CHAPTER 15

THE STANDING OF STATE-OWNED ENTITIES UNDER INVESTMENT TREATIES

MARK FELDMAN*

INTRODUCTION

As a general matter, investment treaties establish procedures for the resolution of investor-State, but not State-to-State, disputes. Given that a significant and growing amount of foreign investment is made by State-owned companies and State-owned investment funds (sovereign wealth funds (SWFs)), the issue of whether disputes concerning such investment constitute investor-State disputes falling within, or State-to-State disputes falling outside of, the scope of investment treaty protections is likely to arise with greater frequency.

The inclusion of investor-State, but not State-to-State, disputes within the scope of investment treaty protections is reflected in both the International Centre for Settlement of Investment Disputes (ICSID) Convention and bilateral investment treaties (BITs). Jurisdiction under the ICSID Convention is limited to investment disputes between a Contracting State and a "national" of another Contracting State, while jurisdiction under BITs is limited, in general, to disputes between a State Party and an "investor" of another Party.

* Mark Feldman previously served as Chief of NAFTA/CAFTA-DR Arbitration in the Office of the Legal Adviser of the U.S. Department of State. The views expressed in this article are those of the author, and do not necessarily reflect those of the U.S. Department of State or U.S. government. The author wishes to thank two anonymous peer reviewers for their helpful comments.


For claims submitted to arbitration under the ICSID Convention by State-owned entities, arbitral tribunals consistently have found that such entities meet the “national” of a Contracting State requirement under ICSID Convention Article 25(1), in most instances without analysis of how investor-State and State-to-State disputes should be distinguished under Article 25(1).

Indeed, where claims have been submitted to ICSID arbitration by a State-owned entity, in only one instance—the CSOB v. The Slovak Republic case—has the tribunal analyzed the distinction between investor-State and State-to-State disputes under Article 25(1). In that case, the tribunal found that so long as the activities of a State-owned entity are commercial in nature, a claim submitted by such an entity to ICSID arbitration will give rise to an investor-State, rather than a State-to-State, dispute, even if the entity engages in activities that are "driven by" State governmental policies and is controlled by the State such that it is “required” to do the State’s “bidding.”

This chapter analyzes the issue of standing for State-owned entities under the ICSID Convention in light of two considerations. First, the distinction between private foreign investment and public foreign investment, which is reflected in the ICSID Convention generally and, more specifically, in the widely-accepted test proposed by Aron Broches for determining whether a State-owned enterprise meets Article 25(1) standing requirements. Under that test, a State-owned entity does not have standing under Article 25(1) if the entity has an agency relationship with the State or is discharging an essentially governmental function.

Second, the intended role of the ICSID Convention as a means for bridging a procedural gap that existed between State-to-State disputes (which can be resolved in, among other fora, the International Court of Justice), and disputes between private entities (which can be resolved through domestic courts or commercial arbitration). The exclusion of State-to-State disputes from the scope of the ICSID Convention is reflected in a number of instances, including (i) the Article 25(1) requirement that a claim against a Contracting State must be brought by a “national” of another Contracting State, (ii) the Article 27 prohibition against diplomatic protection, and (iii) the failed proposal, raised by “a number of governments” during the negotiation of the ICSID Convention, to permit Contracting States to bring subrogation claims on behalf of their nationals against other Contracting States.

This chapter concludes that in light of the above two considerations, the determination of whether a State-owned entity qualifies as a “national” of a Contracting Party under Article 25(1) should include consideration not only of the commercial or governmental nature, but also the commercial or governmental purpose, of an entity’s activities.

This chapter also addresses the standing of State-owned entities under BITs. Article 25(1) of the ICSID Convention extends ICSID jurisdiction only to those disputes to which “the parties

4. CSOB v. The Slovak Republic, decision on objections to jurisdiction (May 24, 1999), ¶¶ 20, 24.
5. See Aron Broches, Selected essays, World Bank, ICSID, and other subjects of public and private international law (Dordrecht: Martinus Nijhoff Publishers, 1995), p. 167 (the ICSID Convention requirement that disputes be between “Contracting States” and “nationals” of other Contracting States "is in keeping with the purpose of the Convention, to create an international forum for the settlement of disputes between states and foreign investors. The facilities of the Centre are neither available for disputes between private parties who can either have recourse to national courts or to commercial arbitration, nor for disputes between states who can bring their disputes before the International Court of Justice or can agree to submit them to conciliation or arbitration through conventional arrangements."); Christoph Schreuer et al., The ICSID Convention: A commentary (Cambridge: Cambridge University Press, 2009), p. 160 (same).

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The dispute consent in writing to submit to the Centre,” and such written consent, on the part of Contracting States, often is expressed in BITs. In general, BITs, like the ICSID Convention, provide for investor-State, but not State-to-State, dispute resolution. While the ICSID Convention requires an investment dispute to be between a “Contracting State” and a “national” of another Contracting State, BITs generally require investment disputes to be between a State Party and an “investor” of another State Party, or, alternatively, a “national” or “company” of a Party. Definitions of “investor” (or “national” or “company” of a Party) under BITs do not distinguish between State-owned and privately owned entities, and in many instances expressly provide that a State-owned entity can qualify as an “investor” or as a “company” of a Party. But with respect to the BIT requirement that an “investor” have an “investment” as defined under the treaty, some BITs expressly permit consideration of the for-profit nature of an entity’s activities or expectations, which could raise jurisdictional obstacles for some State-owned entities seeking to pursue an investment treaty claim.

Finally, this chapter addresses the recently developed “Santiago Principles,” a set of best practices with respect to SWF investment activities that were agreed to in 2008 by 26 International Monetary Fund (IMF) member countries. Under the Santiago Principles, the goals driving SWF activities are of central importance for ensuring prudent and sound investment practices; specifically, SWF investment decisions should aim to maximize risk-adjusted financial returns, based on economic and financial grounds, and any non-economic considerations that may be driving investment decisions should be publicly disclosed. This chapter concludes that when determining, as a legal matter, whether there is jurisdiction to hear claims by State-owned entities against host countries under investment treaties, consideration of the objectives driving the activities of those entities would complement, rather than undermine, recent developments in international investment policy as reflected in the Santiago Principles.

