

**SOVEREIGN WEALTH FUNDS AND INVESTOR-STATE
DISPUTE SETTLEMENT: EXAMINING QUESTIONS OF ICSID’S
JURISDICTION AND THE IMPACT OF INVESTMENT-TREATY
ARBITRATION**

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ABSTRACT

The rate of foreign direct investment made by sovereign wealth funds has increased significantly during the past decade. Various concerns raised by host states—especially those located in the developed world—regarding the purposes and objectives of foreign investments made by these funds have led these states to take measures to protect themselves. Countries such as Canada, Germany, and the United States have issued new laws to address these concerns. Due to the broad discretion and flexibility that these laws grant to the governments of the host states, allegations of mistreatment by investors from the Global South, including sovereign wealth funds, are likely to be made. Subsequently, investor-state arbitration is likely to be pursued by injured sovereign investors before various forums. This article argues that the methodology employed by the *Ceskoslovenska Obchodni Banka, A.S.*, tribunal is inadequate for a number of reasons: first, the Nature of Acts Test employed by the tribunal can lead to undesirable outcomes; second, states may attempt to disguise their political objectives through a separate entity that employs

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the same mechanisms and tools as private investors; and third, the inherent conundrum that is made clear by the mixture of the sovereign and private characteristics of sovereign wealth funds compels a broad approach that takes into consideration the specific characteristics of the particular sovereign wealth fund involved in a given dispute. This article further argues that reference to the general principle of state attribution and laws of sovereign immunity can help future International Centre for Settlement of Investment Disputes (“ICSID”) tribunals shed further light on the true nature of the particular sovereign wealth fund involved in a dispute. Finally, it addresses the order and priority with which these tribunals should address ICSID’s jurisdictional requirements (as set forth in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States) and the jurisdictional requirements incorporated in the relevant international investment agreement. On the basis of this discussion and analysis, this article emphasizes the crucial need for avoiding generalizations about sovereign wealth funds and, instead, investigating the specific characteristics of the particular sovereign wealth funds involved in each case to arrive at a fair and reasonable decision on the question of sovereign wealth funds’ standing in arbitration with ICSID.

I. Introduction

During the last decade, foreign direct investment (“FDI”) made by state-owned corporations (“SOCs”), sovereign wealth funds (“SWFs”), and other sovereign investment vehicles has increased dramatically. SWFs have, in particular, witnessed a considerable increase in the number, size, and value of their Assets Under Management (“AUM”). Scholars have estimated that the collective value of SWFs’ AUM around the globe has reached almost

\$7 trillion, and they note that the bulk of this amount is invested in global financial markets.² They also note that SWFs' number has doubled in the last 15 years.³

The increasing importance of SWFs has been accompanied by increasing scrutiny from the part of the states that host SWFs' investments. The host states have expressed many concerns directed towards the objectives and purposes of SWFs' investment strategies and the lack of transparency in the management and day-to-day operation of SWF activities.⁴ This has led some states, especially those in the developed part of the world, to issue new laws on foreign investment or to amend their existing laws in a manner that guarantees the host state more flexibility and discretion in determining whether to accept investment requests made by SWFs.⁵ This is particularly due to the fact that studies have shown that the United States, the United Kingdom, and Canada are preferred locations for investments by SWFs.⁶

² See generally THE NEW FRONTIERS OF SOVEREIGN INVESTMENT (Malan Rietveld & Perrine Tooledano eds., 2017).

³ See *id.* at 3.

⁴ See Robert Ohrenstein & James White, *The Governance Implications Of The Increasing Levels Of Direct Investment Of Sovereign Wealth Funds*, in THE NEW FRONTIER OF SOVEREIGN INVESTMENT, 44-5, 44-63 (Malan Rietveld & Perrine Tooledano eds., 2017). See also Jiangyu Wang, *State Capitalism and Sovereign Wealth Funds: Finding a "Soft" Location in International Economic Law*, in ALTERNATIVE VISIONS OF THE INTERNATIONAL LAW ON FOREIGN INVESTMENT: ESSAYS IN HONOUR OF MUTHUCUMARASWAMY SORNARAJAH 416, 405-427 (C.L. Lim ed., 2016).

⁵ Walid Ben Hamida, *Sovereign FDI and International Investment Agreements: Questions Relating to the Qualification of Sovereign Entities and the Admission of Their Investments Under Investment Agreements*, 9 L. AND PRACTICE OF INT'L CTS. AND TRIBUNALS 17, 17 (2010).

⁶ See *id.*

Among the characteristics of these new domestic laws on foreign investment, it can be noted that these laws employ the use of very broad terms such as “national security” as grounds for the host state to reject incoming investments by SWFs.⁷ One can anticipate that the application of these new laws will result in disputes between the host state and SWFs seeking to invest in the former’s territory.⁸ Coupled with the fact that some international investment agreements (IIAs) extend their substantive protections and standards of treatment to the pre-investment phase, it becomes easy to understand the importance of addressing key questions and issues that might arise with respect to the foreign investments carried out by SWFs.⁹

Among the procedural issues and questions that are likely to arise is the question of whether an SWF qualifies as an investor in the meaning of the relevant IIA, as well as whether it has standing to bring an arbitration case against the host state before the International Centre for the Settlement of Investment Disputes (ICSID). SWFs have already filed several arbitration cases before the ICSID, but these cases have been settled and the tribunals did not get a chance to decide on the issue under investigation here.

⁷ *See id.*

⁸ Paul Blyschak, *State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protection* 6 J. OF INT’L L. AND INT’L REL. 1, 10 (2011).

⁹ MUTHUCUMARASWAMY SORNARAJAH, *THE INTERNATIONAL FOREIGN INVESTMENT* 88 (3d ed. 2010). Professor Sornarajah refers in this respect to the North American Free Trade Agreement, as well as US, Canadian, Japanese and South Korean BITs. *See also Identifying core elements in investment agreements in the APEC region*, UNCTAD Series on International Investment Policies for Development, United Nations 19 (2008), https://unctad.org/system/files/official-document/diaeia20083_en.pdf.

Only one ICSID tribunal—the Ceskoslovenska Obchodni Banka, A.S. (CSOB), tribunal—has dealt with the question discussed in this article regarding the standing of state entities before the ICSID. However, the methodology employed by the CSOB tribunal is considered by scholars to be inadequate. Hence, the relevance and importance of the search for an alternative approach to the one used by the CSOB tribunal is evidently clear.

In order to adequately tackle such a complicated question, Chapter One of this article includes a history of SWFs to provide context to the issues discussed in subsequent chapters. Afterwards, we turn to a brief discussion of relevant issues of international investment arbitration and ICSID’s jurisdiction. The third chapter discusses the relevant case law and includes an attempt to critically analyze the reasoning employed by the CSOB tribunal before proceeding to a discussion of alternative approaches and solutions.

CHAPTER ONE: Sovereign Wealth Funds

I. DEFINING SWFs

As will be discussed, “sovereign wealth fund” is a recent term. It was coined by Andrew Rozanov in his 2005 paper entitled *Who Owns the Wealth of Nations*.¹⁰ However, no single, universally accepted definition of the term has been accepted and adopted by scholars. Several organizations, bodies, and scholars attempted to define the term; however, although such definitions share certain characteristics of SWFs (e.g. government ownership of the funds and the sovereign character of their resources),

¹⁰ Christopher Beus, *Sovereign Wealth Funds in the ICSID: A New Approach to Standing* 1 THE INDON. J. INT’L AND COMP. L. 543, 545-46 (2014).

discrepancies exist concerning other elements such as the focus of the investment strategies of the funds regarding domestic or foreign investment.¹¹ Thus, careful consideration should be made when defining the term “sovereign wealth fund,” and adequate attention should be given to the purpose and context in which SWFs are discussed and analyzed. The following paragraphs provide a discussion of the most prominent definitions of SWFs followed by the definition that best suits the context and purpose of the present work.

The United States Treasury defines SWFs as “government interest funds, funded by foreign currency reserves but managed separately from official currency reserves. They are pools of money that governments invest for profit. This money is often used for foreign investment.”¹² In contrast to the narrow definition suggested by the United States Treasury, the Congressional Research Service proposes a broader definition of SWFs. The latter defines SWFs simply as “investment funds owned and managed by national governments.”¹³ Furthermore, the Sovereign Wealth Fund Institute adopts a definition that explicitly acknowledges the establishing state’s ownership of SWFs. It defines SWFs as “a state-owned investment fund composed of financial assets such as stocks, bonds, real estate, or other financial instruments funded by foreign exchange assets.”¹⁴

Both the International Working Group on SWFs and the OECD follow the same approach of the Sovereign

¹¹ *See id.*

¹² *See id.* at 545.

¹³ *See id.*

¹⁴ ANGELA CUMMINE, CITIZENS’ WEALTH: WHY (AND HOW) SOVEREIGN FUNDS SHOULD BE MANAGED BY THE PEOPLE FOR THE PEOPLE 225 (2016).

