CHAPTER 11

SOVEREIGN WEALTH FUNDS AND STATE-OWNED ENTERPRISES AS CLAIMANTS UNDER INTERNATIONAL INVESTMENT AGREEMENTS AND ICSID

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Introduction

The activities of Sovereign Wealth Funds (hereinafter SWFs) and State-Owned Enterprises (hereinafter SOEs) are attracting increasing attention within academic and policymaking circles. Together, these entities undertake a significant proportion of international capital market activity, including but not limited to the acquisition of corporate firms and the ownership of trophy assets across the globe. Rather unsurprisingly, their footprints in international private markets have provoked controversy. Sceptics often raise concerns about the national security risks posed by these entities, their governance apparatus and their potentially anti-competitive practices and effects. This has provoked a regulatory avalanche of sorts at the domestic and transnational policymaking levels. In the context of the former, host states are increasingly adopting policy defences which subject individual investments by SWFs and SOEs to national security and other foreign investment reviews. At the multilateral level however, soft law instruments like the OECD Guidelines for the Corporate Governance of state-owned enterprises and the Santiago Principles for Sovereign Wealth Funds have been devised to transform these investors into responsible and accountable market actors. Yet, the policy terrain for these entities remain highly charged, risking discriminatory and arbitrary treatment that might threaten or undermine their investments. This febrile regulatory environment has prompted a renewed focus into the forms of protection that may be available for SWFs and SOEs under International Investment Agreements and tribunals constituted under the ICSID Convention.

This chapter puts forward this inquiry in four sections. The first investigates the rise of SWFs and SOEs as international capital market actors. Under particular scrutiny here are the nature of these entities and the investment strategies adopted by them. This section also examines the concerns raised by these entities and the regulatory measures that have been devised in response to these concerns. The next section considers an overview of international investment law, including its basic features, rationale and the safeguards afforded to potential claimants. This is followed by the third section which is the nucleus of this chapter and which considers the situation of SWFs and SOEs as potential claimants under International Investment Treaties (IIAs) and before tribunals constituted under the ICSID Convention. This section focuses in particular on two jurisdictional hurdles typically faced by SWFs and SOEs.

The first involves the question of whether the investment by the SOE or SWF is protected by the applicable Investment Agreement between its owner state and its host. This is particularly problematic because certain IIAs do not adequately distinguish between private and public investors in their definition of 'covered investors'. This creates interpretative challenges for arbitral tribunals. Recent commentary however suggests that tribunals are likely to interpret such IIAs broadly so as to extend coverage to SOEs and SWFs.

The second jurisdictional conundrum involves an analysis of whether the SOE or SWF has locus standi to assert its claim before the forum of its choice. In the context of the International Centre for the Settlement of Investment Disputes (ICSID) which is the forum considered in this paper, this is most problematic. This is because the ICSID convention proscribes state-to-state dispute resolution, meaning that a tribunal faced with a claim by an SWF or SOE would have to conduct further analysis defined in the seminal Broches test to ascertain whether the entity is acting as an agent of its owner state or discharging an essentially governmental function. Upon an affirmative finding on either limb of the test, an ICSID tribunal is duty bound to decline jurisdiction and deny the state-owned entity access. This creates uncertainty as to the availability of ICSID arbitration for SWFs and SOEs, demanding a review of existing case law such the ICSID tribunal's decision in CSOB v Slovakia and the recent decision in BUCG v Yemen. The final section briefly considers the implication of these decisions for SWFs and SOEs in seeking access to investment tribunals constituted under the ICSID convention.

Sovereign Wealth Funds and State-Owned Enterprises as International Market actors

In an economic climate defined by a tepid recovery from the global economic crisis, flat commodity prices and global macroeconomic imbalances, Sovereign Wealth Funds have emerged as crucial economic power houses, investing public revenue and acquiring trophy assets across much of the developed world. Although existent –as the literature suggests since the 1950s – these funds have emerged from relative obscurity to establish themselves as important capital market actors in an increasingly fragmented global financial order.[1]

[1] Xu Yi-Chong, *The Political Economy of Sovereign Wealth Funds* (Palgrave Macmillan 2010) 1.

According to the International Monetary Fund, SWFs are "special purpose public investment funds, or arrangements owned or controlled by the government, and which hold, manage, or administer assets primarily for medium to long-term macroeconomic and financial objectives."[2] These funds are commonly established out of official foreign currency operations, the proceeds of privatizations, fiscal surpluses, and/or receipts resulting from commodity exports.[3] They employ a variety of investment strategies which include the acquisition of foreign financial assets such as bonds, shares and convertible instruments. They also invest in alternative asset classes such as infrastructure (including energy infrastructure), real estate, agribusiness and natural resources amongst others.[4]

The first SWFs were established in Middle Eastern countries,[5] but these have since been joined by similar sovereign investment vehicles from countries like Norway, China and Russia amongst others. History suggests that the single biggest drivers in the establishment of SWFs can be tied to the expansion in exports from developing states, the rise in global energy and commodity prices over the last three decades and increasing stockpiles of foreign exchange reserves accumulated by energy exporting nations as a result.[6]

The Government Pension Fund Global of Norway, thought to be the world's largest SWF, was in 2017 estimated to hold over US$1 trillion in assets.[7] Its holdings include sizeable stakes in blue chip private corporations such as Royal Dutch Shell, Apple, Barclays Plc and Alphabet amongst others.[8] The Norway fund is closely followed by the China Investment Cor-

[2] International Monetary Fund, Sovereign Wealth Funds- a Work Agenda, IMF (Feb 29, 2008), 26 <http://www.imf.org/external/np/pp/eng/2008/022908.pdf> Accessed 29 January 2018.

[3] Ibid

[4] Preqin, Special Report: Sovereign Wealth Funds (2017),5 <http://docs.preqin.com/reports/Preqin-Special-Report-Sovereign-Wealth-Funds-August-2017.pdf> Accessed 30 May 2018.

[5] The first official SWF is believed to be the Kuwait Investment Authority which was established in 1953 see Xu Yi-Chong, *The Political Economy of Sovereign Wealth Funds* (Palgrave Macmillan 2010)1. There are however other accounts that trace the first SWFs to the US. See Paul Rose, American Sovereign Wealth (2011) Ohio State University, Public Law Working Paper No 161, 3. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1960706> Accessed 20 January 2018.