A. STATE-OWNED ENTITIES AS FOREIGN INVESTORS

States, through their ownership of companies and SWFs, collectively have made foreign investments on a significant scale. Assets under management by SWFs alone are projected to increase from approximately US$2 trillion to US$3 trillion in 2008, to US$12 trillion by 2015. A spike in SWF investment activity occurred in the fourth quarter of 2007, in the wake of the U.S. sub-prime mortgage crisis, when SWFs invested nearly US$45 billion in Western financial institutions. As a few examples of such investments, in 2007 the Abu Dhabi Investment Authority (ADIA) invested nearly US$8 billion in Citigroup and the Singapore State investor Temasek invested approximately US$4.4 billion in Merrill Lynch, while in 2008, the Kuwait Investment


Authority invested approximately US$3 billion in Citigroup and approximately US$2 billion in Merrill Lynch.12

State-owned entities also have made significant investments in other sectors. In 2007, for example, the Abu Dhabi State investor Mubadala Development Company acquired an 8 percent stake in the computer chip maker Advanced Micro Devices.13 In 2008, ADIA purchased a 75 percent stake in New York's Chrysler Building,14 and in 2010 increased its interest in Intoll, an investment group that has stakes in toll roads in Australia and Canada, to nearly 9 percent.15 In 2009, PetroChina, a subsidiary of the State-owned Chinese National Petroleum Corporation, acquired a 46 percent stake in Singapore Petroleum Company for US$1.5 billion16 and a 60 percent stake in an oil sands project located in Alberta, Canada for US$1.7 billion.17 In 2008, the Aluminum Corporation of China (Chinalco), a State-owned mining group, purchased a 9 percent stake in Rio Tinto plc, the Anglo-Australian mining company, for approximately US$14 billion.18

Claims arising from foreign investments by State-owned entities are not uncommon. For example, in 2009, ADIA submitted a claim to arbitration against Citigroup, alleging fraudulent misrepresentations by Citigroup in the 2007 transaction in which ADIA acquired a nearly US$8 billion stake in the company.19 In 2010, Norway's central bank, Norges Bank, filed a lawsuit against Citigroup in federal court in New York alleging that Citigroup failed to disclose the full extent of the financial risks it was facing.20 The 2009 American Lawyer Arbitration Scorecard included arbitration claims submitted by the National Property Fund of the Czech Republic against Nomura Bank and by the Algerian national gas company Sonatrach against Repsol and British Petroleum.21

With respect to potential claims by State-owned entities under investment treaties, a threshold issue will be whether the dispute is an investor-State dispute falling within, or a State-to-State dispute falling outside of, the scope of the applicable treaty. As a general matter, both the ICSID Convention and BITs contemplate investor-State, rather than State-to-State, dispute resolution: The ICSID Convention requires an investment dispute to be between a "Contracting State" and a "national" of another Contracting State, while BITs generally require disputes to be between a state Party and an "investor" of another State Party. As discussed below, for claims submitted to arbitration against Contracting States under the ICSID Convention by State-owned entities, arbitral tribunals consistently have found that such entities meet the criterion of


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"national" of a Contracting Party under Article 25(1), largely without analysis of how investor-State and State-to-State claims should be distinguished under that provision.

B. THE STANDING OF STATE-OWNED ENTITIES UNDER THE ICSID CONVENTION

Article 25(1) of the ICSID Convention states as follows:

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.

Accordingly, under Article 25(1), the ICSID Convention does not apply to disputes between Contracting States, or to disputes between "nationals" of Contracting States. Rather, the ICSID Convention applies only to disputes between, on the one hand, Contracting States, and on the other, "nationals" of other Contracting States. Two key factors support that limitation. First, the ICSID Convention was intended to fill a procedural gap that existed between State-to-State disputes (which can be resolved in, among other fora, the International Court of Justice), and disputes between private entities (which can be resolved through domestic courts or commercial arbitration). Second, the ICSID Convention was intended to facilitate the settlement of disputes arising from private, but not public, foreign investment. Each of those factors is discussed below.

1. ICSID CONVENTION INTENDED TO FILL PROCEDURAL GAP BETWEEN STATE-TO-STATE AND PRIVATE DISPUTES

As observed by Professor Schreuer, the ICSID Convention was intended to "fill a particular procedural gap" by addressing the "peculiar situation" of a dispute between "a State and a foreign national arising from an investment relationship." As stated by Mr. Broches, who played a

22. Broches, Selected essays, op. cit., p. 167 (the ICSID Convention requirement that disputes be between "Contracting States" and "nationals" of other Contracting States "is in keeping with the purpose of the Convention, to create an international forum for the settlement of disputes between states and foreign investors. The facilities of the Centre are neither available for disputes between private parties who can either have recourse to national courts or to commercial arbitration, nor for disputes between states who can bring their disputes before the International Court of Justice or can agree to submit them to conciliation or arbitration through conventional arrangements."); Schreuer et al., The ICSID Convention, op. cit., p. 160 (same). See also Michael M. Moore, "International arbitration between states and foreign investors—the World Bank Convention," 18 Stanford Law Review 1359 (1966), p. 1363 ("At present there are no international arbitration or conciliation bodies which have jurisdiction recognized by treaty over disputes between States and foreign nationals. In this respect the Centre will perform a great service for private investors abroad.") (citation omitted).


central role in the conception and negotiation of the ICSID Convention as General Counsel of the World Bank, “there was general agreement” from the outset of the ICSID Convention negotiations that “private vs. private and state vs. state disputes should be excluded from the jurisdiction of the Centre […]”

The exclusion of State-to-State disputes from ICSID jurisdiction is reflected, among other sources, by the failed proposal, during negotiations of the ICSID Convention, to permit Contracting States to submit subrogation claims to ICSID arbitration. As observed by Mr. Broches, during ICSID Convention negotiations “a number of governments” sought an exception permitting a State or State agency, “which had been subrogated to the claim of an eligible investor under an investment insurance scheme, to be substituted for that investor” in ICSID proceedings. Some developing countries, however, mounted “vigorous” opposition to the proposed exception, and in the end the proposal “was dropped.”

Professor Schreuer provides additional detail on the reasons why subrogation claims were excluded from the ICSID Convention:

[C]an a State, a State agency administering [an] investment programme, or an international investment insurance organization become party to ICSID proceedings after having compensated the investor? The answer is clearly no. There are three main reasons for the denial of party status:

1. The Convention provides for the settlement of disputes between States and nationals of other States. The clear wording of Art. 25(1) cannot be re-interpreted to cover disputes involving States, State agencies or international organizations on the investor's side.
2. One of the Convention's objectives is to depoliticize disputes. This objective is expressed most clearly in Art. 27 prohibiting diplomatic protection in favour of the investor. This purpose would be defeated if the investor's State of nationality were to be given standing before the Centre.
3. The Convention's travaux préparatoires show unambiguously that a conscious decision was made to exclude States, State agencies or international organizations from access to ICSID proceedings on the investor's side.

Accordingly, the limited role of the ICSID Convention in filling a procedural gap between State-to-State and private disputes is reflected on a number of levels, including the Article 25(1) requirement that a claim against a Contracting State be brought by a “national” of another Contracting State, the Article 27 prohibition against diplomatic protection in favor of the investor, and the rejection, during ICSID Convention negotiations, of a proposal that would have allowed States or State agencies to submit subrogation claims to ICSID arbitration.