Wealth Institute and put forward definitions that highlight state ownership of the funds. The former defines SWFs as “[S]pecial-purpose investment funds or arrangements that are owned by the general *government* (general government includes both central and subnational government)”, while the OECD defines SWFs as “Government-owned investment vehicles funded by foreign exchange assets.”¹⁵

Moreover, some scholars have defined SWFs with the purpose of establishing such funds in mind. For instance, Edwin M. Truman, an American economist specializing in international financial institutions, defines SWFs as “separate pools of international assets owned and managed by governments to achieve a variety of economic and financial objectives.”¹⁶ Finally, some scholars propose a definition of SWFs that sheds light on the investment strategies of these funds and how these strategies are determined. For instance, Ashby Monk defines SWFs as follows:

[G]overnment owned and controlled (directly or indirectly) investment funds that have no outside beneficiaries or liabilities (beyond the government or the citizenry in abstract) and that invest their assets . . . according to the interests and objectives of the sovereign sponsor.¹⁷

Upon careful review and analysis of the various definitions of SWFs offered by many scholars and bodies, certain characteristics can be deduced that are inherent in the nature and function of SWFs. These characteristics are that SWFs “ha[ve] to be government controlled, they “invest in a wide variety of securities,” and they “operate to

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ *See id.*

effectuate a variety of goals, which largely depend on the region and status of the nation.”¹⁸ However, given the existence of differences in the political and the economic context in which different SWFs are established and function, it happens that these characteristics vary from one SWF to another.¹⁹ In light of the above, it is deemed important to set the scope of this work by setting forth the definition according to which reference to SWFs was made in subsequent parts thereof. In this piece of work, the term “sovereign wealth funds” was used to refer to special-purpose investment vehicles, funds, or arrangements that are owned and controlled, directly or indirectly, by the sovereign government of their home states, that was established by a sovereign government out of public funds in order to pursue macroeconomic purposes, and that invests mainly in international financial markets. Accordingly, “sovereign development funds,” which adopt investment strategies that focus almost exclusively on investing domestically, are not dealt with here.²⁰

II. THE INCREASING IMPORTANCE OF SWFs

Over the past decade, the role that SOC in general, and SWFs in particular, play in both their domestic economies and on the international level has increased considerably. Some scholars have even described the past decade as the golden era of SWFs.²¹ This is evident in the tremendous growth of both the size and number of SWFs established in different parts of the world.²² It is also

¹⁸ Beus, *supra* note 10, at 545.

¹⁹ *See id.* at 545-46.

²⁰ *See* MASSIMILIANO CASTELLI & FABIO SCACCIAVILLANI, THE NEW ECONOMICS OF SOVEREIGN WEALTH FUNDS 9 (2012).

²¹ Ohrenstein & White, *supra* note 1, at 44.

²² Corinne Deléchat, Mauricio Villafuerte & Shu-Chun S. Yang, “*Best-Practice*” *Sovereign Wealth Funds for Sound Fiscal Management*, in

supported by the significant increase in the value of the AUM of various SWFs around the globe. In spite of the lack of accurate data resulting from transparency-related problems in the management of SWFs and the discrepancies in the available definitions of SWFs, some scholars estimate that “SWFs held approximately \$7.25 trillion in assets as of September 2015. In September 2010, it was estimated that these funds held \$4.1 trillion, implying an increase in assets under management of 77 percent in only five years.”²³ Concerning the increase in the number of SWFs, estimates show that these funds, which are comprised of commodity-based and non-commodity-based funds, doubled in the period starting from the year 2000 until recent days.²⁴

Even though the term “sovereign wealth fund” is about 12 years old, scholars commenting and writing on SWFs note that SWFs are not a new creature. Owing to the difficulties encountered in defining SWFs (a matter that will be discussed in a subsequent part of this chapter), there is a disagreement among scholars regarding the date of birth of such funds. Some trace SWFs back to the 19th century, while others claim that the first fund was established in the 1950s.²⁵ However, there is an agreement between scholars regarding the reasons behind the significant increase in the relevance and importance of SWFs. They explain that development is a natural consequence of “rising global commodity prices, new resource discoveries, and swelling trade surpluses in many

THE NEW FRONTIER OF SOVEREIGN INVESTMENT, 11-12, 11-25 (Malan Rietveld & Perrine Tooledano eds., 2017).

²³ Malan Rietveld & Perrine Tooledano, *Introduction*, THE NEW FRONTIER OF SOVEREIGN INVESTMENT 3 (Malan Rietveld & Perrine Tooledano eds., 2017).

²⁴ *See id.*

²⁵ *See id.*

large emerging markets, coupled with many years of exceptional financial market returns.”²⁶

Resource-rich economies have grown to believe in the importance of SWFs as a tool for combating the uncertainty of continued rates of income and revenue and the severe economic, financial, and even societal repercussions associated with turbulent revenue windfalls.²⁷ Statistical evidence clearly shows the number of SWFs established in emerging economies and how the value of their AUM has increased considerably in many of these economies. Governments of emerging, resource-rich countries, view SWFs as a tool through which they can achieve various economic objectives, which commonly include the accumulation of long-term savings, investing the country’s foreign reserve surpluses in global financial markets to generate revenues, and achieving and maintaining fiscal stabilization.²⁸

The global financial crisis that took place between 2007 and 2009 and the events that followed it constitute a pivotal moment in the history of SWFs and demonstrate their global importance in stabilizing some of the major financial institutions of developed countries.²⁹ Due to certain

²⁶ *See id.*

²⁷ Delechat, Viilfuerte & Yang, *supra* note 10, at 11.

²⁸ *See* Fabio Bassan, *Sovereign wealth funds: a definition and classification*, in RESEARCH HANDBOOK ON SOVEREIGN WEALTH FUNDS AND INTERNATIONAL INVESTMENT LAW 46, 41-56 (Fabio Bassan ed., 2015); *see also* Wang, *supra* note 4, at 405-06; *see also* CUMMINE, *supra* note 14, at 28; *see also* Rietveld & Toledano, *supra* note 23, at 6; *see also* Deléchat, Villafuerte & Yang, *supra* note 22, at 11-13; *see also* Adrian Orr, *Sovereign Wealth Funds as Long-Term Investors: Taking Advantage of Unique Endowments*, in THE NEW FRONTIER OF SOVEREIGN INVESTMENT, 26, 26-44 (Malan Rietveld & Perrine Toledano eds., 2017).

²⁹ Orr, *supra* note 28, at 27.

characteristics of SWFs, including their long-term focus when making their investment decisions and their freedom from liquidity-related restrictions, these entities were able to step in and provide much-needed capital to some of the ailing banking and financial institutions of the developed world. Being in a desperate situation and in significant need of capital and liquidity, the developed world and some of the “too-big-to-fail” financial institutions were eager to welcome capital injections made by SWFs established by resource-rich, emerging economies.³⁰

Some of the SWFs located in Middle Eastern countries have considerably grown in size and the value of their AUM has achieved new records. For instance, studies show that the Abu Dhabi Investment Authority, one of Abu Dhabi’s SWFs, now possesses approximately \$773 billion, and the Kuwait Investment Authority has accumulated approximately \$592 billion. Studies also show that some of the developed countries, such as Canada, the United Kingdom, and the United States are the subject of focus of FDI carried out by these SWFs. Before addressing the concerns of host states, we will discuss the various definitions of SWFs suggested by different bodies and scholars in the following section.

III. CONCERNS RAISED BY HOST STATES REGARDING SWFS INVESTMENTS AND THE POTENTIAL OF INVESTMENT DISPUTES

The increasing role of SWFs in global financial markets and in FDI carried out in the territories of host states has not been perceived by host states, especially developed ones, in an entirely positive manner. While no one disputes the key role played by various SWFs in supporting the global financial system during the global

³⁰ *See id.* at 26.

financial crisis by injecting huge amounts of capital in “too-big-to-fail” financial institutions (such as Citicorp and Merrill Lynch), host states tend to view the capital injections made by SWFs as some sort of necessary evil. This is mainly due to the tension between developed and developing countries concerning foreign investment; such tension can be traced back to colonialism.

Host states, particularly those in the developed world, tend to focus on the underlying objectives and purposes of SWFs’ investments in their territories. In fact, these countries question the objectives and purposes of SWFs’ investments and claim that the countries that own these SWFs seek to disguise their political motives by creating a separate entity that employs the same tools and mechanisms used by private investors.³¹ Expressing these concerns, President Harry S. Truman once said that the “reality is that governments own SWFs, governments are political organizations, and it is naïve to pretend that they are not.”³² Other concerns expressed by host states include a lack of transparency in the management, control, and adoption of mandates and investment strategies within SWFs. Indeed, a number of scholars commenting on SWFs have expressed the same concerns and tied them to the lack of accurate data and information on the day-to-day functioning of SWFs, their AUM, their mandates, and their investment strategies and objectives.³³

³¹ Ben Hamida, *supra* note 5, at 17-8.

³² Beus, *supra* note 19, at 548.

³³ See Anna DeLuca, *The EU and Member States: FDI portfolios investments, golden powers and SWFs*, in RESEARCH HANDBOOK ON SOVEREIGN WEALTH FUNDS AND INTERNATIONAL INVESTMENT 178-180, 178-205 (Fabio Bassan ed., 2015); see also Wang, *supra* note 4, at 405-06; see also CUMMINE, *supra* note 14, at 9 and 12; see also Orr, *supra* note 28, at 36.

As a direct result of the aforementioned concerns, some developed states have actively sought to block certain investments by SWFs in what the former considered to be strategically important companies and assets. For instance, the United States government frustrated Dubai Ports World's plans to acquire certain port facilities in a territory of the United States of America in the year 2006. The United States viewed this investment as a threat to its national security and thus prevented it from occurring.³⁴

On the domestic level, some developed countries actively amended their national laws on foreign investment in order to allow the executive authorities of such countries to control and, if necessary, prevent investments by sovereign investors in their territories.³⁵ Among the countries that took such measures in recent years are Canada, Germany and Russia. Among the scholars who focus on the field of investment arbitration and have seen the merit of addressing the unique positioning of SWFs and their increasing importance in the international sphere is Dr. Waïd Ben Hamida. Dr. Ben Hamida has voiced his concerns and views on the position adopted by a number of developed countries to block or at least limit investments made by SWFs based in developing countries; a position that is reflected in the level of supervision and high-level internal approvals from already-existing or newly established governmental bodies. While discussing the new law that was approved by the German government in 2008, Dr. Ben Hamida has, for instance, stated that “[this law] is especially aimed at investments made by sovereign wealth funds from the Arab States or China and Russian giants such as the State-owned company Gazprom.”³⁶

³⁴ Ohrenstein & White, *supra* note 9, at 49.

³⁵ Ben Hamida, *supra* note 5, at 18.

