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Article

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Abstract

This Article focuses on the rise of state capitalism and its consequences on the international law of foreign investment and transnational arbitration which were both historically designed to regulate foreign private investments. The increasingly free movement of capital and the dominance of multinational corporations in cross-border trade and investment have brought with them increased suspicion about the motives of state-controlled entities (SCEs) when they invest, allocate scarce resources, procure goods and services, and move goods and services across national borders. When state-owned enterprises (SOEs) and sovereign wealth funds (SWFs) become involved in transnational economic activities, either as the perceived "transgressor" or as the "defender" in the face of rules or administrative actions targeted towards such entities, the debate becomes increasingly tense. The increased suspicion

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includes concerns by countries about threats to their national security and to the competitive interests of producers and consumers based in their respective territories, among other concerns. This Article revisits the concept of state capitalism as it has developed in three key jurisdictions (China, France and the United States). It then presents the key legal international instruments granting rights to SCEs and obligations upon host States by looking at the litigation forum SCEs can access. By looking at the litigation options available to SCEs, this Article clarifies and evaluates the progressive adaptation of economic rules to State capitalism and demonstrate the gradual inclusion of SCEs in the world economy and its rules.

INTRODUCTION

Despite the increasing trend towards market liberalization and privatization observed over the last two decades,[1] the role of the state (not to say state interventionism[2]) has in this period of time arguably grown in importance in the sphere of national and transnational business activities.[3] Notably, investments from emerging economies have increased, a large proportion of which was executed by state-owned enterprises (SOEs)[4] and sovereign

1. *See* Larry Cata Backer, *Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State-owned Enterprises, and the Chinese Experience,* 19 TRANSNAT'L L. & CONTEMP. PROBS. 3, 180 (2010); Ian Bremmer, *State Capitalism Comes of Age: The End of the Free Market*, 88 FOREIGN AFF. 40 (2009) (discussing how the recent economic crisis is underlining the role to be played by the national governments in no certain terms); *see also* Niall Ferguson, *We're All State Capitalists Now*, FOREIGN POL'Y (Feb. 9, 2012, 10:51 PM), http://foreignpolicy.com/2012/02/09/were-all-state-capitalists-now/.

2. *See* Joshua Kurlantzick, *State Capitalism and the Return of Economic Interventionism*, WORLD POL. REV. (July 12, 2016), http://www.worldpolitics review.com/articles/19334/state-capitalism-and-the-return-of-economic-interventionism.

3. *See also* Joseph L. Bower et al., *Global Capitalism at Risk: What Are You Doing About It?*, HARV. BUS. REV. 105 (2011); *see also* Christopher A. McNally, *Sino-Capitalism: China's Reemergence and the International Political Economy,* 64 WORLD POL. 765 (2012); *see generally* Aldo Musacchio & Sergio G. Lazzarini, *Leviathan in Business: Varities of State Capitalism and their Implications for Economic Performance*, HARV. BUS. SCH. 1 (2012) (discussing the extent and reach of state capitalism around the world, and its economic implications); *New Masters of the Universe: State Capitalism's Global Reach*, ECONOMIST (Jan. 21, 2012), http://www.economist.com/node/21542925.

4. *See The Visible Hand*, THE ECONOMIST (Jan. 21, 2012), https://www.economist.com/node/21542931; *see also* U.S.–CHINA ECON. SECURITY REV. COMM'N, 112th CONG., ANN. REP. at 40 (2011). International

wealth funds (SWFs).[5] This trend has been further reinforced since 2008/2009 by the fact that sovereign investors have blatantly retained their influence, despite the fears and turbulences that spread all over the world in the wake of the global economic and financial crisis.[6]

The rise of sovereign investment *via* state-controlled entities (SCEs) is more than the addition of a new asset class.[7]

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tribunals have had to define SOEs, and the Salini v. Morocco decision on jurisdiction notes that generally any commercial company dominated or predominantly controlled by the State or by State institutions, whether it has a legal personality or not, is considered to be a State-owned company. *See* Salini Costruttori v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 3, (July 16, 2001). Furthermore, the Al-Kharafi & Sons v. Libya Final Arbitral Award notes that, in certain circumstances, the separate personality of an entity fully controlled by a State can be discarded and the State is considered to be bound by the terms of a contract entered into by such an entity. Accordingly, the tribunal decides that the arbitration clause set out in the contract may be invoked against various State organs/entities. *See* Al-Kharafi & Sons Co. v. Libya, Final Arbitral Award, 263, 266, 268, (Mar. 22, 2013). The definition of SOEs is controversial. Official statistics from the Chinese Ministry of Finance define SOEs as including only wholly state-owned companies. In this article, SOEs are defined more broadly to include wholly state-owned SOEs and companies whose majority shares are owned by the Chinese government at various levels (including the central, provincial, and municipal levels), *see* Scott Cendrowski, *China's Global 500 Companies are Bigger than Ever – and Mostly State-Owned*, FORTUNE (July 22, 2015), http://fortune.com/2015/07/22/china-global-500-government-owned/.

5. Both forms of investments originate from state ownership and state activity, and are thus regularly referred to as investments by "state-controlled entities" (SCEs). *See* R. Gilson & C.J. Milhaupt, *Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism,* 60 STAN. L. REV. 1346 (2008); *see also* Julien Chaisse et al., *Emerging Sovereign Wealth Funds in the Making: Assessing the Economic Feasibility and Regulatory Strategies*, 45 J. WORLD TRADE 837 (2011); Musacchio & Lazzarini, *supra* note 3.

6. *See* David Welch et al., *Smithfield Stoking U.S. Unease Belies Benefit of China Deals*, BLOOMBERG (June 7, 2013), http://www.bloomberg.com/news/2013-06-06/smithfield-stoking-u-s-unease-belies-benefit-of-chinese-deals.html ("Private companies are also freer of government influence."). *See generally* Thilo Hanemann & Adam Lysenko, *Chinese FDI in the United States: Q1 2013 Update*, RHODIUM GROUP (Apr. 30, 2013), http://rhg.com/notes/chinese-fdi-in-the-united-states-q1-2013-update ("In the past 15 months private Chinese firms spent more on US deals than in the 11 years before combined. In the same period, they accounted for 80% of transactions and 50% of total transaction value, a dramatic change compared to previous years when state-owned firms dominated Chinese capital flows to the US.").

7. *See* Michael Feit, *Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity*, 28 BERKLEY J. INT'L L. 1, 142 (2010) ("In many countries, entities that are owned by the state but possess a separate legal personality ("state-owned entities") play a key role in strategically important sectors.").

The SCEs' growth prowess is a reflection of the new role of developing economies, and this illustrates a shift in emphasis in the global economy.[8] Just as the norm in recent decades was for Western companies and portfolio investors to invest in emerging and developing countries—meaning capital flowed from North to South—it is now observed that the present capital surpluses in the South will seek out investment opportunities in the North.[9] In some cases this is achieved through private sector investment, but because many emerging and developing countries do not (for various reasons) have privately owned companies of sufficient size to invest significantly in industrialized countries, this is increasingly done by SCEs, which makes state capitalism a key feature of contemporary global economy.

Such an evolution is generating a number of political and economic problems that the law has to address. SCEs' transnational economics raises concerns because it highlights the importance of state activity in the global economy which is perceived as detrimental to the role of market forces.[10] The legal analysis has already explored the ramifications in the trade world.[11] The issue is far more serious when one looks at the international capital trends and prospects. SCEs make significant investments across borders which allow them to control local assets. The reality of foreign investment, and the

8. *See* Org. for Econ. Co-operation and Dev. [OECD], State-Owned Enterprises: Trade Effects and Policy Implications, TAD/TC/WP (2012)10/FINAL (May 18, 2012). *See generally* Elizabeth J. Drake, *Chinese State-Owned and State-Controlled Enterprises: Policy Options for Addressing Chinese State-Owned Enterprises*, *Testimony before the US-China Economic and Security Review Commission* 1 (2012) (discussing how the economies with high SOE shares account for much smaller shares of world trade than China and display a strong heterogeneity with regard to their role in world trade, relative to their GDP).

9. *See also* Julien Chaisse, *Issues for State-controlled Entities*, *in* INTERNATIONAL ECONOMIC LAW AND GOVERNANCE: ESSAYS IN HONOUR OF MITSUO MATSUSHITA 235 (Julien Chaisse & Tsai-Yu Lin eds., 2016).

10. *See Recruitment*, STATE-OWNED ASSETS SUPERVISION AND ADMIN. COMM'N OF THE STATE COUNCIL (June 28, 2004), http://en.sasac.gov.cn/n1461859/c1463576/content.html; U.S.–CHINA ECON. AND SECURITY REV. COMM'N, *supra* note 4; Cendrowski, *supra* note 4; *see generally* Wooldridge, *supra* note 4 (discussing the rise of state capitalism, as an alternative to liberal capitalism).

11. For an in-depth analysis, *see* Ming Du, *China's State Capitalism and World Trade Law,* 63 INT'L & COMP. L.Q. 409 (2014) (analyzing how China's practice of state capitalism challenges the world trading system and how WTO law, as interpreted by WTO Panels and the WTO Appellate Body (AB), addresses these challenges).

idea that foreigners may control national assets, has given rise to a number of "protectionist reactions." There are fears that SCEs may not make investment decisions based on economic reasons, but instead they may choose to invest for political purposes.[12] Further, most countries that have set up SCEs are located in the developing world, which ultimately may result in a politicization of capital flows vis-à-vis SCEs.[13] The legal problems raised by SCEs' investments will become more acute because, as a result of the financial crisis and the ensuing recession, the need for international investment in the United States or the European Union (EU) will also continue to grow, and this will inevitably increase the probability that SCEs will face obstacles in foreign markets and hence will resort to international dispute settlement to resolve this new kind of dispute.

However, the legal situation is complex. Although Foreign Direct Investment (FDI) has increased significantly over the last two decades—outpacing the already significant expansion of trade during the same period—the current international legal framework for SCE investments is highly fragmented.[14] The current framework consists of a wide variety of national and international rules and principles that differ in form, strength, and coverage.[15] The result is an increasingly complex

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12. *See* Ronald J. Gilson & Curtis J. Milhaupt, *Economically Benevolent Dictators: Lessons for Developing Democracies,* 59 AM. J. COMP. L. 227 (2011) (discussing policy changes that favor politically influential interest groups).

13. *See* Michael C. Jensen, *Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers,* 76 AM. ECON. REV. 323 (1986). For discussions of the empire-building incentives of China's SOE managers, *see* Angela H. Zhang, *Foreign Direct Investment from China: Sense and Sensibility,* 34 NW. J. INT'L L. & BUS. 395 (2014).

14. *See generally* Julien Chaisse & Chistian Bellak, *Navigating the Expanding Universe of Investment Treaties—Creation and Use of Critical Index*, 18 J. INT'L ECON. L. 79 (2015) (explaining the lack of a general theory to analyze the expanding patchwork of international foreign investment).

15. These separate investment chapters in PTAs are comparable, on average, to self-standing Bilateral Investment Treaties (BITs). They can include both rules on investment liberalization (non-discrimination safeguards) and investment protection (substantive standards of treatment afforded by the host state to the foreign investor or investment). *See* United Nations Conference on Trade and Dev.(UNCTAD), *Investing in the SDGs: An Action Plan*, UNCTAD 22 (2014). The North American Free Trade Agreement (NAFTA) is a prime example of an agreement with a wide scope covering investment since it includes three members. *See North American Free Trade Agreement-NAFTA,* INVESTOPEDIA, https://www.investopedia.com/terms/n/nafta.asp (last visited Feb. 14, 2018). The Trans-Pacific Partnership (TPP) is another example of ambitious trade pat including investment matters with twelve members. *See*

international setting for international investment in which foreign investors can reap the benefits of rights that ensure their investments great protection. Along with an increase in number of International Investment Agreements (IIAs), the last decade has also witnessed an exponential surge in investment disputes between foreign investors and host country governments,[16] and one can anticipate seeing a growing number of cases brought by SCEs before international investment arbitral tribunals. It is precisely this legal scenario that this Article wants to explore.

The international regime for foreign investment, which includes both substantive rules and arbitration principles, is gradually adjusting to the emergence of SCEs in the investment sphere. This adjustment implicitly means that the rules and practice of international investment are reshaped by actors that were not initially at the center of the regime. Actually it is a great paradox; the regime for foreign investment, as designed in the last three decades, was intended to serve the interest of private investors seen as the main driver of the global economy. Instead of excluding SCEs from its realm and favoring the emergence of different rules, the international investment regime is gradually absorbing state capitalism. This Article provides a detailed analysis of the forces driving this transformation, of the flexibility of the international norms that apply to SCEs, and, finally, of the rights that SCEs are acquiring.

To demonstrate that state capitalism is reshaping international economic law, this Article first discusses the rise of capitalism at the global level from both economic and legal perspectives (although a strong focus is on China, the analysis also covers the cases of both the United States and France). In the second section, the relevant norms of international economic

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Elizabeth Sheargold, *The Trans-Pacific Partnership*, 5 BR. J. AM. LEG. STUDIES 341 (2016) (providing an overview of the recently concluded TPP Agreement).

16. On the emerging issue of sovereign debt restructuring by international tribunals, see Julien Chaisse et al., *Greek Debt Restructuring, Abaclat v. Argentina and Investment Treaty Commitments: The Impact of International Investment Agreements on the Greek Default*, *in* INTERNATIONAL ECONOMIC LAW AFTER THE GLOBAL CRISIS: A TALE OF FRAGMENTED DISCIPLINES 306 (C.L. Lim & Bryan Mercurio, eds. 2015). Arbitral panels are charged with the task of applying the rules of IIAs in specific cases, an often-complex process given the broad and sometimes ambiguous terms of these arrangements. *See generally* Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 173 (2005) (noting that foreign investors are increasingly resorting to the mechanism of international arbitration for resolving their disputes with the government of a host country).

law are reviewed with a view to understand which would best fit the need of SCEs in their transnational activities. The third section addresses the critical issue of the legal standing of SCEs under investment treaties, since it determines the ability of SCEs to effectively benefit from international rights. Finally, the fourth section analyzes the substantive rights which can benefit SCEs and which will drive the investment strategies of many SCEs in the coming years.

I. THE RISE OF STATE CAPITALISM

The term "state capitalism" means an economic system in which the state controls a substantial part of or even all of capital, industry and business.[17] It is therefore a command system where all or part of the means of production are legally the property of the state, or subject to its guidelines. Sometimes the means of production are in fact held, private or controlled, by the privileged class of the population that monopolizes political power. This expression appeared in the late nineteenth century, in the midst of the anti-capitalist movement, and was presented as a negative perspective.[18] Its use has expanded during the twentieth century.[19] There are differences, especially in terms of political affinity, as the plans are or have been state capitalist. Among the schemes often analyzed as such are: Germany in the First World War, the Soviet Union, and now China, Cuba and Algeria, from Houari Boumedienne.[20] This section discusses the notion of "state capitalism" before it looks at key examples of contemporary "state capitalism" entities in the United States, France, and China.

17. There is a growing literature on state capitalism and its implications for legal changes in China. *See*, *e.g.*, Li-Wen Lin & Curtis J. Milhaupt, *We are the (National) Champions: Understanding the Mechanisms of State Capitalism in China,* 65 STAN. L. REV. 697, 699 (2013); Du, *supra* note 11. For a discourse on state capitalism in general, see, e.g., Bremmer, *supra* note 1, at 40.

18. *See*, *e.g.*, Mariana Pargendler et al., *In Strange Company: The Puzzle of Private Investment in State-Controlled Firms,* 46 CORNELL INT'L L.J. 569 (2013).

19. *Id.* at 571.

20. *See generally* Julien Chaisse, *supra* note 9, at 238–39 (discussing state capitalism and potential market distortions among world schemes).

A. THE NOTION OF STATE CAPITALISM

There is no single definition of "state capitalism."[21] State capitalism is similar to state socialism (i.e. mostly adopted in those socialist states, such as China and Cuba).

> [It is] usually described as an economic system in which commercial economic activity is undertaken by the state in the form of state-owned enterprises (SOEs) resulting in the state owning and controlling most of the means of production and capital. Also, the management and organization of that SOEs' means of production is in a capitalist manner. Ming Du stated that state capitalism is the Chinese economic system, which is fundamentally different from western liberal market capitalism. Also, the substantial reason that state capitalism has been developed in China is because the Chinese government has transformed from a command economy to a market economy (i.e. socialism with Chinese characteristics). The way that the Chinese government exercised the 'state capitalism' is that they directly or indirectly controlled a large number of powerful SOEs, especially in strategic and key sectors (e.g. China Sinopec).[22] Kratsas and Truby stated that the 'interests of sovereign and private investors clash' through state directed capitalism market and accept Keynes's maxim that 'international cash flows are always political,' and Kratsas and Truby have stated that is problematic.[23]

In essence, the term "state capitalism" can refer to economic systems in which capitalism is entirely state driven, or, by extension of another system, where private capitalism has strong state dependence.[24] In the latter case, the term can be

21. *See generally* Catherine P. Mulder, *State Capitalism vis-à-vis Private Communism,* 27 RETHINKING MARXISM 258 (2015) (discussing state-owned enterprises, and the oversimplified approach of labeling them exclusively as either part of the public or private sector); *see also* Musacchio & Lazzarini, *supra* note 4.

22. *Id*. at 409.

23. *See* Julien Chaisse, *Demystifying Public Security Exception and Limitations on Capital Movement: Hard Law, Soft Law and Sovereign Investments in the EU Internal Market,* 37 U. PA. J. INT'L. L. 583, 589 (2016) (citing to Du, *supra* note 11, at 409, 411; Mulder, *supra* note 21, at 259).

24. *See also* Chao Xi, *The Political Economy of Takeover Regulation: What*

confused with concepts and precise theories such as mercantilism, protectionism, or interventionism. The latter usage, more common in English and French, is then used to support the opposition to "laissez-faire" and refers to economic policies such as the New Deal.[25]

Historically, Mikhail Bakunin has developed the theoretical beginnings of Statism and Anarchy in concept, and in his writings, he criticizes Karl Marx's theories, describing them as "authoritarian communism."[26] Bakunin proclaimed that the application of Marxist theories simply leads to the application of capital to production by the only banker, the state, which means that the state would behave in the same way that a capitalist manager (such a banker or a boss) would.[27] Fifty years later, some anarchists see a confirmation of the predictions of Bakunin in the economic reality of the Soviet Union—even if the economic policy in the USSR did not correspond to the economic thinking of Karl Marx.[28]

In light of these theories, a public company, or a state enterprise, can be defined as a company over which the state or other authorities may exercise directly or indirectly a dominant influence by virtue of ownership, financial participation or the rules which govern, as defined in the EU.[29] Such dominant influence is presumed when the public authorities, directly or indirectly, in respect to the company, hold the majority of the subscribed capital of the company or control the majority of the votes attached to shares issued by the company or may appoint more than half the members of the administrative, management, or business surveillance.[30]

Does the Mandatory Bid Rule in China Tell Us, 2 J. BUS. L. 142 (2015).

25. For an excellent overview, *see* Federico Fabbrini, *Europe in Need of a New Deal,* 43 GEO. J. INT'L L. 1175 (2011).

26. *See generally* Michael Bakunin, *Statism and Anarchy*, *in* CAMBRIDGE TEXTS IN THE HISTORY OF POLITICAL THOUGHT 106 (Raymond Geuss ed., 1990) (discussing statism and anarchy in the context of the struggle between parties in the International Working Men's Association).

27. *Id.* at 172.

28. *See* Noah Chomsky, *Notes on Anarchism*, *in* FOR REASONS OF STATE (1973), https://chomsky.info/state01/.

29. *See* Fabbrini, *supra* note 25, at 1175.

30. *See* Du, *supra* note 11, at 435.

