Ibid.* at para. 76, referring to Ian Brownlie, *System of the Law of Nations – State Responsibility, Part I* (Oxford: Clarendon Press, 1983) at 132. This attention to control in addition to ownership was again emphasized by the *Maffezini* tribunal at the Merits stage of the proceedings, where it noted that: "The structural test, however, is but one element to be taken into account. Other elements to which international law looks are, in particular, the control of the company by the State or State entities and the objectives and functions for which the company was created. As the Tribunal emphasized in its decision on jurisdiction, many of these elements point in the instant case to its public nature." See *Emilio Agustin Maffezini v. The Kingdom of Spain* (Award, 13 November 2000), ICSID Case No. ARB/97/7 at para. 50, online: <http://ita.law.uvic.ca/documents/Maffezini-Award-English.pdf>.

[204] *Maffezini v. Spain*, *supra* note 145 at para. 77.

[205] (Decision on Jurisdiction, 23 July 2001) ICSID Case No. ARB/00/4, (2003) 42 I.L.M. 609, online: <http://ita.law.uvic.ca/documents/Salini-English.pdf> [*Salini v. Morocco*].

[206] *Ibid.* at para. 2.

[207] *Ibid.* at paras. 2-4.

[208] *Ibid.* at para. 6.

[209] *Ibid.* at para. 31 (emphasis added), referring also to L.J. Bouchez, "The Prospect for International Arbitration: Disputes Between States and Private Enterprises" (1991) 8 J. Int'l Arb. 81; Jan Paulsson, Book Review of *Arbitration and State Enterprises: Survey on the National and International State of Law and Practice* by Karl-Heinz Böckstiegel, (1985) 1 Arb. Int'l 195.

[210] (Decision on Jurisdiction, 22 April 2005), ICSID Case No. ARB/03/3, online: <http://ita.law.uvic.ca/documents/impregilo-decision.pdf> [*Impregilo v. Pakistan*].

the state. However, this was the case only in the context of Impregilo's breach of contract claims against WAPDA, which were necessarily to be determined under the law of the contract, namely Pakistani law.[211] The Tribunal distinguished between alleged breaches of international law and alleged breaches of the municipal law of a contract, and specifically distinguished the facts before it from the circumstances of the decision in *Salini v. Morocco* on this basis.[212] This distinction was also recognized by the tribunal in *Maffezini* when it held that, while the classification of an entity under domestic law could be considered by a tribunal examining the nature of a purported state-owned or state-controlled entity under international law, it will neither be determinative nor binding on the tribunal's analysis.[213]

In total, the consensus that emerges from *Maffezini v. Spain*, *Salini v. Morocco* and *Impregilo v. Pakistan* is reasonably clear: where a question arises as to the status of an alleged SOE in respect of an international instrument the answer to this question should be sought under international law, and likely must include consideration of both the ownership and *control* of the entity. Furthermore, there is no reason why this should not be the case in respect of the Broches test and *ICSID Convention* Art. 25. The Broches test seeks to identify investors that are either acting as "government agents" or are discharging "essentially governmental functions" to prevent claims that essentially amount to disputes between states rather than disputes between states and purely private entities.[214] Therefore, the focus of the test is on identifying extensions and arms of the state that, while they are not state entities in a formal sense, are acting directly *on behalf of the state* as an "agent of the state" or *in place of the state* through the exercise of "essentially governmental functions."

As such, it would be absurd for the Broches test to be engaged exclusively by state-*owned* entities: state ownership is required neither for an entity to act as an arm of a state, nor for an entity to act in place of that state. However, state *control* is fundamentally necessary if an entity is to act either on behalf of a state or in place of a state at the direction of that state. Therefore, if the mischief that the Broches test seeks to prevent is the abuse of the ICSID forum by an investor that is essentially an arm of a state, then interpreting the Broches test to require government ownership of an investor in addition to government control of that investor represents an impermissibly strict reading of that test.

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[211] *Ibid.* at para. 210. For further discussion on this point, see Eduardo Silva Romero, "ICC Case Law" in Emmanuel Gaillard & Jennifer Younan, eds., *State Entities in International Arbitration*, IAI Series on International Arbitration No. 4 (Huntington, NY: Juris, 2008) 31.
[212] *Impregilo v. Pakistan*, *ibid.* at paras. 210, 213.
[213] *Maffezini v. Spain*, *supra* note 145 at para. 82.
[214] Schreuer, *supra* note 92, Art. 25, paras. 165-169.