³⁶ *See id.* at 19.

These new laws regulating foreign investments by SWFs and SOEs share certain characteristics, including allowing the government of a host state to review investment requests submitted by these entities and to allow or prevent them based on broad grounds, such as “national security.”³⁷ While some IIAs confine the protections and guarantees they offer to foreign investors to the post-investment phase, others are broader in scope and offer rights of access and some protections and guarantees even in the pre-investment phase. Accordingly, should SWFs’ and SOEs’ investment requests be mistreated, SWFs and SOEs can naturally be expected to explore their options and available remedies under both domestic and international law. Since most IIAs now include ICSID as one of the forums provided for in their dispute settlement provisions, the probability that the SWF or SOE would prefer ICSID over the other options is considerably high given the benefits associated with ICSID arbitration in relation to annulment, enforcement, and execution of any ICSID arbitral awards. Hence the relevance of the question that this article seeks to address: do SWFs qualify as investors and have standing before ICSID?

Before turning to an analysis of the relevant case law, the next chapter briefly highlights important information concerning investment arbitration and the jurisdictional requirements that must be fulfilled in order for an ICSID tribunal to hear and decide on investment disputes.

³⁷ See *id.* at 18-20.

CHAPTER TWO: Investor-State Arbitration and ICSID's Jurisdiction

I. The Inception of Investor-state Arbitration

Within the realm of international investment law, considerable attention is directed by scholars, practitioners, and transnational businesses towards the substantive standards of protection and guarantees that IIAs afford to foreign investors who make investments in the territory of a host state. However, equal attention is given to the procedural mechanisms and protections that are provided for in various IIAs. As a mechanism for the settlement of investment disputes, investor-state arbitration is now commonly provided for and incorporated in the dispute-settlement provisions of almost all IIAs (whether bilateral or multilateral).³⁸

Allowing private natural or juridical investors to directly sue host states, independent of the approval of their home state, is rightly deemed by scholars to be a pivotal moment in the history and evolution of the settlement of foreign investment disputes. Prior to this important development, a foreign investor had no direct way through which they could seek recourse against a host state for the mistreatment of the former's investment. Foreign investors had no option available but to make pleas to the governments of their home states to intervene and begin

³⁸ See DAVID COLLINS, AN INTRODUCTION TO INTERNATIONAL INVESTMENT LAW 215 (2017); *see also* CAMPBELL McLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES xxxvii-xxxviii (2d. ed.2007); *see also* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 76 (2d. ed. 2012); *see generally* RESHAPING INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY (Jean E Kalicki & Anna Joubin-Bret eds., vol. 4 2015).

negotiations with the government of the host state. This is what came to be known as “diplomatic protection.” Naturally, this did not sit well with foreign investors, the majority of which are multinational corporations. The inception and development of investor-state arbitration was hailed by foreign investors, practitioners, and scholars as an adequate means of filling the gap that existed in the settlement of investment disputes between private foreign investors and host states, as well as an efficient means of depoliticizing foreign investment disputes and removing the existing tensions between home states and host states. Accordingly, the drafters of most if not all IIAs instituted the practice of incorporating a provision in the agreement to provide for investor-state arbitration.

In addition to the dispute-settlement mechanism provided for in IIAs for the settlement of investor-state disputes, these agreements also typically contain another provision providing mechanisms for the settlement of state-to-state disputes.³⁹ From the inception of this field of law, the focus of investment arbitration scholars has centered on investment disputes that arise between foreign, protected investors and host states. This focus has developed as a natural consequence of the fact that investment disputes have been pursued directly between investors and host states for decades (i.e. without the intervention of home states). This has led to the side-tracking of state-to-state disputes despite the fact that investment disputes center around instruments of international law that are concluded between states. In a way, protected investors are third-party beneficiaries of IIAs; however, due to practical considerations, they have stolen the show from the main players within the international law sphere: states. State-to-state disputes stemming from IIAs most often concern the

³⁹ Ben Hamida, *supra* note 5, at 22.

interpretation of one or more provisions within an IIA and/or the enforcement of the treaty. As many scholars note, the state-to-state mechanism has rarely been used in practice, and the bulk of case law on investment disputes and arbitration was founded and based on the investor-state mechanism.

II. THE VARIOUS AVAILABLE FORA FOR INVESTOR-STATE ARBITRATION AND THE ADVANTAGES OF ICSID

Investor-state arbitration can be pursued by parties who have standing before a number of fora. In a particular case, however, the available options that a foreign investor can choose from will depend on the relevant dispute settlement provision(s) of applicable IIA. As in the case of international commercial arbitration, investment arbitration can be conducted before an arbitration institution or it can be conducted on an *ad hoc* basis. If investor-state arbitration is to be conducted on an *ad hoc* basis, dispute settlement provisions incorporated within IIAs most commonly refer to the UNCITRAL Arbitration Rules as the procedural rules applicable to such arbitrations.⁴⁰

In addition to pursuing investment arbitration on an *ad hoc* basis, parties to an IIA can agree to submit any investment disputes arising between them and investors of another IIA contracting state to arbitration before a number of arbitration institutions. Among the world's existing arbitration institutions, those most commonly referred to and agreed upon in IIAs for the settlement of investor-state

⁴⁰ While parties to an *ad hoc* arbitration can agree to create their own procedural rules that shall be applicable to the arbitration proceedings, it is less common in practice for parties to an arbitration agreement to follow this approach. The UNCITRAL Arbitration Rules are well established and respected internationally, and thus the large majority of *ad hoc* arbitration is pursued in accordance with these rules.

disputes are ICSID, the International Court of Arbitration of the International Chamber of Commerce, the London Court of International Arbitration, and the Arbitration Institute of the Stockholm Chamber of Commerce. While all of these arbitration fora or institutions apart from ICSID were originally designed to settle international commercial disputes between private parties, ICSID was originally established to fill a certain gap. The drafters of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) made it quite clear that ICSID was created in order to fill in a certain gap and to allow investor-state investment disputes to be settled in a neutral and depoliticized manner by means of arbitration or conciliation. Thus, while international commercial arbitration institutions such as the International Court of Arbitration of the International Chamber of Commerce, the London Court of International Arbitration, and the Arbitration Institute of the Stockholm Chamber of Commerce only require the existence of a valid arbitration agreement between the parties to the proceedings in order to be satisfied that they have jurisdiction to hear and decide an investment dispute, the ICSID Convention lays down additional jurisdictional requirements in Article 25 thereof that must be fulfilled in order for ICSID to have jurisdiction and for an ICSID tribunal to have competence.

The various fora before which investor-state arbitration can be pursued have a reputation as respected and well-established arbitration institutions. However, due to a number of factors and benefits related to the post-award phase of ICSID arbitration, there exists a tendency among private foreign investors to pursue investor-state arbitration before the ICSID. Given the aforementioned tendency and preference and the significant increase in the rates of FDI carried out by public or sovereign investors,

we are starting to witness SOEs and SWFs taking on the role of claimant and initiating ICSID arbitration against host states. In this respect, a crucial question arises as to whether SWFs meet the jurisdictional requirements of ICSID and, specifically, whether such entities qualify as “a national of another contracting state” in accordance with Article 25(1) of the ICSID Convention.

III. ICSID’S JURISDICTIONAL REQUIREMENTS

ICSID is an international arbitration institution dedicated to the settlement of investor-state disputes and created to fill a certain gap in the settlement of investment-related disputes. As a result, the drafters of the ICSID Convention laid down certain jurisdictional requirements that must be fulfilled in order for an ICSID tribunal to have competence to hear and decide disputes brought before it. Such jurisdictional requirements are provided for in Article 25(1) of the ICSID Convention, which reads as follows:

(1) The jurisdiction of [ICSID] 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 [ICSID] by that State) and a national of another Contracting State
...⁴¹

In accordance with the provision of Article 25(1) of the ICSID Convention, it is abundantly clear that the following conditions must be satisfied in order for ICSID to have jurisdiction over any dispute: (1) the dispute must be of a legal nature; (2) there must exist a direct relationship between the dispute and the investment operation/project; (3) the dispute must be between a contracting state to the

⁴¹ The ICSID Convention, Art. 25(1) (adopted on 18 March 1965).

ICSID Convention (host state) and a foreign investor that has the nationality of a different state (the home state) that is also a contracting state to the ICSID Convention; and (4) parties to the arbitration proceedings must have agreed to submit the dispute to the ICSID.⁴²

Most of the jurisdictional requirements enumerated in Article 25(1) of the ICSID Convention apply in the same manner to both sovereign FDI and private foreign investment. Due to the commercial nature of the activities carried out by sovereign entities and their use of private mechanisms and methods in carrying out their investments abroad, sovereign FDI carried out in the territory of a host state shares the characteristics of private foreign investments. However, owing to their sovereign characters, a problem exists regarding whether SOEs and SWFs qualify as “national[s] of another contracting State” per in the meaning of Article 25(1). As Fabio Bassan, a professor of international economic law whose work focuses in part on sovereign wealth funds, stated:

SWFs are “private sovereign entities,”
performing a private activity and pursuing public

⁴² DOLZER AND SCHREUER, *supra* note 38, at 238-40; *see also* Walid Ben Hamida, *The Mihaly v. Sri Lanka Case: Some Thoughts Relating to the Status of Pre-Investment Expenditures*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 52-53, 47-76 (Todd Weiler ed., 2005); *see generally* CHRISTOPH H SCHREUER, THE ICSID CONVENTION: A COMMENTARY (2nd. ed., 2010); *see also* ANTONIO R. PARRA, THE HISTORY OF ICSID 8 (1st ed., 2012). It is worth noting that, under the ICSID Additional Facility established by the Administrative Council of ICSID in 1978, some cases that are beyond the jurisdiction of the ICSID can be submitted to the ICSID’s Additional Facility for settlement. These cases include situations where only one party to the dispute is a contracting state or a national of a contracting state and disputes that do not arise directly out of an investment.

welfare . . . The sovereign character of the fund on one side, and the commercial nature of the activity, on the other side, generate the conundrum, for one cannot treat SWFs as private players, irrespective of their ownership.⁴³

In light of the aforementioned conundrum, the question of whether SWFs qualify as investors according to the ICSID Convention and thus whether such entities have standing to bring arbitration before the ICSID (provided that all of the other jurisdictional requirements are fulfilled) can be problematic. Perhaps it is due to the problematic nature of this question that, when faced with the issue concerning state-owned enterprises and corporations, some ICSID tribunals have chosen to avoid addressing it. Indeed, ICSID tribunals in various arbitration proceedings involving sovereign entities as claimants have chosen either not to deal with the abovementioned question at all or to confine themselves to the surface and not to delve into the heart of the matter.⁴⁴

It was only the ICSID tribunal in *CSOB v. Slovak Republic* that took the initiative and discussed the matter at hand with some level of detail. As such, we now turn to a discussion of the CSOB arbitration followed by an analysis of the tribunal's reasoning.