B. THE CONTEMPORARY FORMS OF STATE CAPITALISM

Talking about SOEs immediately brings China into the spotlight, but there are many other jurisdictions where SOEs are important economic actors. A number of state enterprises do exist within the EU—and France is a fascinating case in point.[31] Outside the EU, public enterprises may also correspond to this definition, including some in the United States, where they exist in two legal forms. The first are federal public companies (of which there are very few and are usually temporarily acquired by the federal government and placed under judicial supervision, according to Chapter 11 of the United States bankruptcy law in sectors considered strategic and in order to avoid their liquidation under Chapter 7). The second are public companies of the state (many of which are owned or controlled by one of the federal states, or even several states associated in the operation if companies are larger in size).[32]

1. China's State Capitalism

In the latest Committee on Foreign Investment in the United States (CFIUS) report to Congress there were ninety-seven covered transactions, and twenty-one of those by Chinese investors in 2013.[33] Behind this suspicion lies the perception that China's businesses are too close to the Communist Party.[34] It also shows how important Chinese investments have become to the United States, while a number of Chinese companies remain controlled by the state.[35]

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31. *See also* Benjamin Mojuyé, *French Corporate Governance in the New Millennium: Who Watches the Board in Corporate France,* 6 COLUM. J. EUR. L. 73 (2000); *see also* Justin Yifu Lin et al., *Competition, Policy Burdens, and State-Owned Enterprise Reform,* 88 AM. ECON. REV. 422 (1998).

32. *See generally* Frieder Roessler, *State Trading and Trade Liberalization*, *in* STATE TRADING IN INTERNATIONAL MARKETS 264 (M.M. Kostechi ed., 1982) (examining different approaches to the liberalization of trade).

33. *See* COMM. ON FOREIGN INV. IN THE U.S., 114TH CONG., ANNUAL REPORT 1 (Comm. Print 2015); *see also* WAYNE M. MORRISON, CONG. RESEARCH SERV., RL33534, CHINA'S ECONOMIC CONDITIONS 1 (2012).

34. *See* Mitchell Silk & Richard Malish, *Are Chinese Companies Taking over the World,* 7 CHINA J. INT'L L. 105 (2006); Jason Dean et al., *China's 'State Capitalism' Sparks a Global Backlash*, WALL ST. J. (Nov. 16, 2010), http://www.wsj.com/articles/SB10001424052748703514904575602731006315198.

35. *See generally* EXIT THE DRAGON?: PRIVATIZATION AND STATE CONTROL IN CHINA 16 (Stephen Green & Guy S. Liu eds., Chatham House 2006) (evaluating China's privatization experience); *see also* U.S.-CHINA ECON.

In this new economic system, public enterprises, or "Danwei," are struggling to find their place and they are encountering more and more difficulties.[36] They reached record losses of 102.6 billion yuan (12.5 billion United States dollars (USD)) in 2005, an increase of 56.7% year by year, according to figures from the State Bureau of Statistics (NBS).[37] In the first two months of 2006, losses of public enterprises or state-controlled enterprises already reached 26.2 billion yuan (3.25 billion USD).[38] The increase in production costs, an inefficient pricing system, overcapacity, and significant technological gaps are the main causes of this situation, according to Jiang Yuan, a statistician at the State Bureau of Statistics.[39]

The presence of foreign firms in China is largely responsible for the sharp acceleration in export growth.[40] The establishment of "market socialism" has resulted in the construction of many factories in China, which may now be termed the workshops of the world, because of the social dumping of its plants.[41] They attract a skilled workforce in coastal areas as that is where such workshops are located. Only 10.3% of China's exports come from wholly Chinese companies.[42] Today, 43.2% of exports from China are made by companies whose capital is 100% foreign and 46.5% are the result of partnerships between foreign companies and Chinese companies.[43] Mainland China maintains its

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SECURITY REV. COMM'N, AN ANALYSIS OF STATE-OWNED ENTERPRISES AND STATE CAPITALISM IN CHINA 76 (Comm. Print 2011); Yuanzheng Cao et. al., *From Federalism, Chinese Style to Privatization, Chinese Style,* 7 ECON. IN TRANSITION 103 (1999); Shaomin Li et. al., *The Road to Capitalism: Competition and Institutional Change in China,* 28 J. COMP. ECON. 269 (2000); Minxie Pei, *The Dark Side of China's Rise,* FOREIGN POL. (Oct. 20 2009), http://foreignpolicy.com/2009/10/20/the-dark-side-of-chinas-rise/.

36. *See* Bruce M. Owen et al., *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 ANTITRUST L.J. 231, 231–32 (2008).

37. *SOEs' losses hit record US$12.75b in 2005,* China Daily (Mar. 28, 2006, 8:55 AM), http://www.chinadaily.com.cn/china/2006-03/28/content_553865.htm.

38. *Id.*

39. *Id. See also See Chinese State-Owned and State Controlled Enterprises: Policy Options for Addressing Chinese State-Owned Enterprises: Hearing Before the U.S-China Econ. and Sec. Review Comm'n*, 112th Cong. 127 (2012) (statement of Elizabeth J. Drake, Partner, Stewart and Stewart); OECD, *International Trade and Investment by State Enterprises*, (Sept. 2012).

40. *See, e.g.*, Silk & Malish, *supra* note 34, at107.

41. *See* McNally, *supra* note 3, at756–58.

42. Nature of China's Export Enterprises, Foreign Investment Monthly, Ministry of Commerce China, Table 5, http://zhs.mofcom.gov.cn/table2016//tab05.pdf

43. *Id.*

attractiveness for companies with its labor force, which is cheap, non-unionized, and docile. An unskilled worker in China costs about one USD per hour, which is well below the minimum wage of the industrialized countries.[44] The non-organization of Chinese workers represents a substantial benefit for employers, who find such "job flexibility" impossible to implement in liberal democracies. Together, the two Chinese giants of mobile telephone companies, namely, China Mobile and China Unicom, have about a billion customers.[45]

A series of reforms accompanied the dual internal liberalization and opening movement on the world market.[46] One law authorized individuals to have limited liability companies.[47] In 2004, the Constitution was revised to strengthen

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44. Education Bureau of Hong Kong Special Administrative Region, Resource Pack for Economics Curriculum (Secondary 4-6): Economic Analysis and Evolution of Government Policies: Minimum Wage 2015, 2-3. ("Since the last update in 2009, the federal minimum wage has stood at US$7.25 per hour [in the United States]." "In China, the Provisions on Minimum Wages were effective from March 1, 2004. The setting of minimum wage is delegated to local governments, which choose a monthly minimum for full-time workers, and an hourly minimum for part-time workers." "There is a wide range of minimum wage levels across the country. In general, the highest wages are in the more developed coastal regions and the lowest ones in the less developed central and western provinces. . . . The lowest ones were around RMB10 (US$1.64).")

45. *See Number of Mobile Subscribers in China as of January 2016, by Operator* (In Millions), STATISTIA, https://www.statista.com/statistics/291795/china-mobile-subscribers/ (last visited Feb. 12, 2018).

46. *See generally* John Hassard et al., *China's State-Owned Enterprises: Economic Reform and Organizational Restructuring,* 23 J. ORGANIZATIONAL CHANGE MGMT. 500 (2010) (discussing reforms of state-owned enterprises since the beginning of China's "open door" policy); Jonathan R. Woetzel, *Reassessing China's State-Owned Enterprises*, MCKINSEY Q. 1 (2008) (considering the value state-owned companies might bring to a global partnership); *see also* Xu Chenggang, *The Fundamental Institutions of China's Reforms and Development*, 49 J. ECON. LITERATURE 1076 (2011); Lin & Milhaupt, *supra* note 17.

47. During the SOE reforms in the 1980s and early 1990s, the government allowed SOEs to retain an individually negotiated percentage of their profits, which could be used to finance benefits and awards paid to managers and employees. A 1994 tax reform set a uniform rate of tax on SOE profits; any remaining profits belonged to the SOEs. *See* Louis Kuijs et al., *SOE Dividends: How Much and To Whom?* 2 (World Bank, Working Paper No. 56651, 2005), http://www-wds.worldbank.org.easyaccess1.lib.cuhk.edu.hk/external/default/WDSContentServer/WDSP/IB/2010/09/17/00033495520100917050418/Rendered/PDF/566510WP0SOE1E10Box353729B01PUBLIC1.pdf. However, between 1994 and 2007, the state collected no dividends from SOEs. *See* Nicholas Borst, *SOE Dividends and Economic Rebalancing*, PETERSON INST. INT'L ECON. (May 11, 2012, 12:30 PM), https://piie.com/blogs/china-economic-watch/soe-dividends-and-economic-rebalancing.

the role of the non-state sector and to reaffirm the right of private property.[48] The prohibition on private companies to intervene in certain sectors (infrastructure, public services, financial services) was abolished in 2004.[49] FDI was allowed and encouraged by the development of coastal zones and the lowering of tariffs. The state monopoly on foreign trade was dismantled and the multiple exchange rate system was introduced.[50] The private sector was expanded: "[b]etween 2010 and 2012, private sector firms produced between two-thirds and three-quarters of China's GDP; it also accounts for 90% of China's exports."[51] But, exports of the private sector under Chinese control are still growing faster, as it receives new export licenses.[52] The state sector is parallel subject to ongoing

48. *See* Alberto Gabriele, *The Role of the State in China's Industrial Development: A Reassessment,* 52 COMP. ECON. STUD. 348 (2010).

49. Mo Zhang, *From Public to Private: The Newly Enacted Chinese Property Law and the Protection of Property Rights in China*, 5 BERKELEY BUS. L.J. 317, 335 (2008).

50. *See* Xu Chenggang, *The Fundamental Institutions of China's Reforms and Development,* 49 J. OF ECON. LITERATURE 1076 (2011).

51. *See* Hassard et al., *supra* note 46. Jonathan Eckart, *8 Things You Need to Know about China's Economy*, WORLD ECONOMIC FORUM (June 23, 2016) https://www.weforum.org/agenda/2016/06/8-facts-about-chinas-economy/.

52. According to the ChinaDaily:

> China's private sector is gradually regaining momentum after a gloomy 2016, as businesses become more optimistic on the country's economic outlook. In the first half of the year, fixed-asset investments by the private sector grew 7.2 percent year on year, accounting for 60.7 percent of total investment, according to data from the National Bureau of Statistics. The growth was much higher than the 3.2 percent registered last year . . . .China's economy expanded 6.9 percent for the first half of 2017 . . . .China's foreign trade increased at its fastest pace since the second half of 2011, with exports in yuan-denominated terms up 15 percent year on year in the first half of this year (2017).

Xinhua, China's Private Sector Regains Strength on Optimistic Economic Outlook, ChinaDaily.com (August, 2, 2017), http://www.chinadaily.com.cn/business/2017-08/02/content_30328022.htm.

China has recently changed their regulatory rules to reflect this growth:

> All institutions issuing export licenses for goods, and relevant enterprises and entities: In accordance with the Foreign Trade Law of the People's Republic of China, the Regulation of the People's Republic of China on the Administration of the Import and Export of Goods and the Measures for the Administration of Export Licenses for Goods, the matters concerning the application for, issuance and use, and other matters of export licenses for goods are clarified as follows:
>
> 1. The enterprises and entities applying for alumina, magnesia, talcum lump (powder), fluorite, rare earth, tin and tin products, tungsten and tungsten products, molybdenum, antimony and antimony products, coke, silicon carbide, and indium and indium

restructuring, which has led to the removal of millions of jobs between 1998 and 2010.[53] "Some 42 per cent of all SOEs lost money in 2013, according to official data. Total profits for such groups fell in absolute terms last year for the first time since 2001. The gap in return on assets between SOEs and private firms is now the largest in two decades."[54] The tax system is highly decentralized in China, and the provinces and small governments that manage a large share of the tax revenue are

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> products (see the Annual Catalogue of Goods Subject to Export Licensing Administration for H.S. codes) shall apply for export licenses for goods based on the export contracts for goods.
>
> 2. The relevant license-issuing institutions shall, in accordance with laws and regulations, effectively conduct the issuance of export licenses for goods, further standardize their processes, optimize their services, and ensure that export licenses for goods are issued and other relevant matters are handled within the prescribed time limit.
>
> 3. The relevant enterprises and entities shall use export licenses for goods in accordance with the law, and shall not trade, transfer, alter or forge such licenses.

商务部配额许可证事务局关于货物出口许可证申领、签发等事宜的函 [Letter on Matters Concerning the Application for, Issuance of, and Other Matters Concerning, the Export Licenses for Goods] (promulgated by the Admin. Bureau of Ministry of Com., effective date Jan. 25, 2017) LawInfoChina.

The Ministry of Commerce added new items to the application for an export license as well:

> The export of goods subject to export License Administration by foreign-invested enterprises shall be handled in accordance with the following requirements: (1) For the export of goods subject to export quota administration by a foreign-invested enterprise, the issuing agency shall issue export license in accordance with the export quota quantity of such foreign-invested enterprise issued by the Ministry of Commerce; for the export of goods subject to quota tendering administration, relevant approval documents specified in Article 11(2) shall be attached.

货物出口许可证管理办法 [Order No.11, Measures for the Administration of License for the Export of Goods] (promulgated by the Ministry of Com., effective Jul. 1, 2008), at art. 13.

53. Dong Zhang & Owen Freestone, *China's Unfinished State-owned Enterprise Reforms*, ECON. ROUNDUP, AUSTRL. GOV'T, TREASURY (2103) https://treasury.gov.au/publication/economic-roundup-issue-2-2013-2/economic-roundup-issue-2-2013/chinas-unfinished-state-owned-enterprise-reforms/#P8_131 (" . . . SOEs accounted for 20 per cent of total industrial employment in 2010, falling from around 60 per cent in 1998. After shedding tens of millions of workers while undergoing various reforms, SOEs are no longer China's major employer. The share of workers employed by SOEs have more than halved between 1998 and 2010. The non-state sector is, and will continue to be, the main source of employment.").

54. Gabriel Wildau, *China's State-owned Zombie Economy,* FIN. TIMES (Feb. 29, 2016), https://www.ft.com/content/253d7eb0-ca6c-11e5-84df-70594b99fc47.

also involved in education and health.[55] There is very little financial solidarity between the provinces.[56]

In his last speech on the State of the Union, President Barack Obama said that "anyone who tells you otherwise, anyone who tells you that America is in decline or that our influence has waned, doesn't know what they are talking about."[57] In Beijing, this facile patriotism must make people smile. China's revival threatens American power, especially in the Asia-Pacific region. This situation has been clear for some time, at least for observers who know what they are talking about.[58]

The rivalry between the two superpowers is also a rivalry between two economic models: market capitalism against state capitalism. In fact, market capitalism has just gone through five particularly difficult years. Remember the Washington Consensus, the list of ten possible measures to Americanize the emerging markets in the 1990s?[59] The United States government and international financial institutions have tried to persuade various countries to impose fiscal discipline, to reduce or to eliminate their budget deficits, to expand their tax base, to lower their tax rates, to allow the market to set its interest rates and exchange rates, and to liberalize trade and capital flows. When the Asian economies were hit by the financial crisis in 1997–1998, critics were quick to lament the "crony capitalism" of this region,[60] and, at the time, they could

55. China's former Premier repeatedly called for political reforms—an indication that the Chinese leadership recognizes that further economic reforms require new political institutions. *See* Malcolm Moore, *Wen Jiabao Promises Political Reform for China*, TELEGRAPH (Oct. 4, 2010), http://www.telegraph.co.uk/news/worldnews/asia/china/8040534/Wen-Jiabao-promises-political-reform-for-China.html; Michael Wines, *Wen Calls for Political Reform but Sidesteps Details*, N.Y. TIMES (Mar. 12, 2012), http://www.nytimes.com/2012/03/15/world/asia/china-wen-jiabao-calls-for-political-reform.html.

56. *See* Gary Hufbauer, *China as an Economic Actor on the World Stage: An Overview, in* CHINA IN THE WORLD TRADING SYSTEM: DEFINING THE PRINCIPLES OF ENGAGEMENT 47, 50 (Fredrick M. Abbott ed., 1998); *see also* John H. Jackson, *The Impact of China's Accession on the WTO, in* CHINA AND THE WORLD TRADING SYSTEM 19, 26 (Deborah Z. Cass et al. eds., 2003).

57. Ferguson, *supra* note 1.

58. *See, e.g.*, Mattlin Mikael, *Chinese Strategic State-Owned Enterprises and Ownership Control,* 21 BICCS ASIA PAPER 3, 8 (2010); Bremmer, *supra* note 1.

59. John Williamson, *The Strange History of the Washington Consensus*, 27 J. POST KEYNESIAN ECON. 195 (2004).

60. Alan Beattie, *Suharto and the Crisis of Asian Crony Capitalism, January 1998*, FIN. TIMES (July 18, 2008), https://www.ft.com/content/f503fa82-

claim to have economic history on their side.

But, since then, America has experienced a financial crisis, the biggest since the Great Depression. And the world has changed. Not only did the collapse of the financial markets (2008–2009) seem to have highlighted the fragility of the capitalist system, but the apparent ease with which China has escaped the aftermath of the collapse of Wall Street opens up the possibility of a new "Beijing Consensus," based on both central planning and a state which can control the fluctuations of market forces. In his book, *The End of the Free Market*, Ian Bremmer (the president of Eurasia Group) argues that authoritarian governments around the world have "invented something new: state capitalism."[61] For Bremmer, state capitalism is a major "threat" not only for the model of free trade, but also for democracy in the developing world.[62]

2. U.S. State Capitalism

Companies backed by the government (government-sponsored enterprises, or GSEs)[63] are a group of financial service companies created by the United States Congress. Their function is to improve the flow of credit to targeted sectors of the economy and to make these segments a more efficient and transparent capital market.[64] The desired effect of GSEs is to improve the availability and to reduce the cost of credit for borrowers' targeted sectors: agriculture, real estate finance, and education.[65] Congress created the first GSE in 1916 with the creation of the Farm Credit System for financing the agricultural sector;[66] it initiated GSEs in the real estate

5159-11dd-b751-000077b07658.

61. *See* Bremmer, *supra* note 1.

62. *Id.* at 55.

63. *Credit-Rating Agencies and Financial Markets: Hearing before the Subcomm. on Capital Mkts., Ins. and Gov't Sponsored Entities of the H. Comm. on Fin. Servs.*, 110th Cong. 2 (2007) (statement of Mark Adelson, Member, Adelson-Jacob Consulting).

64. In the United States, "[d]istinctions between the governmental and private sectors are especially blurred with respect to a category of organization known as 'government-sponsored enterprises' (GSE)." KEVIN R. KOSAR, CONG. RES. SERV., RL30533, THE QUASI GOVERNMENT: HYBRID ORGANIZATIONS WITH BOTH GOVERNMENT AND PRIVATE SECTOR LEGAL CHARACTERISTICS 7 (2011). Typically, GSEs are privately owned but enjoy implicit government guarantees of obligations. *Id.* at 8.

65. *Id.*

66. *Id.*

financing segment with the creation of the Federal Home Loan Banks in 1932;[67] and targeted education by regulating Sallie Mae in 1972.[68] The housing loans segment is by far the largest borrower's segment in which GSEs operate.

Together, the three housing finance GSEs (Fannie Mae, Freddie Mac, and the twelve Federal Home Loan Banks) hold billions of dollars in outstanding loans, as shown in their income statements.[69] The federal government owns warrants which, if exercised, would allow it to take a share of 79.9% ownership in these companies.[70] The federal government has so far not exercised these warrants. These companies include: Fannie Mae, Freddie Mac, Farmer Mac, Sallie Mae, and Federal Home Loan Banks.[71]

Regulated companies held by the federal government (federal government-chartered and -owned corporations) are a separate set of companies that have been initiated, controlled and owned by the federal government to operate in the provision of federal public services, but, unlike federal agencies (such as the Environmental Protection Agency or the Bureau of Indian Affairs) or federal independent commissions (*e.g.*, the Federal Communications Commission, the Nuclear Regulatory Commission, etc.), they have a separate legal personality from the federal government, thereby providing the highest degree of independence from political power.[72] They sometimes receive

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67. *See* Julie A. Hill, *Bailouts and Credit Cycles: Fannie, Freddie, and the Farm Credit System,* 2010 WIS. L. REV. 1, 19 (2010).