Sources of Ownership and Control

Once it is accepted that the Broches test will be activated by a claimant that is either owned or controlled by a state, the next question becomes what sources of such ownership and control should be considered. The *ICSID Convention*, its drafting history, related case law and commentary are again helpful in this pursuit. Together, they suggest that there can be no bright-line test for state ownership and control: the particular circumstances of each entity will need to be uniquely evaluated with a view to any relevant contextual factors.

The Tribunal in *CSOB v. Slovak Republic* decided that the issue of CSOB's standing engaged the Broches test, since it accepted that more than 65% of CSOB's shares were owned "in one form or another by the Czech Republic" and that this was sufficient to give the Czech Republic "absolute control" over the bank.[215] This exclusive focus on shareholding is understandable given the clear ability of the Czech Republic in the circumstances of the case to dictate CSOB's conduct, and follows the approach of other ICSID tribunals asked to examine the control of investors.[216] However, an exclusive reliance on control through the prism of shareholding does not appear appropriate upon examination of the *ICSID Convention*, its drafting history and further case law.

ICSID Convention Art. 25(2)(b) partly defines a "National of another Contracting State" to include "any juridical person which had the nationality of the Contracting State party to the dispute... and which, because of foreign *control*, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention (emphasis added)."[217] Although this does not speak directly to the question of state control, it has provided much useful discussion as to "control" in the context of Art. 25. This body of commentary and law clearly establishes that tribunals should approach issues of Art. 25 "control" with a wide lens.

At least in the context of Art. 25(2)(b), the drafters of the *ICSID Convention* recognized that "a mere majority holding of shares would not necessarily be [a] decisive [indicator of control]."[218] Not only was it not meant to be decisive, it was not even meant to be necessary: the drafters recognized that "even a minority holding of as little as 25% or even 15% might amount to control through a capacity to block major changes or otherwise."[219] In this regard, as noted by Schreuer:

> [c]ontrol over a juridical person is not a simple phenomenon. Participation in the company's stock or share ownership, while relatively simple to ascertain,

[215] *CSOB v. Slovak Republic*, supra note 140 at para. 18.
[216] See *e.g. Klöckner v. Republic of Cameroon* (Award, 21 October 1983), ICSID Case No. ARB/81/2, 2 ICSID Rep. 3 at 15-16.
[217] The purpose of this provision is to allow companies incorporated in state A to bring investment claims against state A where they are controlled by investors from state B. This provision is therefore an acknowledgement of, and a response to, the fact that it is common for national foreign investment laws to require inbound foreign investment to be made through locally incorporated vehicles. See Schreuer, *supra* note 92, Art. 25, paras. 760-763.
[218] *Ibid.*, Art. 25, para. 851, referring to *History*, *supra* note 199 at 359-360, 396, 447-448, 538.
[219] Schreuer, *ibid.*, referring to *History, ibid.* at 447-448, 538.

> is not necessarily a reliable indicator of control. Different voting rights attached to different types of shares, decision-making procedures and the exercise of management all contribute to a complex picture of control.[220]

He concludes that the existence of adequate control for the purpose of Article 25 "is a complex question requiring examination of several factors" and that, "for purposes of ICSID's jurisdiction, the concept of control should be treated with some flexibility." [221]

Various investment tribunals have likewise recognized the complexity of inquiries into control. In *Vacuum Salt Products Limited v. Government of the Republic of Ghana*,[222] the Tribunal had to determine whether a Ghanaian company 80% owned by Ghanaian nationals and 20% owned by a Greek national could for the purpose of Art. 25(2)(b) be considered to be controlled by the latter. The Tribunal concluded that there is no strict "formula" for determining control and that each case "must be viewed in its own particular context, on the basis of all the facts and circumstances."[223] The Tribunal decided it "reasonable" to conclude that "100% ownership would almost certainly result in... control, by whatever standard," and that a total absence of shareholding would "virtually preclude the existence of such control."[224] However, how much control would be "enough" control, the tribunal reasoned, could not be "determined abstractly" and it recommended in addition to ownership such criteria as voting rights and management powers. It also emphasized that, the less shareholding was present, the more such various other indicators of control would be required. [225]