[6] Paul Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and their investments protected?' (2011) 6(2) Journal of International Law and International Relations 1,5. See also, Edwin Truman, *Sovereign Wealth Funds: Threat or Salvation* (Peterson Institute for International Economics 2010) 20.

[7] Mikael Holter and Sveinung Sleire, 'The World's Biggest Wealth Fund Hits $1 Trillion' *Bloomberg* (19 September 2017) <https://www.bloomberg.com/news/articles/2017-09-19/norway-wealth-fund-says-reached-1-trillion-in-value> Accessed 12 December 2017.

[8] W Martins, 'These are the stocks the world's biggest sovereign wealth is putting its faith in' *Business Insider* (31 August 2016) <http://uk.businessinsider.com/worlds-biggest-sovereign-investment-fund-top-stock-holdings-2016-8/#10-blackrock-1> Accessed 20 January

poration and the Abu Dhabi Investment Authority (ADIA) with over US$ 900 billion[9] and US$ 800 billion of assets under management respectively.[10] Overall, SWFs are estimated to hold about US$ $7.2 trillion of assets under management, a significant part of which are thought to be in foreign-based assets.

Besides their deep pockets, SWFs also pursue variegated policy goals and objectives for their owner states which include securing access to national resources (including energy and mineral resources), the stabilisation of national economies during economic downturns and the transfer of national wealth across generations.[11]

The emergence of SWFs has coincided with the growth in the size and significance of another genus of state-owned investors – State-Owned Enterprises (SOEs). These are not pools of sovereign capital like SWFs. They are rather commercial and corporate entities owned and controlled by states.[12] Like SWFs, State-owned enterprises typically hail from emerging economies in the Middle East and China.[13] They are also established for a variety of purposes which include engagement in sectors of strategic importance to owner states both in the domestic economy but increasingly also in the international market place. [14]

Like their SWF cousins, SOEs are making inroads into international capital markets. In the energy sector for instance, State-owned oil Corporations have dislodged the so-called seven sisters of Shell, BP, Chevron, Texaco, Exxon, Mobil and Total. Instead, state-owned energy giants like Petrochina, Sinopec, Saudi Aramco and Russia's Gazprom now constitute the largest energy corporations across the globe. [15]

2018.

[9] Xinhua, 'China's sovereign wealth fund hits 900 bln USD' *China Daily* (7 October 2017). <http://www.chinadaily.com.cn/business/2017-10/07/content_32960068.htm> Accessed 20th January 2018.

[10] Simon Kerr, 'Abu Dhabi to combine two sovereign wealth funds into new $200bn vehicle' *Financial Times* (21 March 2018) <https://www.ft.com/content/a529b3f4-2cf9-11e8-a34a-7e7563b0b0f4> Accessed 20 May 2018.

[11] Udabair Das, Adnan Mazarei and Han Van der Hoorn, 'Sovereign Wealth Funds and the Santiago Principles' in Udabair Das, Adnan Mazarei and Han Van der Hoorn (eds), *The Economics of Sovereign Wealth Funds* (International Monetary Fund 2010) 60.

[12] OECD, Guidelines for the Corporate Governance of State-Owned Enterprises, OECD (2015),14 <https://read.oecd-ilibrary.org/governance/oecd-guidelines-on-corporate-governance-of-state-owned-enterprises-2015_9789264244160-en#page16> Accessed 20 March 2018.

[13] Ibid at 11.

[14] Paul Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and their investments protected?' (2011) 6(2) Journal of International Law and International Relations 1,6.

[15] Statista, 2018 ranking of the leading global oil and gas companies based on revenue (in billion U.S. dollars) (2018) <https://www.statista.com/statistics/272710/top-10-oil-and-gas-

The activities of these entities are not limited to energy markets. There are also diversification drives into far-flung sectors such as Agri-business. An interesting example is the 2017 takeover of the European fertiliser firm Syngenta by the Chinese State-owned Enterprise, Chemchina. The same Chinese SOE had two years earlier acquired the Italian tyre company, Pirelli in a deal worth over seven billion euros. Both transactions raised concerns at the European Commission regarding Chemchina's motives as well as the implication of the transaction for competition in the European agri-business sector.[16]

Western markets are not the only destination for State-owned enterprises. These entities are also making inroads into developing and transition economies. Notable examples include the recent purchase of Namibian offshore oil assets by the Indian State-owned Oil and Gas Corporation, ONGC.[17] ONGC's internationalisation effort has also seen it acquire a 26 percent stake in Vankorneft JSC, a Russian Oil and Gas giant.[18] Further examples of this expansionist drive include Chinese SOEs that are increasingly acquiring treasures troves in Africa's mining sector.[19]

Concerns about State-owned Enterprises and Sovereign Wealth Funds

As the operations of State-Owned Enterprises and Sovereign Wealth Funds have increased in size and scale, their activities in many host states have become the focus of rising policy and regulatory concern. Due to their nexus to owner states, investments made by SWFs and SOEs attract additional scrutiny from regulators in comparison to the investments of entities of a private character.[20]

companies-worldwide-based-on-revenue/> Accessed 20 May 2018.

16 Rochelle Toplensky, 'ChemChina takeover of Syngenta nears EU approval' *Financial Times* (3 March 2017) <https://www.ft.com/content/44777ada-ff5c-11e6-96f8-3700c5664d30> Accessed 20 May 2018.

17 UNCTAD, World Investment Report 2018: Investment and New Industrial Policies (2018), 49 <http://unctad.org/en/PublicationsLibrary/wir2018_en.pdf> Accessed 6 June 2018.

18 Ibid.

19 Andrew England and Javier Blas, 'China returns to hunt for African mine assets' *Financial Times* (6 February 2014)<https://www.ft.com/content/7c2c6478-8f42-11e3-be85-00144feab7de> Accessed 6 June 2018. For a broader discussion on the motivation of these enterprises see Wenjie Chen, David Dollar, and Heiwai Tang, 'Why is China investing in Africa? Evidence from the firm level' (2015)<https://www.brookings.edu/wp-content/uploads/2016/06/Why-is-China-investing-in-Africa.pdf> Accessed 10 June 2018. See also Xu Yi-Chong, 'Chinese State-owned Enterprises in Africa: ambassadors or freebooters?' (2014) 23 Journal of Contemporary China, 822-840.

20 Paul Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and their investments protected?' (2011) 6(2) Journal of International Law and International Relations 1,7.