⁴³ Bassan, *supra* note 28, at 46.

⁴⁴ See *Compagnie Minière Internationale Or S. A. v. Republic of Peru*, ICSID Case No. ARB/98/6; see also *Compagnie Française pour le Développement des Fibres Textiles v. Cote d'Ivoire*, ICSID Case No. ARB/97/8; see also *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision on the Application for Annulment (29 June 2005); *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award (13 September 2006); see also *Rumeli Telekom v. Kazakhstan*, Award (29 July 2008).

CHAPTER THREE: ICSID's Case Law & Application

I. *CSOB v. SLOVAK REPUBLIC* (ICSID)

I.1 THE FACTUAL AND PROCEDURAL BACKGROUND OF *CSOB v. SLOVAK REPUBLIC*

The *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic* (“*CSOB v. Slovak Republic*”) arbitration case was filed by the CSOB (claimant) against the Slovak Republic (respondent) by virtue of the request for arbitration that the former submitted to ICSID on April 18, 1997.⁴⁵ As the tribunal notes in its Decision on Objections to Jurisdiction dated May 24, 1999, the case revolved around the claimant’s allegation that the respondent breached the consolidation agreement that the claimant, the Ministry of Finance of the Slovak Republic, and the Ministry of Finance of the Czech Republic signed on December 19, 1993.⁴⁶

The claimant was established as a commercial bank. However, this did not prevent the respondent from raising objections regarding the jurisdiction of ICSID and the competence of the tribunal based on arguments linking the claimant to the Czech Republic and stressing that the dispute was, in reality, between two contracting states to the ICSID Convention. The claimant based their argument that ICSID had jurisdiction to hear and decide the dispute that arose between it and the respondent on Article 8(2) of the relevant bilateral investment treaty (BIT) (i.e., the

⁴⁵ See *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, ¶ 1 (24 May 1999).

⁴⁶ See *id.*

Agreement between the Government of the Slovak Republic and the Government of the Czech Republic Regarding the Promotion and Reciprocal Protection of Investments, which was signed on November 23, 1992, and entered into force as of January 1, 1993). The respondent submitted a jurisdictional challenge to the tribunal during the first session held by the tribunal on October 6, 1997. By virtue of such a jurisdictional challenge, the respondent state argued that the ICSID had no jurisdiction to hear and decide the dispute brought before it by the claimant on the grounds that that dispute was in fact between two contracting states to the ICSID Convention (i.e. the Slovak Republic and the Czech Republic) and not between a contracting state and a “national of another contracting state.”⁴⁷ In support of its jurisdictional objection, the respondent argued that “a) claimant is a state agency of the Czech Republic rather than an independent commercial entity; and b) the real party in interest to this dispute is the Czech Republic.”⁴⁸

I.2 THE HOLDING AND REASONING OF THE CSOB TRIBUNAL

The tribunal rejected the respondent’s jurisdictional objections relating to the link between the claimant and its home state and held that the claimant qualifies as an investor per the meaning of the ICSID Convention and thus

⁴⁷ *See id.*

⁴⁸ *See id.* at ¶ 15. The other jurisdictional objections submitted by the respondent included the issue of entry into force of the BIT and the effects that such an issue has on the consent to arbitrate the dispute before an ICSID tribunal and questioned whether the dispute submitted by the claimant qualified another condition stipulated in Article 25(1) (i.e., whether it was one arising directly out of an investment). However, these issues do not concern the qualification of SWFs as an investor within the meaning of Article 25(1) of the ICSID Convention, and thus were not addressed in this work.

had standing to bring arbitration proceedings before an ICSID tribunal. In making its decision on the aforementioned jurisdictional objection, the tribunal first acknowledged that:

[T]he language of Article 25(1) of the [ICSID] Convention makes clear that [ICSID] does not have jurisdiction over disputes between two or more Contracting States. Instead, the dispute settlement mechanism set up by the Convention is designed to deal with disputes between Contracting States and nationals of other Contracting States.⁴⁹

The tribunal then proceeded to note that, while the term “national” used in Article 25(1) of the ICSID Convention is clarified in Article 25(2) of the convention to “include both natural and juridical persons, neither term is defined as such in the convention.”⁵⁰ Thus, the tribunal found it necessary to refer to the legislative history of the ICSID Convention in the hope that it could provide some guidance as to the meaning and scope of the term “national.” Indeed, in its decision on jurisdiction, the tribunal noted that:

The legislative history of the [ICSID] Convention indicates that the term “juridical persons” as employed in Article 25 and, hence, the concept of “national,” was not intended to be limited to privately-owned companies, but to embrace also wholly or partially government-

⁴⁹ See *id.* at ¶ 16.

⁵⁰ See *id.*

owned companies. This interpretation has found general acceptance.⁵¹

Based on this interpretation of Article 25, which was based solely on a comment to a preliminary draft of the ICSID Convention, the tribunal deduced that ownership of the concerned entity (whether whole or partial) or control thereof is not the decisive element in answering the respondent's jurisdictional objection. In other words, whether the claimant entity is a public-sector entity or a private-sector entity does not alone have a bearing on the jurisdiction of ICSID. Instead, the tribunal found that:

The accepted test for making this determination has been formulated as follows: . . . [F]or purposes of the [ICSID] Convention a mixed economy company or government-owned corporation should not be disqualified as a "national of another Contracting State" unless it is acting as an agent for the government or is discharging an essentially governmental function. Both parties to this dispute accept this test as determinative.⁵²

The respondent argued that the claimant acted as "an agent or representative of the state to the international banking and trading community, that its subsequent reorganization has not changed its status, and that, moreover, the instant dispute arises out of the functions CSOB performed in that capacity."⁵³ In response, the tribunal conceded to the respondent's claim that the claimant had, for a significant part of its history, represented its home state in carrying out and facilitating

⁵¹ *See id.*

⁵² *See id.* at ¶ 17.

⁵³ *See id.* at ¶ 19.

commercial transactions on foreign soil and also in transactions that related to the field of international banking. The tribunal further conceded that the claimant, in carrying out the aforementioned activities and transactions, was under the control of its home state, which “required [the claimant] to do the state’s bidding in that regard.”⁵⁴

However, the tribunal maintained that the critical issue in deciding whether the claimant “exercised governmental functions . . . must be on the nature of these activities and not their purpose.”⁵⁵ Upon review of some of the CSOB’s acts that the tribunal deemed to be relevant in the context of the case brought before it, and notwithstanding the fact that the tribunal conceded that the claimant was acting on behalf of its home state to promote the latter’s strategies and policies, the tribunal held that such acts were of an “essentially commercial” nature.⁵⁶ In one paragraph of its decision on jurisdiction, the tribunal explicitly put more weight on the nature of the activities that are relevant to the dispute and that were carried out by the CSOB and less so on the purpose of such activities or on the CSOB’s alleged role as an agent of the state.⁵⁷

Moreover, another issue of relevance in this work that the respondent raised to support its jurisdictional objection was that the agreement around which the dispute revolved (i.e. the consolidation agreement) was concluded with the “ultimate goal of . . . the privatization of [the] CSOB.”⁵⁸ And since privatization was a state function, according to the respondent, the claimant was carrying out governmental functions and, thus, should be deemed by the

⁵⁴ *See id.* at ¶ 20.

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *See id.* at ¶ 21.

⁵⁸ *See id.* at ¶ 22.

tribunal to be a public investor that would not have standing before an ICSID tribunal.⁵⁹ In other words, the respondent argued that the real claimant in this arbitration was, in fact, the Czech Republic. Additionally, the respondent asserted that this was actually a dispute between two contracting states to the ICSID Convention, and therefore ICSID did not have the jurisdiction to hear and decide it. However, the tribunal refuted this argument by re-emphasizing that the relevant criterion according to which this matter should be decided was that of the nature of the acts carried out by the claimant entity (i.e. whether these acts were commercial or governmental in nature).⁶⁰

Having determined that the activities carried out by the claimant were essentially commercial and not governmental in nature, the tribunal rejected the respondent's jurisdictional objection and concluded that it had jurisdiction to hear and decide the dispute.

II. CRITICAL ANALYSIS OF THE TRIBUNAL'S REASONING IN THE CSOB

II.1 ICSID HAS NO JURISDICTION TO HEAR AND DECIDE DISPUTES BETWEEN TWO CONTRACTING STATES

ICSID was established by virtue of the ICSID Convention. The ICSID Convention was concluded on March 18, 1965 and entered into force on October 14, 1966. It is a matter of consensus among scholars that the ICSID Convention set up ICSID to fill a gap that existed prior to its establishment. While there were mechanisms for the settlement of disputes between two or more states and for the settlement of disputes between two or more private

⁵⁹ *See id.*

⁶⁰ *See id.* at ¶ 23-24.

parties before the creation of ICSID, there was no mechanism for the settlement of disputes between host states of investment and foreign investors.⁶¹ Upon ICSID's establishment, such a gap was eradicated.