68. Congress has also authorized Sallie Mae to resign government partnership to become a fully private institution in 2008. *See* James Politi, *Sallie Mae Gains $ 31bn Financing*, FIN. TIMES (Jan. 28, 2008), https://www.ft.com/content/5b95dc94-cda6-11dc-9e4e-000077b07658.

69. For an analysis of the methodological challenges of valuing the subsidies, *see* Ron Feldman, *Estimating and Managing the Federal Subsidy of Fannie Mae and Freddie Mac: Is Either Task Possible?,* 11 J. PUB. BUDGETING, ACCT. & FIN. MGMT. 81, 83 (1999); Edward J. Kane, *Housing Finance GSEs: Who Gets the Subsidy,* 15 J. FIN. SERV. RES. 197, 197 (1999).

70. U.S. TREASURY DEP'T OFF. PUB. AFF., FACT SHEET: TREASURY SENIOR PREFERRED STOCK PURCHASE AGREEMENT (2008), https://www.treasury.gov/press-center/press-releases/Documents/pspa_factsheet_090708%20hp1128.pdf.

71. *See* USHA C.V. HALEY & GEORGE T. HALEY, SUBSIDIES TO CHINESE INDUSTRY: STATE CAPITALISM, BUSINESS STRATEGY, AND TRADE POLICY 24 (2013) (explaining that the two best-known GSEs, Fannie Mae and Freddie Mac, were placed into government conservatorship at the height of the 2008–09 financial crisis). *But cf.* Lin & Milhaupt, *supra* note 17 (providing an analysis of the Chinese SOEs as a "networked hierarchy" with deep connections to the party-state).

72. These companies include: National Railroad Passenger Corporation

federal budget appropriations, but some have independent sources of income.

The companies acquired by the federal government are a separate set of companies that were neither initially created nor controlled by the federal government, but of which the government has taken ownership in order to operate them itself. They are in two categories:

- the Incidental Governmental Corporations (IGCs): these companies are temporarily in the possession of the government by the capture effect of the property of a defaulter of the government, such as the offending companies with the tax authorities or an inability to repay funds that were advanced to them for the supply of products and services not rendered to the government; usually, they are waiting for a legal tender and are too small to be rated individually, especially because their survival time is short; and
- the companies acquired by the government (government-acquired corporations, or GACs): these are companies whose shares and/or assets were purchased by the Federal Government, because of the fact that these companies were found to be strategic and "too big to fail"

(Amtrak), Tennessee Valley Authority, Corporation for Public Broadcasting, Federal Deposit Insurance Corporation, Federal Crop Insurance Corporation, Millennium Challenge Corporation, St. Lawrence Seaway Development Corporation, Pension Benefit Guaranty Corporation, Corporation for National and Community Service (AmeriCorps), Overseas Private Investment Corporation, Federal Reserve Legal Services Corporation, United States Postal Service Conrail (former), Resolution Trust Corporation, and Panama Canal Commission. *See* EDWIN M. DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860 (1954); JAMES W. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS (1950); JAMES W. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES 1 (1956) [hereinafter HURST, CONDITIONS OF FREEDOM]; JAMES W. HURST, LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY (1960). *See also* JAMES W. HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915 (1974) [hereinafter HURST, LUMBER INDUSTRY IN WISCONSIN]; JAMES W. HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES 1 (1977); for a comprehensive bibliography of works by and about Hurst, *see* Ronald Eskin & Robert Hayden, *James Willard Hurst (b. 1910) Bibliography*, 10 LAW & SOC'Y REV. 325 (1975). Corporations were legislative creatures and thus, within the limits discussed here, they were subject to regulation by their chartering states. To a lesser degree, they were also subject to regulation by the states in which they sought to do business. During the early nineteenth century, the states were the only significant source of charters. Until the 1860s, the federal government chartered only two corporations. Harry N. Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 LAW & SOC'Y REV. 57 (1975).

or, in other words, that their liquidation would present too high a systemic risk to the overall economy of the United States to allow such companies to be liquidated, declared bankrupt, or simply to cease to provide their services. These companies include Citigroup, General Motors, and AIG (American International Group).[73]

There is a second level of sovereign government in the United States after the federal government, namely, the different states of the Federation that make up the country. State governments are legally sovereign entities and they owe their sovereign existence to the sovereign people of their land who created and wrote their State Constitution; they are not corporate bodies, since they were not created by the achievement of the federal government and they exist with or without the consent of the federal government. As sovereign, they have the power to detain the "radical title" to the land, and to exercise the four fundamental powers (raising taxes, "eminent domain", police power, and exemption) as well as various other powers (including the power to grant charters). The vast majority of non-government corporations in the United States are regulated by the states and not by the federal government; this includes most charities (although some of national reputation are regulated by the federal government and not by a state government), non-profit corporations, and corporations for profit.[74] States, as sovereign, also have the power to organize and regulate the companies they own, for which they exercise control and have responsibility for financing and directing. This includes:

- municipal corporations (MCs): these are public companies that have a vested democratic control over local affairs in a given geographic area (they exist in villages, cities, suburbs, towns or counties).[75] Although these municipal

73. *See generally* Kevin Kosar, Federal Government Corporations: An Overview, CONG. RESEARCH SERV. (June 8, 2011) https://fas.org/sgp/crs/misc/RL30365.pdf (defining federal government corporations and explaining their characteristics). *See also* Martin Arnold, *Citigroup Tops List of Global Banks Posing Systemic Risk*, FIN. TIMES (Nov. 21, 2016), https://www.ft.com/content/3e7f5e1a-afe1-11e6-9c37-5787335499a0.

74. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *Non-Governmental Organizations (NGOs) in the United States, Facts Sheet* (Jan. 20, 2017) https://www.state.gov/j/drl/rls/fs/2017/266904.htm.

75. *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1109 (1980). *See* Gerald E. Frug, *A Legal History of Cities*, *in* LEGAL GEOGRAPHIES READER 154 (Blomley et al. eds., 2001), for an updated and condensed version. *See* JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 16 (5th ed., 1911), for a contemporaneous analysis.

corporations are often regulated and sometimes funded by the state government, and can often collect local taxes, they are public entities vested with limited scope and non-sovereign, and the state government that regulates them is not legally responsible for their debts in the event of a municipal bankruptcy; and

- regulated companies and state-owned (state-owned and -chartered corporations, or SCOCs): these are numerous and provide various public services. Examples include North Dakota Mill and Elevator or South Dakota Public Broadcasting.[76] Generally speaking, a status document passed by a state legislature authorizes a company owned by the government to support a public service mission with funds or public property.[77] Lottery companies are also owned by the state governments, such as the Georgia Lottery Corporation and many others.[78]

There is a third level of sovereign government in the United States, namely, the tribal governments of Native Americans. The Native American tribes are included as former sovereignty established by the sovereign people since time immemorial and recognized as sovereign by the federal government of the United States (as well as that of various states).[79] As such, Native American tribal governments (and Native Alaskans) have specific rights to sovereignty, which include the power to detain the "radical title" to the land, to exercise the four fundamental powers (taxes, "eminent domain," police power, and waiver) as well as other powers, such as that of regulating companies and supporting public tasks that can benefit their tribal citizens, Native Americans and Native Alaskans who are also citizens of

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76. The North Dakota Mill and Elevator Association began operating October 22, 1922, as a value-added market for wheat produced in North Dakota, which now adds value to 23 million bushels of North Dakota spring and durum wheat annually by selling wheat products to various bakeries, pasta customers, and food service suppliers—providing the state with an annual payroll of $7 million. *About Us*, N.D. MILL, https://www.ndmill.com/index.cfm/about/about-us/ (last visited February 10, 2018).

77. Bureau of Democracy, Human Rights, & Labor, *Non-Governmental Organizations (NGOs) in the United States: Facts Sheet*, U.S. DEP'T OF STATE (Jan. 20, 2017) https://www.state.gov/j/drl/rls/fs/2017/266904.htm.

78. GA. CODE ANN. § 50-27-4 (West 1992) ("[T]he Georgia Lottery Corporation which shall be deemed to be an instrumentality of the state, and not a state agency, and a public corporation.").

79. *See Tribal Governance*, NAT'L CONG. OF AM. INDIANS (NCAI) http://www.ncai.org/policy-issues/tribal-governance.

their respective states and also United States citizens.[80] Native Alaskans are particularly advanced in the exercise of their tribal sovereignty in incorporating companies held by and for the benefit of their tribal citizens and to compete in the highly competitive economic sectors via the Alaska Native Regional Corporations.[81] The Native American tribes in the interior forty-eight states use their sovereignty and their ability to regulate and organize it by using regulatory facilitation. Many tribes have taken advantage of the Federal Native 8(a) Contracting Program which allows companies owned by the federally recognized tribes (SOEs) to participate in Federal contracting and receive economic benefits from the United States federal government.[82] Some of these small businesses have proven to be successful for tribal sovereign Native American and tribal societies after being included in federal initiatives, finally creating a successful federal economic program that works for Native Americans.[83]

3. France's State Capitalism

Industrial and commercial activities undertaken by the administration are entrusted to public companies.[84] It is, for France, a body with legal personality in the public sector with a possibility of private sector participation. There is no unique status of the public company. Thus, there are a number of different types of operations:

- an *établissement public à caractère industriel et commercial* (Public Establishment in the Field of

80. *See* Jessica A. Shoemaker, *Complicity's Shadow: American Indian Property, Soveriegnty, and the Future*, 115 Mich. L. Rev. 487, 489 (2017); Stephan Pevar, The Rights of Indians and Tribes 95, 98, 99, 174, 314 (4th ed. 2012).

81. *See Alaska Native Corporations*, RESOURCE DEV. COUNCIL, http://www.akrdc.org/alaska-native-corporations (last visited Apr. 22, 2018).

82. *See* Native Am. Contractors Ass'n, *What is the Native 8(a) Contracting Program? https://www.chenega.com/Media/Default/Native%208(a)/NACA%20brochure%20re%208(a)%20program.pdf*.

83. *See In Support of Native American Full Participation in the Small Business Administration's 8(A) Business Development Program*, NCAI, Res. SPO-16-059 (June 30, 2016) *http://www.ncai.org/resources/resolutions/in-support-of-native-american-full-participation-in-the-small-business-administration-s-8-a-business-development-program*. *See also* Native Am. Contractors Ass'n, *supra* note 82.

84. *See* Mojuyé, *supra* note 31.

Commercial and Industrial Sectors)[85] (or EPIC) is a category of public undertaking in France. It is subject to public law, it is not open to the securities market and it lacks capital[86] EPICs are public agencies in the meaning of public law when acting in the commercial and industrial sectors.[87] They can be represented either by mixed companies jointly held by public and private entities but are not subject to general law or by national companies, whose equity capital is fully held by the state;

- domestic companies under private law but whose capital is wholly owned by the state; and
- companies of mixed economy of private companies in which the state or local governments invest, but do not have half the capital (Article L. 1522-1 CGCL.).[88]

Sometimes the state transforms an EPIC into a national company then sells shares (privatization). Thus, EPICs become public companies, which in turn, private companies invests in.

Most public companies have been public since the 1945 nationalization.[89] The state sold a portion of these investments in 1986, and this initiated a large wave of privatizations under the government of Jacques Chirac, and slow and incremental sales in the years 1990 and 2003 (and others) by waves of privatization, which allowed some companies to recapitalize (to increase EDF's capital, for example), to open certain sectors to

85. Sébastien Martin, *The Difficulties Faced By Public Establishments In Light Of Competition Law: A Discussion Of The "La Poste" Case*, MONTESQUIEU L. REV. Jan. 2015, at 108, 109 http://www.montesquieulawreview.eu/lr1_content/mlr1.pdf ("On this basis, as for all other public-law entities in France but unlike private companies, both La Poste and France Telecom do not have any share capital and are not subject to the ordinary law on receivership and judicial winding-up of firms in difficulty. As is emphasised [sic] in French legal doctrine, "*the particularities of the legal regime for some state-owned companies remain linked to the fact that, behind a uniform title drawn from business law, there indeed remains the specific strength of the public-law nature of those companies that take the form of public entities*.").

86. *Id.*

87. *See generally Serving the Public*, SNCF, http://www.sncf.com/sncv1/en/meet-sncf/epic-status (describing an EPIC).

88. CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. L. 1522-1 (Fr.).

89. France nationalized Renault in 1945, Charbonnages de France, Electricité de France, and Gaz de France in 1946, and for a brief time under the presidency of Mitterrand, France also nationalized a large part of the banking sector and industries of strategic importance to the state (1982–1986). *See* Paul Cohen, *Lessons from the Nationalization Nation: State-Owned Enterprises in France*, DISSENT MAG., Winter 2010, https://www.dissentmagazine.org/article/lessons-from-the-nationalization-nation-state-owned-enterprises-in-france.

competition (*e.g.*, France Telecom) and to reduce the budget deficit to slow the progression of the French public debt.[90] For listed companies, the state gradually reduced its participation by small successive sales. These SOEs include:

- Thales: In December 2015, the public sector accounts for 26% of the shares, the individual and institutional shareholder accounts for 46% of the shares;[91]
- SNPE: 100% in 2005, total current privatization in 2011;[92]
- Areva: 95% in 2005, 28.83% in 2017[93] and
- EDF: 100% in 2005, 84.94% in 2017.[94]

Many public companies are owned by local authorities; for example, the City of Paris owns eighteen semi-public companies.[95] Local authorities sometimes undertake joint control with the state, as in the case of *the Compagnie Nationale du Rhône* (CNR).[96]

II. THE REGULATION OF STATE CAPITALISM INVESTMENTS

State capitalism is diverse and on the rise. Practically, it means that the volume of international investments made by SCEs is increasing, thus rendering international norms on the protection of foreign investment increasingly significant. International investment law provides rules to ensure access for foreign investment to host country markets and to protect

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90. *See* Mojuyé, *supra* note 31, at 81.

91. *Shareholders and Board of Directors*, THALES, https://www.thalesgroup.com/en/global/corporate-responsibility/governance/shareholders-and-board-directors (last visited May 5, 2018).

92. *See* Michel Berne & Gérard Pogorel, *Privatization Experience in France*, *in* CEDIFO DICE REP. 36, table 3 (2005), https://www.cesifo-group.de/DocDL/dicereport105-forum5.pdf. *See also* http://www.privatizationbarometer.com/database.php (last visit 14 Apr. 2018).

93. Berne & Pogorel, *supra* note 92; *France - 7-State-Owned Enterprises* (Aug. 3, 2017), https://www.export.gov/article?id=France-Competition-from-State-Owned-Enterprises.

94. Berne & Pogorel, *supra* note 92; *France - 7-State-Owned Enterprises*, *supra* note 93.

95. *See* Real Estate Dev. Servs., *Mixed Economy Companies, Local Public Companies and Public Companies: Local Development City of Paris* (2016) (in French) https://api-site-cdn.paris.fr/images/98230.

96. *See* Vincent Guérard & Vincent Trévisani, *L'ouverture a la concurrence du marché français de l'éctricité: une révolution en marche* [*The Opening of the French Electricity Market to Competition: A Revolution is Underway*], 2 INT'L BUS. L.J. 123, 131 (2003); *see also* Mojuyé, *supra* note 31.

investment against risk (especially political risk). It creates a specific set of investment protection obligations on host countries, including protection against expropriation without compensation and it gives access to financial compensation through investor–state arbitration when the host country has breached a protection obligation.[97]

Unfortunately, as of today, there is no comprehensive multilateral agreements on investment, either under the ambit of the World Trade Organization (WTO) or anywhere else. Under the WTO's Doha Development Agenda, the possibility of negotiations on investment was originally included in 2001 but it was dropped in 2004.[98] There was a prior attempt to negotiate a multilateral investment agreement (MIA) between OECD countries as a plurilateral agreement, but these negotiations ended without success in 1997.[99] Hence, international rules on investment are fragmented and there are a wide variety of obligations. Customary international law[100] is applicable to investment but its content is limited and disputed. The WTO Trade-Related Investment Measures (TRIMS) agreement does mention investment, but it is a very limited agreement, dealing only with investment rules that have an impact on trade in goods that is contrary to the General Agreement on Tariffs and Trade (GATT).[101] It mainly prohibits performance requirements that are contrary to national treatment (NT) of goods (such as local sourcing requirements) or by the creation of a quota on goods.[102] The WTO General Agreement on Trade in Services (GATS), under Mode-3 Commitments on commercial presence, applies to some kinds of investment in services.[103] The main source of

97. *See also* OECD, *Fair and Equitable Treatment Standard in International Investment Law* (OECD Working Papers on International Investment, Paper No. 3, 2004), https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf.

98. General Council, *Decision on the Doha Work Programme*, ¶ 1(g), WTO Doc. WT/L/579 (Aug. 2, 2004).

99. *Multilateral Agreement on Investment*, GLOBAL POLICY FORUM, https://www.globalpolicy.org/globalization/globalization-of-the-economy-2-1/multilateral-agreement-on-investment-2-5.html.

100. Customary international law is the law that develops from the consistent practice of states that have an appropriate sense of legal obligation. *See* Tarcisio Gazzini, *The Role of Customary International Law in the Field of Foreign Investment*, 8 J. WORLD INV. & TRADE 691 (2007).

101. *See Agreement on Trade Related Investment Measures,* WORLD TRADE ORG. [WTO], https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm.

102. *Id*.

103. *See The General Agreement on Trade in Services (GATS): Objectives,*

international investment law is contained in other treaties, sometimes called IIAs, which include Preferential Trade and Investment Agreements (PTIAs) that address investment, and Bilateral Investment Treaties (BITs). These provide more comprehensive rules on investment. IIAs also include double taxation agreements (DTAs).[104]

A. INTERNATIONAL INVESTMENT AGREEMENTS

In principle, the treatment of international investment is defined by domestic law, that is to say the law of the state of the investment of territoriality.[105] Thus, an investment host state makes the rules and regulations applicable to investments according to the desired orientation, incentive, or disincentive. Exporting countries of investment, for most developed countries are favorable to domestic law mechanisms because they allow them greater concessions in terms of treatment and protection from the state of territoriality.[106] For their part, importing

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Coverages, and Disciplines, WTO, https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm.

104. Lisa E. Sachs & Karl P Sauvant, *BITs, DTTs, and FDI Flows: An Overview*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS xxvii (Karl P. Sauvant & Lisa E. Sachs eds., 2009). *See generally* Zachary Elkins et. al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties*, 60 INT'L ORG. 811, 814–15 (2006) ("The United States embraced BITs later than did its West European counterparts. Between 1962 and 1972, during which time West Germany entered into forty-six BITs and Switzerland entered into twenty-seven, the United States eschewed such treaties and signed only two Friendship Commerce and Navigation Treaties—with Togo and Thailand. One reason for the delayed U.S. participation in bilateral arrangements may have been the hope of retaining a multilateral approach. The United States was one of the most aggressive proponents of the Hull Rule and may have feared that BITs represented a threat to its claim that investment was already protected under customary international law. Moreover, potential hosts may have had incentives to resist the relatively onerous provisions the United States government typically tried to secure. One of the prime differences between the terms typically offered by the Europeans and the United States at this time was the former's emphasis on investment protection and the latter's additional insistence on liberalization.").

105. For a critical account of the current investment arbitration regime, *see* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 19 (2008); JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES (2009). *See also*, Gus Van Harten, *Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law, in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 627 (Stephan W. Schill ed., 2010).