The top concern in regulatory circles is the fear that SWFs and SOEs may subjugate their commercial interests in favour of the political and foreign policy goals of their owner states.[21] This is exacerbated by the fact that the largest SWFs and SOEs often hail from emerging market economies with obdurate foreign policy goals.[22] These apprehensions, whether rational or not, have led to high profile incidents in the United states, Canada and the European Union which host a significant proportion of SWF and SOE investments.[23]

For instance, an attempt by Dubai Ports World, an SOE owned by the government of Dubai, to purchase a major Seaport in United States was truncated by Members of the US Congress who expressed hostile opinions regarding the national security implications of the deal.[24] Likewise, a 2005 attempt by the Chinese National Oil Corporation (CNOOC) to purchase the US energy firm Unocal was withdrawn after inordinate pressure by members of the US congress. Canada for its part has sought to restrict SOE and SWF investment in its energy sector. For instance, in response to the takeover of two Canadian energy firms by Chinese SOEs, 'the then Prime Minister, Stephen Harper,' announced that the deals were the "end of a trend" and that "going forward," investments by Foreign SOEs in the Canadian oil sector will be found to be of net benefit "only in an exceptional circumstance".[25] In the European Union, these concerns have recently been expressed in the wake of increasing Chinese SOE investments across vast areas of the European economy. For instance, the incumbent European Commission President Jean Claude Juncker has recently called for an investment screening mechanism to "protect Europe's collective security."[26]

Beyond national security concerns, SOEs and SWFs also raise concerns about governance, transparency and disclosure. Critics often point to the opaque structures and practices of some SWFs and SOEs, including the failure of certain funds and State-owned Enterprises to disclose annual re-

21 Joseph Norton , 'The "Santiago Principles" and the International Forum of Sovereign Wealth Funds: Evolving Components of the New Bretton Woods II Post-Global Financial Crisis Architecture and Another example of Ad Hoc Global Administrative Networking and Related "soft" Rulemaking ?' [2010] 29 Review of Banking & Financial Law 465,466.

22 Edwin Truman, *Sovereign Wealth Funds: Threat or Salvation* (Peterson Institute for International Economics 2010) 41.

23 Paul Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and their investments protected?' (2011) 6(2) Journal of International Law and International Relations 1, 7.

24 ibid 8.

25 Angela Avery, Peter Glossop, and Paula Olexuik, 'Foreign Investment in Canada's Oil and Gas Sector: New and Emerging Challenges' (2013) 51(2) Alberta Law Review 344, 370.

26 James Kynge and Michael Peel, 'Brussels rattled as China reaches out to Eastern Europe' *Financial Times* (27 November 2017) <https://www.ft.com/content/16abbf2a-cf9b-11e7-9dbb-291a884dd8c6> Accessed January 20 2018.

ports and information about their asset allocation.[27] Others inveigh against the perceived lack of operational independence between certain funds and the apparatus of their owner states which raise fears that investment decisions may be made on non-economic grounds.[28]

Besides governance concerns, SOEs and SWFs also raise issues about market distortion and competition. Here, it is often asserted that SWFs and SOEs do not operate on a level playing field with other private market operators.[29] Critics cite, in particular, the 'undue advantages' that SWFs and SOEs can enjoy by virtue of their nexus to owner states.[30] These include forms of direct subsidisation, concessionary financing, state-backed guarantees, preferential regulatory treatment and exemptions from antitrust enforcement or bankruptcy rules. Whilst these may be less inimical in a domestic context, their extension beyond national borders may crowd out private actors and undermine international trade and investment.[31]

Regulatory responses to SWFs and SOEs

The concerns examined above have elicited regulatory responses across recipients of sovereign capital. These include national foreign investment screening measures which seek to assess individual investments by SOEs and SWFs for national security risks. The US Foreign Investment and National Security Act 2007 is the most notable of these measures.[32] It empowers the Committee for Foreign Investments in the US (CFIUS) – a secretive Inter-departmental agency of the US government – to screen investments by SWFs and SOE for national security risks and to make recommendations to the US President as to whether to prohibit or bar the said investment.[33]

27 Wouter Schmit Jongbloed, Lisa Sachs and Karl Sauvant, 'Sovereign Investment: An Introduction' in Karl Sauvant, Lisa Sachs and Wouter Schmit Jongbloed (eds) *Sovereign Investment: Concerns and Policy Reactions* (Oxford University Press, 2012) 14. See also Anne-Sylvainne Chassany, 'QIA leads fund rankings for missing Santiago governance standards' *Financial Times* (27 October 2014)<http://www.ft.com/cms/s/0/b6000716-5b81-11e4-b68a-00144feab-7de.html#axzz4C9bNBFrJ> Accessed 2 June 2018.

28 Ibid.

29 OECD, State-Owned Enterprises as International Competitors: A Challenge or Opportunity, 51 (2016) <https://read.oecd-ilibrary.org/finance-and-investment/state-owned-enterprises-as-global-competitors_9789264262096-en#page3> Accessed 20 May 2018.

30 Ibid.

31 Max Büge, Matthias Egeland, Przemyslaw Kowalski, and Monika Sztajerowska, 'State-owned enterprises in the global economy: Reason for concern?' *VoxEU* (2 May 2013) <https://voxeu.org/article/state-owned-enterprises-global-economy-reason-concern> Accessed 20 March 2018.

32 Mark Clodfelter & Francesca Guerrero, 'National Security and Foreign Government Ownership Restrictions on Foreign Investment: Predictability for Investors at the National Level' in Wouter Schmit-Jongbloed, Lisa Sachs and Karl Sauvant,(eds) Sovereign Investment: Concerns and Policy Reactions(Oxford University Press 2012) 178.

