STATES AS FOREIGN INVESTORS

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INTRODUCTION

- Colonial era - **politics** and **economic interests** were closely aligned in the **development of international investment law**

- Key players in imperial politics – **european trading companies**
  - they invested big efforts in establishing **legal standards** to protect their international activities
  - **Dutch East India Company** (a Dutch trading company founded in 1602 to protect Dutch trading interests in the Indian Ocean) hired **Hugo Grotius** (famous Dutch jurist) as a legal advisor to help them legitimize activities of the Company

INTRODUCTION

- Legal doctrines on **international commerce, territory and property** were partly developed by sovereign or quasisovereign investors from the **West**
- **Today** - Western countries are increasingly **hosting** sovereign investors from the **developing world** (who enjoy protections from treaties initially meant to serve Western interests in Africa, Latin America and Asia)
- Investment treaty arbitration is supposed to '**depoliticize**' investment disputes by **reducing** the role of home governments / home governments are **making the investments**?

THE GLOBALIZATION OF STATE CAPITALISM

- **States** remain key sources of foreign investment:
  - State-owned enterprises (**SOEs**),
  - Sovereign wealth funds (**SWFs**),
  - State-owned financial institutions (**SOFIs**),
  - State-influenced enterprises (**SIEs**)

THE GLOBALIZATION OF STATE CAPITALISM

- **SOEs** – most important; owning or controlling more than 15,000 foreign affiliates and controlling more than $2 trillion worth of foreign assets around the world
- **SWFs** – more than $100 billion of foreign investment stock (mostly in developed countries)
- **SOFIs** – account for a quarter of total assets in global banking systems
- **SIEs** – government involvement through direct influence on investment activities

THE GLOBALIZATION OF STATE CAPITALISM

- Examples of **SIEs**:
  - **Russian State** guiding activities of conglomerates owned by Russian oligarchs,
  - In **Iran**, the Revolutionary Guards influencing on a wide range of companies,
  - in **Pakistan**, the army is deeply embedded in the country's major companies and banks

THE GLOBALIZATION OF STATE CAPITALISM

- Questions – the **motives** of sovereign investors and their **funding**

- **Politically** highly controversial topics:
  - **Dubai Ports debacle** – American politicians were concerned about a State-owned Arab company seeking to acquire six major US seaports
  - US security agencies and the House Intelligence Committee have been suspicious that telecom giant **Huawei** may be engaging in cyber-espionage on behalf of the Chinese government