25. Id., p. 167.

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2. ICSID CONVENTION INTENDED TO APPLY TO PRIVATE, BUT NOT PUBLIC, FOREIGN INVESTMENT

An additional factor supporting the Article 25(1) requirement that ICSID disputes be between "Contracting States" and "nationals" of other Contracting States is the Convention's intended purpose to promote private, as distinguished from public, foreign investment. As stated by Mr. Broches, "[t]he broad purpose of the Convention is the promotion of private foreign investment and the first preambular clause of the Convention uses the term private international investment." That preambular clause, according to Professor Schreuer, "would indicate that the investor must be a private individual or corporation" and thus "States acting as investors have no access to the Centre in that capacity." The Report of the Executive Directors on the ICSID Convention similarly observes that the ICSID Convention was intended to promote private foreign investment:

The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.

Mr. Broches provided additional context concerning the ICSID Convention’s focus on private foreign investment, observing that as a development institution, the World Bank "was and is vitally concerned with capital flows from the developed to the developing countries." Mr. Broches outlined four categories of such capital flows, only one of which, in his view, constituted "private foreign investment," namely private funds that are made directly available for projects in developing countries.

By contrast, according to Mr. Broches, three other categories of capital flows—"according to their origin and the channels through which they reach the developing countries"—constitute public foreign investment. Two of those categories concern the transfer of "governmental" funds to: (1) developing countries under bilateral arrangements, and (2) developing countries (or private or public entities in those countries) "through and by multilateral institutions to which the governments in question have made these funds available," including the World Bank. The third category of public foreign investment concerns "private" funds that are transferred "through and by multilateral institutions to whom these private savings are loaned"; those multilateral institutions, in turn, re-lend the borrowed funds "for development projects and programmes."

32. Id., p. 193.
33. Id., p. 192.
34. Id., pp. 192–93.
35. Id., p. 193.

According to Mr. Broches, private foreign investment in the form of private funds that are
made directly available for developing country projects is of great quantitative\(^{36}\) and qualitative\(^{37}\)
importance for development. Given the importance of private foreign investment for develop-
ment, the World Bank “considered it appropriate to explore whether it could make a contribu-
tion to an improvement in the investment climate,”\(^{38}\) which ultimately resulted in the ICSID
Convention.

The need to distinguish private from public foreign investment is reflected in the widely
accepted test—formulated by Mr. Broches in 1972—for determining whether there is jurisdic-
tion over claims submitted by State-owned entities against Contracting States under the ICSID
Convention. That test—which recently was characterized by Professor Schreuer as “probably”
the “best guideline” for determining whether a State-owned entity qualifies as a “national” of a
Contracting State under ICSID Convention Article 25(1)—provides that a State-owned entity
“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.”\(^{39}\)

When formulating that guideline, Mr. Broches highlighted the need to distinguish private
from public investment:

I shall speak at some length about the determination of nationality in the light of the provisions
of Article 25(2). But there is another question which is not dealt with by the Convention, namely
whether an entity in order to qualify as a ‘national of another Contracting State’ must be a privately
owned entity. The broad purpose of the Convention is the promotion of private foreign investment
and the first preambular clause of the Convention uses the term private international investment.
On the other hand, it was recognized in the discussions leading up to the formulation of the
Convention that in today’s world the classical distinction between private and public investment,
based on the source of the capital, is no longer meaningful, if not outdated. There are many
companies which combine capital from private and governmental sources and corporations all of
whose shares are owned by the government, but who are practically indistinguishable from the
completely privately owned enterprise both in their legal characteristics and in their activities.
It would seem, therefore, that for purposes of the Convention a mixed economy company or
government-owned corporation should not be disqualified as a “national of another Contracting
State” unless it is acting as an agent for the government or is discharging an essentially governmen-
tal function. I believe that it is fair to say that there was a consensus on this point among those
participating in the preparation of the Convention.\(^{40}\)

\(^{36}\) Id., p. 193 (“private foreign investment […] is of great quantitative importance as a supplement to a necessar-
ily limited volume of public development finance, and in many periods has accounted for between one-third and
one-half of total capital flows […]”).

\(^{37}\) Id., p. 193 “[private foreign investment] has a number of potential side benefits in transferring managerial
and technical know-how, encouraging the creation of auxiliary industries and development of export markets
[...]”).

\(^{38}\) Id., p. 193.

\(^{39}\) Schreuer et al., The ICSID Convention, op. cit., p. 161 (quoting Aron Broches, “The convention on the
settlement of investment disputes between states and nationals of other states,” 136 Recueil des Cours 331 (1972),

\(^{40}\) Broches, Selected essays, op. cit., pp. 201–202.

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Thus, because the “classical distinction” between public and private investment—based on the source of capital—had become outdated, Mr. Broches supported two alternative factors for distinguishing public from private investment: First, whether a State-owned entity was acting as an agent for the government, and second, whether the State-owned entity was discharging an “essentially governmental” function.

Of the several claims that have been submitted to ICSID arbitration by State-owned entities, in only one case, CSOB v. The Slovak Republic, did the tribunal consider whether the State-owned entity was acting as an agent for the government or discharging an essentially governmental function. In three other cases, namely HEP v. Slovenia,41 CDC v. Seychelles,42 and Telenor v. Hungary,43 the tribunals found, without analysis, that the State-owned entity met the “national” of a Contracting Party requirement under Article 25(1).44

Furthermore, as discussed below, in no case submitted to ICSID arbitration by a State-owned entity has a tribunal considered the larger factors supporting the Article 25(1) standing requirement: The limited role of ICSID in supporting private, as distinguished from public, foreign investment, and the limited role of ICSID in filling a procedural gap between State-to-State and private disputes. In addition, as discussed below, in no case has the purpose, as distinguished from the nature, of a State-owned entity’s activities been considered when determining whether such entities have standing to submit a claim to ICSID arbitration.

3. CLAIMS SUBMITTED TO ICSID ARBITRATION
BY STATE-OWNED ENTITIES

A failure to consider the goals driving the activities of State-owned claimants risks expanding ICSID jurisdiction to include State-to-State disputes. The test formulated by Mr. Broches, as well as the broader considerations of the ICSID Convention’s limited role in filling a narrow procedural gap and promoting private but not public foreign investment, support consideration, under ICSID Convention Article 25(1), of not only the nature, but also the purpose, of a State-owned entity’s activities. The issue of standing under Article 25(1) is discussed below in the context of four claims submitted to ICSID arbitration by State-owned entities.

a. HEP v. Slovenia

Hrvatska elektroprivreda, d.d. (HEP), “the national electric company of Croatia,” which was wholly owned by the Government of Croatia, submitted a Request for Arbitration under the ICSID Convention in 2005. The dispute concerned the ownership and operation of a nuclear power plant in Slovenia, which had been built in the 1970s “with funds contributed equally by the national power industries of the Socialist Republics of Slovenia and Croatia when they were both still part of the former Yugoslavia.” The contracts at issue, which governed the “financing, construction, operation, management, and use” of the power plant, had been entered into “by the Socialist Republics of Slovenia and Croatia.” HEP was the legal successor of the original Croatian investors, and held a 50 percent interest in the power plant.