106. *See generally* Benjamin K. Guthrie, *Beyond Investment Protection: An Examination of The Potential Influence of Investment Treaties on Domestic Rule*

countries investments, often those of developing countries, are favorable to the mechanisms of international law, because the use of an international interest allows them to mitigate the concessions would welcome the state of nationality investment.[107] This feature was debated in a lively way during the 1960s, and it was the cause of the proliferation of conventional instruments on the treatment and protection of investments.[108] In general, a treaty invariably stipulates that the host country should pay for investment once it is established in its territory. Very often bilateral treaties include one or more general principles, together or individually, which are intended to provide global criteria through which it is possible to judge whether the treatment accorded to an investment is satisfactory; the principles also help to interpret special situations when applied to more specific provisions.[109] The treatment of investments is defined as "the set of principles and rules of international law as national law governing the regime of international investment, since the moment of its formation until its liquidation."[110]

of Law, 45 N.Y.U. J. INT'L L. & POL., 1151 (2013) (discussing the existing models of interaction between BITs and domestic rule of law, including the complement model, the substitute model and the limits of both). *See also* Richard C. Chen, *Bilateral Investment Treaties and Domestic Institutional Reform*, 55 COLUM. J. TRANSNAT'L L. 547 (2016-2017).

107. *See* S.K. Dholakia, *Investment Treaty Arbitration and Developing Countries: What Now and What Next - Impact of White Industries v. Coal India Award*, 2 INDIAN J. ARB. L. 4 (2013). *See also* Eric Gottwald, *Leveling the Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration*, 22 Am. U. Int'l L. Rev. 237 (2006-2007).

108. *See, e.g.* M. Sornarajah, *The New International Economic Order, Investment Treaties and Foreign Investment Law in ASEAN*, 27 Malaya L. Rev. 440 (1985).

109. See, e.g. JONATHAN BONNITCHA, SUBSTANTIVE PROTECTION UNDER INVESTMENT TREATIES: A LEGAL AND ECONOMIC ANALYSIS (2014); Lorenzo Cotula, *Do Investment Treaty Unduly Constrain Regulatory Space?*, QUESTIONS OF INT'L L. 9 (2014); J. PEDRO MARTINEZ-FRAGA & C. RYAN REETZ, PUBLIC PURPOSE IN INTERNATIONAL LAW: RETHINKING REGULATORY SOVEREIGNTY IN THE GLOBAL ERA (2014); William Schreiber, *Realizing the Right to Water in International Investment Law: An Interdisciplinary Approach to bit Obligations*, 48 (1) NAT. RESOURCES J. 431 (2008); Howard Mann, *Implications of International Trade and Investment Agreements for Water and Water Services: Some Responses from Other Sources of International Law*, 5 Transnational Dispute Management (2006); Gus Van Harten, *Five Justifications for Investment Treaties: A Critical Discussion*, 2 (1) TRADE, L. & DEV. 19 (2010).

110. *See* Rudolf Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37(4) N.Y.U. J. INT'L L. & POL. 953,954 (2005).

The general standards of treatment found systematically in a bilateral agreement include absolute norms and standards.[111] This generally means that the absolute standards are those that set out the treatment to be given.[112] The standards define the required treatment by reference to the treatment accorded to other investments. However, it should be noted that "absolute" terms and "relative" terms are not universally accepted. Generally, bilateral treaties can therefore include several provisions on absolute standards for the treatment to be accorded. BITs provide several clauses that are part of the absolute standard of treatment accorded to investments.[113] These provisions for the FET, full protection and security, the prohibition of arbitrary or discriminatory measures and treatment in accordance with international law, and one or more provisions relating to the treatment.[114] BITs use two different terms in order to prevent the discriminatory treatment of investments. These are the Most Favored Nation (MFN) clause and the NT standard. We discuss below the applicability of these two types of treatment in bilateral treaties, as well as exceptions to these two treatment standards.[115]

A major reason why many developed countries took the initiative to conclude bilateral treaties during the 1960s was to protect their investments abroad. Investment protection is defined as "the set of principles and rules of international law as of national law, which have the object or effect of preventing or suppressing any public affect the existence or the consistency of

111. *See* Stephen Jagusch & Nicole Duclos, *Compensation for the Breach of Relative Standards of Treaty Protection*, 10 J. WORLD INV. & TRADE 515, 516 (2009).

112. Moshe Hirsch, *Conflicting Obligations in International Investment Law: Investment Tribunals' Perspective*, in THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY 323, 324–5 (T. Broude & Y. Shany eds., Hart 2008).

113. *See* Jesse Kennedy, *Autocatalysis in Investment Treaty Law*, 47 GEO. J. INT'L L. 1035 (2015-2016).

114. See *id.*; Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201 (1988).

115. *See* Julien Chaisse, *The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration*, 11 HASTINGS BUS. L.J. 225 (2015). See also Giorgio Sacerdoti, *BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defense of Necessity*, 28 ICSID REV. 351, 382 (2013); *see also* Julien Chaisse, *Exploring the Confines of International Investment and Domestic Health Protections—Is a General Exceptions Clause as a Forced Perspective*, 39 AM. J.L. & MED. 332, 358–59 (2013).

international investment."[116] The protection regime is intimately linked to the notion of permanent sovereignty, and its rules and principles laid down by the domestic law of the state of the investment of territoriality, cover all the problems of expropriation and nationalization. Thus, the States of investors, especially in developed countries, do not want to depend on choices made by the South. Therefore, the clauses designed to protect investments in the bilateral treaties are of particular importance. These are, in general, the provisions designed: (1) to prevent investments against expropriation; (2) against war and civil unrest; (3) for the transfer of payments; (4) for specific protection clauses; and (5) also other provisions concerning the general exceptions.

This increased importance of IIAs necessitates an understanding of the scope of their application, with which a state must comply. The most important issues of comprehension related to the scope of application in IIAs include the following: what is the definition of "investor" and "investment?[117] When

116. Julien Chaisse & Lisa Li, *Shareholder Protection Reloaded Redesigning The Matrix Of Shareholder Claims For Reflective Loss*, 52 STAN. J. INT'L L. 51, 61 (2016).

117. Treaty obligations only apply to the "investments" of "investors," as defined in the treaty. Julien Chaisse, *Renewables Re-energized? The Internationalization of Green Energy Investment Rules and Disputes*, 9 J. WORLD ENERGY L. & BUS. 269 (2016). The key question is: who is an investor and what is an investment? To address this question, countries should think about the following issues: What kind of investments will benefit from the treaty obligation? Generally, capital exporting states would like to have a broad definition to ensure that their investors are protected regardless of the form of their investment. Host states may be concerned that a broad definition of investment may create a substantial risk of investor–state claims. Host states may also be concerned about whether there are any areas of state policy that would be affected by the scope of the definition. For example, some countries would not like to include state debt obligations in order to have flexibility to deal with such obligations in the face of a balance-of-payments crisis. What type of investment would a state like to attract? Does a host state want to attract FDI or portfolio or both? Most IIA definitions extend the scope of the agreement to a much broader conception of investment. Commonly a broad definition is adopted in IIAs which is called an "Open Ended Definition" that includes every kind of asset (even intellectual property, etc.). More recently a "Closed Ended Definition" has also been introduced in IIAs which limits investment to categories that are specified in a list. In such cases, however, sometimes the list could be quite long. In both cases, the definition may or may not require that investment must possess the characteristics of classical concept of investment to qualify for protection. The Malaysia-Pakistan Closer Economic Partnership 2007 does require that some of these characteristics are present. *See* Malaysia-Pakistan Closer Economic Partnership Agreement, Malaysia-Pak., art. 88(1)(d), Nov. 8, 2007, http://fta.miti.gov.my/miti-fta/resources/auto%20download%20 images/55892379ea5d1.pdf ("Where an asset lacks the characteristics of an

should the treaty obligations start? Does the treaty cover only new investments after the treaty is in place, or is it also valid for existing investments? When does the treaty obligation end? Upon termination of the treaty should the obligations end or continue for a specified period of time for existing investments?

B. THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

As discussed in the Introduction, the controversy over SCEs is essentially about the interaction of two very different concepts of the role of government in a capitalist economy, *i.e.*, state capitalism as opposed to market capitalism. There is a potential for abuse or corruption where elements of state capitalism interfere in a tradition of market capitalism. This may arguably be created by the greater proximity an SCE creates between governments and the private sector. This particularly applies to services like banks.[118] If an SCE cannot directly rely on the WTO dispute procedure, its close connection to the government may be presumed as rendering the claim natural by its government against a host country.[119]

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investment, that asset is not an investment regardless of the form it may take. The characteristics of an investment include the commitment of capital, the expectation of gain or profit, or the assumption of risk."). Article 88 requires that in addition to Open Ended Definition, there is a Qualification Note to be applied for eligibility of an investment. *Id.*

118. The China Investment Corporation (CIC) has already strongly invested in this financial sector; a growing network of interlinked investments between banks and other financial firms within China and overseas can be assumed. In practice, CIC's investment in companies such as Morgan Stanley may provide them with unfair preferential access to China's domestic financial markets, or, in return, overseas financial firms may be put under pressure to treat Chinese companies in global business preferentially compared to others. Neutrality of the business sector and a level playing field for MNEs worldwide is at stake. Julien Chaisse et al., *Managing India's Foreign Exchange Reserve: Managing India's Foreign Exchange Reserve: An Exploration of the SWF Temptation*, INDIAN J. INT'L ECON. L. 2010 (3), 20.

119. The WTO agreements provide extensive rights and impose many obligations on its members and on their conduct of international trade. A key issue is how the WTO assesses and enforces those rights and duties. A critical part of any enforcement mechanism is an effective system to resolve disputes over what the rules mean and whether they have been broken in a specific case. This is essential to promote compliance with these rules. Article XXIII of the GATT 1994 and the DSU set out the basic institutional and jurisdictional scope of WTO dispute resolution. *See* General Agreement on Tariffs and Trade art. 23, Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153, https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf [hereinafter GATT]; *see also* Understanding

There is little doubt that WTO GATS does apply to potential SCEs' investments. The GATS mostly concerns investment issues of all the existing WTO agreements. Although GATS does not deal officially with investment, it covers FDI through its commercial presence.[120] This Section will answer two questions: does the GATS apply to SCE operations, and, if yes, is it possible to have investment disputes at the WTO?

Also, some countries have explicitly excluded foreign government ownership from the scope of their GATS commitments in a few sectors. The United States' commitment states that government-owned or government-controlled insurance companies, whether domestic or foreign, are not authorized to conduct business in a large number of states, and in basic telecommunications, radio, and television broadcast services licenses may not be granted to or held by foreign governments or the representatives thereof.[121] In the sector of audiovisual services and the sub-sector of "Radio and Television Transmission Services." the United States has set some restrictions on the nature of the foreign investors, and these implicitly exclude SOEs from the said sector.[122] The United

on Rules and Procedures Governing the Settlement of Disputes, annex II, Apr. 15 1994, https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf. The latter document has established a unified and compulsory dispute settlement mechanism for all covered agreements adopted under the umbrella of the WTO. *Id.* It comprehensively codifies the relevant procedural rules and guidelines. The same core principles apply to any dispute across all agreements and subject-matters (with only few exceptions of special or additional rules contained in covered agreements applicable as *lex specialis* only to disputes arising under that agreement). Fundamentally, the mechanism is explicitly designed to promote the rule of law and to provide security and predictability to the multilateral trading system. Hence, it ensures that the approach taken by panels and the Appellate Body is of an essentially legal nature. The WTO does not grant direct access to its work or meetings for any actor other than the members. This holds equally true for dispute settlement proceedings to which only members can formally become a party. Private actors and individuals such as industries, consumers and NGOs cannot initiate a formal dispute resolution proceeding, let alone have standing before panels or the Appellate Body. Governments alone decide whether a complaint shall be brought before the WTO dispute settlement system. This mechanism reflects classical diplomatic protection of individuals and groups by nation states as developed under general public international law.

120. The GATS modes of supply are: cross-border supply, consumption abroad, commercial presence, and the movement of natural persons. *See Modes of Supply*, UN TRADE STATISTICS, https://unstats.un.org/unsd/tradekb/Knowledgebase/50665/Modes-of-Supply.

121. U.S. INT'L TRADE COMM'N, U.S. SCHEDULE OF COMMITMENTS UNDER THE GENERAL AGREEMENT ON TRADE IN SERVICES 55 (1998).

122. *Id.* at 47.

States schedules state:

> Radio and television licences may not be held by: a foreign government; a corporation chartered under the law of a foreign country or which has a non-U.S. citizen as an officer or director or more than 20 per cent of the capital stock of which is owned or voted by non-U.S. citizens; a corporation chartered under the laws of the United States that is directly or indirectly controlled by a corporation more than 25 per cent of whose capital stock is owned by non-U.S. citizens or a foreign government or a corporation of which any officer or more than 25 per cent of the directors are non-US citizens.[123]

In the sector of financial services, as with all subsectors, "[f]oreign ownership of Edge corporations is limited to foreign banks and US subsidiaries of foreign banks, while domestic non-bank firms may own such corporations."[124]

The establishment of a commercial presence relates substantially and directly to investment. As long as a SCE decides to invest in a WTO country member (i.e., the United States or the EU), and if it is in the services sector, GATS is a relevant legal instrument to use.

It is only by reference to a country's schedule, and its MFN exemption list, that it can be seen which services sectors and under what conditions the basic principles of the GATS (Market access, NT, and MFN treatment) apply within that country's jurisdiction. A specific commitment in a services schedule is an undertaking to provide market access and NT for the service activity in question on the terms and conditions specified in the schedule.[125] The commitments made in the field of "commercial presence" are important since with the constitutional principle of obligation, parties to GATS are committed to treating services and service providers from one member in a no less favorable way than like services and service providers from any other as concerns measures affecting trade in services.[126] NT is, however,

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123. *Id.* at 48.

124. *Id.* at 64.

125. *Guide to Reading the GATS Schedules of Specific Commitments and the List of Article II (MFN) Exemptions*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (last visited Feb. 14, 2018).

126. The wording of MFN treatment in GATS is the same as in NAFTA and the United States BITs, using the negative list approach, once it states that with respect to any measure covered by this Agreement, each member shall

not automatically accorded across the board. It applies only for scheduled sectors when the parties agree to provide NT in the context of specific market access commitments.[127] GATS also states that a member may maintain a measure inconsistent with MFN treatment provided that such a measure is listed in, and meets the conditions of the Annex on Article II Exemptions.[128]

The GATS does not set out any operational conditions directly. The host countries continue to regulate foreign investment through their domestic legislation (as discussed above) and not by directly imposing obligations on foreign investors in IIAs. Nevertheless, there are some general obligations within GATS that certainly affect the investment operational conditions. Such obligations are: domestic regulation, recognition, monopolies and exclusive service suppliers, and business practice obligations.[129]

The domestic regulation affects the operation of investment mostly through an authorization process, qualification requirements, technical standards and licensing requirements, where these conditions and procedures are required for the supply of a service. The obligations of recognition affect investment in the supply of a service, where services suppliers need to meet standards or criteria for the authorization, licensing, or certification of their services, or where they need to achieve special education or experience.[130] The obligation on monopolies and exclusive service suppliers within the Agreement states that each member shall ensure that any monopoly supplier of a service in its territory does not act in a manner inconsistent with the MFN treatment principle.[131] If a supplier fulfills the condition on monopoly and exclusive service supplier, then this Agreement will certainly affect the operation of his or her investment in order not to allow such a supplier to abuse its monopoly position. Regarding the obligations on business practices, the Agreement appeals the members to eliminate certain business practices of service suppliers that

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accord immediately and unconditionally to services and service suppliers of any other member treatment no less favorable than that it accords to like services and service suppliers of any other country.

127. *Guide to Reading the GATS Schedules of Specific Commitments and the List of Article II (MFN) Exemptions, supra* note 125.

128. *Id.*

129. *See* General Agreement on Trade in Services, Jan. 1, 1995, 1869 U.N.T.S. 183, 33 I.L.M. 1167 [hereinafter GATS].

130. *Id.* art. 7.

131. *Id.* art. 8.

may restrain competition and thereby restrict trade in services.

III. STATE CONTROLLED ENTITIES AS CLAIMANTS: LEGAL STANDING UNDER INVESTMENT TREATIES

As this Article previously discussed, SCEs from China, France and the United States are increasingly active in transnational investment operations. Simultaneously, the role of international investment agreements reaches a level never known in its history. This creates new legal questions as none of these rules of international law are designed to regulate foreign public investments and indirectly the activities of SCEs. In particular, the global regime for international investment was not thought to be designed to allow SCEs to act as a claimant before an international tribunal. However, that question is now a reality, challenging the fundamentals of international law.

The Investor State Dispute Settlement is a particular feature of IIAs which differentiates them from all other types of treaties.[132] Investors from one party state are permitted to seek financial compensation from the other party state through binding arbitration on the grounds that the other has failed to comply with its obligations under the treaty.[133]

According to the United Nations Conference on Trade and Development (UNCTAD), the number of cases launched now exceeds 550.[134] These disputes have been filed with the International Center for Settlement of Investment Disputes (ICSID)[135] (or the ICSID Additional Facility) which has dealt with the largest number of disputes.[136] ICSID arbitration

132. *See* Chaisse, *The Treaty Shopping Practice*, *supra* note 115.

133. It fulfills investors' needs in the following ways. It avoids exposure of the investor to the uncertainties of host state laws and regulation by creating a separate treaty-based set of rules to govern host state's conduct. It gives investors an alternative to the host state's judicial system to seek relief from the host state's actions. An investor can determine when there has been a breach of a treaty obligation and launch a claim. It is unnecessary for an investor to rely on its home state espousing its claim. There may be various reasons why a state may not want to make a claim against another state in diplomatic relations. Julien Chaisse & Dini Sejko, *Investor-State Arbitration Distorted: When the Claimant Is a State, in* JUDGING THE STATE IN INTERNATIONAL TRADE AND INVESTMENT LAW: SOVEREIGNTY MODERN, THE LAW AND THE ECONOMICS 86 (Leïla Choukroune ed. 2016).

134. *Id.*

135. *Id.* at 86 n.36.

136. *Database of ICSID Member States*, WORLD BANK, https://icsid.world

possesses have several characteristics that make it particularly attractive for investors. For instance, an ICSID award is not subject to any review not foreseen in the ICSID Convention, and it is to be recognized by the contracting states as if it were a final judgment of a court in that state.[137] In addition, host states have a strong incentive to comply with ICSID awards because of the institutional link of ICSID to the World Bank.[138]

The concept of 'legal standing' refers to the ability of a party to demonstrate to the court/dispute resolution institution sufficient connection to and harm from the law/treaty or action challenged to support that party's participation in the case.[139] Most investment treaties offer a solution that gives independent standing to shareholders: the treaties include shareholding or participation in a company in their definition of 'investment'.[140] Mark Feldman identified that the disputes between investor and State within the scope of investment treaty protections are reflected in both the ICSID and in BITs.[141] The ICSID was intended to fill a narrow procedural gap that existed between State-to-State and private disputes and facilitate the settlement of disputes arising from private, but not public, foreign

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bank.org/en/Pages/about/Database-of-Member-States.aspx (last visited Nov. 4, 2007); Hernando Otero & Omar García-Bolívar, *International Arbitration between Foreign Investors and Host States*, HAUSER GLOBAL LAW SCHOOL PROGRAM http://www.nyulawglobal.org/globalex/International_Arbitration_Foreign_Investors_Host_States.html. *See* Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road,* 5 J. WORLD INV. & TRADE 229, 231 (2004) (pointing out that most BITs refer to ICSID). More than 140 states are parties to the ICSID Convention. *List of Contracting States and Other Signatories of the Convention*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (Nov. 4, 2007), https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf. Investment disputes may also be settled under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), the Stockholm Chamber of Commerce, the International Chamber of Commerce, and ad-hoc arbitration.

137. *See* Chaisse & Sejko, *supra* note 133 , at 87.

138. *See ICSID and the World Bank Group,* ICSID, https://icsid.worldbank.org/en/Pages/about/ICSID%20And%20The%20World%20Bank%20Group.aspx (describing ICSID as one of the five organizations of the World Bank).

139. *See Standing*, BLACK'S LAW DICTIONARY (10th ed. 2014).