The Tribunal in *International Thunderbird Gaming Corporation v. The United Mexican States*[226] also examined what factors other than share ownership could result in control. Although Thunderbird owned less than 50% of the shares in certain Mexican investment vehicles, the tribunal nonetheless held that there was sufficient *de facto* control. The tribunal noted that:

> It is quite common in the international corporate world to control a business activity without owning the majority voting rights in shareholder meetings. Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise and, under certain circumstances, control can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know how, and authoritative reputation. Ownership and legal control may assure that the owner or legally controlling party has the ultimate right to determine key decisions. However, if in practice a person exercises that position with an expectation to receive an economic return for

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[220] Schreuer, *ibid.*, Art. 25, para. 850.
[221] *Ibid.*, Art. 25, paras. 864-865.
[222] *Vacuum Salt Products Limited v. Government of the Republic of Ghana* (Award, 16 February 1994), ICSID Case No. ARB/92/1, 9 ICSID Rev. – F.I.L.J. 72 [*Vacuum Salt v. Ghana*].
[223] *Ibid.* at para. 43.
[224] *Ibid.*
[225] *Ibid.* at paras. 43-44.
[226] (Award, 26 January 2006), (Arbitral Tribunal constituted under Chapter Eleven of *NAFTA*, conducted under the UNCITRAL Arbitration Rules) at para. 107, online: <http://www.iisd.org/pdf/2006/itn_award.pdf>. Note that, as this case proceeded under the UNCITRAL arbitration rules, the tribunal was not discussing the concept of control expressly in relation to the *ICSID Convention*.

> his efforts and eventually be held responsible for improper decisions, one can conceive the existence of a genuine link yielding the control of the enterprise to that person.[227]

This formulation had much merit. However, it is important to note that, as it takes a broad and rather inclusive approach to defining the ability to control, it also simultaneously creates the possibility that an entity may have multiple "controllers."

The Tribunal in *Vacuum Salt v. Ghana* was conscious of this proposition and questioned whether "control" within the meaning of Art. 25 "means exclusive control, or whether it allows for the possibility that more than one shareholder or group or shareholders may enjoy control."[228] However, it reached no conclusion on the matter as it found that it need not address the issue in the circumstances at hand.[229] Schreuer is of the opinion that the existence of multiple controllers should not preclude an investment tribunal from focusing on one such controller in particular, and making a conclusive decision on jurisdiction on that basis.[230] In other words, he argues that the fact that one controller can be said to exercise a higher degree of control than a second controller need not necessarily require dismissing the second controller as a true or real controller.[231] Accepting this proposal requires distinguishing between "absolute control" and "a reasonable amount of control" without immediately discriminating against or disregarding the latter.[232] However, he also cautions that "not every substantial minority participation should be accepted as control."[233] On the other hand, Schreuer further contends that, in principle, tribunals should not ignore the collective control exercised by two or more sources. He finds support for this proposition in the rulings in *Sempra Energy International v. The Argentine Republic*[234] and *Camuzzi International S.A. v. The Argentine Republic*[235] in which the respective Tribunals allowed control influenced by multiple minority foreign investors to combine to satisfy the control requirements of *ICSID Convention* Art. 25(2)(b). In the case of an alleged SOE, this would allow a tribunal to consider not just the cumulative effect of various means of state influence, but also the cumulative effect of multiple sources of such state influence, including various different government officials, bodies, agencies, organs or otherwise.

Another important question arises as to whether control must be in fact be exercised, or whether its mere presence and potential to be exercised is sufficient.[236] In *AdT v. Bolivia*, for example, the Tribunal noted that the

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[227] *Ibid.* at para. 108.
[228] *Vacuum Salt v. Ghana*, supra note 222 at para. 43, fn. 21.
[229] *Ibid*.
[230] Schreuer, *supra* note 92, Art. 25, para. 865.
[231] *Ibid*.
[232] *Ibid*.
[233] Schreuer, *supra* note 92, Art. 25, para. 865.
[234] (Decision on Objections to Jurisdiction, 11 May 2005), ICSID Case No. ARB/02/16 at para. 51, online: <http://ita.law.uvic.ca/documents/sempra-en.pdf>.
[235] (Decision on Objections to Jurisdiction, 11 May 2005), ICSID Case No. ARB/03/2, online: <http://ita.law.uvic.ca/documents/camuzzijurisdiction.pdf>.
[236] Schreuer, *supra* note 92, Art. 25, paras. 859-863.