33 Ibid.

The US approach is also mirrored in Canada and Australia where the Investment Canada Act[34] and Foreign Acquisitions and Takeovers Act[35] empowers government departments to screen inward investments by SOEs and SWFs according to the net benefit and national interest tests. European countries have followed suit. Germany and Italy are notable for having strengthened their policy defences in response to increasing Sovereign investment activity. Germany has for instance implemented measures in the Foreign Investments Act 2009 which require acquisitions by foreign state-owned entities beyond a 25 percent threshold to be scrutinised for national security risks.[36]

For the most part, these screening mechanisms are subjective and often cumbersome.[37] Also, reviewing authorities such as the CFIUS possess largely unfettered discretion and decision-making power.[38] Critics have also argued that these agencies may cave into political pressure, forcing them to make decisions that satisfy narrow political considerations but adversely affect the investments of SWFs and SOEs. There is also the additional risk that SWFs and SOEs may be subject to hostility and arbitrary treatment even after their investments have been admitted into the host state.[39]

Beyond domestic regulatory frameworks, there are also transnational soft law instruments such as the Santiago Principles for SWFs[40] and the OECD guidelines for SOEs[41] which emphasise the need for disclosure, transparency, operational independence and risk management for SWFs and SOEs. These measures, like the domestic law mechanisms discussed above, provide additional safeguards for the recipients of sovereign capital by seeking to transform these entities into responsible and accountable market actors. However, they do not adequately address the equally cru-

[34] RSC 1985, c 28 (1st Supp) [ICA].

[35] *the Foreign Acquisitions and Takeover Act 1975* (Cth) (FATA).

[36] Mark Thatcher, 'Western Policies towards SWF Equity Investments: A Comparison of the UK US and EU' (2013) LSE Policy Brief No 2 <http://www.lse.ac.uk/IDEAS/programmes/kuwait/documents/Thatcher-policy-brief.pdf> Accessed 11 February 2018.

[37] Paul Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and their investments protected?' (2011) 6(2) Journal of International Law and International Relations 1, 13.

[38] Ibid.

[39] Ibid.

[40] International Working Group, 'Sovereign Wealth Funds: Generally Accepted Principles and Practices' (2008) < http://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf > Accessed 30 March 2018.

[41] OECD, 'Guidelines for the Corporate Governance of State-Owned Enterprises' (2015),14 <https://read.oecd-ilibrary.org/governance/oecd-guidelines-on-corporate-governance-of-state-owned-enterprises-2015_9789264244160-en#page16> Accessed 20 March 2018.

cial question of how to protect the investments of SOEs and SWFs from the whims and caprices of their hosts.

Given the highly charged political environment that SOEs and SWFs operate in, it is not unlikely that their investments may be adversely affected by the policy measures of host states. It is also probable that SOEs and SWFs may be subject to discriminatory, arbitrary and capricious treatment motivated by narrow political considerations. This warrants an inquiry into the forms of protection that may be available to SWFs and SOEs in the realms of International Investment Law and the ability of these entities to seek redress where such illegitimate treatment is alleged to have occurred.

An Overview of International Investment Law

Before turning to the specific issues that are the focus of this chapter, it is important to review some of the fundamentals of international investment law.

International Investment Law is a subdivision of International Economic Law that is predicated upon the protection of foreign proprietary interests from the whims and caprices of the host state in which the said interests are situated or located.[42] Investment Law is also distinguished from other aspects of Economic Law by the provision of forms of direct legal redress that can be activated by an injured private party against a host state in which the former operates.[43]

The corpus of contemporary International Investment Law is woven around a range of regulatory instruments such as bilateral investment treaties, bilateral and regional free trade agreements with investment chapters and sector-specific investment agreements such as the Energy Charter Treaty (ECT).[44] Together, these instruments are characterised as International Investment Agreements (IIAs) and were first developed in the aftermath of the Second World War to guard against renewed hostility between states and to promote cross-border cooperation, trade and investment.[45]

IIAs promote cross-border capital and investment flows in two ways. First, they oblige host states to provide certain safeguards to foreign inves-

[42] Krista .N Schefer, *International Investment Law: Text, Cases and Materials* (Edward Elgar 2013) 1.

[43] Elizabeth Whitsitt and Todd Weiler, 'Sovereign Wealth Funds and Bilateral Investment Treaties' new models: Issues, new trends and State Practice' in F Bassan (eds) *Sovereign Wealth Funds and International Investment Law*(Edward Elgar, 2015) 279.

[44] Ibid.

[45] Paul Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and their investments protected?' (2011) 6(2) Journal of International Law and International Relations 1, 14.

tors. These safeguards include guarantees of National Treatment, Fair and Equitable treatment, Most Favoured Nation Treatment and Compensation in the event of actions tantamount to direct or indirect expropriation.[46] Secondly, IIAs afford foreign investors the right to initiate arbitral proceedings against a host state in whose jurisdiction the investor operates. By invoking the dispute settlement provisions in an IIA, the foreign investor avers that the host state has committed an infraction of the protective standards embedded within the relevant treaty.[47] Common fora for proceedings of this kind include the International Centre for the Settlement of Investment Disputes (ICSID) – which was established under the auspices of the World Bank in the 1960s for the settlement of investment disputes between host states and private nationals of other states.[48] Having considered a broad overview of contemporary investment law, it is important to situate SWFs and SOEs as claimants within its realms.

Sovereign Wealth Funds and SOEs as Claimants under IIAs and ICSID

Given the concerns that the operations of State-controlled investors (SWFs and SOEs) raise in host states, it is not inconceivable that their investments may be threatened and that disputes might ensue. This chapter argues that Treaty-based arbitration presents a plausible dispute resolution mechanism.[49]

In considering whether SWFs and SOEs are entitled to pursue claims before Investment Tribunals, there are typically two jurisdictional hurdles. For one, it is important to establish that the concerned entity is a covered 'investor' within the ambit of the International Investment Agreement (IIA) between its home state and its host.[50] In addition, the SWF or SOE would have to satisfy the jurisdictional constraints of the relevant arbitral tribunal where it seeks to pursue its claim. These hurdles are explained below.

Jurisdictional Hurdle 1

The question of protection for SWFs and SOEs under an IIA depends on the provisions of the relevant investment treaty, in particular, its definition of investor.[51] In this context, two broad approaches are discernible.

[46] Ibid

[47] Elizabeth Whitsitt and Todd Weiler, 'Sovereign Wealth Funds and Bilateral Investment Treaties' new models: Issues, new trends and State Practice' in F Bassan (eds) *Sovereign Wealth Funds and International Investment Law* (Edward Elgar, 2015) 280.

[48] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (1st edn CUP, 2010) 299.

[49] Julian Chaisse and Dini Sejko, 'Investor State Arbitration Distorted' in Leila Choukroune (eds), *Judging the State in International Trade and Investment Law* (Springer, 2016) 87.

[50] ibid 91.