The jurisdiction *ratione personae* of ICSID is made clear by virtue of the provision of Article 25 (1) of the ICSID Convention, which provides that:

(1) The jurisdiction of [ICSID] 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 [ICSID] by that State) and a national of another Contracting State.⁶²

Moreover, the preamble of the ICSID Convention explicitly mentions private international investment and “disputes [that] may arise in connection with such investment between Contracting States and nationals of other Contracting States.”⁶³ In addition to the above, the Report of the Executive Directors of the IBRD on the ICSID Convention explicitly refers to private international investment and private international capital. Indeed, the Report hails the establishment of ICSID as “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.”⁶⁴ The Report adds that:

⁶¹ COLLINS, *supra* note 38, at 233.

⁶² See ICSID Convention, Art. 25.

⁶³ See *id.*

⁶⁴ ICSID CONVENTION, REGULATIONS AND RULES, REPORT OF THE EXECUTIVE DIRECTORS OF THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES PART B (2006)

The Executive Directors believe that private capital will continue to flow to countries offering a favorable climate for attractive and sound investments . . . on the other hand, adherence to the [ICSID] Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.⁶⁵

In addition to the clarity and decisiveness of the drafters of ICSID, as apparent in the provision of Article 25 of the [ICSID] Convention, it is worth noting that relevant information regarding the standing of a State as a party to an ICSID arbitration can be found in the preparatory work of the ICSID Convention. Indeed, it has been remarked that: [d]uring the preparatory work of the Washington Convention, it seems that there was an agreement not to consider States as foreign investors under the [ICSID] Convention. The representative of France, Mr. Deguen, indicated that a State and one of its nationals might well both participate in an investment operation in another Contracting State. He pointed out that in that case, it was perhaps desirable to provide for all three parties to be associated in the proceedings. Otherwise, there might be two conflicting decisions in the same dispute. However, the Chairman, Mr. Broches, answered that it was preferable for a case of that type to be dealt with by means of an agreement

<http://icsidfiles.worldbank.org/ICSID/ICSID/StaticFiles/basicdoc/basic-en.htm>.

⁶⁵ *Id.*

between the two States that they would abide by the decision that would be given in the dispute between one of them and the investor. He stated that “It was not desirable to introduce a radical exception to the provisions of the Convention.”⁶⁶

Perhaps it is due to this clarity of expression and consistency between the ICSID Convention, the Report of the Executive Directors, and the exchanges made during the preparatory work of the ICSID Convention that ICSID tribunals agree and stress in their awards that ICSID does not have competence to decide disputes between two contracting states. For instance, the tribunal in *Maffezini v. Spain* held that “[ICSID] has no jurisdiction to arbitrate disputes between two states.”⁶⁷ Reiterating the same position, the tribunal in *CSOB v. Slovak Republic* stressed that “[t]he language of Article 25(1) of the [ICSID] Convention makes clear that [ICSID] does not have jurisdiction over disputes between two or more Contracting States.”⁶⁸

Article 25(1) of the ICSID Convention is utterly clear: ICSID does not have jurisdiction to hear and decide disputes between two contracting states. The Report of the Executive Directors of IBRD on the ICSID Convention, the exchanges made during the preparatory work for the ICSID Convention, and various awards rendered by ICSID tribunals confirm this point. Agreeing to expand on the definition of investor and/or investment in an IIA

⁶⁶ Ben Hamida, *supra* note 5, at 25; *see also* Beus, *supra* note 10, at 545-46.

⁶⁷ *See Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (25 Jan. 2000).

⁶⁸ *CSOB v. Slovak Republic*, *supra* note 45, Decision on Jurisdiction (24 May 1999).

concluded between two contracting states does not and cannot change the situation.⁶⁹ The scope of ICSID's jurisdiction remains governed primarily by the requirements and scope of the ICSID Convention itself, and such scope cannot be deviated therefrom by two or more contracting states. As such, this article submits that the CSOB's reasoning in this regard is correct.

II.2 QUESTIONING THE AUTHORITY OF THE BROCHES TEST APPLIED BY THE TRIBUNAL

Faced with a challenge to its jurisdiction that was raised by the respondent state, which argued that the claimant was “merely an agent of the Czech Republic” and that, therefore, “there was an identity between the claimant and the Czech Republic and that the dispute was between two contracting states,” the tribunal in the CSOB had to choose the criteria to be used to decide on this challenge.⁷⁰,⁷¹ Despite the fact that there is a consensus that ICSID has no jurisdiction to settle disputes between two contracting states, settling on the criteria to be used by the tribunal to decide on the respondent's jurisdictional objection was not a straightforward or simple issue. This is due to the fact that, while various provisions of the ICSID Convention are quite explicit that ICSID has no jurisdiction to settle disputes between two contracting states, it does not contain any express provisions that deal with the scenario in which

⁶⁹ In this scenario, it becomes clear that, in certain cases, even if the parties to the relevant IIA have agreed to expand the jurisdiction of an investment arbitration tribunal (for example, by incorporating broad definitions of investment and/or investor), they can only have recourse to certain arbitration fora (ones mainly dedicated for international commercial arbitration and that do not have any prerequisites to jurisdiction apart from the existence of a valid arbitration agreement) to the exclusion of others (such as ICSID).

⁷⁰ *CSOB v. Slovak Republic*, *supra* note 45, at ¶ 10.

⁷¹ Ben Hamida, *supra* note 5, at 28.

a tribunal is faced with an arbitration case involving a public or sovereign body or entity of one state that contracts with ICSID and another contracting state (i.e. the host state for the investment). In light of this situation and the lack of any case law on that particular issue, the tribunal was faced with no option but to make reference to the negotiating history of the ICSID Convention and the Convention's preparatory work for any guidance on this matter.⁷²

Upon review of the legislative history of the ICSID Convention, the tribunal noted that “[i]t indicates that the term ‘juridical persons’ as employed in Article 25 and, hence, the concept of ‘national,’ was not intended to be limited to privately owned companies, but to embrace also wholly or partially government-owned companies.”⁷³ Immediately afterwards, the tribunal proceeded to make the following statement: “[t]his interpretation has found general acceptance.”

Having determined that a wholly or partially government-owned company falls within the concept of “national” used in Article 25 of the ICSID Convention, the tribunal then referenced some statements made in 1972 by one of the framers of the ICSID Convention, Aron Broches, during a course that he taught at the Hague Academy of International Law. The tribunal deemed these statements to constitute the applicable criteria for deciding whether a state entity can take part in an ICSID arbitration.⁷⁴ In this respect, the tribunal states the following:

It follows that the question whether a company qualifies as a ‘national of another Contracting

⁷² *CSOB v. Slovak Republic*, *supra* note 45.

⁷³ *See id.* at ¶ 16.

⁷⁴ *See id.* at ¶ 17.

State’ within the meaning of Article 25(1) does not depend upon whether or not the company is partially or wholly owned by the government. Instead, the accepted test for making this determination has been formulated as follows: ‘. . . for purposes of the [ICSID] 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 government function.’⁷⁵ (emphasis added)

The CSOB tribunal’s progress in this regard is quite surprising because it lacks any solid or reasonable justification. First, while it is correct that the preliminary draft of the ICSID Convention contained a comment regarding the possibility of a wholly or partially owned public body or entity as a party to an ICSID arbitration, the tribunal cannot rely solely on this statement or comment to justify its conclusion. This is particularly true given the fact that this comment only appeared in a preliminary draft of the ICSID Convention, was not reiterated again either in the ICSID Convention in its final form or in the Report of the Executive Directors of the IBRD on the ICSID Convention, and thus cannot carry any weight in supporting the tribunal’s conclusion.⁷⁶

Secondly, assuming that the drafters of the ICSID Convention intended government-owned entities (whether wholly or partially owned) to be included within the scope of jurisdiction *ratione personae* of the ICSID, the tribunal’s reliance on what came to be called “the Broches Test” is still hard to justify. Citing statements that one of the

⁷⁵ See *id.*

⁷⁶ Ben Hamida, *supra* note 5, at 25.

framers of the ICSID Convention, Aron Broches, made approximately 5 years after the entry into force of the ICSID Convention during a course that the latter used to teach at the Hague Academy of International Law as the applicable criteria to answer the question of a sovereign entity's standing in ICSID arbitration can, at best, be considered as a desperate attempt on the part of the tribunal to find readily prepared criteria that it can use to determine its jurisdiction.⁷⁷ Thus, it is not difficult to imagine a future ICSID tribunal that, when hearing a dispute involving a sovereign entity as a party to the proceedings, refuses to adopt the Broches Test as the applicable test for determining that sovereign entity's standing. This is particularly true because of the lack of a system of precedents in international investment arbitration.⁷⁸ In this respect, it is worth noting how some ICSID tribunals have dealt with certain tests or criteria laid down and adopted in previous ICSID awards.

The tribunal in *Biwater Gauff*, for example, took a different approach regarding the definition of investment, and, in fact, criticized the criteria that the tribunal established in *Salini v. Morocco* in 2001, which was widely

⁷⁷ The fact that the parties to the dispute in CSOB accepted what is now referred to as the Broches Test as the applicable test or criteria that the tribunal would use to decide on its jurisdiction (something that the tribunal made sure to mention in its Decision on the Objections to Jurisdiction), as well as the lack of previous case law on the matter of the standing of sovereign entities as parties to ICSID arbitration, perhaps alleviates the tribunal's apparent preference for readily made tests/criteria and lack of interest in fully exploring all the aspects that a sovereign entity's standing before an ICSID tribunal entails in light of the circumstances of the case laid before it.