140. *See* DOLZER & SCHRUER, *supra* note 105, at 57.

141. *See* Mark Feldman, *The Standing of State-Owned Entities Under Investment Treaties, in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 615 (Andrew K. Bjorklund ed. 2012).

investment.[142] Therefore, the "legal standing" in the context of investment arbitration is based on thousands of BITs and the ICSID Convention. Those investment arbitrations are mostly to take place in the ICSID (i.e. an international arbitration institution which facilitates legal dispute resolution and conciliation between international investors). In this Section, the Article reviews the most important cases brought to arbitration dealing with the issue of SCEs legal standing (For a detailed summary of all cases, including pending cases, see *Annex 1*).

Standing is a material question in all cases. SCEs may be reluctant to submit disputes to such arbitral panels without assurances that the panels would confer jurisdiction. By way of example, Temasek Holdings, the sovereign wealth arm of Singapore, apparently chose not to submit a dispute with Indonesia over telecom investments to an international investment dispute process despite (a) the existence of a BIT between the two states, and (b) the implication in the new ASEAN Comprehensive Investment Agreement that sovereign wealth fund investors should be treated similarly to private foreign investors for BIT purposes.[143]

A. AN INVESTOR BY ANY NAME?

One of the most important issues in an investment treaty is to define who is an investor whose rights are protected under the treaty.[144] Investors must be related to the state party to the treaty other than the one complained against. This arrangement must be the case to benefit from the investor protection obligations in the host state.[145] The issue to be addressed is what

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142. *See id.*

143. *See, e.g.*, P.R. Venkat, *Indonesia Fines Temasek $1.7 Million*, WALL ST. J. (Jan. 18, 2011), http://www.marketwatch.com/story/indonesia-fines-temasek-17-million-2011-01-18 (reporting on the result of Temasek's submission of claims to an Indonesian domestic court).

144. For an example definition of "investor" *see* Agreement Between the Government of Canada and the Government of the Republic of South Africa for the Promotion and Protection of Investments, Can.-S. Afr., art. I, Nov. 27, 1995, http://www.sice.oas.org/Investment/BITSbyCountry/BITs/CAN_Southafrica_e.asp.

145. BITs offer foreign investors a unique dispute settlement mechanism to enforce the rights given to them by the investment treaties. This unique element of investment treaties provides an investor with the possibility of bringing a direct claim against the host state in an international arbitration forum, such as the International Center for Settlement of Investment Disputes

connection between an investor and a state is required. Typically, for natural persons, a national of a state party to the treaty or a citizen of the state is considered to be an investor of that state. The nationality is determined by the law of the state whose nationality is to be claimed to the extent not addressed in the treaty. Dual nationality, like in the case of many developing countries, may be permitted by state law. The possibility of dual nationality raises the question of whether dual nationals are allowed to be protected under the treaty if they have the nationality of the host state. The majority of treaties do not give an answer to this but provide a way to analyze this question. For example, treaties ask which state a person has the most substantial connection as a way of defining nationality for the purposes of the treaty. Residency in a specific state is typically not required.[146]

The next issue is what or who is a legal or juridical person, such as a corporation? IIAs typically require that a legal person be incorporated or organized under the domestic laws of a party to claim its nationality.[147] It is quite simple for foreigners to meet this condition and to therefore qualify for treaty protection. It is also easy for host states to determine whether a person legally qualifies for protection. The problems with such a definition is that it leads to very broad protection, and thus it may need to be confined with some conditions. This need depends on the domestic policy of the host state. Some states may not want further limits because they may want to make it as easy as possible for investors to qualify for protection under the treaty. Other states may be concerned about "treaty shopping." Where simple incorporation in a country gives an investor the nationality of that country there is a risk that investors may take advantage of treaty protection. They could do this by simply incorporating a subsidiary in one party state for the purpose of making an investment in another party state. A domestic

(ICSID) or the International Chamber of Commerce (ICC). A discriminatory act against an SWF can be followed by a direct claim by the SWF against the host state based on the applicable investment treaty between the host state and the home state of the SWF. Assuming successful passage through any jurisdictional challenges, an arbitration forum will have to decide whether the legislative or executive act can be considered a discriminatory measure that violates an investor protection standard. *See* Chaisse & Sejko, *supra* note 133, at 88.

146. *See* Agreement Between Canada and South Africa, *supra* note 144.

147. Chaisse & Sejko, *Investor-State Arbitration Distorted: When the Claimant Is a State, in* JUDGING THE STATE IN INTERNATIONAL TRADE AND INVESTMENT LAW: SOVEREIGNTY MODERN, THE LAW AND THE ECONOMICS, *supra* note 133, at 589.

investor in one party state could even seek the protection of the treaty against its own government by channeling an investment through a subsidiary in the other party state back into the first party state. Some countries, like Mauritius, that want to be international business hubs are not concerned about this problem, but other countries may want to manage their exposure to treaty obligations and are interested in targeting only a narrow class of investors.[148]

Another alternative to address treaty shopping is a "denial of benefits" provision. Instead of incorporating requirements in the treaty definition of investor, a host state can deny the benefits of a treaty with a denial of benefits provision if particular criteria, such as seat, ultimate ownership, or substantial business presence in a party state, cannot be established by the investor.[149] For example in *Phoenix Action*, an investor who was a Czech national had a dispute with the Czech government.[150] He subsequently incorporated a corporation in Israel and transferred his investment to the Israeli corporation with the goal of making the investment eligible for protection under the Czech–Israel BIT.[151] As an Israeli firm, that investor launched a claim against the Czech Republic.[152] A hypothetical denial of benefits provision that contained a substantial "business activity in Israel" requirement could have been used to deny the benefits of the treaty to the investor.[153] Some cases

148. To avoid treaty shopping, certain limitations are used in IIAs: (1) they require the ultimate owners who control investment to be nationals of the home state party. This is a rare approach in IIAs but would avoid misuse of protection. Such an approach is used in the Germany–Antigua and Barbuda BIT. TNCs often have quite complex structures making it difficult to determine where ultimate control resides, and (2) they require a legal person to have substantial business activity, or its seat (location of effective management), head office or some other significant connection in a state party. This is a common approach adopted in IIAs, but it is quite vague leading to uncertainty when the issue is addressed in investor–state tribunals. Sometimes tribunals, in interpreting the requirement for the seat to be in a party state have required a minimal connection. For example, in one case it was held that if one director is resident in the jurisdiction and the corporation files its financial statement in that country, the seat of the corporation is in that country. Hence the application of this requirement can be hard to predict in practice.

149. Lindsay Gastrell & Paul-Jean Le Cannu, *Procedural Requirements of 'Denial-of-Benefits' Clauses in Investment Treaties: A Review of Arbitral Decisions*, 30 ICSID REV. 78, 79 (2015).

150. Phoenix Action v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 2 (Apr. 15, 2009).

151. *Id.* ¶ 22.

152. *Id.* ¶ 6.

153. *See id.* ¶ 38.

have interpreted denial of benefits provisions as requiring that states must give notice of a denial of benefits before a claim is filed. Whether this is a requirement will depend on how a "denial of benefits" provision is drafted.

IIAs, being instruments of cooperation for the promotion, protection, and liberalization of foreign investment, have increased over recent years, and they grant rights to SCEs as long as they are "qualified investors," as defined in the IIA. The legal framework of investment agreements has also evolved significantly, and thus the accompanying jurisprudence raises new questions about the interpretation and implementation of IIAs for governments and investors both in developed and developing countries. One feature of many investment agreements that have contributed to calls for a balancing of investor rights with responsibilities has been the grant of direct legal personality to investors; *i.e.*, enabling them to mount an international arbitration against host states. Most recent investment agreements provide recourse to so-called investor–state arbitration.[154] If SCEs can operate as "qualified investors," then the main question is whether SCEs can successfully use the investor–state dispute settlement mechanism, or whether they have to rely on traditional state-to-state channels. I will deal with the specific case of ICSID in a subsequent section.

BITs or preferential trade agreements (PTAs) apply only to investments made by "investors" of one of the contracting parties in the territory of the other party.[155] Most BITs have traditionally included a definition of "investor," which covers both natural and legal persons.[156] Concerning natural persons (which is relevant only when discussing SCEs), most IIAs protect persons who have the nationality of one of the contracting parties. Thus, the typical definition of a national of a state party is a natural person recognized by that party's internal law as a national or citizen.[157] Investments made by persons not covered

154. Gastrell & Cannu, *supra* note 149, at 84.

155. *The Arbitration Game*, ECONOMIST (Oct. 11, 2014), https://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration.

156. *See* SUZY H. NIKIÈMA, INT'L INST. FOR SUSTAINABLE DEV., BEST PRACTICES DEFINITION OF INVESTOR 1 (2012), http://www.iisd.org/pdf/2012/best_practices_definition_of_investor.pdf.

157. Sometimes, the "investor" definition is broadened to include not only citizens but also individuals who qualify as permanent residents under domestic law. *See, e.g.*, Agreement Between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments,

under that definition will fall outside of the scope of the agreement. The definition of "investor" specifies what types of legal entities are covered. Such a provision helps to answer whether an SCE is covered in a specific situation because either there is an explicit mention or there is none.

1. State-controlled Entities Explicitly Covered Investors

During the United States' preparation of the new 2012 United States BIT model,[158] there was considerable discussion about extending the coverage of BIT investment protections to state-owned enterprises. Only one change from the 2004 Model BIT was made in response to those discussions. The only modification was to include a footnote to Article 2.2(a) making it clear that the application of the substantive obligations of the BIT "to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party" covered government delegations effected by a wide variety of regulatory means, including the broad term "party action."[159] This language aims to address concerns that governments can delegate such governmental authority to state-owned enterprises through less formal means, even though the state-owned enterprise is effectively acting as a government entity at the government's effective delegation. Of course, evidentiary proof of such an allegation will be a challenge in most circumstances. The United States government declined to adopt proposals for an inward screening mechanism for investments by state-owned enterprises or to regulate the competitive activities of state-owned enterprises under the BIT even when acting in a commercial manner.[160]

H.K.-Austl., art. 1(f)(i)(A), Sept. 15, 1993, [1993] ATS 30. Natural persons having the nationality of both BIT parties under their respective laws: One possibility, following the international law principle of an effective link, is to consider a person as a national of the country of his/her dominant and effective nationality.

158. The United States concludes all of its BITs based on a model. The U.S. Department of State and the United States Trade Representative along with other agencies completed a 2012 Model BIT. *See Bilateral Investment Treaties and Related Agreements*, U.S. DEP'T ST., http://www.state.gov/e/eb/ifd/bit (last visited July 31, 2015). For the text of the 2012 Model BIT, *see also 2012 U.S. Model Bilateral Investment Treaty*, U.S. DEP'T ST., http://www.state.gov/documents/organization/188371.pdf (last visited July 31, 2015) [hereinafter *2012 Model BIT*].

159. *2012 Model BIT*, *supra* note 158, art. 2(a), n.8.

160. Charlene Barshefsky et al., *United States to Resume Bilateral*

The recent result of the United States' attempts to refine the definition of "investor" and to decide whether SCEs should be explicitly incorporated is not surprising. Other treaties do provide an explicit reference to SCEs. For instance, a provision relevant to the issues of ownership and control presented in this case is Article 1139 of the North American Free Trade Agreement (NAFTA), which defines "investment of an investor of a Party" as follows:

> [I]nvestment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party. Investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment.[161]

In the BIT between the United Arab Emirates and South Korea (2004), Article 1.3 reads "investors" to mean any natural or juridical persons of one Contracting Party, governmental or private, who invest in the territory of the other Contracting Party: (a) the term "natural persons" means natural persons having the nationality of one Contracting Party in accordance with its laws; and (b) the term "juridical persons" means any entity such as companies, public institutions, authorities, foundations, partnerships, firms, establishments, organizations, corporations or associations, incorporated or constituted in accordance with the laws and regulations of one Contracting Party."[162] Similarly, Article 1.4 of the United Arab Emirates–Finland 2005 BIT explicitly mentioned financial institutions and investment authorities as protected foreign investors. According to Article 1 of this treaty, "[t]he term investor means 'The government of the contracting state and any other legal person, such as public and private companies, financial institutions and investment authorities, having its seat in the territory of either

Investment Treaty Negotiations on the Basis of a Revised Model Treaty, WILMERHALE (May 15, 2012), https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=89748.

161. North American Free Trade Agreement, Can.-Mex.-U.S., art. 1139, Dec. 17, 1992, 32 I.L.M. 289 , 648 art. 1139 (1993) [hereinafter NAFTA].

162. Agreement Between the Government of the Republic of Korea and the Government of the United Arab Emirates for the Promotion and Protection of Investments, S. Kor-U.A.E., art. 1.3, June 9, 2002, https://treaties.un.org/doc/Publication/UNTS/No%20Volume/49761/Part/I-49761-080000028033111c.pdf.

contracting state."[163]

2. State-controlled Entities Not Explicitly Covered Investors

Although some treaties may explicitly refer to SCEs, a large majority of IIAs simply do not make any mention of them generating some ambiguity as for the applicability of investment treaties to SCEs.[164] In this situation, one may be tempted to follow a strict logic and conclude that if state entities are not mentioned among the investors covered by the treaty, they should not be protected by the treaty. A key legal argument would be that a state operating as an economic actor is in any case protected by the customary rules of international law. However, in the absence of an explicit mention of SCEs, ambiguity can only be settled by proper tribunal interpretation.

B. The Treatment of SCEs Claims by Investment Tribunals

One feature of many IIAs that has contributed to calls for a balancing of investor rights with responsibilities has been the grant of direct legal personality to investors, enabling them to mount international arbitrations against host states. Most recent investment agreements provide recourse to so-called investor-state arbitration "which entitles an injured investor to sue the host government for damages because of a violation of treaty standards and rights."[165] This novel device has permitted investors to challenge government measures, policies or actions which are thought to contravene the substantive provisions of a given treaty.

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163. Agreement between the Government of Finland and the Government of the United Arab Emirates on the Promotion and Reciprocal Protection of Investments, Fin.-U.A.E., art. 1.4(a), Apr. 12, 1996, 1981 U.N.T.S. 116.

164. For example in the Singapore–PRC BIT 1985 the definition of juridical person does not explicitly include SCEs as investors covered by the treaty. The definition covers only companies and it means: "(a) in respect of the People's Republic of China, a company or other juridical person incorporated or constituted in its territory in accordance with its laws; (b) in respect of Singapore, any company, firm, association or body, with or without legal personality, incorporated, established or registered under the laws in force in the Republic of Singapore." Agreement on the Promotion and Protection of Investments, China-Sing. art 1, Nov. 21, 1985, 1986 U.N.T.S. 293.

165. Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 446 (2010).

The investor–state mechanism has given rise to a substantial volume of litigation in recent years. In stark contrast, the WTO dispute settlement rules are exclusively reserved for state-to-state disputes. On the basis of investor-state arbitration provisions, disputes between a state party and an investor national of the other state are settled by international arbitration rather than by the domestic courts of the host state (as would be the case otherwise). The host government's consent to the jurisdiction of an international arbitration tribunal is granted *ex ante* in the form of an open offer in either the investment treaty or in its national law. Over the last few years, investment disputes brought before international arbitrators have multiplied, and they have attracted attention by reason of the significant compensations host states have had to pay in some instances.[166]

1. A Review of Cases Filed by SCEs

This Section offers a review of the case law dealing with SCEs and SWFs. Although there are not many cases, this section focuses on the most important cases. Those cases mentioned in this section can foster a better understanding of how SCEs have been treated by the tribunals. There are in total nine investment claims which have been filed by SCEs (*see Annex 1*). The present Section only reviews decided cases. Among them, the most interesting are the four following awards: *Ceskoslovenska Obchodni Banka, A. S. v. The Slovak Republic*,[167] *Hrvatska Electroprivreda v. Slovenia*,[168] *Rumeli Telekom v. Kazakhstan*,[169] and *Telenor Mobile Communications v. Hungary*.[170]

166. One notable example is the case of CME Czech Republic v. Czech Republic, a UNCITRAL arbitration under the Netherlands–Czech Republic BIT, which resulted in an award and payment of $269 million plus interest to an injured investor, one of the largest awards ever made in an arbitration proceeding. *See* CME Czech Republic B.V. v. Czech Republic (UNICITRAL), Final Award, ¶ 650 (Mar. 14, 2003); Peter S. Green, *Czech Republic Pays $355 Million to Media Concern*, N.Y. TIMES (May 16, 2003), http://www.nytimes.com/2003/05/16/business/czech-republic-pays-355-million-to-media-concern.html.

167. Ceskoslovenska Obchodni Banka v. Slovak Republic, ICSID Case No. ARB/97/4, Award (Dec. 29, 2004), 13 ICSID Rep. 183 (2008).

168. Hrvatska Elektroprivreda v. Republic of Slovn., ICSID Case No. ARB/05/24, Award of the Tribunal (Dec. 17, 2015).

169. Rumeli Telekom v. Republic of Kaz., ICSID Case No. ARB/05/16, Award (July 29, 2008).

170. Telenor Mobile Communications v. Republic of Hung., ICSID Case No.

Ceskoslovenska Obchodni Banka, A. S. (CSOB) v. The Slovak Republic (Slovakia) is a case involving a dispute related to an international investment agreement before the International Centre for Settlement of Investment Disputes (ICSID).[171] CSOB claimed that Slovakia breached the "Agreement on the Basic Principles of a Financial Consolidation of Ceskoslovenska Obchodni Banka, A. S." (Consolidation Agreement).[172] The breach consisted of the failure by Slovakia to cover the losses incurred by the Slovenska inkasni spol. s. r. o. (Slovak Collection Company).[173] CSOB required the respondent to fulfill the Consolidation Agreement: i.e., to pay the damages for the losses and cover the costs.[174] Meanwhile, Slovakia claimed that the Claimant lacked jurisdiction to claim this by applying Article 25. 1 ICSID Convention.[175] The issue of jurisdiction was the main legal issue that needed to be tackled by the Tribunal, as Article 25 ICSID only allows disputes "between a Contracting State and a national of another Contracting State."[176] Therefore, in this case, a key legal issue that arose was whether CSOB merely an agent of the Czech Republic or not.[177] Another key legal issue was whether CSOB was a qualified investor, and if so, why it was a qualified investor.[178] On May 24, 1999, the Tribunal unanimously found that the dispute was within the jurisdiction of the Centre and the competence of the Tribunal.[179] The necessary order for the continuation of the proceedings on the merits would be issued.[180] Also, the Tribunal granted the request and recommended the suspension of the bankruptcy proceedings.[181] In its reasoning,

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ARB/04/15, Award (Sept. 13, 2006), 17 ICSID Rep. 173 (2016).

171. *See Ceskoslovenska Obchodni Banka*, 13 ICSID Rep. 183 ¶ 1.

172. *Id.* ¶ 1.

173. *Id.*

174. *Id.*

175. Ceskoslovenska Obchodni Banka v. Slovk., ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, ¶ 10 (May 24, 1999),5 ICSID Rep. 335, 338.

176. Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 25, Apr. 18, 1965, 575 U.N.T.S. 159.

177. *See* Ceskoslovenska Obchodni Banka v. Slovak Republic, ICSID Case No. ARB/97/4, Award, ¶¶ 27–37 (Dec. 29, 2004), 13 ICSID Rep. 183 (2008).

178. *See id.*

179. *Id.* ¶ 3.

180. *See id.* ¶ 5.

181. Ceskoslovenska Obchodni Banka v. Slovak Republic, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, ¶ 9 (May 24, 1999), 5 ICSID Rep. 335, 338 ("[T]o the extent that such proceedings might include

the Tribunal stated that what mattered was the nature of the activities and not their purpose.[182] This case widens the scope of application of BITs and ICSID, which means that it widens the potential application of international investment law.