[51] Mark Feldman, 'The Standing of State-Owned Entities under Investment Treaties' in

In the first instance, there are certain IIAs that define the notion of 'investor' in broad terms without specific regard to the governmental or private nature of covered entities. These ownership-blind treaties merely accentuate the nationality or place of incorporation of protected entities.[52] Notable examples include the Singapore–China BIT which defines 'investor' with sufficient breadth to include:

(i) 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;

(ii) 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.[53]

This approach is mirrored in the India-Turkmenistan BIT which defines covered entities as "every juridical person, associations, firms, companies and other societies or unions with the rights of a juridical entity founded in accordance with the legislation of Turkmenistan and located on its territory."[54]

In such a situation, the question of whether a SWF or SOE is a covered investor under the IIA would presumably be a matter for interpretation at tribunal level and an arbitral tribunal faced with such a thorny issue would most likely adopt an interpretative analysis under article 31(1) of the Vienna Convention on the Law of Treaties (VCLT).[55] Recent commentary however suggests that tribunals are likely to adopt a laissez-faire interpretation of such IIAs so as to extend coverage to state-owned entities.[56]

Conversely however, certain IIAs provide explicit coverage for entities of a governmental or state-controlled nature, including SWFs and SOEs. Such an approach is visible in Bilateral Investment treaties entered into

Karl P. Sauvant, (eds), *Yearbook on International Investment Law & Policy 2010/2011* (New York: OUP, 2011) 631.

52 Ibid.

53 Agreement between the Government of the Peoples Republic of China and the Government of the Republic of Singapore on the promotion and protection of investments (signed 21 November 1985, entered into force 4 December 1986) ('China-Singapore BIT') Article 3.

54 Agreement between the Government of the Republic of India and the Government of Turkmenistan for the Promotion and Protection of Investments (signed 20 September 1995, entered into force 20 February 1996)('India-Turkmenistan BIT') Article 1.

55 Elizabeth Whitsitt and Todd Weiler, 'Sovereign Wealth Funds and Bilateral Investment Treaties' new models: Issues, new trends and State Practice' in F Bassan (eds) *Sovereign Wealth Funds and International Investment Law* (Edward Elgar, 2015) 291.

56 UNCTAD, 'The Protection of National Security in IIAs: UNCTAD Series on International Investment Policies for Development' (2009)43, <http://www.unctad.org/en/docs/diaeia20085_en.pdf> Accessed 20 March 2018.

by Arab states such as the UAE, Saudi Arabia, Kuwait and Qatar.[57] Interestingly also, these states are home to some of the largest SWFs and SOEs in the world.[58] By way of example, all six Saudi-Arabia BITs entered into in the years 2000-2011 contain a similar definition of 'investor' which expressly references its SWF, the Saudi Arabian Monetary Agency (SAMA).[59] Similarly, 25 out of 27 UAE BITs ratified between 1992 and 2011 contain a definition of investor that mentions specific SWFs and state-owned enterprises in its definition of covered investor.[60] Equally, BITs entered into by the Kingdom of Kuwait explicitly mentions its SWF, the Kuwait Investment Authority, within its definition of Investor. Indeed, the 1997 Kuwait–Germany BIT goes even further by defining investor to include 'the government of the state of Kuwait acting directly or indirectly through its SWF, the Kuwait Investment Authority.'[61]

Explicit coverage for SWFs and SOEs is not just a matter for Arab IIAs. Indeed, several non-Arab treaties extend protection to state-owned investors such as SWFs and SOEs. Notable examples include the NAFTA treaty which defines 'investor' as 'any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association.'[62] The 2012 United States Model Investment Treaty also adopts the NAFTA approach with a similar definition of investor.[63] Where (as in the examples cited above) the protection of an IIA is explicitly extended to SWFs and SOEs, the ordinary meaning of the IIA pursuant to Article 31(1) of the VCLT will prevail, allowing the SWF or SOE to assert its status as an investor under the applicable IIA and to pursue its claim before an arbitral tribunal.

Jurisdictional Hurdle 2

Besides the preliminary hurdle embedded in the applicable investment treaty, a SWF or SOE would also have to scale through the jurisdictional requirements of the relevant arbitral tribunal to which it seeks to submit its

57 Elizabeth Whitsitt and Todd Weiler, 'Sovereign Wealth Funds and Bilateral Investment Treaties' new models: Issues, new trends and State Practice' in F Bassan (eds) *Sovereign Wealth Funds and International Investment Law* (Edward Elgar, 2015) 290.

58 Ibid 291.

59 Ibid.

60 Ibid 293.

61 Ibid.

62 North American Free Trade Agreement (Between the Governments of the United States, Canada and Mexico) (Signed 12 December 1992, entered into force 1 January 1994) Article 201(1).

63 United States Trade Representative, 2012 Model Bilateral Investment Treaty (2012), Art 1<https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> Accessed 30 May 2018.

claim. In the case of ICSID, the most popular forum for the adjudication of investment treaty disputes, this is most controversial.[64]

For a start, the ICSID Convention provides in Article 25 that a dispute shall arise between a contracting state and a national of another contracting party.[65] This is often interpreted to mean disputes between a contracting state and a private investor.[66] Two factors support this view. First, the Convention was originally intended to apply to private, but not public foreign investment. Indeed, its preamble[67] and the Report of ICSID Executive Directors make several allusions to the purpose of the convention which is to stimulate private capital flows and to facilitate private foreign investment.[68]

Second, the convention and its institutional creation (ICSID) were established to address the procedural imbalance which existed between state-to-state disputes (which could be adjudicated at fora such as the International Court of Justice), and disputes between private entities (which can be resolved domestically or via commercial arbitration).[69] Taking this view, it would appear that SWFs and SOEs which are instrumentalities of states might not qualify as 'a national of another contracting party' as required by Art 25 of the ICSID Convention.[70]

Yet, there are limited instances in which ICSID tribunals are able to assume jurisdiction in proceedings involving State-owned entities. These instances are explained by what is now known in ICSID parlance as the 'Aron Broches test.' This test devised by Aron Broches, one of the principal drafters of the convention, allows a tribunal to assume jurisdiction in a case involving a state-owned investor where the concerned investor does not act as an agent of its home state or does not discharge an essentially governmental function but is instead acting in a commercial capacity.[71] Broches set out his reasoning in a 1972 paper as follows:

'In today's world the classical distinction between private and public investment, based on the source of the capital, is no longer meaningful, if