Following Slovenia’s termination of electricity deliveries to HEP in 1998, the governments of Slovenia and Croatia “entered into negotiations aimed at restoring HEP’s rights,” which ultimately resulted in a treaty between the two countries governing the operation of the power plant, referred to in the decision as the “2001 Agreement.” HEP submitted a claim to ICSID arbitration alleging a breach of the 2001 Agreement.

When considering its jurisdiction over HEP’s claim, the tribunal focused on the terms of the 2001 Agreement and did not consider Article 25(1) of the ICSID Convention. Specifically, the tribunal found that the issue of whether HEP could bring its claim against Slovenia was “readily settled” by the dispute resolution provision of the 2001 Agreement. That provision gave HEP, as a “Shareholder” in the limited liability company that had been incorporated as the legal successor of all rights and obligations of the power plant, “the right to arbitrate directly against the ‘other State Party’ for any failure on the latter’s part to cause its wholly owned ‘Shareholder’ to comply with the agreement.”

Given the language of the dispute settlement provision in the 2001 Agreement, the tribunal concluded that it was “in no doubt as to its jurisdiction to hear and

45. HEP v. Slovenia, decision on the treaty interpretation issue, (June 12, 2009) ¶¶ 1, 17.
47. HEP v. Slovenia, decision on the treaty interpretation issue, op. cit., ¶ 8.

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decide the dispute here presented to it,” and did not address whether the dispute ultimately was between two “Contracting States,” that is Slovenia and Croatia, which would have been in violation of Article 25(1) of the ICSID Convention.

The scope of an ICSID tribunal’s jurisdiction, however, depends not only on the provisions of the instrument in which a host country has consented to arbitration, but also on the provisions of the ICSID Convention itself. The HEP v. Slovenia tribunal did not consider whether the claimant—the national electric company of Croatia—met the criterion of “national” of a Contracting Party under ICSID Convention Article 25(1).

Although jurisdictional issues “were not seriously contested between the parties” in the HEP v. Slovenia arbitration, the facts of the case could support an argument that for purposes of standing under Article 25(1), HEP should have been considered part of the Government of Croatia. Preambular language in the 2001 Agreement refers to the “desire” of Croatia and Slovenia “as sovereign and internationally recognized states […] to continue to jointly regulate their relations regarding the status, use and dismantling” of the power plant. The 2001 Agreement also provides that the power plant was to operate “based on the principle of covering all expenses, and therefore in principle does not produce either losses or profits as a result of its operation.” Thus, in the HEP v. Slovenia case, the national electric company of Croatia submitted a claim to ICSID arbitration against Slovenia alleging a breach of a treaty between Croatia and Slovenia, which concerned the joint regulation by those States of a not-for-profit nuclear power plant. It would not appear, under such facts, that HEP could be characterized, in the words of Mr. Broches, as being “practically indistinguishable” from a privately owned enterprise in terms of its “legal characteristics” and its “activities.”

The nature, as distinguished from the purpose, of HEP’s activities could be characterized as commercial in nature: HEP was a shareholder in a limited liability company that was engaged in “economic activities,” specifically the generation and distribution of electricity; HEP itself was engaged in the purchase of 50 percent of all electricity generated by the company.

But considering only the nature of HEP’s activities would overlook a significant, and possibly predominant, State-to-State element in the HEP v. Slovenia case. HEP owned shares in, and purchased electricity generated by, a nuclear power plant that (i) operated on a non-for-profit basis, (ii) served as a “significant national power resource” for the Croatian state, and (iii) was governed by a bilateral treaty between Croatia and Slovenia.

52. See, e.g., Stanimir A. Alexandrov, “The compulsory jurisdiction of the International Court of Justice: How compulsory is it?” 5 Chinese Journal of International Law 29 (2006), p. 36 (“[T]he scope of an ICSID tribunal’s jurisdiction depends on both the ICSID Convention—as an outside limit—and the specific provisions of the written instruments in which consent to arbitration is expressed.”).
53. HEP v. Slovenia, decision on the treaty interpretation issue, op. cit., ¶ 166.
55. 2001 Agreement, op. cit., Art. 2 sec. (2).
57. 2001 Agreement, op. cit., Art. 7.

Under facts such as those at issue in the HEP v. Slovenia case, any determination regarding whether a claimant has submitted an investor-State or State-to-State dispute to ICSID arbitration should consider more than the mere nature of the activity, i.e., that a company was purchasing electricity from another company. Rather, the scale of such purchases (which in the HEP v. Slovenia case were made from a “significant national power resource” for the Croatian State), the for-profit or not-for-profit goals driving the investment (the nuclear power plant in the HEP v. Slovenia case was only intended to cover its expenses), and the identity of the entities that negotiated the terms at issue (in the HEP v. Slovenia case, the claimant’s purchases of electricity were governed by a series of bilateral agreements negotiated between the Government of Croatia and the Government of Slovenia), should all be relevant considerations.

b. CDC v. Seychelles

In the CDC v. Seychelles case, the claimant, CDC Group plc (CDC), “was founded in 1948 as the United Kingdom (‘UK’) governmental instrumentality for investing in developing countries [...] [and at] the relevant times [...] was wholly owned by the UK Government, but acted on a day-to-day basis without Government instruction or operational involvement.”\(^{61}\) CDC made investments in the Seychelles relating to the expansion and/or upgrading of two power stations.\(^{62}\)

CDC alleged breaches of two contracts: A 1990 Guarantee and 1993 Guarantee concerning two loan agreements that had been entered into by CDC and the Public Utilities Corporation (an entity organized in the Seychelles that was responsible for electric power generation).\(^{63}\) Under each of those Guarantees, the parties had agreed that CDC was a “‘National of another Contracting State’ for the purposes of Article 25 of the [ICSID] Convention.”\(^{64}\) Furthermore, although the Seychelles initially had raised a jurisdictional objection under Article 25 concerning whether the contracts at issue constituted “investments” within the meaning of Article 25(1), it subsequently withdrew its jurisdictional objection.\(^{65}\) Although “consent alone will not suffice” to bring a dispute within the jurisdiction of ICSID,\(^{66}\) the tribunal relied on the respondent’s withdrawal of its jurisdictional objection when finding, without analysis, that the elements of Article 25(1) of the ICSID Convention had been met.\(^{67}\)

The CDC v. Seychelles tribunal observed, as a factual matter, that CDC’s investments in the Seychelles “were made on a commercial basis” and that CDC’s activities were “commercial in substance and nature.”\(^{68}\) In every instance, however, extending loans to borrowers can be

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61. CDC v. Seychelles, annulment decision (June 29, 2005) ¶ 2.
62. CDC v. Seychelles, award (December 17, 2003) ¶ 17.
63. CDC v. Seychelles, award, op. cit., ¶ 8.
64. CDC v. Seychelles, award, op. cit., ¶ 4.
65. CDC v. Seychelles, award, op. cit., ¶¶ 6, 19.
68. CDC v. Seychelles, award, op. cit., ¶ 17.

characterized as commercial activity. But for purposes of distinguishing investor-State from State-to-State disputes, characterizing a lender as a commercial actor, without additional analysis of the lender’s mission, sources of capital and decision-making structure, risks overlooking the distinction drawn by Mr. Broches with respect to private and public foreign investment.