ordinary meaning of "control" can "encompass both actual exercise of powers or direction and the rights arising from the ownership of shares."[237] Stated differently, the Tribunal distinguished between the "power to control" and "the actual exercise of control."[238] AdT had instituted ICSID arbitration under the Bolivia-Netherlands BIT and sought to satisfy the control requirements of Art. 25(2)(b) on the basis of its ownership by a series of Dutch holding companies.[239] However, Bolivia objected to the jurisdiction of the Tribunal on this basis, arguing that the holding companies were mere shells without any actual control over AdT and that all such actual control resided with the large Italian and American parents of the holding companies.[240] As such, Bolivia argued that any assertion of control required proof of actual control.[241] The Tribunal disagreed, deciding that "it is almost impossible to discern precisely at what stage mere formal control through ownership might transform and become actual or effective control."[242] It therefore concluded that control is "a quality of the ownership interest" that exists regardless of its actual exercise,[243] It decided that "an entity may be said to control another entity [merely] if it possesses the legal capacity to control it" even in the "absence of its overt exercise" of such control.[244]

Altogether, these authorities combine to sketch a broad portrait of the various possible manifestations of control for Tribunals to consider. A majority shareholding may be considered very strong proof of control but should not necessarily be considered decisive. Nor should control through ownership be automatically dismissed where only a minority position is held. No rigid formula for determining control should be mapped and each case should be viewed in the totality of its particular circumstances. Control may be weighed via a multiplicity of criteria, including voting rights, management powers, executive influence, access to capital and other resources, and unofficial but authoritative sources of power. There can be multiple controllers, and the presence of a controller with greater influence than a second controller will not necessarily diminish the significance of the authority of such second controller. Nor should a tribunal be barred from considering the cumulative effect of multiple different sources of influence in addition to multiple different means of influence. On the other hand, control need not necessarily be exercised in order to be recognized; potential control in the form of legal capacity can be sufficient.

The flexibility of these considerations is a good thing. The size, complexity and dynamism of contemporary SOEs defy simple categorization and demand the application of an extensive set of analytical tools to be

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[237] *Supra* note 135 at para. 227.
[238] Schreuer, *supra* note 92, Art. 25, para. 859, referring to *AdT v. Bolivia, ibid.* at para. 232.
[239] *AdT v. Bolivia*, *ibid.* at paras. 210-213.
[240] *Ibid.* at paras. 206-209.
[241] *Ibid.* at para. 207.
[242] Schreuer, *supra* note 92, Art. 25, para. 860, referring to *AdT v. Bolivia, ibid.* at para. 247.
[243] *AdT v. Bolivia*, *ibid.* at para. 242.
[244] Schreuer, *supra* note 92, Art. 25, paras. 861-862, referring to *AdT v Bolivia, ibid.* at paras. 242, 264.

properly appreciated and understood,[245] and this is no less the case in respect of investigations into the control of SOEs. Tribunals determining the standing of a purported SOE to bring arbitration under *ICSID Convention* Art. 25 should be conscious of the many means of implementing control over an SOE and should not refrain from the investigation of each. Nor should they necessarily refrain from setting a moderate standard in respect of what should be considered a SOE for the purposes of *ICSID Convention* Art. 25. As acknowledged by the Tribunal in *CSOB v. Slovak Republic*, Art. 25 does not absolutely bar the participation of SOEs as claimants under the *ICSID Convention*. It merely bars SOEs "acting as an agent" for their home government or SOEs "discharging an essential governmental function" in place of their home government. Therefore, the identification of a purported SOE as an actual SOE is not the end of the inquiry but in many respects the beginning of the real inquiry: whether the entity is or has been in fact behaving in a fashion which would infringe the intentions of the *ICSID Convention*'s drafters. In this regard, while it is arguable that tribunals should adopt a relatively rigorous standard in respect of the type of activity that will bar an SOE from standing under Art. 25, it is where the two limbs under the Broches testare actually being applied that such a rigorous standard would be most appropriate. Either way, what is clear is that significant further analysis of the relationship between *ICSID Convention* Art. 25 and SOEs by investment arbitration tribunals is to be welcomed.[246]