[64] Lauge N.S. Poulsen, 'Investment Treaties and the Globalisation of State Capitalism: Opportunities and Constraints for host states' in R. Echandi and P. Sauve, *Prospects in International Investment Law and Policy* (Cambridge University Press, 2012) 77.
[65] Convention on the Settlement of investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art 25.
[66] Ibid
[67] Ibid p.11.
[68] Ibid p.40.
[69] Mark Feldman, 'The Standing of State-Owned Entities under Investment Treaties' in Karl P. Sauvant, (eds), *Yearbook on International Investment Law & Policy 2010/2011* (New York: OUP, 2011) 620.
[70] Ibid.
[71] Ibid 621.

not outdated…. It would seem, therefore, for the purposes of the convention that a mixed economy company or government-owned corporation should not be disqualified as a "National of another Contracting state" unless it is acting as an agent for the government or is discharging an essentially governmental function (emphasis added)'[72]

Although welcome, this test has often provoked controversy in arbitral settings. The most troubling aspect for tribunals is precisely what Broches meant by 'acting as agent for the government' and 'discharging an essentially governmental function.' The leading decision in this sphere is the decision of the ICSID Tribunal in Ceskoslovenska Obchodni Banka, A.S v the Slovak Republic.[73]

The case concerned CSOB, a Bank owned by the government of the Czech Republic which in 1993 entered into a series of arrangements with the Slovak Republic and other related parties. In addition, CSOB entered into a loan agreement with a Slovak Collection company whose debt obligations were guaranteed by the Slovakian state. When the Company failed to honour its obligations under the loan agreement and the Slovak State in turn failed to fulfil its guarantee, CSOB filed a claim for arbitration before an ICSID tribunal alleging an infraction of the BIT between its home state (the Czech Republic) and the Slovak Republic.[74] As is often the case in proceedings involving a state-owned investor, the respondent (the Slovak state) began by challenging the tribunal's jurisdiction under the BIT and the ICSID Convention arguing, in particular, that the dispute was in effect a state-to-state dispute between the Slovak State and its Czech counterpart and that CSOB was acting as an agent of its owner.[75]

The ICSID tribunal began its analysis of Slovakia's objection by averring that Article 25(1) of its constituting convention leaves no doubt that ICSID tribunals have no jurisdiction over disputes between states. The tribunal also noted that the article simply states that potential claimants would have to be 'nationals' of contracting states in order to be granted standing. The tribunal further examined the accompanying provision – Article 25(2) in which the term 'national' was declared to include both natural and juridical persons and nothing more.[76] Due to the lack of clarity in both

72 Aron Broches, Selected essays, World Bank, ICSID, and other subjects of public and private international law (Dordrecht: Martinus Nijhoff Publishers, 1995)167.
73 *Ceskoslovenska Obchodni Banka A.S. v The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction (24 May 1999) <https://www.italaw.com/sites/default/files/case-documents/ita0144.pdf> Accessed 20 April 2018.
74 Ibid.
75 Ibid para 10.
76 Ibid para 16.

provisions, the tribunal turned to the legislative history of the ICSID convention for guidance.

Here, the tribunal identified the seminal 1972 statement of Aron Broches (discussed above) as the determinative test. In particular, it was persuaded by Broches' suggestion that the jurisdictional barrier on state-state disputes did not preclude wholly or partially government-owned corporations from pursuing arbitral claims before ICSID tribunals.[77]

In reaching a decision on its jurisdiction, the tribunal examined the elements of the test. It will be recalled that the test is divided into two limbs. The first requires an analysis of whether the state-owned investor is acting as an agent of its home state and the second calls for an inquiry into whether the concerned entity is discharging an essentially governmental function.

As to the first limb, the CSOB Tribunal conceded that CSOB 'had acted on behalf of the state' in executing international banking and foreign commercial operations that the Czech state wished to support.[78] It further conceded that the Czech state's control of CSOB (65 percent at the time of the claim) meant that it was required to do its bidding.[79] Rather controversially, the tribunal refrained from making a full determination on the agency limb, it instead went on to discuss the second part of the Broches test which requires an examination of whether the investor was discharging an essentially governmental function.

Regarding the second limb, the tribunal again acknowledged the Czech state's majority ownership of CSOB. Crucially also, it highlighted CSOB's role in promoting the 'policies or purposes' of the Czech state.[80] More controversially however, the tribunal emphasised that, in the light of the Broches test, both observations would not be determinative. It instead held that a determination of whether CSOB's investment constituted an 'essentially governmental function' should focus on the nature of its investment rather than the purpose.[81] In other words, it was immaterial that CSOB had functioned to promote the policies of its home government (as conceded by the tribunal), the crucial issue was that it acted in a commercial capacity in providing financing facilities to the Slovak state and its corporations.[82] Having reached this position, the tribunal dismissed the Slovak state's objection.

[77] Ibid para 16 and 17.
[78] Ibid para 20.
[79] Ibid.
[80] Ibid.
[81] Ibid.
[82] Ibid.

Although the CSOB decision represents a significant clarification on the requirements of Art 25 of the ICSID convention, it is not immune from criticism. For one, the tribunal's treatment of the agency limb of the Broches test is suspect. It would be recalled that the Broches test is formulated in a disjunctive way. Its limbs are separated by the word "or". Therefore, the test clearly calls for two separate and discrete inquiries.[83] First, it asks whether the state-owned entity is acting as an "agent for the government" or whether the entity is "discharging an essentially governmental function." If either of these limbs are satisfied, the ICSID Convention will presumably not apply to protect the relevant state-owned entity, meaning that the tribunal must decline jurisdiction.[84] However in the CSOB case, the tribunal appeared to apply the test in a conjunctive way.