CDC is “the UK’s development finance institution.” By providing “capital to invest in promising businesses, with a particular emphasis on sub-Saharan Africa and South Asia,” the CDC “contributes to long-term poverty reduction in developing countries.” CDC is owned by the UK government’s Department for International Development, which “is the part of the UK government that manages Britain’s aid to poor countries and works to get rid of extreme poverty.”

Extending loans to borrowers will be activity that is commercial in nature regardless of whether the lender’s mission is to contribute to the reduction of poverty in developing countries, and regardless of whether the lender is owned by a government agency that itself aims to reduce the level of poverty in the developing world. But the commercial nature of lending activity should not render such facts irrelevant when determining whether an investor-State or a State-to-State dispute has been submitted to arbitration under the ICSID Convention.

c. Telenor v. Hungary

Telenor Mobile Communications AS (Telenor), a company established under the laws of, and 75 percent owned by, the Kingdom of Norway, submitted a Request for Arbitration under the ICSID Convention in 2003. Telenor’s wholly owned subsidiary, Pannon GSM Telecommunications RT (Pannon), held a concession to provide mobile telephone services in the Republic of Hungary.

Under the 2002 EC Universal Service Directive, Member States of the European Union were required to provide “universal telephone service” within their respective territories, meaning a minimum set of telecommunications services that would be available to the public at a reasonable cost. Universal telephone service providers in Hungary were exclusively fixed-line operators. In order to fund unrecovered costs incurred by those universal telephone service providers, the Government of Hungary imposed a levy on all telecommunications service providers in its territory, including both fixed-line and mobile operators. The Government of Hungary also introduced a regulated price regime for mobile service providers with significant market power, which substituted regulated prices for free market prices with respect to “call termination” services.

Telenor alleged that the imposition of the levy and regulated price regime breached Article VI (Expropriation and Compensation) of the Norway-Hungary BIT. Hungary raised

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70. CDC Group plc, “What we do,” op. cit.
72. Telenor v. Hungary, award (June 22, 2006), ¶¶ 3, 16.

jurisdictional defenses concerning Telenor’s failure to establish a prima facie expropriation claim, which ultimately led to the dismissal of the case.\textsuperscript{78} Hungary did not, however, raise a jurisdictional defense under ICSID Convention Article 25(1), and the tribunal did not address Article 25(1) in its award.

Although its parent company was 75 percent owned by the Kingdom of Norway, the telecommunications services provider Pannon in the Telenor v. Hungary case provides a helpful example of a State-owned entity that was, in the words of Mr. Broches, “practically indistinguishable” from a privately owned enterprise in terms of its “legal characteristics” and its “activities.”\textsuperscript{79} The concession at issue in the case arose from Hungary’s decision in 1990 to reorganize its State-controlled telecommunications system and to invite tenders from the private sector for the provision of mobile communications services.\textsuperscript{80} A consortium of investors, which included Pannon, won the tendering process for a concession to provide mobile telephone services in Hungary.\textsuperscript{81} Pannon itself was “a very successful and profitable company” whose profits nearly doubled between 1999 and 2003.\textsuperscript{82} Unlike the HEP v. Slovenia case, the agreement at issue had not been negotiated between governments. Unlike the CDC v. Seychelles case, the claimant’s investment had not been driven by the aim to contribute to long-term poverty reduction. Although its claim ultimately was dismissed on jurisdictional grounds, Telenor clearly had submitted an investor-State, rather than a State-to-State, claim to ICSID arbitration.

Unlike the HEP v. Slovenia, CDC v. Seychelles, and Telenor v. Hungary decisions, which did not address whether the claimant in each case, as a State-owned entity, qualified as a “national” of a Contracting State under ICSID Convention Article 25(1), the tribunal in the CSOB v. The Slovak Republic case analyzed that issue in detail, as discussed below.

d. CSOB v. The Slovak Republic

Following the 1989 “Velvet Revolution” in Czechoslovakia, the State-owned bank Ceskoslovenska Obchodni Banka, A.S. (CSOB) took various steps “to gradually throw off its exclusive economic dependence on the State and to adopt measures to enable it to function in this new economic environment as an independent commercial bank.”\textsuperscript{83} As part of that transition, CSOB entered into a Consolidation Agreement with the Ministry of Finance of the Slovak Republic and the Ministry of Finance of the Czech Republic, which provided for the assignment by CSOB of certain non-performing loan portfolio receivables to two “Collection Companies” that were to be established by the Czech Republic and the Slovak Republic, and for the payment by the Collection Companies to CSOB for the assigned receivables.\textsuperscript{84} Alleging breach of the Consolidation Agreement by the Slovak Republic, CSOB submitted a request for arbitration to ICSID.

\textsuperscript{78} See Telenor v. Hungary, \textit{award}, op. cit., ¶ 102 (dismissing claim on grounds that the Norway-Hungary BIT limited the tribunal’s jurisdiction to claims of expropriation and that Telenor had failed to adduce a prima facie case of expropriation).

\textsuperscript{79} Broches, Selected essays, op. cit., pp. 201–202.

\textsuperscript{80} Telenor v. Hungary, \textit{award}, op. cit., ¶ 22.

\textsuperscript{81} Telenor v. Hungary, \textit{award}, op. cit., ¶ 22.

\textsuperscript{82} Telenor v. Hungary, \textit{award}, op. cit., ¶ 77.

\textsuperscript{83} CSOB v. The Slovak Republic, \textit{decision on objections to jurisdiction}, op. cit., ¶ 21.

\textsuperscript{84} CSOB v. The Slovak Republic, \textit{decision on objections to jurisdiction}, op. cit., ¶¶ 1–2.