V. Conclusion

This article has attempted to address a number of difficult questions that may arise where an investor owned or controlled by a state institutes an investment arbitration claim. In particular, it has examined how investment tribunals should proceed when deciding whether a SOE has standing to

[245] For an in depth analysis of the structure, function and control of Chinese SWFs and SOEs, for example, see Backer, *supra* note 7. For a similar review of various state-owned oil companies, see Marcel, *supra* note 24.

[246] Unfortunately, not all tribunals have met this obligation. See e.g. *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (Award, 29 July 2008), ICSID Case No. ARB/05/16 at paras. 280-300, 327, online: <http://ita.law.uvic.ca/documents/Telsimaward.pdf>.
Kazakhstan raised several objections to the jurisdiction of the tribunal, based on the control of a Turkish state agencys (TSDIF) over the Claimants. In particular, Kazakhstan argued that TSDIF's control of Rumeli and Telsim prevented the claim from satisfying the restrictions in *ICSID Convention* Art. 25 on the standing of state-owned investors. Kazakhstan conceded that the shares of the Claimants remained in private hands, and not in the hands of TSDIF. However, Kazakhstan argued that corporate control under the *ICSID Convention* is not viewed exclusively through the lens of share ownership, but includes consideration of such elements as management and decision-making structure. In this regard, while the Claimants were not owned by TSDIF, Kazakhstan argued that by virtue of recent legislation the Claimants remained under the complete control of TSDIF and were thus "effectively State-owned corporations". According to Kazakhstan, this required the application of the Broches test to the claimant's operation and activities, including the act of bringing the investment arbitration claim itself. However, Kazakhstan's efforts in this regard were lost upon the tribunal. Rather than dealing with the assertion that the Claimants were "effectively state owned corporations" for the purposes of Art. 25, the tribunal appeared to brush aside Kazakhstan's argument simply by asserting that the "record... confirms that the TSDIF is not the owner of Claimants' shares."

arbitrate under a particular IIT and when deciding whether a SOE has standing to arbitrate under the Art. 25 of the *ICSID Convention*.

However, this survey is not exhaustive and a number of other important issues may arise. For example, it is important to note that a Most Favoured Nation (MFN) clause, contained in the IIT under which a SOE brings its claims, may impact on the standing of the SOE under the IIT. It has become common practice for investors to employ MFN clauses in IITs to access more favourable provisions in other IITs signed by the same host state against which they are bringing their claim.[247] In the context of a SOE claim, this could affect a tribunal's investigation of the broader treatment of SOEs by an IIT.[248] On the other hand, it is important to recognize that many IITs contain national security exceptions that exempt the States parties from liability where their otherwise unlawful actions are in response to a threat to their security. Therefore, even where an SOE is clearly protected under an IIT, it may not be entitled to protection or compensation under the treaty if its actions can be interpreted by a tribunal as threatening the security of its host state.[249]

All of these issues are deserving of further study and analysis. Different countries have different histories with public ownership, but going forward SWFs and SOCs are only expected to grow in number and influence in what may very well become an increasingly turbulent world.[250] Furthermore, while there is not yet any known instance of SWFs behaving in an overtly political manner rather than in pursuit of purely benign commercial objectives[251] and while the International Energy Agency has very recently announced that Chinese state oil companies, for example, should not be

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[247] See, for example, *Maffezini v. Spain*, *supra* note 145; *Plama Consortium Limited v. Bulgaria* (Decision on Jurisdiction, 8 February 2005), ICSID Case No. ARB/03/24, online: <http://ita.law.uvic.ca/documents/plamavbulgaria.pdf>; *RosInvestCo v. Russia*, supra note 130. For one of a number of academic discussions of the role and use of MFN clauses in investor-State arbitration, see Dana H. Freyer & David Herlihy, "Most-Favoured-Nation Treatment and Dispute Settlement in investment Arbitration: Just How 'Favored' is 'Most-Favored'?" (2005) 20 ICSID Rev. – F.I.L.J. 58.