Hrvatska Electroprivreda (HEP) v. Slovenia is another case that involved a dispute related to an international investment agreement before the ICSID.[183] The dispute between HEP and Slovenia was about the ownership and operation of the Krško NPP, which is an important power resource for both countries.[184] HEP was seeking compensation from the respondent for the financial losses that suffered as a result of respondent's failure to resume deliveries of electricity from the Krško NPP to HEP.[185] Also, HEP asserted a claim against respondent for breaching its obligation under a2001 Agreement to restore electricity deliveries to HEP from the Krško NPP by June 30, 2002.[186] Issues of jurisdiction were not seriously contested between the parties to this arbitration.[187] On June 12, 2009, the majority of the Tribunal found that the Republic of Slovenia was liable to HEP for the financial value of undelivered electrical power from July 1, 2002 to April 10, 2003.[188] This case shows that state-controlled entities can make claims as a qualified investor.

Rumeli Telekom (Rumeli) v. Kazakhstan was a case which involved a dispute before the ICSID related to an investment contract.[189] Rumeli argued that Kazakhstan's right to challenge

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determinations as to whether the Slovenska inkasni spol. s.r.o. [Slovak Collection Company] has a valid claim in the form of a right to receive funds from the Slovak Republic to cover its losses as contemplated in the Consolidation Agreement at issue in this arbitration.") (citing Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic, ICSID Case No. ARB/97/4, Procedural Order No. 4, ¶ 1 (Jan. 11, 1999)).

182. *Ceskoslovenska Obchodni Banka*, ICSID Case No. ARB/97/4, Award, ¶ 51.

183. *See* Hrvatska Elektroprivreda v. Republic of Slovn., ICSID Case No ARB/05/24, Treaty Interpretation, ¶¶ 6–15 (June 12, 2009).

184. *Id.* ¶ 6.

185. *Id.* ¶ 13.

186. *Id.* ¶ 15.

187. *See id.* ¶ 166 ("A threshold issue is whether under the 2001 Agreement, to which only Croatia and Slovenia are parties, this Tribunal has jurisdiction over the dispute presented to it. More precisely, can HEP bring this case against the Republic of Slovenia and before us? Issues of jurisdiction were not seriously contested between the parties to this arbitration; nevertheless, some questions were asked and in any event the Tribunal is obliged to be satisfied of its jurisdiction.").

188. *Id.* ¶ 202.

189. *See* Rumeli Telekom v. Republic of Kaz., ICSID Case No. ARB/05/16,

the termination should be denied, and the compensation was not adequate because respondent wrongfully terminated the investment contract.[190] Rumeli argued the Kazakhstan should be responsible for the termination of the investment contract and liable for losses caused by it's failure to follow the BIT (the Agreement between the Republic of Kazakhstan and the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments, dated May 1, 1992).[191] In this dispute, the main legal issues were whether Rumeli was a qualified investor and whether the state must benefit from its expropriation.[192] This was similar to *Ceskoslovenska Obchodni Banka v. Slovakia*.[193] Article 25 ICSID was an important provision in the dispute. On July 29, 2008, the Tribunal found that the respondent breached its obligation by failing to follow the BIT and that expropriation may occur without any benefit to the State.[194] The Tribunal also found that the claimant was a qualified investor.[195]

2. Should SCEs Use the Investor-State Dispute Mechanism or the State-to-State Dispute Mechanism?

The main question is whether public entities can use the investor-state arbitration system or whether they have to use the state-to-state mechanism. It is an open question as the tribunal in *Tulip v. Turkey Award* held that there is no basis under international law to conclude that ownership of a corporate entity by the State triggers the presumption of Statehood; whilst State ownership may, in certain circumstances, be a factor relevant to the question of attribution, it does not convert a separate corporate entity into an 'organ" of

Award, ¶ 7 (July 29, 2008), ("On May 20, 1999, KaR-Tel and the Investment Committee executed Contract N° 0123-05-99 . . . .").

190. *Id.* ¶ 11.

191. *Id.* ¶ 12.

192. *See id.* ¶¶ 9–12.

193. *See* Ceskoslovenska Obchodni Banka v. Slovak Republic, ICSID Case No. ARB/97/4, Award, ¶¶ 27–37.

194. *Rumeli Telekom*, ICSID Case No. ARB/05/16, Award, ¶ 707 ("[T]hat the expropriation was not directly for the benefit of the State but for the benefit of Telecom Invest does not affect this conclusion, since, as the parties agree, expropriation can exist despite there being no obvious benefit to the State concerned.").

195. *Id.* ¶¶ 333–36.

the State.[196] Actually, as stated in *Electrabel v. Hungary Decision on Jurisdiction, Applicable Law and Liability*, the fact that a State acts through a state-owned or state-controlled company over which it exercises some influence is, by itself, insufficient for the acts of such entities to be attributed to the State.[197]

In 2006, the Government of the Region of Kaliningrad (Russian Federation) commenced arbitration proceedings against Lithuania based on the bilateral investment treaty between the Russian Federation and Lithuania.[198] The Government of the Region of Kaliningrad initiated arbitration, under the rules of the International Court of Arbitration of the International Chamber of Commerce (ICC).[199] The ICC arbitral tribunal found that it did not have jurisdiction over the dispute and that the application was unfounded.[200] Kaliningrad alleged that Lithuania was liable for expropriating the building owned by the Kaliningrad government (it was seized by order of the Lithuanian courts).[201] The tribunal determined that the Kaliningrad regional government qualified as an investor

196. Tulip Real Estate Investment v. Republic of Turk., ICSID Case No. ARB/11/28, Award, ¶ 289 (Mar. 10, 2014); *see also* Noble Ventures, Inc. v. Rom., ICSID Case No. ARB/01/11, Award, ¶ 69 (Oct. 12, 2005 (holding that legal entities separate from the State are not organs of the State).

197. Electrabel v. Republic of Hung., ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 7.95 (Nov. 30, 2012).

198. In substance, the Government of the Region of Kaliningrad claimed compensation for the expropriation of its assets further to the enforcement of a 2004 LCIA award which was rendered in favor of a Cyprus company against the Region of Kaliningrad (Russian Federation) for its failure to reimburse a loan. The 2004 LCIA award was enforced in Lithuania against two buildings that the Region of Kaliningrad owned there what triggered the Government of the Region of Kaliningrad claim before the ICC. *See* Cour d'appel [CA] [regional court of appeal] Paris, le ch., Nov. 18, 2010, 09/19535 (2010).

199. James Clark, *Paris Court of Appeals Rules that Enforcement of an Arbitration Award Did Not Amount to Expropriation Under a BIT*, THOMSON REUTERS: PRACTICAL LAW (Dec. 21, 2010).

200. Dmitry Davydenko, *French Judgment Unenforceable Because of Lack of Legal Certainty*, CIS ARBITRATION FORUM (Mar. 30, 2015), http://www.cisarbitration.com/2015/03/30/french-judgment-unenforceable-because-of-lack-of-legal-certainty ("The Region applied to the Paris Appellate Court to set aside the [ICC] award on jurisdiction but the Court rejected the claim. Furthermore, the Court held that the Region as a "losing party" must pay EUR 150,000 to the Republic of Lithuania under article 700 of the French Civil procedure code. Article 700 of the French Civil procedure code establishes the general rules of distribution of court expenses between the parties."); *see* Kaliningrad Region v. Lith., ICC, Final Award (not public), (Jan. 28, 2009), http://www.italaw.com/cases/593.

201. Davydenko, *supra* note 200.

according to the definition contained in the treaty.[202] The treaty refers to Russian law for guidance as to which persons and entities can be considered "investors."[203] This approach is sure to be debated in future investment treaty arbitrations, particularly given the large volumes of foreign investments made in recent years by states or parastatal entities.

Telenor Mobile Communications A. S. v. The Republic of Hungary is a case that involved a dispute related to a specific Bilateral Agreement (2001) and Energy Charter Treaty before the ICSID.[204] Telenor claimed that Hungary should pay damages for alleged losses, because respondent breached the BIT in 2002 and 2003.[205] Telenor wanted the respondent to compensate their loss, which was caused by respondent's failure to follow the BIT.[206] Meanwhile, the Republic of Hungary claimed that the application treaty (i. e., Energy Charter Treaty) limited ICSID's jurisdiction to expropriation claims; the claimant lacked standing and failed to establish a prima facie case.[207] In this dispute, the main legal issues that arose were whether the MFN clause in the treaty extended the jurisdiction of the tribunal to categories of disputes beyond those set out in the treaty itself,[208] and whether the claimant alleged facts sufficient to make out a prima facie case. On September 13, 2006, the Tribunal dismissed the Telenor's claim.[209] The Tribunal had no jurisdiction over the claim because none of the allegations rose to the level of expropriation under international law and the BIT limit jurisdiction to expropriation claims.[210] Also, the claimant failed to establish a prima facie case.[211] The Tribunal set a standard of review for investment treaty claims at the jurisdictional stage and confirmed the fundamental importance of respecting limits placed by sovereign States on

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202. *See id.*; Davydenko, *supra* note 200.

203. Agreement between the Government of the Russian Federation and the Government of the Republic of Lithuania on the Promotion and Reciprocal Protection of the Investments, Lith.-Russ., art. 1(1)(b), June 29, 1999.

204. *See* Telenor Mobile Communications v. Hung., ICSID Case No. ARB/04/15, Award, ¶ 16 (Sept. 13, 2006).

205. *Id.* ¶ 17.

206. *See id.* ¶ 17(1).

207. *Id.* ¶ 18.

208. *See id.* ¶ 20.

209. *Id.* ¶ 108(1).

210. *See* Telenor Mobile Communications v. Hung., ICSID Case No. ARB/04/15, Award, ¶ 102 (Sept. 13, 2006).

211. *Id.* ¶ 102(1).

their consent to international arbitration.[212]

3. Are SCEs Entitled to Make a Claim before the ICSID?

The access of public investors to ICSID is another controversial issue because it is not clear whether public investors can be considered "investors."[213] As stipulated in Article 25.1, "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."[214] A question immediately emerges when reading Article 25: Does the ICSID focus on private investment? According to its preamble, the ICSID was established with regard to "the role of private international investment."[215]

In ICSID case law, arbitrators have excluded jurisdiction over disputes between two states. It stated in the *Maffezzini* case (2000) that "[j]ust as the Centre has no jurisdiction to arbitrate disputes between two States, it also lacks jurisdiction to arbitrate disputes between two private entities. Its main jurisdictional feature is to decide disputes between a private investor and a State."[216] Moreover, the decision in the case *Ceskoslovenska Obchodní Bankav v. Slovak Republic* explained that:

> The language of Article 25(1) of the Convention makes clear that the Centre does not have jurisdiction over disputes between two or more Contracting States. Instead, the dispute settlement mechanism set up by the Convention is designed to deal with disputes between

212. *See id.* ¶ 97.

213. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Treaty] (explaining the jurisdiction of the ICSID). *See generally* CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY (2d ed. 2009) (providing an in depth look at the ICSID Convention).

214. ICSID Treaty, *supra* note 213, art. 25(1).

215. *Id.* pmbl.

216. Maffezini v. Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, ¶ 74 (Jan. 25, 2000).

> Contracting States and nationals of other Contracting States.[217]

Actually, in ICSID case law, arbitrators have set a condition of control on jurisdiction over disputes between a state and a SCE. It is again in the *Ceskoslovenska* case that the issue was discussed which elaborated that:

> Although the concept of "national", as that term is used in Article 25(1), is in Article 25(2) declared to include both natural and juridical persons, neither term is defined as such in the Convention. The legislative history of the Convention does provide some answers, however, that bear on the issues presented in this case. It indicates that the term "juridical persons" as employed in Article 25 and, hence, the concept of "national," was not intended to be limited to privately-owned companies, but to embrace also wholly or partially government-owned companies. This interpretation has found general acceptance.[218]

There is no exclusion *a priori* of public investors but arbitrators underscore that "[w]hile it cannot be doubted that in performing the above-mentioned activities, *Ceskoslovenska Obchodni Banka* was promoting the governmental policies or purposes of the State, the activities themselves were essentially commercial rather than governmental in nature."[219]

In the same vein, the *GEA v. Ukraine Award* found that an attempt to make the respondent liable for the actions of a former state-owned entity could not succeed because the record made it clear that the company was a separate legal entity, acting entirely in a commercial capacity, for which the respondent was not responsible.[220] It seems that arbitrators wanted to rely on a criterion which would be the nature of the economic activities without, however, providing detailed criteria by which to enable a better definition of such an activity. In the current scenario,

217. Ceskoslovenska Obchodni Banka, A. S. v. Slovk., ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶ 16 (May 24, 1999).

218. *Id.*

219. *Id.* ¶ 20.

220. GEA Group Aktiengesellschaft v. Ukr., ICSID Case No. ARB/08/16, Award, ¶ 262 (Mar. 31, 2011).

one can simply observe that tribunals have slightly stretched the ICSID convention to allow SCEs, when they act on a commercial basis, to access international arbitration. In that sense, the whole global investment regime has been adjusted to the reality of new SCE actors. In essence, the nature of the economic activities has become more important than the nature of the SCEs.

Another important legal issue is the sequence of events in an ICSID claim. Should a tribunal first look at Article 25 (quite narrow) or start with the BIT definition (usually broader). All this might be relevant to the discussion around the notion of investor under ICSID (*i. e.*, the legal standing of SCEs under ICSID). Overall, it seems that there is no clear-cut methodology. In the *Tokies Tokeles* disputes, Professor Weill issued a dissenting opinion. He said that:

> To decide the jurisdictional issue the Decision should, therefore, have checked *first* whether the Tribunal has jurisdiction under Article 25 of the Convention—interpreted, as the decision recalls, in light of its object and purpose—and *then*, in a second stage, whether it has jurisdiction *also* under the bilateral investment treaty. It is only if the tribunal had reached the conclusion that it has jurisdiction under the Convention that it would have had to examine whether it has jurisdiction also under the BIT. This, however, is not how the Decision proceeds. It states that "we begin our analysis of this jurisdictional requirement by underscoring the deference this Tribunal owes to the definition of corporate nationality contained in the agreement between the Contracting Parties, in this case, the Ukraine–Lithuania BIT." And this is what it does: it begins with the "Definition of 'investor' in Article 1(2) of the BIT," and then in a second stage it turns to the "Consistency of Article 1(2) of the BIT with the ICSID Convention."[221]

However, it is the opposite approach that was applied by the tribunal in Malaysian Historical Salvor since it started with the applicable BIT before it looked at Article 25. 1 ICSID.[222] The

221. Tokios Tokelés v. Ukr., ICSID Case No. ARB/02/18, Dissenting Opinion (Chairman Prosper Weill), ¶ 14 (Apr. 29, 2004).

222. Malaysian Historical Salvors v. Malay., ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 75 (Apr. 16, 2009).

tribunal "applied these criteria to the contract and concluded that it constituted an investment pursuant to the BIT as well as Article 25 of the Washington Convention."[223] Also, in *Global Trading v. Ukraine*, the tribunal said that:

> Against that background, the Tribunal turns now to an analysis of the two governing treaties, namely the BIT and the ICSID Convention, in the light of the arguments put before it by the parties to the Arbitration. There seems to be no set methodology among ICSID tribunals as to whether the analysis ought to begin with the BIT, which goes to the condition of consent within the meaning of the ICSID Convention, or with the notion of investment under the ICSID Convention. In the present case, it makes no difference where the analysis starts. The Tribunal accordingly finds it convenient to begin with the BIT.[224]

IV. NATIONAL SECURITY EXCEPTIONS AS THE BOUNDARIES OF SCES' RIGHTS

SCEs from various jurisdictions make investments and are becoming major legal actors because they can file a claim before international tribunals. This, in turn, raises the question of the substantive rights which is now given to state capitalism actors.[225] The actionable rights of an SCE can fundamentally be divided into two stages.

Firstly, the pre-establishment stage and the associated pre-establishment rights (*see Annex 2*). These refer to the entry of investments and investors of a party (member country of a trade or investment agreement) into the territory of another party.

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223. *Id.*

224. Global Trading Resource Corp. v. Ukr., ICSID Case No. ARB/09/11, Award, ¶ 46 (Dec. 1, 2010).

225. *See generally* Charles N. Brower & Diane Brown, *From Pinochet in the House of Lords to the Chevron/Ecuador Lago Agrio Dispute: The Hottest Topics in International Dispute Resolution*, 26 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 1 (2013) (explaining that states must provide effective means of asserting claims and enforcing rights with respect to investment); George K. Foster, *Investors, States, and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties*, 17 LEWIS & CLARK L. REV. 361 (2013) (explaining that states' power to regulate the host country related to environment and human rights has been undermined by investment treaties).

Each party allows the investors of other parties to establish an investment in their territory on terms no less favorable than those that apply to domestic investors (NT) or investors from third countries (MFN treatment). In the case of the provision on performance requirements, pre-establishment refers to the prohibition of imposing certain performance requirements as a condition for the establishment of an investment.[226] Pre-establishment is rarely granted without exceptions since every country has sensitive sectors where foreign investment is not permitted. In fact, members of a trade or investment agreement usually list a number of measures (for example, laws and regulations) or entire sectors where pre-establishment (free entry of investments and investors) do not apply.

Secondly, there is the post-establishment stage and associated post-establishment rights. These refer to the operation of an investment. It guarantees that foreign investors and their investments (those of another member country of the trade or investment agreement), once established or admitted, are treated no worse than domestic investors and their investments (NT) or any other foreign investors and their investments (MFN treatment).[227]

C. EXCEPTIONS TO INTERNATIONAL ECONOMIC LAW

Globalization has encouraged more foreign investment around the world and brought about more regulations to protect investors from any discriminatory action. Over the past decades, SCEs have been active in the FDI market. Correspondingly, concerns about the purpose of SCEs have been raised to attention, for example, whether the government behind intends to carry out any political action by making such investment and

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226. Joshua Boone, *How Developing Countries Can Adapt Current Bilateral Investment Treaties to Provide Benefits to Their Domestic Economies*, 1 GLOBAL BUS. L. REV. 187, 187 (2011) ("The idea was to facilitate . . . investment flows by the opening up of secure channels for foreign direct investment . . . stabilizing the investment climate, granting protective investment guarantees, and providing neutral dispute mechanisms for 'injured' investors."); *see also* U.N. CONF. ON TRADE & DEV., THE ROLE OF INTERNATIONAL INVESTMENT AGREEMENTS IN ATTRACTING FOREIGN DIRECT INVESTMENT TO DEVELOPING COUNTRIES, 20, U.N. Doc. UNCTAD/DIAE/IA/2009/5, U.N. Sales No. E.09.II.D.20 (2009) [hereinafter *Role of IIAs in Attracting FDI*].

227. *See* Michael Hahn and Kateryna Holzer, EMERGING ISSUES IN SUSTAINABLE DEVELOPMENT: INTERNATIONAL TRADE LAW AND POLICY RELATING TO NATURAL RESOURCES, ENERGY, AND THE ENVIRONMENT 267 (Mitsuo Matsushita & Thomas J. Schoenbaum eds. 2016).

whether the foreign investment will be a threat to the country. This section will discuss how the national security exception plays a role in foreign investment in the area of SOEs and SWFs. It will look at the available international economic law—WTO Law, IIAs, and CIL—and study the problems or gaps that need to be filled, conclude whether there can be improvements or possible solutions to tackle the problems, and bring spotlight to the world's latest update in this area.

The issue of national investment legislation is based on national security, which may block, impede, undo, or in some other way adversely affect investments made by SCEs. Such a domestic action would not be a violation of its GATS Mode 3 commitments in itself. The country may indeed rely on GATS Article XIV bis in order to benefit from the "security exception." It is true that one of the most critical concerns regarding foreign acquisitions is national security.[228] The problem with national security issues is that there is no way to clearly define what types of investment invoke these concerns and what types do not. Most IIAs maintain exceptions for national security or subject investments to national interest tests.[229]

D. THE NATIONAL SECURITY ISSUE

SCEs investment raises concerns because they highlight the importance of state activity in the global economy, which is perceived as detrimental to the role of market forces. SCEs may not make investment decisions based on economic reasons, but instead they may choose to invest for political purposes. Furthermore, most countries that have set up SCEs are located in the developing world which ultimately may result in a politicization of capital flows vis-à-vis SCEs.