Regarding the issue of agency, it found that "it cannot be denied that for much of its existence, CSOB acted on behalf of the state in facilitating or executing the international banking transactions and foreign commercial operations the state wished to support." In other words, the tribunal established that for a protracted period of time, CSOB had acted as an agent 'on behalf' of a disclosed principal (the Czech State) and that it was at the behest of the principal for much of its operations. Rather than conclude that CSOB therefore did not qualify as a national of a contracting state under Mr Broches' disjunctive articulation and therefore decline jurisdiction, the tribunal instead went on to consider the second part of the test where it based its decision to assume jurisdiction. This is most improper from a procedural perspective.[85]

Besides the above, the Tribunal's treatment of the second limb of the Broches test is also open to criticism. By according significant weight to the nature of CSOB's investment rather than its purpose and goals, the tribunal rejected a crucial line of inquiry which may have been useful in demonstrating whether the entity was in fact discharging an essentially governmental function. Indeed in many instances, the goals and purposes of a particular entity or its investments may be crucial in determining whether its activities are commercial or not. Some may even argue that it is impossible to separate the nature of an activity from its purpose.[86] Returning to CSOB, it can therefore be argued that the failure to sufficiently consider

[83] Mark Feldman, 'The Standing of State-Owned Entities under Investment Treaties' in Karl P. Sauvant, (eds), *Yearbook on International Investment Law & Policy 2010/2011* (New York: OUP, 2011) 630.
[84] Ibid.
[85] Paul Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and their investments protected?' (2011) 6(2) Journal of International Law and International Relations 1, 34.
[86] Ibid 31.

the broader framework of an entity's purpose, motivations or goals could result in a situation where a tribunal is unable to fully appreciate whether what it is faced with is essentially a state-to-state claim or an investor-state dispute. It is submitted that these facts are too important to ignore.

The many limitations of the CSOB decision were again thrown into sharp relief in the 2017 decision of an ICSID tribunal in BUCG v Yemen, a case involving a Chinese state-owned Enterprise and the Yemeni state.[87] The dispute arose out of the termination of BUCG's contract for the construction of an airport terminal in the Yemeni city of Sana'a. BUCG contended that the Yemeni state unlawfully deprived it of its investment by employing military forces and security agencies to detain and assault its employees thereby forcibly denying it access to the construction site.

The Yemeni state on the other hand retorted that BUCG had failed in multiple respects to perform the construction contract satisfactorily. It cited, in particular, instances of the unauthorised removal of materials, importation of equipment without customs authority, lengthy absence of key BUCG personnel and recurring problems with subcontractors.[88] The Yemeni state also filed an objection to the tribunal's jurisdiction contending that BUCG did not qualify as "a national of another contracting party" under Article 25 of the ICSID Convention. Importantly also, the respondent based its objection on the Broches test under which it alleged that BUCG was both an agent of the Chinese State and that it discharged governmental functions even in its ostensibly commercial undertakings.[89]

Rather unsurprisingly, BUCG countered that it was a "national of another Contracting state" under the Convention and that it had locus standi to pursue claims against the Yemeni state before the Tribunal. BUCG further accepted that the Broches test was determinative in assessing its claim to locus standi. It also submitted that it did not in any way act as the agent of the Chinese state nor did it discharge any governmental functions in making its investment in Yemen.[90]

In its interpretative exercise, the tribunal first considered the absolute jurisdictional bar to state-state disputes under Article 25 of the ICSID convention.[91] It also clarified that the convention is not open to State-Owned entities as claimants when acting as agents of their home state or when

[87] *Beijing Urban Construction Group Co Ltd v The Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, (31 May 2017) <https://www.italaw.com/sites/default/files/case-documents/italaw8968.pdf> Accessed 21 May 2018.

[88] para 27.

[89] para 29.

[90] para 30.

[91] para 31.

engaged in activities that are tantamount to the discharge of a governmental function.[92] It further accepted the parties' contention that the Broches test is the functional approach in these circumstances.[93] Importantly also, the tribunal acknowledged the disjunctive nature of the test – a welcome change from the Tribunal in CSOB.[94] The BUCG tribunal further noted the application of the Broches test in the CSOB case and the focus of the CSOB tribunal on a context-specific analysis of the commercial function of the investment – a reasoning which the BUCG tribunal suggested that it agreed with.[95] Having set the tone, the tribunal turned to an examination of each limb of the Broches test.

Regarding the first limb which asks whether the state-owned entity is acting as an agent of the Chinese Government, the Tribunal accepted that BUCG was a publicly funded and wholly state-owned entity established by the Chinese State.[96] It further noted the Yemeni state's reliance on a variety of Chinese government documents and directives which demonstrated that BUCG was expected to advance China's national interest. It noted, in particular, evidence that BUCG was subject to the overall control of a board that was "representative of the state's interests."[97] It also highlighted documents tendered before it, which suggested that BUCG was under the supervision and inspection of the Beijing State-owned Assets Supervision, the Administrative Bureau and the Beijing Finance Bureau – all government organs responsible for the administration of state-owned assets.[98] More interestingly, the tribunal noted evidence tendered by the respondent which suggested that BUCG like several other Chinese State-owned Enterprises had Communist party committees and cells which focused not only on supervising human resources but also on monitoring an SOE's implementation of national policies.[99]

In its determination of the agency branch of the Broches test, the tribunal rejected the above submissions as decisive. It instead averred that forms of corporate controls and mechanisms were not surprising in the context of Chinese State-owned corporations. It presumably based this reasoning on the fact that China's command and control economy has been a matter of public record for several decades.[100] The tribunal further maintained that

[92] Ibid.
[93] para 33.
[94] para 33.
[95] para 35.
[96] para 32.
[97] para 37.
[98] Ibid.
[99] Ibid para 38.
[100] Jing Li, 'State-Owned Enterprises in the Current Regime of Investor-State Arbitration' (2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2473834> Accessed 20 May

the relevant issue was not the existence of frameworks and controls governing the SOE but whether BUCG functioned as an agent of its home state in the fact-specific context i.e. the construction of an airport terminal in the Yemen.[101]

Regarding this point, the tribunal concluded that the evidence before it did not support an agency nexus between the Chinese state and BUCG. To explain its reasoning, the tribunal cited evidence which showed that BUCG participated in the airport project as a general contractor and that it had undergone a competitive bidding process in which its tender was selected on its "commercial merits".[102] The tribunal also noted that BUCG's contract had been terminated not for reasons associated with the "PRC's decisions or policies" but for reasons supposedly associated with its performance on the construction contract.[103] With this in mind, the tribunal surmised that BUCG was in fact performing its operations on the Airport site as a commercial actor and not as an agent of its home state, the Peoples Republic of China.