[248] Note that, as the *ICSID Convention* does not contain a MFN clause, this issue will not occur in the context of SOE standing under the *Convention*.

[249] See UNCTAD, "National Security", *supra* note 9; William W. Burke-White & Andreas von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties" (2008) 48 Va. J. Int'l L. 307; Susan Rose-Ackerman & Benjamin Billa, "Treaties and National Security" (2008) 40 N.Y.U.J. Int'l L. & Pol. 437; Andrea K. Bjorklund, "Emergency Exceptions: State of Necessity and Force Majeure" in Peter Muchlinski, Federico Ortino & Christoph Schreuer, eds., *Oxford Handbook of International Investment Law* (New York: Oxford University Press, 2008) 459.

[250] Kovacs, *supra* note 12. The reality is that the future permutations of an emerging "state capitalism" cannot accurately be predicted. See Jeffrey Garten, "The Unsettling Zeitgeist of State Capitalism" *Financial Times* (14 January 2008); "A Special Report on Globalisation: The Rise of State Capitalism" *The Economist* (20 September 2008); Rose, "Sovereigns", *supra* note 51 at 149 ("we may yet see the day when SWFs are viewed not merely as commercial tools, but also as economic and political tools used by all sovereigns in the normal course of international affairs.")

[251] Rose, "Active or Passive", *supra* note 71. See also Gordon & Tash, *supra* note 36 at 4; Fotak & Megginson, *supra* note 44.

considered "puppets" of their home state,[252] this is not necessarily the case in respect of SOCs.[253] Moreover, while the interests of capital importing states and SOEs are currently aligned, it does not take much imagination to imagine circumstances, such as a prolonged global energy crisis,[254] where this might be less the case. Should this occur, it is easy to imagine foreign SOEs becoming the target of heightened political suspicion and controversy, whether justified or not, as well as the target of focused regulatory intervention, whether arbitrary or discriminatory or not. Broadly worded domestic investment legislation such as the *FINSA* gives regulatory bodies such as the CFIUS and the executive behind it the power to force the divestiture of foreign investment at any point in its lifetime. This power will always be vulnerable to capture by forces and sentiment beyond the control of individual investors and sometimes even individual administrations.[255] The fear of foreign competitors and foreign governments is an often powerful stimulant. This can lead to overreactions by host governments that result in legitimate international investment arbitration claims by state-owned or state-controlled foreign investors.

To mitigate these risks that are perhaps inherent in international investment by SOEs, two steps can be taken. One of the surest ways to safeguard against such abuses and unnecessary confusion regarding the jurisdiction of investment arbitration tribunals to hear cases brought by SOEs is clearer drafting in national legislation and international investment treaties. In addition, building on the framework set out in this article would result in the elaboration of principles for international investment law that better serve all interested parties, regulators and investors alike: principles that would be more clearly agreed-upon among stakeholders, more predictable in their application, and therefore more capable of serving as the basis for informed investment decision-making.

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[252] Peter O'Neil, "Chinese oil companies aren't 'puppets,' report says" *Calgary Herald* (17 February 2011).

[253] Perhaps the most glaring example of politically motivated activity by SOCs (again, as opposed to by SWFs) is the politically charged operations of Russia's Gazprom and Transneft. These SOCs have repeatedly been used to send strong messages to Eastern and Central European states. In particular, Russia has directed Gazprom to turn off gas supplies to Ukraine a number of times following disagreements between the two states regarding foreign policy. Russia has also directed Transneft to slow oil pipeline flows to the Czech Republic following that countries talks with the US regarding the installation of missile defence technology in the Czech Republic. See Riblett, *supra* note 1 at 26. Chinalco's direct involvement in the scuttling of Rio Tinto's proposed merger with BHP Billiton has raised suspicion that the company was acting on behalf of China, which sought to preserve a diversity of mineral suppliers. See Schwalb, *supra* note 7.

[254] See Hon. Richard D. Cudahy, "The Bell Tolls for Hydrocarbons: What's Next?" (2008) 29 Energy L.J. 381.

[255] For a discussion of some of the most recent foreign investment proposals attracting intense scrutiny by CFIUS, see Eric Lipton, "Questions on Security Mar Foreign Investments" *New York Times* (18 December 2009) B1.