⁷⁸ McLACHLAN, SHORE & WEINIGER, *supra* note 38, at 148 (noting that "[o]f course, crystal-ball gazing in a developing field of law where awards do not carry precedential authority is an especially uncertain activity."

followed by later ICSID tribunals.⁷⁹ The *Biwater Gauff* Tribunal found that the concept of investment was not defined in the ICSID Convention and, accordingly, stated that “ICSID tribunals [have] no authority to impose their own view[s] of appropriate fixed criteria applicable to all cases.”⁸⁰

II.3 INTERPRETING THE ICSID CONVENTION IN LIGHT OF THE RELEVANT PROVISIONS OF THE VIENNA CONVENTION ON THE LAW OF TREATIES

In contrast with what happened in the CSOB arbitration, one or both parties to an ICSID proceeding may refute the Broches Test on one of the grounds mentioned above. Also, an ICSID tribunal constituted to hear and decide the dispute in that arbitration, either unilaterally or on the basis of the parties’ arguments, may conclude that the Broches Test is not binding and has no authoritative power. In this scenario, the next logical question that an ICSID tribunal will have to face is the following: on what basis should the tribunal make a decision on its jurisdiction to decide a dispute brought before it by an SWF?

Many scholars writing on the topic of ICSID jurisdiction over sovereign entities or SOEs have dealt with this issue. There is a consensus that, in light of the lack of any explicit provisions on this issue in the ICSID Convention, interpretation of relevant provisions of the ICSID Convention should be carried out according to the Vienna Convention on the Law of Treaties.⁸¹ This means that an ICSID tribunal should proceed with the ordinary

⁷⁹ *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 42 ILM 609, ¶ 56 (2003).

⁸⁰ DOLZER AND SCHREUER, *supra* note 38, at 68.

⁸¹ McLACHLAN, SHORE & WEINIGER, *supra* note 38, at 156-57.

meaning of any relevant terms found in the ICSID Convention in an attempt to determine the true intentions of the contracting states, with due regard for the context in which the ICSID Convention was concluded and adopted.⁸²

In light of the context of the ICSID Convention and its object and purpose (as clarified in previous parts of this work), it can be argued that the ICSID mechanism is not meant for investments carried out in the territory of a state by a sovereign entity that (1) is an arm or agent of its home state government, and (2) uses sovereign wealth to make its investment. Allowing standing before an ICSID tribunal to such a sovereign entity is tantamount to a finding of jurisdiction for an ICSID tribunal to hear and decide a dispute between two contracting states to the ICSID Convention. That is inconsistent with explicit provisions of the ICSID Convention and previous awards rendered by ICSID tribunals.

II.4 THE TRIBUNAL'S EMPHASIS ON THE NATURE OF ACTS TEST DOES NOT CONSTITUTE A BRIGHT-LINE TEST

Assuming that an ICSID tribunal states that the Broches Test is the applicable test regarding deciding on its jurisdiction to hear and decide an investment dispute involving a sovereign or public entity, we now turn to an analysis of the application of said test by the CSOB tribunal and whether such application is adequate. Upon deciding that the Broches Test is the appropriate choice for the jurisdiction decision and that both parties to the arbitration have accepted it as such, the CSOB tribunal turned to an

⁸² The Vienna Convention on the Law of Treaties, Art. 31(1) provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in context and in the light of its object and purpose.”

analysis of the Broches Test in order to determine its requirement(s). In making its determination as to the character of the CSOB's acts (i.e. whether those acts were governmental or commercial), the tribunal decided that the sole relevant criterion in this regard was the nature of these acts. By relying solely on the nature of the CSOB's acts, the tribunal explicitly declared that certain issues were simply irrelevant, including state ownership or control of the CSOB, the government's use of the CSOB as a tool to carry out the latter's policies, and the underlying motives or purposes of the CSOB's investment.

This application of the Broches Test by the CSOB tribunal is inadequate for a number of reasons. Firstly, as mentioned above, the CSOB tribunal held that the sole criteria for determining whether there was unity between the CSOB and its home state of the Czech Republic was the nature of the acts performed by the CSOB and whether these acts were governmental or commercial in nature. The tribunal presented the Nature of Acts Test and the distinction between governmental and commercial acts as simple and straightforward; however, this is not the case. The undeniable reality is that, even when a certain government decides to pursue some commercial activities, it carries them out within a certain political context and situation. Any variation in that political context has an impact on how the government proceeds and deals with its commercial activities. As the OECD articulately puts it:

. . . when governments undertake commercial activities, they remain answerable to a wide range of societal pressures that their governance structures are designed to take into account. For this reason, governments may encounter difficulties in making credible commitments to pursue only 'commercial' objectives, since their

raison d'être involves being sensitive to political pressures and to pursuing non-commercial objectives.⁸³

Along the same lines, Larry Catá Backer stresses that “there are not separate political and economic playing fields where States and companies operate respectively . . . [t]hey both make a political use of financial power trying to influence the market they operate in.”⁸⁴

Considering this inherent difficulty in characterizing a specific act of an entity as purely commercial or governmental in nature, it is not surprising that the tribunal in *Noble Ventures v. Romania* refused to accept and employ the use of that very distinction when it made its finding on state attribution. In its decision, the tribunal noted that “[t]he [International Law Commission (ILC)] Draft does not maintain such a distinction.” Then the tribunal proceeded to note that “there is no common understanding in international law of what constitutes a governmental or public act.”⁸⁵

The same rationale used by the Nobel Ventures tribunal to refute and disregard the distinction between governmental and commercial acts also applies to SWFs. On the one hand, according to the various definitions

⁸³ Kathryn Gordon and April Tash, *Foreign Government-controlled Investors and Recipient Country Investment Policies: A Scoping Paper*, OECD Investment Division, 10 (2009), www.oecd.org/dataoecd/1/21/42022469.pdf.

⁸⁴ See Larry Catá Backer, *SWFs in five countries and three narratives: Similarities and Differences*, in RESEARCH HANDBOOK ON SOVEREIGN WEALTH FUNDS AND INTERNATIONAL INVESTMENT LAW 69, 57-98 (Fabio Bassan ed., 2015).

⁸⁵ See *Noble Ventures, Inc. v. Romania*, ICSID No. ARB/01/11, Award, (2005).

offered by scholars and bodies, SWFs are publicly owned by the government. On the other, SWFs employ private-law mechanisms in order to carry out their mandates, investment strategies, and functions. Moreover, it is not uncommon for ICSID tribunals to reference the law of state responsibility “as elucidated by the [ILC] in 2001” in order to decide on the question of whether the actions of an entity or organ can be attributed to the state (which is a very similar, if not identical, to the same issue raised in the CSOB).⁸⁶ Thus it becomes clear that the Nature of the Acts Test employed by the CSOB tribunal is not a bright-line test that leads to predictability and stability. On the contrary, it is an ambiguous test for which application will vary from one tribunal to the next.

III. ALTERNATIVE APPROACHES TO THE METHODOLOGY EMPLOYED BY THE CSOB

III.1 THE PRINCIPLE OF ATTRIBUTION

The issue of attribution and the various matters related to it have been addressed in the field of foreign investment mainly with respect to cases involving an allegation by the claimant to the effect that the host state of the investment should be held liable for the acts of one of its entities. Indeed, most of the available case law in international investment arbitration that addresses attribution revolves around that very issue. Scholars were quick to acknowledge that this does not mean that

⁸⁶ Elizabeth Whitsitt and Todd Weiler, *Sovereign wealth funds and bilateral investment treaties’ new models: Issues, new trends and state practice*, in RESEARCH HANDBOOK ON SOVEREIGN WEALTH FUNDS AND INTERNATIONAL INVESTMENT LAW 280, 273-320 (Fabio Bassan ed., 2015).

attribution can only be applied by investment tribunals in a similar situation. As Dolzer and Schreuer note:

In the field of foreign investment, matters of attribution have most often come up on the side of the respondent when a state argues that acts by state entities cannot be attributed to the state. However, the issue may also be relevant for a claimant whom a respondent considers as a state entity rather than a national of another state.⁸⁷

Clearly, this is exactly what took place in the CSOB. Whether intentional or not, the CSOB tribunal did not refer to the principle of attribution at all. Evidently it was satisfied with the comment to the preliminary draft of the ICSID Convention and with referring to statements made a number of years after the adoption of the ICSID Convention by one of its framers, Aron Broches, and relied on these statements as the decisive criteria.

Owing to the general character of state attribution and the existence of extensive case law and jurisprudence on it in investment arbitration, we are of the opinion that future ICSID tribunals should take the principle of attribution into consideration when deciding whether state entities (such as SWFs or SOEs) have standing before ICSID. In particular, the principle of state attribution finds its basis in “the concept of the unity of the state,”⁸⁸ as well as in a jurisdictional objection raised by a respondent in an ICSID arbitration on the basis of the existence of a strong link between a claimant entity and its home state, which undoubtedly relates to that concept. Thus, the application of attribution in the latter case or scenario should not be considered far-fetched.

⁸⁷ DOLZER AND SCHREUER, *supra* note 38, at 219.

⁸⁸ *See id.* at 216.