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The Slovak Republic argued that the dispute was in fact between two Contracting States—the Czech Republic and the Slovak Republic—in violation of ICSID Convention Article 25(1), on grounds that CSOB was “a state agency of the Czech Republic rather than an independent commercial entity” and that the Czech Republic, rather than CSOB, was the real party in interest in the dispute.\(^\text{85}\)

The CSOB v. The Slovak Republic tribunal confirmed that Article 25(1) “makes clear that the Centre does not have jurisdiction over disputes between two or more Contracting States,”\(^\text{86}\) and that a claim against a Contracting State must be brought by a “national” of another Contracting State.\(^\text{87}\) When determining whether a company that is “partially or wholly owned by the government” qualifies as a “national” of another Contracting State under Article 25(1), the tribunal identified as the “accepted test” Mr. Broches’ formulation: Whether the State-owned entity was acting as an agent of the government or discharging an essentially governmental function.\(^\text{88}\) The disputing parties accepted Mr. Broches’ formulation as “determinative.”\(^\text{89}\)

Although Mr. Broches’ formulation is stated as a disjunctive test—acting as an agent of the government or discharging an essentially governmental function prevents a State-owned entity from meeting the “national” of a Contracting State requirement—the CSOB v. The Slovak Republic tribunal appeared to apply the test conjunctively, finding that CSOB would qualify as a “national” of a Contracting Party unless it had acted as an agent of the State and had discharged an essentially governmental function.\(^\text{90}\) Regarding the issue of agency, the tribunal stated:

[i]t cannot be denied that for much of its existence, CSOB acted on behalf of the State in facilitating or executing the international banking transactions and foreign commercial operations the State wished to support and that the State's control of CSOB required it to do the State's bidding in that regard.\(^\text{91}\)

Thus, the tribunal found that at least “for much of its existence,” CSOB had been an agent of the State. Rather than concluding, however, that CSOB therefore did not qualify as a “national” of a Contracting State under Mr. Broches’ disjunctive test, the tribunal instead turned to the second part of that test: Whether CSOB had been discharging an essentially governmental function. When applying that standard, the tribunal found that only the nature, and not the purpose, of the entity’s activities should be considered.\(^\text{92}\)

The CSOB activities at issue concerned loans made by CSOB “during the State’s non-market economy period,” which gave rise to the non-performing loan portfolio receivables that were the

85. CSOB v. The Slovak Republic, decision on objections to jurisdiction, op. cit., ¶ 15.
86. CSOB v. The Slovak Republic, decision on objections to jurisdiction, op. cit., ¶ 16.
87. CSOB v. The Slovak Republic, decision on objections to jurisdiction, op. cit., ¶ 15.
88. CSOB v. The Slovak Republic, decision on objections to jurisdiction, op. cit., ¶ 17.
89. CSOB v. The Slovak Republic, decision on objections to jurisdiction, op. cit., ¶ 17.
90. For an alternative, conjunctive formulation of the test, see P.F. Sutherland, “The World Bank convention on the settlement of investment disputes,” 28 International & Comparative Law Quarterly 367 (1979), p. 385 (“The juridical person is a national in the context of the ICSID Convention so long as it is not acting as an agency of Government in performing an essentially Government function.”)
91. CSOB v. The Slovak Republic, decision on objections to jurisdiction, op. cit., ¶ 20.
92. CSOB v. The Slovak Republic, decision on objections to jurisdiction, op. cit., ¶ 21.

subject of the Consolidation Agreement at issue in the dispute. As found by the tribunal, even if CSOB’s lending activities “were driven by” and “implemented” State policies, those State policies did not cause CSOB’s lending transactions to “lose their commercial nature,” and thus CSOB qualified as a “national” of a Contracting State under ICSID Convention Article 25(1).

If the lending decisions of a State-owned bank are being driven by, and implementing, state policies, there is some likelihood that the State-owned bank is acting on behalf of the State. The agency part of Mr. Broches’ test—under which a State-owned enterprise does not qualify as a “national” of Contracting State if it is acting as an agent of the State—contemplates consideration of the goals driving a State-owned enterprise’s activities. By finding that “for much of its existence,” CSOB had been an agent of the State, and then moving on to the issue of whether CSOB discharged an essentially governmental function, the CSOB v. The Slovak Republic tribunal failed to acknowledge that under Mr. Broches’ test, an agency relationship with the State, standing alone, defeats standing under Article 25(1).

The goals driving a State-owned entity’s activities also can be considered under the “discharging an essentially governmental function” part of Mr. Broches’ test, which, like the agency part of the test, was formulated to help distinguish private from public foreign investment at a time when the “classical distinction” between those two forms of investment—based on the source of capital—had become “no longer meaningful, if not outdated.” In many instances, the goals driving a State-owned entity’s activities will be relevant for purposes of determining whether the “function” of a State-owned entity is essentially governmental or commercial, and thus relevant for distinguishing private from public foreign investment. In the CDC v. Seychelles case, for example, a key goal driving the claimant’s lending activities—to contribute to long-term poverty reduction in developing countries—suggests a governmental, rather than commercial, function. By contrast, in the Telenor v. Hungary case, the profitability of the telecommunications services provider Pannon appeared to be of central importance for the company, which “regularly describe[d] itself” in annual reports as “very successful and profitable,” and which had succeeded in nearly doubling its profits between 1999 and 2003.

Failing to consider the goals driving the activities of State-owned entities such as CDC and Pannon would result in a failure to consider fully whether claims submitted to ICSID arbitration by such entities give rise to State-to-State, or investor-State, disputes. Whether a State-owned entity seeks to reduce poverty in developing countries, or to maximize profits for its shareholders, or to carry out international banking transactions that the State “wished to support,” are relevant facts when determining whether the entity is acting on behalf of the State, discharging an essentially government function, or, in broader terms, engaging in public foreign investment. Given that ICSID Convention Art. 25(1) “cannot be re-interpreted to cover disputes involving States, State agencies or international organizations on the investor’s side,” facts concerning the goals driving the activities of a State-owned enterprise will likely be, in many instances, too significant to ignore.

93. CSOB v. The Slovak Republic, decision on objections to jurisdiction, op. cit., ¶ 20.
94. CSOB v. The Slovak Republic, decision on objections to jurisdiction, op. cit., ¶ 21.
96. CDC Group plc, “What we do,” op. cit.
98. CSOB v. The Slovak Republic, decision on objections to jurisdiction, op. cit., ¶ 20.

C. THE STANDING OF STATE-OWNED ENTITIES UNDER BITs

Article 25(1) of the ICSID Convention extends ICSID jurisdiction only to those disputes that "the parties to the dispute consent in writing to submit to the Centre." Such written consent, on the part of Contracting States, often is expressed in BITs. And as a general matter, BITs, like the ICSID Convention, provide for investor-State, but not State-to-State, dispute resolution.

While the ICSID Convention requires an investment dispute to be between a "Contracting State" and a "national" of another Contracting State, BITs generally require investment disputes to be between a State Party and an "investor" of another State Party. The definition of "investor" under an investment treaty "delineates who has standing to bring a claim in arbitration." Some investment treaties include alternative definitions for purposes of standing, such as "national" or "company" of a Party. As discussed below, definitions of "investor" (or "national" or "company" of a Party) under BITs do not distinguish between State-owned and privately-owned entities, and in many instances expressly provide that a State-owned entity may qualify as an "investor" or "company" of a Party.