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228. Giorgio Sacerdoti, *BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defense of Necessity*, 28 ICSID REV. 351, 382 (2013); *see also* Chaisse, *Exploring the Confines of International Investment and Domestic Health Protections*, *supra* note 115, at 358–59 (2013).

229. Free Trade Agreement Between the Government of New Zealand and the Government of the People's Republic of China, N.Z.-China, art. 201, ¶ 1, Apr. 7, 2008, 2590 U.N.T.S. 46123 (showing exception for certain "essential security interests" and full investor-state arbitration provisions, even if countries conclude BITs and FTAs making it broadly easier for firms from either country to invest in the other, that sort of exception could be invoked by a contracting party, for example, to block or restrict an investment.).

The range of reasons articulated by host countries for scrutinizing SCEs and state-owned entities (SOEs) more than private investors are indicated in *Box 1* below.

Box 1. Main Reasons to Scrutinize SCEs more than Private Investors

- Fears that countries, as controlling authorities of SWFs, invest in companies with a view to acquiring "know-how" (*e. g.* , dual-use (civil and military) items and technologies; research, produce or trade in weapons; intellectual property)
- Danger of foreign investment in companies that are directly or indirectly involved with issues of national security (*e. g.* , wire tapping and mail interception equipment; cryptology services; activities of firms entrusted with national defense secrets)
- "Political" investments that create dependencies (*e. g.* , in the energy sector; water);
- Lack of transparency in the investment policy of SWFs
- Reciprocity: How can countries that invest in foreign companies via SWFs be prompted to adopt at his needs finishing. less restrictive policy with regard to foreign investment in their own country (e. g. Russia)?

E. LEGAL EXCEPTIONS

As there are more transnational investment transactions around the world, many countries have signed different international investment agreements, bilateral or multilateral, with different countries to stimulate market openness so as to attract more FDIs to build their economies. These agreements contain obligations, thought; he national security exception is a type of exceptions exempt from obligations assumed. It mainly controls the over-protection concern regarding measures against SWFs.

The fundamental concern is how to balance between national security and market liberalization. On the one hand, the host country has to protect its own nation and fellow citizens, while on the other hand, the foreign investor are concerned about being discriminated due to abuse of the protective measures by the host state. Additionally, such protective acts may also bring further political tensions.

The issue of sovereign investment has raised attention due to opaqueness. As governments are involved, some doubt that the true motives behind sovereign investment are politically-driven.[230] SWFs mostly lack transparency, so the host country cannot determine whether the intentions of such investment are genuinely commercial or the investment will jeopardize national security and financial stability.[231] They believe that if strategic industries fall under foreign control, the foreign government will take the advantage to attack the host country.[232] For instance, assuming that a foreign country acquires a telecommunication company in another country, it is reasonable to be cautious that a leak of confidential information by surveillance may be possible.

Especially after the 9/11 terrorist attack, the concerns provoked some countries to regulate and restrict sovereign investment in certain sectors, such as telecommunication and commodities.[233] Even though there are studies indicating that restrictions are unnecessary,[234] governments should always stay mindful of guarding harm. Some argue the measures for being over-protective and discriminatory to attract FDIs are the breach of international economic law.[235]

Before the law regarding national security was developed, only Customary International Law could be relied on. To avoid disputes, including national security exceptions in international

230. Bart De Meester, *International Legal Aspects of Sovereign Wealth Funds: Reconciling International Economic Law and the Law of State Immunities with a New Role of the State*, 20 EUR. BUS. L. REV. 779, 784 (2009).

231. *Id.* at 785.

232. *Id.*

233. *See, e. g.*, HELMUT REISEN, OECD DEV. CTR., POL'Y BRIEF NO. 38: HOW TO SPEND IT: COMMODITY AND NON-COMMODITY SOVEREIGN WEALTH FUNDS 6 (2008).

234. *Id.*

235. Fabio Bassan, *Host States and Sovereign Wealth Funds, between National Security and International Law*, 21 EUR. BUS. L. REV. 165, 180 (2010).

treaties has been a developing trend.[236]

F. THE WORLD TRADE ORGANIZATION (WTO) LAW

There are more than 160 members in the WTO, which means that WTO law is multilaterally binding.[237] Since most countries involved in FDI are WTO members, WTO law becomes a principal law to solve many legal problems. This section will discuss why the GATS is more relevant and when the GATS is applicable in the context of SWFs. The section will then illustrate some major roles of the national security exception under the GATS and conclude by examining some underlying problems.

Within the WTO treaties, the GATS is more relevant and important in the context of SWFs because it is the only legally binding law in relation to investment.[238] Although the GATT does contain an article about Security Exception[239] and thus is theoretically applicable, its principles are relatively limited. Some scholars view that GATT is too general.[240] Even with its investment-related reference treaty, the Agreement on Trade-Related Investment Measures (TRIMs), the GATT is still short of specific discipline. It means that the general principles provided may not be applicable to some specific investments, while the TRIMs do not give enough additional support and reference.[241]

On the contrary, the GATS is more relevant when talking about FDIs such as SWFs because FDI nowadays trends towards the service sector. The purpose of GATS is to make sure the service sectors are liberalized for foreign investments, including state investments such as SOEs and SWFs, by "facilitating the

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236. *Id.* at 189.

237. *See generally* Julien Chaisse, *Deconstructing the WTO Conformity Obligation: A Theory of Compliance as a Process*, 38 FORDHAM INT'L L.J. 57 (2015) (showing that the law of the WTO is superior to domestic legal systems and WTO has reformulated a secondary obligation among its members); Julien Chaisse & Mitsuo Matsushita, *Maintaining the WTO's Supremacy in the International Trade Order: A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism*, 16 J. INT'L ECON. L. 9 (2013) (arguing that WTO has contributed much toward a rule-oriented international trading system and that WTO should combine hard law and soft law in the future).

238. De Meester, *supra* note 230, at 780.

239. GATT, *supra* note 119, art. 21.

240. Bassan, *supra* note 235, at 173.

241. *Id.*

freedom of capital inflows in the service sector."[242] Hence, it is more specific yet flexible to be applied to service-related FDIs.

The GATS is applicable to FDI when the investment takes form of "commercial presence" mode in the service sector, meaning that the foreign investor holds fifty percent ownership.[243] Therefore, only when SWFs tend to take control of the target company will the GATS be applicable.

To promote market liberalization in service sectors to foreign investors, the GATS imposes obligations on the host states.[244] However, these obligations are subject to general exceptions and specific exceptions. The GATS Article 14 *bis* Security Exception illustrates one of the general exceptions regarding national security that the host state can rely on to refuse foreign investments. The purpose of this exception is to "preserve members' freedom of action in areas relating to national defense and security."[245] The article provides that the states are exempted from the non-discriminatory obligations imposed when the investment concerns an "essential security interest."[246] It is reasonable for the host states to enforce necessary actions to restrain the access of FDIs to defend their national security interests and uphold public safety and stability.

G. International Investment Case Law

Cases are very useful in filling in the gaps of the uncertainty of any IIA provisions regarding national security exception in order to predict the outcome while making investment decisions. As discussed above, the phrases like "essential security" or "national security" are too broad. This results in investment disputes which may lead to lawsuits. This section will study some significant cases which give more guidelines on how to interpret the IIAs.

242. Efraim Chalamish, *Global Investment Regulation and Sovereign Funds*, 13 THEORETICAL INQ. L. 645, 661 (2012).

243. *Id.* at 660.

244. Julien Chaisse, *Assessing the Relevance of Multilateral Trade Law to Sovereign Investments: Sovereign Wealth Funds as "Investors" Under the General Agreement on Trade in Services*, 2015 INT'L REV. L. 1, 6 (2015).

245. *Id.* at 14.

246. GATS *supra* note 129, art. 14.

1. *Republic of Nicaragua v. United States*[247]

The case concerned whether the United States was justified in invoking the security defense in the context of the BIT signed between two countries. The words "necessary to protect its essential security interests"[248] were brought under the spotlight in this case. The United States argued that the provision justified the adoption of the measure.[249] However, the International Court of Justice (ICJ) compared the provision with the security exception under the GATT and found that the party may adopt measures that they "consider necessary" whereas the provision under the FCN Treaty "speaks simply of 'necessary' measures, not those considered by a party to be such."[250] Therefore, it was held that the measure was not necessary to protect the security interest of the United States and that the provision did not allow any self-judging measures.[251] Thus, the protective measure made by the United States was not final.

2. *Commission v. Belgium*[252]

There are various cases regarding the exception in the context of EU law. The proportionality test is used to justify the protective or restrictive measures implemented against the investment. This case held that the measure was compatible, and four criteria were set out to justify the use of the security exception.[253] The criteria are (1) the national measures must aim

247. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. United States), Judgment, 1986 I.C.J. Rep. 14, ¶ 1 (June 27).

248. Treaty of Friendship, Commerce and Navigation, Nicar.-U.S., art. 21, Jan. 21, 1956, 9 U.S.T. 449, 465.

249. *Nicar. v. United States*, 1986 I.C.J. Rep. at 141, ¶ 280. These measures related to the military and paramilitary activities carried out by the United States against Nicaragua from 1981 to 1984. *See* Fernando R. Teson, *Appraisals of the ICJ's Decision: Nicaragua v. Unites States (Merits)*, 81 AM. J. INT'L L. 77 (1987); Zia Modabber, *Collective Self-Defense: Nicaragua v. United States*, 10 LOY. L.A. INT'L & COMP. LAW J. 449 (1988).

250. *Id.* ¶ 222, at 116.

251. *Id.* ¶ 272, at 141–42.

252. Case C-503/99, Comm'n v. Belgium, 2002 E.C.R. I-4809.

253. *Id.* at ¶¶ 46–51. It related to the provisions of the Royal Decree of 10 June 1994, specifically, the regulation concerning golden shares held by Belgium in private undertakings in the two companies, which were engaged in transportation and the supply of gas. *See* Carlos Padros & Endrius E. Cocciolo, *Security of Energy Supply: When Could National Policy Take Precedence over European Law*, 31 ENERGY L. J. 31, 43, 45 (2010). *See also* Bassan, *supra* note

at the protection of a legitimate general interest, (2) foresee strict time limits for the exercise of opposition rights, (3) the assets or management decisions targeted must be specifically listed, and (4) the system's objective and stable criteria must be subject to an effective review by the domestic courts.[254] This case provides and clarifies the idea of how to justify the breach. The member may appropriately invoke the exception on the grounds of public order or public security when the criteria are satisfied.

3. Argentine Cases

After the Argentine economic crises in 2002, Argentina was involved in a series of lawsuits. The most significant dispute dealing with the national security exception was between Argentina and the United States.[255] Like most recent BITs, the Argentina-United States BIT allows state-versus-state dispute settlement concerning the national security exception.[256]

The BIT references the security exception provision with the phrase "the [p]rotection of its own essential security interests."[257] In one of the cases, it was held that major economic emergencies were considered "essential security interests."[258] So, *prima facie*, Argentina could invoke the exception. However, the court continued to express that the article was not self-judging.[259] The decision shows that the court is reluctant to let states determine whether they can invoke the exceptions.[260] The judgment also provides a framework that when either party would like to justify its breach of obligations based on the BIT's exception, that party should show the relationship between the measures adopted and the "resolution of the crisis."[261] In

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254. Case C-503/99, Comm'n v. Belgium, 2002 E.C.R. I-4809.

255. CMS Gas Transmission Co. v. Republic of Arg., ICSID Case No. ARB/01/8, Award, ¶ 332 (May 12, 2005).

256. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Arg.-U.S., art. XI, Nov. 14, 1991, 31 I.L.M. 124 (1992).

257. *Id.*

258. *See CMS Gas Transmission Co.*, ICSID Case No. ARB/01/8 ¶ 359.

259. *Id.* ¶ 373.

260. *Id.*

261. *Id.* ¶ 320–9, 355–6, 374; *See also* Continental Casualty Co. v. Republic of Arg., ICSID Case No. ARB/03/9, Award, ¶ 181, 196-197, 214, 227, 232-233 (Sept. 5, 2008); Sempra Energy Int'l v. Republic of Arg., ICSID Case No. ARB/02/16, Award, ¶ 376, 388 (Sept. 28, 2007); Enron v. Republic of Arg., ICSID Case No. ARB/01/3, Award, ¶ 334 (May 22, 2007); LG&E Energy Corp. v. Republic of Arg., ICSID Case No. ARB/02/1, Decision on Liability, ¶ 239–42, 257

considering the applicability of Art XI Argentina-US BIT, the tribunals have adopted various interpretations of what may constitute 'necessary' in the cases involved US investors challenged Argentina's emergency measures. The first three tribunals to deal with claims under Art. XI are *CMS,*[262] *Encron,*[263] and *Sempra.*[264] These tribunals conflated the requirements of Art. XI with the customary international law of necessity defense and each of the decisions was subject to application for annulment.[265] The LG&E tribunal adopted a more flexible approach in determining the concept of "necessary" and stated the measures were suitable to respond to the crisis.[266] This approach has been criticized as "overly deferential"[267] without considering the effectiveness of the measures, but it seemed to have "required that the package of measures as a whole was capable of achieving the objective."[268] The tribunal in *Continental* case held that in determining the suitability of the measures to arrest the crisis, they need to decide whether the measures had 'contributed materially' to achieve the goals.[269] In deciding the alternative measures, the tribunal granted 'a certain deference' given the circumstances of economic crisis,[270] and concluded in general the measures 'were applied in a reasonable and proportionate way.'[271] The Argentine cases provide direction on how a decision would likely conclude, which increases certainty. The decisions give more clarifications on how to interpret the security exception provision of a BIT when

(Oct. 3, 2006).

262. *CMS Gas Transmission Co.*, ICSID Case No. ARB/01/8 ¶ 320–9, 355–6, 374.

263. *Enron*, ICSID Case No. ARB/01/3, Award, ¶ 334.

264. *Sempra Energy Int'l*, ICSID Case No. ARB/02/16, Award, ¶ 376, 388.

265. CAROLINE HENCKELS, PROPORTIONALITY AND DEFERENCE IN INVESTOR-STATE ARBITRATION: BALANCING INVESTMENT PROTECTION AND REGULATORY AUTONOMY 87–90 (2015); Jürgen Kurtz, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis*, 59 Int'l & Comp. L. Q. 325, 341–51 (2010).

266. *LG&E Energy Corp.*, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 239–42, 257. *See* HENCKELS, *supra* note 265, at 90.

267. HENCKELS, *supra* note 265, at 90. *See also* Christina Binder & August Reinisch, *Economic Emergency Powers: A Comparative Law Perspective in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 503, 511 (Stephan Schill ed., 2010); Kurtz, *supra* note 265, at 356.

268. HENCKELS, *supra* note 265, at 90.

269. Continental Casualty Co. v. Republic of Arg., ICSID Case No. ARB/03/9, Award, ¶ 196-197, 214, 232 (Sept. 5, 2008).

270. *Id.* ¶ 181, 198–9, 233.

271. *Id.* ¶ 227, 232.

the key terms are unclear. The case law provided lessons to the states for clearer terms and has assisted them to negotiate and conclude new BITs. After the Argentine case, the United States updated its treaty language based on the United States Model BIT.[272] The United States has ensured the exception is self-judging, so it can be invoked easily.[273] Therefore, the claims actually fill in the existing gap and help further better the investment law and promote sovereign investments.

H. CUSTOMARY INTERNATIONAL LAW (CIL)

When the treaties do not help conclude transnational problems, CIL is exercised. When binding treaties between the parties do not include explicit provisions, CIL is applied to seek clarification. In fact, there are quite a number of cases in which CIL has been used to reach conclusions. There are two major doctrines under CIL related in this context: necessity and self-defense, which are mostly used when dealing with national security concerns.[274] These two doctrines are uncodified but recognized by the International Law Commission in Responsibility of States for Internationally Wrongful Acts (ILC Articles).[275] The principles are often explicitly included in treaties so that legal cases will be considered according to CIL. ILC Article 25 provides a framework on how a state can justify the use of the security exception under the necessity defense of CIL. Two criteria have to be satisfied: first, the party who would like to invoke the defense must prove that the questioned measure is "the only way" to protect its essential interest, and second, that the measure "does not seriously impair an essential interest" of "the international community as a whole."[276] To avoid any abuse, Article 25 strictly limits the conditions for using the necessity defense, including national security.[277] However, the inclusion of national security does not automatically mean that the issue rises to necessity. The phrase "the international community as a whole" is meant to prevent any acts of corruption so as to encourage an honest investment

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272. U.S. MODEL BILATERAL INV. TREATY ART. 20 (DEP'T OF STATE 2012).

273. *Id.*

274. Int'l Law Comm'n, Responsibility of States for Internationally Wrongful Acts, arts. 21, 25, U.N. Doc. A/56/49 (Vol. I)/Corr.4 (Dec. 12, 2001).

275. *Id.*

276. *Id.* art. 25(1).

277. *Id.*

environment and protect the collective interest of every country. CIL cannot be used as a means to exclude any wrongfulness or as an excuse because this will affect the collective interest, which consequently results in political tensions and influences the global investment environment.

The case *Sempra Energy International v. Republic of Argentina* details how CIL can be applied to decide whether the related security exception can be invoked. It illustrates that the court will check if there is any violation of treaties by interpreting the terms literally.[278] If the concerned treaties do not consist of any self-judging feature, the measures adopted will then be examined to see if it is necessary for the party to invoke the exception. [279] Lastly, CIL will help define the scope of "essential security," in this case under ILC Article 25.[280] Therefore, it seems that the CIL acts as a last resort for the state party to justify its breach of obligation due to national security. Some scholars commented that "[t]he notion of necessity ascertained in the international customary law . . . is far more accurate than the definition of essential security interest . . . in national statutes."[281] This is because the ILC Articles provides a clear framework on how to justify measures adopted under the necessity defense. Related cases further upheld the certainty of such framework. Apart from being used to interpret explicit national security provisions, CIL determines whether there is any implicit exception "to permit states to respond to emergencies and to hostile actions by others."[282] Some treaties may not include an explicit provision about national security exemptions, but it would be unreasonable for a state to have no right to carry out protective measures to safeguard its security. Hence, CIL can imply the use of a national security exception.

278. Sempra Energy Int'l v. Republic of Arg., ICSID Case No. ARB/02/16, Award, ¶ 389 (Sept. 28, 2007).

279. *Id.* ¶ 388.

280. *Id.* ¶ 375.

281. Bassan, *supra* note 235, at 192.

282. Susan Rose-Ackerman & Benjamin Billa, *Treaties and National Security*, 40 N.Y.U. J. INT'L L. & POL. 437, 445 (2008).

V. UNITED STATES-CHINA BIT

The recent focus on the national security exception is the BIT negotiation between the United States and China because these two countries are leaders in international economics. The conclusion of the United States-China BIT will encourage more FDI between the two countries.[283] This BIT will be important in regards to the national security exception in the context of SWFs because most FDIs by communist China in foreign countries are in SWF form.[284] The United States has been involved in many significant cases on rejecting sovereign investments, such as the Dubai Port World, and the China National Offshore Oil Corporation (CNOOC).[285] In the CNOOC acquisition case, the United States decided to reject this sovereign investment, fearing that this acquisition deal would threaten its national security.[286] However, to avoid tensions with the United States, China eventually withdrew its investment on Unocal Oil Company due to political pressure.[287] Because no BIT exists between the two countries, only WTO law and the term "essential security" was concerned. In the recent United States-China Strategic and Economic Dialogue, the BIT was one of the negotiation topics.[288] Within the BIT negotiation, cyber-security has been one of the security concerns.[289] Placing a high importance on its national security, especially after the 9/11 incident and Snowden political scandals, the United States will stand strong on safeguarding its security interests and rights to invoke the security defense. Also, the target is "communist" China, which has been involved in many FDI-related violations, such as violations of cybersecurity and intellectual property

283. C. Fred Bergsten et al., *Toward a US-China Investment Treaty*, PETERSON INST. FOR INT'L ECON. (Feb. 2015), https://piie.com/sites/default/files/publications/briefings/piieb15-1.pdf.