Given that state entities are most often set up by the state in a manner that conveys upon them a separate legal personality, the general rule is that the actions of such entities cannot be attributed to the state. However, there are exceptions to this general rule. Among these exceptions are “cases where the corporation exercises public power, and cases where the state owns the entity provided that ‘control is exercised in order to ‘achieve a particular result.’”⁸⁹ The application of these exceptions to scenarios involving SWFs and SOEs will entail a broad analysis and investigation into the structure, function, and control of the entity in question by the sovereign government. It is likely that ICSID tribunals’ broad analysis when deciding on the standing of an SWF or SOE will most likely help alleviate some of the major concerns that the host state may have regarding the purpose sought by a particular SWF from a particular investment, as well as whether such purpose involves political considerations and objectives of the home state. In *Maffezini v. Spain*, the ICSID tribunal took into consideration a mixture of structure, function, and control. In its decision on jurisdiction, the tribunal stated the following:

The question whether or not SODIGA is a State entity must be examined first from a formal or structural point of view. Here a finding that the entity is owned by the State, directly or indirectly, gives rise to a rebuttable presumption that it is a State entity. The same result will obtain [sic] if an entity is controlled by the State, directly or indirectly. A similar presumption arises if an entity’s purpose or objectives is the carrying out of functions which are governmental in nature or which are otherwise normally

⁸⁹ See *id.* at 219-20.

reserved to the State, or which by their nature are not usually carried out by private businesses or individuals.⁹⁰

Also, in *Salini v. Morocco*, the tribunal relied on both the structural aspect of ADM—including its legal personality, management, and ownership—and its functional aspect. The tribunal found that “ADM being . . . a body distinguishable from the State only by virtue of its legal status, the Tribunal . . . concludes that the Italian companies have shown that ADM is a State company, acting in the name of the Kingdom of Morocco.”⁹¹

Toto v. Lebanon is particularly important when the issue of standing before ICSID is raised concerning an SWF. This is due to the fact that the *Toto* tribunal had to decide whether the actions of two entities that carried out public works (CEPG and its successor, CDR), received funding from the sovereign government, were controlled indirectly by the state, or were attributable to the state.⁹² Having found that both entities “exercised governmental authority in the sense of Article 5 of the ILC Articles,” the tribunal decided that the actions of these entities were attributable to the state and that it therefore had jurisdiction to decide the dispute. Since SWFs are owned by the sovereign government, receive funding from sources that can be categorized as sovereign wealth, and carry out the function of investing this sovereign or public money to achieve certain objectives entrusted to them by the government, the decision of the *Toto* Tribunal is of

⁹⁰ *Maffezini v. Spain*, *supra* note 67.

⁹¹ *Salini v. Morocco*, *supra* note 79.

⁹² See generally *Toto Construzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 Sep. 2009).

particular relevance to the standing of SWFs as claimants in ICSID arbitration. Despite the potential benefits of applying the principle of attribution to answer the question of SWFs standing before ICSID tribunals, it is worth noting that the outcome of such an application will necessarily differ from one case to another depending on the specific circumstances of each case. Such circumstances may include how each SWF is established and managed, what its mandates and investment strategies are, and the degree of actual independence that it has from the sovereign government.⁹³

III.2 THE LAWS OF SOVEREIGN IMMUNITY

Acknowledging the inadequacy of the CSOB tribunal's methodology regarding the Nature of Acts Test and the question of SWF and SOE standing before ICSID tribunals, some scholars have hinted at the possibility of turning to sovereign immunity laws for guidance.⁹⁴ Since SWFs were originally intended to invest sovereign wealth primarily in foreign assets, SWFs were intended to (and commonly do) "enter into a legal relationship with private natural or legal persons governed by the national law of the host State (including its conflict of law rules). The question then arises whether they could be sued before the courts of the latter."⁹⁵ While the laws of sovereign immunity are

⁹³ DOLZER AND SCHREUER, *supra* note 38, at 221-22.

⁹⁴ Ben Hamida, *supra* note 5, at 30; *see also* Giovanna Adinolfi, *SWFs and state immunity: Overcoming the contradiction*, in RESEARCH HANDBOOK ON SOVEREIGN WEALTH FUNDS AND INTERNATIONAL INVESTMENT LAW 226, 223-272 (Fabio Bassan ed., 2015). Despite the fact that the UN Convention on Jurisdictional Immunities of States and Their Property (UNCSI) has not yet entered into force, the European Court of Human Rights and some national courts have referred to its provisions, arguing that the convention merely reflects the established rules of customary international law.

⁹⁵ Adinolfi, *supra* note 94, at 224.

meant to apply when a case involving a foreign state is brought before the national court of another state, such laws can also be referenced with respect to a particular SWF in order to determine whether the link between that fund and its home state reached a certain level after which the sovereign status of the home state would extend to that fund.⁹⁶ If that was found to be the case, one could argue that such a fund lacked standing to bring a dispute concerning its foreign investment before ICSID. This is simply because the dispute in such a case would qualify as a dispute between two contracting states to the ICSID Convention, and thus ICSID has no jurisdiction to hear and decide it.

Factors that ICSID tribunals should take into consideration to guide their investigations into the link between the SWF in question and its home state and whether the sovereign character of the state extends to that fund could include the legal personality of the fund (or lack thereof), the source of the fund's capital, the fund's mandates, the fund's management and the public goals set by the government for the fund. Given that the existing SWFs are heterogeneous, the finding of the tribunal will necessarily vary from one case to the next depending on the specific details of the SWF in question and its relationship with its home state. While reference to the laws of sovereign immunity in relation to the question of SWFs' standing before ICSID does not provide us with a bright-line test that provides predictability and stability, it does enable ICSID tribunals to broadly investigate the overall

⁹⁶ See *id.* at 229. In its 2012 decision in *Germany v. Italy*, the International Court of Justice held that national courts of one state lack jurisdiction to hear disputes involving a foreign state due to the latter's sovereignty.

framework within which a particular SWF exists and carries out its functions. This will certainly help alleviate some of the major concerns that a host state may have regarding a particular SWF's purposes and objectives.

Given the importance and significance of SWFs in the field of foreign investment has increased dramatically during the last decade, and considering the ambiguity surrounding the issue of whether SWFs fall within the definition of an investor as one of the conditions of benefiting from both the substantive and procedural protections of IIAs, some states sought to include SWFs in the definition of an investor' by making an explicit reference to SWFs in the IIAs they form with other states. While this is not a problem in cases where arbitration is sought before fora dedicated to commercial arbitration, the situation is different when parties seek investor-state arbitration before ICSID. This is simply due to the fact that the ICSID Convention has its own jurisdictional requirements. Therefore, an important question arises regarding whether an explicit provision in an IIA that includes SWFs as investors would have an impact on ICSID's jurisdiction. This matter is discussed in the following section.

IV. RECENT BIT PRACTICE INCLUDING SWFs IN THE NOTION OF THE INVESTOR AND ITS IMPACT ON ICSID'S JURISDICTION

IV.1 DEFINITION OF AN INVESTOR IN THE ICSID CONVENTION

As previously mentioned, the jurisdictional requirements of ICSID are set forth in Article 25 of Chapter II: Jurisdiction of the Centre of the ICSID Convention. In its first and second paragraphs, Article 25 stipulates that:

(1) The jurisdiction of [ICSID] 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 [ICSID] by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to [ICSID]. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) ‘National of another Contracting State’ means:

(a) . . .

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.⁹⁷

As it clearly appears from the above provisions, the drafters of the ICSID Convention failed to provide—or perhaps deliberately omitted—a specific mechanism or method to be used by ICSID tribunals to determine whether a claimant investor, as a juridical person, satisfies the jurisdictional condition of nationality pursuant to the ICSID

⁹⁷ ICSID Convention, Art. 25(2).

Convention.⁹⁸ This is a point with which most if not all ICSID tribunals and scholars that write on nationality within ICSID's jurisdiction begin their discussion.⁹⁹ For instance, in light of the provision of Article 25 of the ICSID Convention, it has been remarked by scholars that “the threshold jurisdictional question of nationality – like the threshold question of ‘investment’ – looms large as the basis for potential objections to jurisdiction on the part of respondent States.”¹⁰⁰ Given the fact that the drafters of the ICSID Convention did not explicitly provide such a method, tribunals constituted under the auspices of the ICSID have differed in their application of the nationality requirement, with “[t]he overwhelming weight of the authority . . . point[ing] towards the traditional criteria of incorporation or seat for the determination of corporate nationality under Art. 25(2)(b).”¹⁰¹

IV.2 VARIATIONS IN THE DEFINITION OF NATIONALITY IN BITs

After a careful overview of the relevant provisions of various model BITs concerning the requirement(s) that a juridical person must satisfy in order to qualify as a protected investor of one contracting party—and thus be protected by the substantive and procedural provisions of an international investment agreement—one can safely state that three criteria may be employed by investment tribunals: the state of incorporation, control, or seat of the juridical person.¹⁰² Regarding the nationality requirement provided for in Article 25 of the ICSID Convention, an

⁹⁸ This is the same approach used by the drafters of the ICSID Convention concerning the definition of an investment.

⁹⁹ McLACHLAN, SHORE & WEINIGER, *supra* note 38, at 132.

¹⁰⁰ *See id.* at 138.

¹⁰¹ *See id.* at 144.

¹⁰² *See id.* at 142.

undeniably relevant issue is that “[t]ypically, modern IIAs afford a right to non-State actors (such as an individual or an enterprise) to invoke the compulsory dispute settlement provisions of the treaty by initiating arbitral proceedings against a host State.”¹⁰³ In light of this, states that are home to SWFs—particularly those that are home to the largest SWFs—try to negotiate the provisions of the BITs that they form to incorporate express terms in the provision defining an investor, with the desired effect that the SWFs would qualify as investors. This stems from the desire to ensure that SWFs’ investments in the territory of the host state are protected by the substantive and procedural provisions of the BITs and, accordingly, that the SWFs are able to initiate investment arbitration against the host state in case a legal dispute arises out of an SWF’s investment in the territory of that state.

However, whether the home state of the SWF is successful depends on the respective negotiating power of both the home state and the host state. Of course, the probability of the success of the SWF’s home state in this regard becomes higher as the host state’s need for capital becomes more urgent. As Whitsitt and Weiler stated:

. . . the various definitions of investor found in IIAs could be understood on a spectrum with one end demarcated by a definition that expressly includes SWFs and may even go so far as to name specific SWFs. In that case, the ordinary meaning should be self-evident. At the other end of the spectrum is a definition that expressly excludes SWFs or States parties and their corporations or agents. Again, the ordinary meaning should be self-evident. Most

¹⁰³ Whitsitt and Weiler, *supra* note 85, at 280.

definitions of investor, however, are not clear and fall in the middle of these two extremes.¹⁰⁴

For instance, the United Arab Emirates and Saudi Arabia, among other countries, own some of the largest SWFs in the world; as a result, these states often ensure that the definition of an investor in any IIA they consider forming contains a broad definition that enables the extension of the protections provided by that IIA to their SWFs. As such, we notice that the broad definition of an investor is included in the majority—if not all—of the BITs that Saudi Arabia formed between 2001 and 2011. The provision defining the term “investor” in Saudi Arabia’s BITs with other states stipulates that:

3. The term ‘investor’ means:

(a) . . .