For legal persons, the definition of "investor" under an investment treaty normally will include one or more of the following categories of requirements: (i) The company is constituted or incorporated in accordance with the laws of the home country (the "place of incorporation" requirement); (ii) the company's seat/place of administration/place of effective management is located in the home country (the "siège social" requirement); and (iii) the company is controlled by nationals of the home State (the "control" requirement). Each of those requirements establishes a certain nexus that must exist between a claimant and its home country in order for the claimant to have standing under the applicable treaty.

Whether a definition of "investor" includes a place of incorporation, siège social or control requirement, such provisions do not distinguish between State-owned and privately-owned entities. As examples of place of incorporation requirements, the Cyprus-Hungary and Netherlands-Romania BITs include within the definition of "investor" legal persons constituted "in compliance with" (Cyprus-Hungary BIT) or "under" (Netherlands-Romania BIT) the law of a Contracting Party. As examples of siège social requirements, the Germany-China, Japan-Turkey, and Austria-Iran BITs include within the definition of "investor" "juridical persons" (for German claimants under the Germany-China BIT), "economic entities" (for Chinese claimants under the Germany-China BIT), "companies" (Japan-Turkey BIT), or "legal entities" (Austria-Iran BIT) having their "seat" (Germany-China and Japan-Turkey BITs) or "real economic activities"...
(Austria-Iran BIT) in the territory of their alleged home country.\textsuperscript{102} As an example of a control requirement, the Peru-China BIT includes within the definition of “investor,” with respect to Peruvian claimants, “juridical persons” that are “directly or indirectly controlled” by nationals of Peru.\textsuperscript{103}

In addition, under some BITs the definition of “investor” not only makes no distinction between State-owned and privately owned entities, but in fact expressly provides for the ability of State-owned entities to bring claims against a State under the treaty. Under the United States-Panama BIT, for example, the definition of “company of a Party” provides that the State itself (the “Party”) may have a “substantial interest” in a “company of a Party.” Under that definition, a “company of a Party” means:

\begin{quote}
\emph{a company} duly incorporated, constituted, or otherwise duly organized under the applicable laws and regulations of a Party or a political subdivision thereof in which:
\begin{itemize}
\item[(i)] natural persons who are nationals of such Party, or
\item[(ii)] such Party or political subdivision thereof or their agencies or instrumentalities have a substantial interest as determined by such Party.\textsuperscript{104}
\end{itemize}
\end{quote}

Similarly, the Japan-Vietnam BIT defines “investor” to include any “entity constituted or organized under the applicable laws and regulations” of the home country, “whether private or government owned or controlled”\textsuperscript{105} The Jordan-Singapore BIT includes similar language.\textsuperscript{106} Furthermore, the Korea-Saudi Arabia BIT expressly includes state agencies within the definition of investor, and specifically identifies the Saudi Arabian Monetary Agency as an illustrative


\textsuperscript{104} United States-Panama BIT, op. cit., Art. 1(c) (emphasis added).


example.\textsuperscript{107} Moreover, the U.S.-Rwanda BIT provides that the State itself may qualify as an “investor of a Party,” which is defined as “a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party.”\textsuperscript{108}

For claims brought by State-owned entities, one potentially relevant distinction between BITs is that some treaties expressly include not-for-profit entities within the definition of “investor,” while others do not. The China-Finland BIT, for example, includes within the definition of “investor” legal entities constituted under the law of a Contracting Party “irrespective of whether or not for profit.”\textsuperscript{109} Under the Turkey-Japan BIT, “companies” of a Contracting Party include companies, “whether or not for pecuniary profit,” which are organized under the applicable law of a Contracting Party.\textsuperscript{110} The Germany-Philippines BIT includes within the definition of “investor,” with respect to German claimants, juridical persons having their seat in Germany “irrespective of whether its activities are directed at profit.”\textsuperscript{111} The Jordan-Singapore BIT includes within the definition of “investor” legal persons organized in accordance with the laws and regulations of a Party “whether or not for profit […].”\textsuperscript{112}

By contrast, the definitions of “investor” under many other BITs are silent on the issue of whether the not-for-profit status of an entity, or the not-for-profit nature of an entity’s activities, is relevant to the determination of the entity’s status as an “investor.”\textsuperscript{113} Furthermore, under many BITs and investment chapters of free trade agreements entered into by Canada and the United States, a claimant’s expectation of economic gain or profit is expressly identified as a

\textsuperscript{107} Agreement between the Government of the Republic of Korea and the Government of the Kingdom of Saudi Arabia concerning the reciprocal encouragement and protection of investments, \textit{entered into force}: February 19, 2003, available at: http://www.unctad.org/sections/dite/iia/docs/bits/Singapore_Jordan.pdf (last visited April 8, 2011), Art. 1(b)(iii) (including within the definition of “investor,” for Saudi Arabian claimants, the state’s “public financial institutions, official agencies and authorities such as the Saudi Arabian Monetary Agency, public funds and other similar public institutions existing in Saudi Arabia”).


\textsuperscript{109} Agreement between the Government of the Republic of Finland and the Government of the People’s Republic of China on the encouragement and reciprocal protection of investments, \textit{entered into force}: November 15, 2006, available at: http://www.unctad.org/sections/dite/iia/docs/bits/US_Rwanda.pdf (last visited April 8, 2011), Art. 2(b). See also China-Germany BIT, op. cit. Arts. 2(a) and 2(b) (including within the definition of “investor” for German claimants, juridical persons “irrespective of whether or not its activities are directed at profit,” and for Chinese claimants, economic entities “irrespective of whether or not for profit”).

\textsuperscript{110} Japan-Turkey BIT, op. cit., Art. 1(4).


\textsuperscript{112} Jordan-Singapore BIT, op. cit., Art. 1(2).

\textsuperscript{113} See, e.g., Cyprus-Hungary BIT, op. cit., Art. 1(3) (including within the definition of “investor” legal persons constituted in compliance with the law of a Contracting Party, without addressing the relevance, if any, of a legal person’s not-for-profit status); Netherlands-Romania BIT, op. cit., Art. 1(b)(ii) (same); Austria-Iran BIT, op. cit., Art. 2(b) (including within the definition of “investor” “legal entities constituted or incorporated under the laws of a Contracting Party having its real economic activities in the territory of that Contracting Party” without addressing the relevance, if any, of the not-for-profit status of a legal entity or the not-for-profit nature of its activities).

relevant factor when determining whether a claimant has met the “investment” requirement under the treaty. The Canada-South Africa BIT, for example, requires that an “investor” make an “investment” in the territory of the host country, and excludes from the definition of “investment” “tangible or intangible property” that is “not acquired in the expectation or used for the purpose of economic benefit or other business purposes.” 114 Similarly, the U.S.-Rwanda BIT identifies “expectation of gain or profit” as one among several characteristics of an investment to be considered when determining whether the “investment” requirement under the treaty has been met. 115

Accordingly, with respect to issues of jurisdiction for claims submitted by State-owned entities under BITs, the relevance of the for-profit nature of an entity’s activities or expectations can vary considerably across treaties. Depending on the applicable BIT, such activities or expectations may be expressly identified as a relevant, or as an irrelevant, factor for purposes of determining whether a claimant meets the “investor” and/or “investment” requirements under a given treaty. Many others BITs remain silent on the issue. BITs thus take varied approaches with respect to the relevance, for jurisdictional purposes, of the for-profit nature of a claimant’s activities or expectations. At the same time, however, the mere fact that a claimant is State-owned, rather than privately owned, will not defeat standing under BITs, which do not distinguish between State-owned and privately owned entities for purposes of standing and in many instances expressly provide that a State-owned entity may qualify as an “investor” or “company” of a Party.