284. Qingxiu Bu, *China's Sovereign Wealth Funds: Problem or Panacea?*, 11(5) J. WORLD INV. & TRADE 849, 850–51 (2010).

285. GARY CLYDE HUFBAUER ET AL., US-CHINA TRADE DISPUTES: RISING TIDE, RISING STAKES 47 (2006).

286. *Id.* at 50.

287. *Id.* at 48–50.

288. William Johnson, *The Five Most Important Issues in U.S.-China Relations*, REUTERS (June 23, 2015), http://blogs.reuters.com/great-debate/2015/06/23/the-five-most-important-issues-in-u-s-china-relations/.

289. *US Says Progress Made in Talks with China on Currency Issues, Cyber-Security*, S. CHINA MORNING POST (June 25, 2015, 11:15 am), http://www.scmp.com/news/china/policies-politics/article/1826327/us-says-progress-made-talks-china-currency-issues-cyber.

rights. Therefore, negotiation will be difficult for both countries[290]—especially for the United States, which has agreed to various treaties with different countries.

The conclusion of the BIT is forward-looking. It not only will promote trade liberalization and further encourage FDIs but will also become a cornerstone of international economics.

VI. POSSIBLE SOLUTIONS

After investigating different types of applicable law, it is apparent that the law is still uncertain. The law in the context of sovereign investment is not perfect and has not been updated to be in sync with the rise and change of SWFs.

Some scholars have expressed the view that international economic law should ascertain the rights of states in this area, particularly by amending the terms in treaties.[291] Some suggest clarifications by the WTO, inclusion of obligations regarding SWFs, or clearer definitions provided by the IIAs.[292] These suggestions have their benefits and concerns. "The broader these exceptions are, the easier it will be for governments to limit SWFs' access . . . . The [narrower] these limits are . . . the easier it will be for SWFs to come into the . . . market."[293] It may appear that the listed exceptions will alleviate the problems and depoliticize SWFs, but there is a chance that some states will deceive the host state by taking advantage of these solutions with political purposes.

Measures implemented by the host states may provide a clearer way for reference. Although each country has its own law regarding the national security review system, such as Foreign Investment and National Security Act of 2007 (FINSA) in the United States,[294] the IIAs can mention the use of the respective national law or any measures to be taken which may be different from the express one regarding SWFs. This can increase predictability and transparency of the review system. SWF investors will feel more protected with more certainty and will then be able to invest more effectively. This way, sovereign

290. *See* Bergsten et al., *supra* note 283, at 34.

291. *See* Bassan, *supra* note 235, at 193; Chaisse, *supra* note 23, at 588.

292. *See* Bassan, *supra* note 235, at 199–201; Chaisse, *supra* note 23, at 604; Meester, *supra* note 230, at 816.

293. Chaisse, *supra* note 23, at 611.

294. Foreign Investment and National Security Act of 2007, Pub. L. No. 110–49, 121 Stat. 246.

investment can be further promoted.

Some suggest standardization of IIAs may ensure certainty and transparency.[295] However, this goes against the unique feature of every treaty. Every state has their own characteristics, such as demography, geography, or natural resources. Some states may demand more applications of the national security exception, while some may not. The conclusion of an IIA may be drafted based on previous treaties with some terms amended accordingly, but standardized IIAs will not fit every state and hence would create other investment problems.

VII. CONCLUSION

The recent emergence of SCEs as active and important players in international financial markets has raised a host of questions, which are focused on in the current analysis. As the current financial turmoil demonstrates, financial liquidity is vital for Western economies. SCEs as a class of investor will grow considerably in importance over the next decade, both by number and volume. At the same time, the number of international investment disputes arising from investment agreements has increased sharply. Likewise, the cases brought to dispute settlement have become increasingly complex, creating various interpretations of their provisions and generating huge debates between governments, academics, and practitioners. There have been until now only a handful of disputes involving state-controlled entities against host states. It seems that rather often no restriction exists for SCE to act under an IIA as a "qualified investor" (but treatment standards may vary from one treaty to another). These investors may also rely on the more adequate investor–state dispute mechanism instead of the more political state-to-state dispute procedures, which demonstrates the potential for international investment arbitration involving SCEs.

SCEs are on the rise and likely to increase even more. Once the crisis is over, the problems will return. There will be new disputes that are likely to be treated as any other foreign investor. However, SCEs do have rather more favorable access to DSB than private actors. Meanwhile, access to arbitration may evolve as criteria do not seem well-established. The key issue which may be brought before arbitration is the one of

295. *See* Bassan, *supra* note 235, at 198; Chaisse, *supra* note 23, at 623.

national security. If so, however, we are likely to see more cases in which the (more broadly frustrated) home state of a frustrated investor reacts—even in a later context—against what it may have perceived as an overeager invocation of the national security exception.

In the current scenario, one can simply observe that international investment tribunals have slightly stretched the ICSID convention to allow SCE, when they act on a commercial basis, to access international arbitration. In that sense, the whole global investment regime has adjusted to the reality of new actors that are SCEs. In essence, the nature of the economic activities has become more important than the nature of the SCEs.

The national security exception is very crucial to international economics because it directly affects the FDI environment. It provides an exemption from a state's regular obligations to safeguard its security interests by prohibiting suspicious government-controlled investments from being established in its territory. However, the international economic law also avoids any abuse of this exception. The language of the exception in treaties determines whether a state is justified to invoke such an exemption. Every term will be interpreted prudently, particularly the term "essential security" in all contexts. If there is no explicit provision addressing such concern, then CIL will be the final resort. In fact, there are not many cases regarding the use of the exception because no one would like to bring political tensions. The law directly affects FDI performance around the world. The exception plays both political and commercial roles; it promotes market openness and cooperation between countries. Additionally, it releases any political tensions and improves political relationships. It balances the national interests and financial benefits of the sovereign parties. With the rise of SWFs and trend of FDI, there may be more conflicts concerning national security. Undoubtedly, the certainty of right and predictability requires clarification of the terms. There are many suggestions to improve the terms. The United States-China BIT conclusion will be under the spotlight to see how the leaders will strike a balance between tackling the national security matters and promoting FDIs.

The current scenario is technically favorable to SCEs, and it shows that they can now operate like any other private investor. Further, the whole ICSID and investment regime was designed for the promotion of foreign private investment. However, the

SCEs have now become significant players who are treated like any private investors. State capitalism has become ordinary, and in this sense, state capitalism now "comes of age," as said by Ian Bremer.[296] It is a paradox that the system states designed to promote private investment is being gradually penetrated and reshaped by state capitalism without much difficulty.

While there are solutions for SCEs, there are challenges for policy-makers because it raises the question of a good definition of investor, treatment of SCEs in future, and IIAs and treaties. If these trends continue, namely, if direct investor-state arbitration provisions are concluded or reinterpreted to restrict the ability of home states to have second thoughts about foreign investments once they have been accepted, it seems to me that they will be more careful in allowing FDI. But when they do, somewhere down the line, they may get a reaction from a frustrated home state, and we will be back to the world dominated by individual states, i.e. capitalism.

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296. Bremer, *supra* note 1, at 46.

Annex 1: Investment Cases (Decided and Registered) Dealing with the Legal Standing of SCEs

Case	Definition of investor in applicable BIT	Did respondent raise the issue of the SOE nature?	How was the SCE treated?	Findings
CDC Group PLC v. Republic of the Seychelles[297]	N/A	Issues of jurisdiction are the main legal issue that needed to be tackled by the Tribunal. As Article 25 of the ICSID only allows disputes "between a Contracting State and a national of another Contracting State."[298] Therefore, in this dispute, the main legal issue that arose was whether CSOB was merely an agent of the Czech Republic or not. Generally, the main legal issue to decide	CDC is a public company incorporated under the Companies act 1985 in England and Wales. At all material times CDC has been, and continues to be a national of the United Kingdom. The tribunal does not argue the fulfilment of the conditions of Art 25(1) ICSID.	The UK government owns 40% of CDC. Seychelles initially objected to the jurisdiction on ICSID art 25 grounds but withdrew the objection during the oral hearing.

297. CDC Group PLC v. Republic of the Sey., ICSID Case No. ARB/02/14, Award, (Dec. 17, 2003).
298. ICSID Treaty, *supra* note 213, art. 25.

		is whether CSOB is a qualified investor, and if so, why it is a qualified investor?		
Ceskoslovenska Obchodni Banka, A. S. v. The Slovak Republic[299]	The BIT meaning of investor was not determinant to the decision. However, the Consolidation Agreement stated the definition of investor.	Article 25 of ICSID only allows disputes "between a Contracting State and a national of another Contracting State." Therefore, in this dispute, the main legal issue that arose was one of jurisdiction—whether CSOB was merely an agent of the Czech Republic or not. Generally, the main legal issue to decide is whether CSOB is a qualified investor, and if so, why it is a qualified investor?	CSOB was treated as a foreign investor based on the meaning of art. 25 ICSID and won the case.	The Tribunal unanimously found that the dispute was within the jurisdiction and competence of the Tribunal. The necessary order for the continuation of the proceedings on the merits will be issued. Also, the Tribunal granted the request and recommended the suspension of the bankruptcy proceedings; the Tribunal stated that what mattered was the nature of the activities and not their purpose. This case broadens the scope of BITs

299. Ceskoslovenska Obchodni Banka, A.S. v. Slovk., ICSID Case No. ARB/97/4, Award, (Dec. 29, 2004), 13 ICSID Rep. 183 (2008).

				application and ICSID, which means that it broadens the potential application of investment law. The measures taken by the CSOB to improve its balance and consolidate its financial position, removing from the books non-performing assets derived from activities conducted by the bank when acted as agent of the state, must be deemed to be commercial in character. The ability to negotiate in favorable conditions, determined by the interest of the States, does not transform commercial transactions into government acts.

Telenor Mobile Communications A. S. v. The Republic of Hungary[300]	"a) any natural person possessing the nationality of a contracting party according to its laws b) any corporation, company, firm enterprise, and association incorporated or constituted under the law in force of the territory of a contracting party."[301]	In this dispute, the main legal issue was whether the most-favored-nation clause in a treaty may have been used to extend the jurisdiction of the Tribunal to categories of disputes beyond those set out in the treaty itself; whether the claimant alleged facts sufficient to make out a prima facie case of expropriation.	Norway owns 75% of Telenor but Hungary did not contest jurisdiction on the grounds of art. 25 of the ICSID Agreement.	The Tribunal dismissed the claim holding it did not have jurisdiction over the claims brought by Telenor because the BIT limited jurisdiction only applies to expropriation claims and Telenor failed to bring a prima facie claim. The Tribunal set a standard for the initial review of investment treaty claims at the jurisdictional stage and confirmed that respect towards the limits placed by sovereign States on their consent to international arbitration is fundamentally important.

300. Telenor Mobile Communications A.S. v. Hung., ICSID Case No. ARB/04/15, Award, (Sept. 13, 2006), 17 ICSID Rep. 173 (2016).

301. Promotion and Reciprocal Protection of Investors, art. 1, Nor.-Hung., Apr. 8, 1991.

Rumeli Telekom A. S. v. Republic of Kazakhstan[302]	"(b) corporations, firms or business associations incorporated or constituted under the law in force of either of the Parties, and having their headquarter in the territory of that Party."[303]	In this dispute, the main legal issue that arose was whether Rumeli is a qualified investor and whether the state must benefit from its expropriation. The main legal issue in this case is similar to Ceskoslovenska Obchodni Banka, A. S. v The Slovak Republic. Article 25 ICSID acts as an important provision in the dispute.	Claimants are companies incorporated and existing under the laws of Turkey. Turkey ratified the ICSID Convention on March 3, 1989. Claimants therefore appear as prima facie nationals of a Contracting State under the meaning of Article 25. The claimant won the case on grounds of FET and expropriation.	The Tribunal found that the respondent breached its obligation, failed to follow the BIT, that and expropriation may occur without any benefit to the State. Also, the Tribunal found that the claimant was a qualified investor. The state agency newly appointed managers continued to run Petitioner companies as telecommunications companies and started ICSID arbitration. The TSDIF however was not a claimant. The Tribunal also considered that Article 25(2)(b), stating that a national of another

302. Rumeli Telekom A.S. v. Kaz., ICSID Case No. ARB/05/16, Award, (July 29, 2008).

303. Agreement Concerning the Reciprocal Promotion and Protection of Investments, art. 1, Kaz.-Turk., May 1, 1992.

				contracting State also means “any juridical person which had the nationality of the Contracting State party to the dispute on “the date on which the parties submitted the dispute to arbitration” and which, because of foreign control, the parties have agreed that they should be treated as a national of another Contracting State for the purposes of this Convention,” was inserted to broaden the scope of ICSID’s jurisdiction and not to limit it, as evidenced by the awards invoked by Respondent, such as the SOABI, the Vacuum Salt and LETCO cases. The

				parties refer to the CSOB case.
Kaliningrad Region v. Lithuania[304]	"a) any natural person who is a national of the state of this Contracting Party according to the legislation of this Contracting Party and authorized to invest in the territory of the other Contracting Party according to the legislation of the latter Contracting Party; b) in regards to the Russian Federation: any legal person, constituted or established according to the legislation in force, in the territory of the Russian Federation provided this legal person is authorized	Information unavailable. Award not publicly available as of August, 1 2010.	Information unavailable. Award not publicly available as of August, 1 2010.	Information unavailable. Award not publicly available as of August 1, 2010.

304. Kaliningrad Region v. Lith., ICC, Final Award, (Jan. 28, 2009).

	according to the legislation of the Russian Federation to invest in the territory of the Republic of Lithuania; in regards to the Republic of Lithuania: any entity constituted and registered in the territory of the Republic of Lithuania in conformity with its legislation."[305]			
Hrvatska Elektroprivreda d. d. v. The Republic of Slovenia[306]	"Investor' means: (a) with respect to a Contracting Party: (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its	Issues of jurisdiction were not seriously contested in this arbitration.	"HEP," the Croatian national electric company, changed its status from a state-owned to a joint-stock company. From 1994 to the date of award, the Croatian government owned 100% of the stock in	The majority of the Tribunal found that Slovenia was liable to HEP for the financial value of undelivered electrical power from July 1, 2002 to April 10, 2003. This case shows that state controlled entitles can make a claim as an investor.

305. Agreement on the Promotion and Reciprocal Protection of the Investments, art. 1, Lith.-Russ. June 29, 1999.

306. Hrvatska Elektroprivreda d.d. v. Slovn., ICSID Case No. ARB/05/24, Decision on the Treaty Interpretation Issue, (June 12, 2015); Hrvatska Elektroprivreda d.d. v. Slovn., ICSID Case No. AERB/05/24, Award, (Dec. 17, 2005).

	applicable law; (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party; (b) with respect to a 'third state,' a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party." [307]		HEP. HEP was claimed to have operated on a cost-covering basis. The jurisdiction was not examined under art 25 (1) ICSID Convention.	Issues of jurisdiction were not seriously contested between the parties to this arbitration. "The two State Parties to the [2001] Agreement have entered into it as the ultimate shareholders of the immediate 'Shareholders' of NEK d. o. o." The Agreement establishes in detail the points generally included in a shareholders agreement. In doing so it gives their respective wholly-owned immediate 'Shareholders' of NEK d. o. o. the right to arbitrate directly against the 'other State Party' for any failure on the latter's part to cause its

307. Energy Charter Treaty art. 1.7, Dec. 17, 1994, I-36116 U.N.T.S. 95.

				wholly-owned 'Shareholder' to comply with the Agreement. Moreover, in Article 12(1)2 of the Agreement (entitled 'Protection of Investments') '[t]he Contracting Parties agree . . . that they shall ensure fair and impartial treatment of the Shareholders belonging to the other Contracting Party on their territories, i. e. that they shall treat such Shareholder the same way as its own Shareholder, with full protection and security of investments for the duration of the joint investment."[308]

308. *Hrvatska Elektroprivreda*, ICSID Case No. ARB/05/24, Decision on the Treaty Interpretation Issue, ¶ 168.

Mohamed Abdulmohsen Al□Kharafi & Sons Co. v The Government of the State of Libya and others (Libyan Investment Authority ("LIA") 2012)[309]	"Arab investor: an Arab citizen who owns Arab capital which he invests in the territory of a State Party of which he is not a national." [310]	Issues of jurisdiction were the main legal issues of this Arbitration.	The Tribunal rejected the request to join LIA, acknowledged the role of LIA as an integral part of Libya, including the role of implementing this arbitral award.	The Tribunal upheld its own jurisdiction, and found Libya to be in breach of contract, Libya law, and the Unified Agreement for the Investment of Arab Capital in the Arab States.
Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen[311]	TBD[312]	TBD	Beijing Urban Construction Group is a large international comprehensive construction group. Nominally, this company is a limited company publicly listed at Shanghai Stock Exchange. In fact, this company that	Pending (as of January 2018, the proceeding is suspended, pursuant to the parties' agreement.)

309. Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya, Final Arbitral Award, 263, 266, 268, (Mar. 22, 2013) (Ad-hoc Arb.).

310. Unified Agreement for the Investment of Arab Capital in the Arab States art. 1.7, Nov. 26, 1980.

311. Beijing Urban Construction Group Co. v. Republic of Yemen, ICSID Case No. ARB/14/30, (May 31, 2017).

312. The Tribunal will apply the China- Yemen BIT. *Id.* ¶ 53; *see* Agreement on the Encouragement and Reciprocal Protection of Investments Between the Government of the People's Republic of China and the Government of the Republic of Yemen, China-Yemen, Feb. 16, 1998, http://globalsummitryproject.com.s197331.gridserver.com/RuleofLaw/bits/yemen2010.html.

			began its operation in 1958 as a state-owned professional survey and design institute, specifically for the Beijing Subway Line. Then the Company was converted into a joint stock company with limited liability and renamed as 'Beijing Urban Construction Design Development Group Co., Ltd. on October 28, 2013. Therefore, this company is less likely to be a state-owned company because there is no factual evidence showing so.	

Hanocal Holding B. V. and IPIC International B. V. v. Republic of Korea[313]	The term ``investors" means with regard to either Contracting Party: a) "natural persons having the nationality of that Contracting Party;" and b) "legal persons constituted under the law of that Contracting Party," who made an investment in the territory of the other Contracting Party.[314]	Data not available (the proceeding was discontinued after the first hearing and the Tribunal's procedural order)	"IPIC is the International Petroleum Investment Company, formed by the Abu Dhabi government in 1984 to invest in the energy and related sectors across the globe."[315] Hanocal Holding B. V. is a company based out of Netherlands and is categorized as an accounting and legal firm.	N/A (The proceeding was discontinued after the first hearing and the Tribunal's procedural order.)

313. Hanocal Holding B.V. v. S. Kor., ICSID Case No. ARB/15/17, (May 20, 2015).

314. Agreement on the Promotion and Protection of Investments between the Government of the Kingdom of the Netherlands and the Government of the Republic of Korea, art. 1, Neth.-S. Kor., July 12, 2003.

315. *IPIC*, TOTAL, http://ae.total.com/en-us/ipic.

Annex 2: Substantive and Procedural Rights Granted by IIAs to SCEs

International Legal Instrument	Liberalization (Pre-establishment Commitments)	Protection (Substantive Rights)	Litigation (State-to-State Dispute)	Litigation (Investor–State Dispute)
BITs and PTAs	Sometimes (NAFTA like agreements)	“Fair and equitable treatment,” “full protection and security,” expropriation conditions and the non-discrimination standards	Yes	Yes
WTO GATS	Yes (Mode 3)	Non-discrimination standards only	Yes	No
IMF Principles	No	Institutional framework and governance structure, investment and risk management framework	No	No