The tribunal's treatment of the second limb of the Broches test also merits attention. Its approach mirrors the style and substance of its treatment of the agency limb. For instance, the tribunal began by describing the attempt of the Yemeni state to situate BUCG within the broader context of China's state-directed economy as "convincing but largely irrelevant."[104] It also rejected Yemen's rather illuminating submissions which included evidence that much of the cross border transactions undertaken by BUCG were to be "administered, coordinated and regulated" by the Chinese Foreign Economic and Trading department.[105] Also rejected was the respondent's contention that the Chinese state was the 'ultimate decision maker for key management, operational and strategic decisions.'[106] Here, the tribunal described the evidence as "too remote from the facts of the Sana'a International Airport project to be relevant."[107] It then concluded that BUCG was 'clearly not exercising a Chinese governmental function on the airport site in Yemen.'[108] Its conclusion was predicated on the facile ground that the alleged military aggression against BUCG's investment was not against its

2018.
101 *BUCG* (n1277) para 39.
102 Ibid para 40.
103 Ibid para 40.
104 Ibid para 42.
105 Ibid para 43.
106 para 43.
107 Ibid.
108 para 43.

owner state, the Peoples Republic of China but in relation to BUCG as an airport contractor.

Although the BUCG decision provides an additional clarification of the scope and application of the Broches test and the approach of ICSID tribunals to the locus standi of state-owned entities, it is nonetheless fraught with difficulties. For one, the context-specific approach of the tribunal appears to be an alter ego of the much derided nature over purpose approach in CSOB. It is also a decidedly pro-investor approach. We see this in the tribunal's reluctance to attach substantial weight to the broader context in which BUCG may have operated in its treatment of both limbs of the Broches test.

When placed in its proper context, it would appear that BUCG's operations were very much part of the Chinese government's SOE internationalisation policy – a policy prosaically referred to as the 'going out strategy' which required State-owned entities in China to cultivate cross border links for the actualisation of China's foreign and economic policy goals.[109] This is in fact borne out in the Yemeni state's submissions on the structural links between the entity (BUCG) and the apparatus of the Chinese state, including its administration and supervision by several organs of the Chinese state and the presence of Communist party representatives on its board. It is precisely for this reason that there are several multilateral instruments like the OECD guidelines for the Corporate Governance of State-Owned Entities[110] and the Santiago Principles for SWFs[111] that emphasise amongst other things the need for operational independence and a functional separation between State-owned entities and the apparatus of their owner states. It would therefore appear that the tribunal's parochial fixation on the 'particular investment' disregards a crucial line of inquiry which may have unearthed the true motivations behind BUCG's internationalisation drive and helped to explain whether the entity was acting as an agent or carrying out the policy diktats of its owner state.

[109] The Economist, 'China's "going out" strategy' *The Economist* (21 July 2009) <https://www.economist.com/free-exchange/2009/07/21/chinas-going-out-strategy> Accessed 20 May 2018.

[110] OECD, 'Guidelines for the Corporate Governance of State-Owned Enterprises' (2015), p 14 <https://read.oecd-ilibrary.org/governance/oecd-guidelines-on-corporate-governance-of-state-owned-enterprises-2015_9789264244160-en#page16> Accessed 20 March 2018.

[111] International Working Group, 'Sovereign Wealth Funds: Generally Accepted Principles and Practices' (2008) <http://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf> Accessed 30 March 2018.

Implications for SWFs and SOEs

What does this all mean for SWFs and SOEs? At first, it appears that these investors are entitled to pursue treaty-based claims before Investment tribunals. However, they are faced with two major jurisdictional hurdles. The first involves an analysis of whether the SWF or SOE is a covered investor under the investment treaty between its owner state and its host. The second involves the jurisdictional bar in article 25(1) of the ICSID convention which proscribes the adjudication of state-to-state disputes by ICSID tribunals. This creates severe difficulties for entities of a sovereign or state-owned nature like SWFs and SOEs. In deciding whether a state-owned entity has locus standi to pursue its claims under ICSID, it appears that an ICSID tribunal would have to conduct an analysis of the Broches Test which calls for a two-part inquiry into whether the concerned entity was acting as an agent of its home state or whether it was discharging an essentially governmental function. An affirmative finding on either count defeats a state-owned entity's claim to standing before an ICSID tribunal. However, arbitral jurisprudence in CSOB v Slovakia and BUCG v Yemen suggests that ICSID tribunals are often inclined to allow standing to these entities and will normally do so through a decidedly pro-investor analysis of the Broches test.

Concluding Remarks

This Chapter set out to explore the possibility of SOEs and SWFs as claimants under International Investment Treaties and the ICSID convention. It began with an analysis of the nature of these entities and their operations. The chapter found that SWFs and SOEs are established for a variety of policy purposes which include the stabilisation of national economies and engagement in sectors of strategic importance to owner states. Increasingly also, state-owned behemoths play a significant role in global capital markets through their acquisition of trophy assets across various parts of the globe. This formally sovereign and functionally private nature has provoked controversy in host states ranging from National security fears to concerns about market distortion and uncompetitive practices. Also, several host states are increasingly adopting policy measures which target the investments of these entities for national security reviews. The chapter further argued that the highly charged and febrile regulatory environment in which these entities operate raise fears of arbitrary and discriminatory treatment which may adversely affect their investments and operations. This raises the question of protective safeguards for SWFs and SOEs to which international investment law provides a plausible option.

In considering international Investment Law as an avenue for the protection of SWFs, the chapter tackled two jurisdictional conundrums. The first involved the question of protection for SWFs and SOEs under international investment agreements entered into by their home and host states. The second involved standing before investment tribunals such as ICSID.

In the context of the former, the Chapter revealed the binary approach of contemporary IIAs. On the one hand, some IIAs provide explicit coverage for SWFs as investors and would therefore extend treaty-based protections directly to these entities. On the other, certain IIAs are more latent on the question of coverage for SWFs and SOEs, meaning that a tribunal would have to adjudicate over any possible extension of treaty-based protection. Recent commentary however suggests that tribunals are likely to adopt a laissez-faire approach in such determinations.

Regarding the second jurisdictional hurdle, the Chapter tried to position SOEs and SWFs as claimants under the ICSID convention. This in itself raised additional questions. For one, the convention creates difficulties for state-owned entities given its absolute bar to state-state dispute resolution. It however appears that SWFs and SOEs can still gain standing to these tribunals by scaling through the Broches test which calls for a two-part inquiry into whether the entity was acting as an agent of the state or whether it was discharging an essentially governmental function. ICSID jurisprudence on the test appears to be decidedly pro-investor, with tribunals adopting a rather narrow focus on the nature of the investment and not its purpose or the SOE's broader role within the policy framework of its owner state. Taken together, it would appear that SWFs and SOEs have a realistic prospect of pursuing treaty-based claims against host states before ICSID tribunals.