D. CONSIDERATION OF GOALS DRIVING STATE-OWNED ENTITY ACTIVITIES COMPLEMENTS, RATHER THAN UNDERMINES, RECENT DEVELOPMENTS IN INTERNATIONAL INVESTMENT POLICY

As discussed above, for claims submitted to ICSID arbitration by State-owned entities, two key factors support consideration of the goals driving the activities of such entities when distinguishing investor-State from State-to-State disputes under ICSID Convention Article 25(1).


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First, the limited role of the ICSID Convention in filling a procedural gap that existed between State-to-State and private disputes. Second, the limited role of the ICSID Convention in facilitating the settlement of disputes arising from private, but not public, foreign investment. In addition, as discussed above, consideration in particular of the for-profit nature of a claimant’s expectations may be appropriate under certain BITs. Such consideration of the goals driving the activities of State-owned entities complements, rather than undermines, recent developments in international investment policy, in particular as reflected in the set of Generally Accepted Principles and Practices for SWF investment, known as the Santiago Principles.

In 2007, the International Monetary and Financial Committee—a committee of the Board of Governors of the IMF—“expressed the need for further analysis of key issues for investors and recipients of SWF flows, including a dialogue on identifying best practices.”116 Following that request, at a 2008 meeting of countries with SWFs, the International Working Group of Sovereign Wealth Funds (IWG), which comprises twenty-six IMF member countries with SWFs, was established. Later that year, the IWG issued the Santiago Principles.

Under the Santiago Principles, the motivations driving SWF activities are of central importance for ensuring prudent and sound investment practices. Specifically, under Santiago Principle 19, SWF investment decisions “should aim to maximize risk-adjusted financial returns in a manner consistent with its investment policy and based on economic and financial grounds,” and if investment decisions are subject to considerations other than economic and financial factors, such considerations “should be clearly set out in the investment policy and be publicly disclosed.” The explanation and commentary section for Principle 19 further states that “[i]t is a core principle that SWF’s overarching objective is to maximize risk-adjusted financial returns, given the risk tolerance level of the owner. SWF’s investment decisions and activities, therefore, should be guided by and be consistent with this objective.”117 As illustrated by Santiago Principle 19 and its accompanying commentary, many governments have recognized the importance of determining whether SWF activities are grounded in commercial objectives.118

The same policy concern is reflected in a joint statement released in 2008 by the United States, Abu Dhabi, and Singapore. In that statement, the three countries expressed their “common interest in an open and stable international financial system” as well as their shared hope that the work of the IMF, as well as the work of the Organization for Economic Cooperation and Development, in developing voluntary best practices for SWFs could build upon certain “basic principles,” including the principle that:

SWF investment decisions should be based solely on commercial grounds, rather than to advance, directly or indirectly, the geopolitical goals of the controlling government. SWFs should make this statement formally as part of their basic investment management policies.119

118. See also Larry Catá Backer, “Sovereign investing in times of crisis: Global regulation of sovereign wealth funds, state-owned enterprises, and the Chinese experience,” 19 Transnational Law and Contemporary Problems 3 (2010), at 65 (“[A]s the Santiago Principles’ efforts suggest, governments increasingly see SWFs as grounded in commercial objectives.”).

Thus, under the Santiago Principles as well as the principles set out in the joint statement of the United States, Abu Dhabi, and Singapore, the objectives driving the activities of SWFs are of central importance for maintaining sound investment practices. When determining, as a legal matter, whether there is jurisdiction over claims by State-owned entities against host countries under investment treaties, consideration of the objectives driving the activities of those State-owned entities would complement, rather than undermine, these recent developments in international investment policy.

CONCLUSION

Given the significant and growing amount of foreign investment being made by State-owned entities, the issue of whether disputes concerning such investment constitute investor-State disputes falling within, or State-to-State disputes falling outside of, the scope of investment treaty protections is likely to arise with greater frequency. The inclusion of investor-State, but not State-to-State, disputes within the scope of investment treaty protections is reflected in both the ICSID Convention and in BITs.

The role of the ICSID Convention is limited in two important respects, each of which supports consideration of the goals driving the activities of State-owned entities when determining whether claims brought by such entities against Contracting States give rise to investor-State or State-to-State disputes under ICSID Convention Article 25(1). First, the ICSID Convention was intended to fill a narrow procedural gap that existed between State-to-State and private disputes. Second, the ICSID Convention was intended to facilitate the settlement of disputes arising from private, but not public, foreign investment. With respect to ICSID claims submitted to date by State-owned entities against Contracting States, tribunals have not considered either of those two factors when finding jurisdiction under Article 25(1) of the ICSID Convention.

When a Contracting State's written consent to ICSID arbitration is based on a BIT, a State-owned entity will also need to meet jurisdictional requirements under that treaty. In general, BITs, like the ICSID Convention, provide for investor-State, but not State-to-State, dispute resolution, which is illustrated by the BIT requirement that investment disputes be between a state Party and an “investor” of another state Party (or, alternatively, a “national” or “company” of a Party). Definitions of “investor” (or “national” or “company” of a Party) under BITs do not distinguish between State-owned and privately owned entities, and in many instances expressly provide that a State-owned entity may qualify as an “investor” or “company” of a Party. But with respect to the BIT requirement that an “investor” have an “investment” as defined under the treaty, some BITs expressly permit consideration of the for-profit nature of an entity’s activities or expectations, which could raise jurisdictional obstacles for some State-owned entities seeking to pursue investment treaty claims.

120. See also Robert M. Kimmitt, “Public footprints in private markets,” 87 Foreign Affairs 1 (2008), p. 126 ("[T]he benefits of SWF investments to the recipient countries depend on the extent to which the behavior of SWFs is economically driven. If these investments are economically, rather than politically, driven, recipient countries have a strong interest in providing an open, transparent, and predictable framework for SWF investment.").

Finally, as reflected in the recently developed Santiago Principles, over two-dozen IMF member countries have recognized that objectives driving the activities of SWFs are of central importance for maintaining sound investment practices. Thus, when determining, as a legal matter, whether there is jurisdiction over claims by State-owned entities against host countries under investment treaties, consideration of the objectives driving the activities of those entities would complement, rather than undermine, recent developments in international investment policy.