(b) in respect of the Kingdom of Saudi Arabia:

(i) . . .

(ii) . . .

(iii) the Government of the Kingdom of Saudi Arabia and its financial institutions and authorities such as the Saudi Arabian Monetary Agency, public funds and other similar governmental institutions existing in Saudi Arabia.¹⁰⁵

In the preceding paragraphs, we saw how some home states of SWFs succeeded in incorporating a definition of

¹⁰⁴ See *id.* at 290.

¹⁰⁵ See *id.* at 291. Other relevant examples include the BITs formed by the United Arab Emirates.

an investor in their BITs with other states. Their purpose was to explicitly or implicitly guarantee that SWFs would benefit from the protections and guarantees of the BITs and would have standing in investment arbitration. If the provision of the relevant IIA explicitly or implicitly included SWFs in its definition of an investor, and if a SWF decided to bring arbitration against the host state before any arbitration forum provided for in that BIT's dispute-settlement provision other than ICSID, the issue of jurisdiction *ratione personae* would be straightforward. However, should the SWF decide to bring its arbitration case before ICSID, the following question would arise: should the agreement of the parties to the BIT prevail over the jurisdictional requirements of ICSID, or should the ICSID tribunal defer to the agreement of the parties to the BIT only within the limits set forth in the ICSID Convention?

IV.3 PRIORITY SHOULD BE GIVEN TO ICSID'S JURISDICTIONAL REQUIREMENTS

There are not any ICSID arbitral awards that explicitly discuss the order of the analysis or investigation that an ICSID tribunal should follow when faced with a question regarding whether the claimant qualifies as an investor under both the ICSID Convention and the provisions of the relevant IIA. However, there are ICSID arbitral awards that discuss the very issue of the order to be followed by an ICSID tribunal when faced with a question regarding the qualification of the claimant's transactions or activities in the territory of the host state as an investment. Therefore, it is important that reference be made in this respect to decisions that tackled the issue of the priority or order between the ICSID Convention and the relevant IIA in the context of the definition of an investment by way of analogy. This is especially important because the drafters

of the ICSID Convention failed to provide a definition of both an investor and an investment. The issue in question is whether an ICSID tribunal should address its competence first based on the requirements of the ICSID Convention and then, if satisfied, address the requirements under the relevant IIA. This is a general question that deals with the fulfilment or lack thereof of a jurisdictional requirement for an ICSID tribunal.

Given the lack of a definition of the term “investment” in Article 25 of the ICSID Convention, arbitral tribunals constituted under the auspices of ICSID have varied in the approach that they adopted to answer the considerably important question of whether a claimant’s activities or transactions in the territory of the respondent state qualify as an investment. On the one hand, some ICSID tribunals have given deference to the agreement of the parties in their BIT, as encapsulated in the provision that defined the term “investor.”¹⁰⁶ For instance, the majority of the members of the tribunal in the *Tokios* arbitration, in agreement with the tribunal in the *Wena Hotels Ltd v. Arab Republic of Egypt*, took the view that “the international law direction was to favour the expansion of arbitral jurisdiction.”^{107,108} In order to settle the issue of the tribunal’s jurisdiction and competence, they then relied on the relevant provisions of the BIT between Ukraine and Lithuania, which defined the term “investor.”¹⁰⁹ The majority’s decision in *Tokios* did not sit well with the other member of the tribunal, Professor Weil, who drafted a dissenting opinion.

¹⁰⁶ COLLINS, *supra* note 38, at 234-35.

¹⁰⁷ See *Wena Hotels Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction, 6 ICSID Rep. 67, 81-82 (1999).

¹⁰⁸ McLACHLAN, SHORE & WEINIGER, *supra* note 38, at 147.

¹⁰⁹ See generally The Ukraine-Lithuania Bilateral Investment Treaty, 8 Feb. 1994.

In his opinion, Professor Weil made an argument for the inclusion of the origin of capital among the criteria used to determine whether the claimant qualified as an investor.¹¹⁰ To support his argument, Professor Weil claimed that such an inclusion would be consistent with the object and purpose of the ICSID Convention.¹¹¹ More importantly in the present context, Professor Weil argued that:

... the *Tokios* decision reversed the proper order of analysis: the majority should first have considered whether the Tribunal had jurisdiction under Article 25 of the [ICSID] Convention, and only after that assessed jurisdiction under the BIT, in keeping with the ICSID principle that parties to a BIT can narrow but not expand the jurisdiction provided by the Convention.¹¹²

It is worth noting that, despite the logical and persuasive character of the arguments put forward by Professor Weil, the tribunal simply chose to neglect these arguments and did not offer any response.¹¹³

On the other hand, some ICSID tribunals took the opposite view and, in the course of addressing and settling the issue of their jurisdiction and competence, gave deference to the provisions of the relevant IIA only to the extent that the definitions in the IIA did not exceed the limits set forth in the ICSID Convention, with respect to ICSID's jurisdiction. For example, in its decision on

¹¹⁰ See *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Dissenting Opinion of Chairman Prosper Weil, ICSID Rev-FILJ 205, 246 (24 Apr. 2004).

¹¹¹ See *id.*

¹¹² McLACHLAN, SHORE & WEINIGER, *supra* note 38, at 150.

¹¹³ See *id.* at 150.

jurisdiction, the tribunal in *Aguas del Tunari v. Republic of Bolivia* “proceeded to address the applicable substantive law, and in this viewed the BIT as determinative, with jurisdiction under the BIT being limited by the jurisdictional provisions of the ICSID Convention.”¹¹⁴ Confirming the point expressed in the *Aguas del Tunari v. Bolivia* arbitration, the tribunal in *Joy Mining v. Egypt*, while dealing with the issue of the definition of an investment in order to decide on its competence and jurisdiction, held that “there is a limit to the freedom with which the parties may define an investment if they wish to engage the jurisdiction of ICSID tribunals.”¹¹⁵

In light of the above, it is clear that the various ICSID awards reflect conflicting positions with respect to the order of analysis and investigation between the ICSID Convention and the BIT provisions. Thus, the matter is not settled in ICSID case law, and—in light of the lack of a system of precedents in international investment arbitration—we will have to wait and observe how future arbitral tribunals constituted under the auspices of ICSID deal with this issue. However, this article asserts that the argument submitted for the prevalence of the jurisdictional requirements set forth in the ICSID Convention, as some prominent scholars have noted, “appears persuasive on its face.”¹¹⁶

II. Conclusion

In light of the above, it is clear that the role of SWFs in foreign investment has considerably increased throughout the past decade, and that host states have not

¹¹⁴ See *id.* at 156.

¹¹⁵ *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction ¶ 63 (6 Aug. 2004).

¹¹⁶ McLACHLAN, SHORE & WEINIGER, *supra* note 38, at 150.

taken this matter lightly. Owing to persisting tensions among developed and developing countries in the field of international investment law, states that host FDI that is carried out by SWFs in particular and SOEs in general have considered such investments with scrutiny. Host states have amended their domestic laws that deal with foreign investment and have legislated new laws to provide their governments with more flexibility and broad discretion to control—and even prevent—investments that SWFs seek to make in their territory. This is achieved mainly by reference to broad terms, such as national security, that give host states the right to reject access to foreign investors in general and SWFs and SOEs in particular.

Given that some IIAs have extended the scope of their substantive and procedural protections to the pre-investment phase, and that host states could discriminate against SWFs and SOEs by rejecting or cancelling their investments on grounds related, *inter alia*, to national security reasons, it is likely that we will gradually witness more ICSID cases brought by SWFs and SOEs against host states. Accordingly, determining whether an SWF has standing to bring an arbitration case before ICSID as a “national of another Contracting State” is a considerably important issue that demands more attention from scholars.

This article also examined the reasoning of the ICSID tribunal in the CSOB arbitration and emphasized that the methodology used by that tribunal failed to provide a clear, adequate, or comprehensive approach that would help settle the issue of ICSID standing for SWFs. This article questioned the CSOB tribunal’s reliance on the Broches Test because of the lack of any authoritative power that could be attributed to statements made by one of the drafters of the ICSID Convention years after its enactment. Moreover, this article has demonstrated that the Nature of

Acts Test employed by the CSOB tribunal is not consistent with the inherent conundrum in the nature of SWFs (i.e. the inherent mixture of sovereign and private characteristics).

Finally, in an attempt to provide alternative approaches to the methodology used by the CSOB tribunal, this article discussed the possibility of referring to the principle of attribution and the laws on sovereign immunity for guidance regarding how to approach the issue of ICSID standing with respect to SWFs. While it is true that referring back to these doctrines will not provide future ICSID tribunals with bright-line tests that would lead to consistent findings of jurisdiction or lack thereof in cases involving different SWFs, this does not detract from the fact that these doctrines will provide future ICSID tribunals with broad and comprehensive tests that take into consideration various relevant factors, such as the structure of an SWF, its management, the sources of its funds, the ownership and level of control that the sovereign government enjoys over the activities of the particular fund, and the purposes and objectives that the particular fund seeks to realize through its investment in the territory of the host state.

As Walid Ben Hamida stated, “[s]overeign battles under investment treaties may take place soon.”¹¹⁷ Thus, there is an imminent need for scholars to address the important questions that may arise when these battles begin. The issue of ICSID standing for SWFs is one of these questions.

¹¹⁷ Ben Hamida, *supra* note 5, at 36.