THE GLOBALIZATION OF STATE CAPITALISM

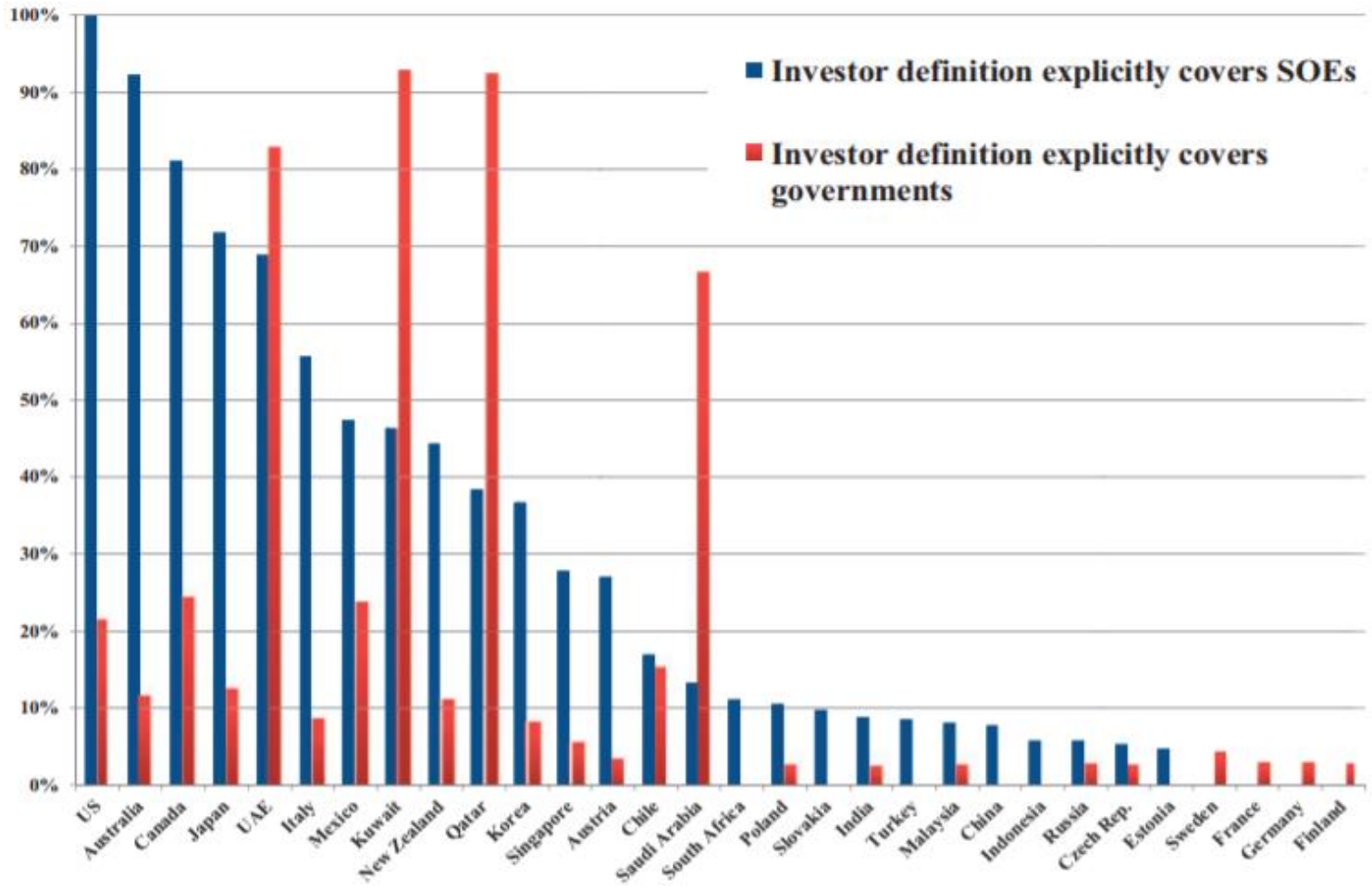
- Western governments **do not want** to keep all sovereign investors out:
  - important source of **financing**
  - European governments have large SOEs with significant assets **abroad**

- Defensive and offensive **State interests** need to be **balanced** – regulation through **international codes of conduct**, **domestic** reforms and reforms of **investment treaties**

SOVEREIGN INVESTORS AS PRIVATE INVESTORS

- **OECD survey** of more than 1800 treaties – only **16 percent explicitly mentioned sovereign investors** in otherwise broad investor definitions

- **Significant variations** across countries:
  - **United States, Australia, Canada, Japan and the United Arab Emirates** have routinely mentioned SOEs in their investor definitions
  - most **European countries** do not mention sovereign investors in their treaties (also, **China** very rarely)



- Share of investment treaties that explicitly cover sovereign investors, by country

SOVEREIGN INVESTORS AS PRIVATE INVESTORS

- **Arbitrators** have repeatedly decided that the **investment treaty regime covers sovereign investors** (even without explicit text on them)

- They often operate in **highly capital-intensive industries** with large sunk costs (natural resources, infrastructure industries and public utilities) - **more likely to experience investment disputes with host States**

SOVEREIGN INVESTORS AS PRIVATE INVESTORS

- Two of the most controversial investment treaty claims – **Vatenfall** (Swedish power company, wholly owned by the Swedish state) **v. Germany**
- **Energy Charter Treaty** did not explicitly mention sovereign investors (but did not excluded them either)
- Vattenfall took both disputes to **ICSID** – an organization for the resolution of disputes arising from **private** foreign investments, but which **cover sovereign investors if their function and nature can be considered commercial**

SOVEREIGN INVESTORS AS PRIVATE INVESTORS

- Investors with **closer relationship to the government** than Vattenfall have also filed ICSID claims
- Large number of sovereign investors are likely to have **recourse** to **treaty-based arbitration** when running into disputes with host States
- Arbitrators are given considerable **power** in determining what host governments **can**, and **cannot** do, when seeking to regulate sovereign investment

LEAVE IT TO THE ARBITRATORS?

- Assistance with ‘de-politicizing’ investment disputes

- The state of investor’s nationality is relieved of the pressure that relations with the host state wouldn’t be disturbed because of controversy between its national (investor) and the host state

THE PARADIGM IN INVESTOR-STATE DISPUTES

first party
as plaintiff

second party
as respondent

NO THIRD PARTIES

THE EXTENT TO WHICH THIS JUSTIFICATION FOR INVESTMENT ARBITRATION IS ACCURATE IS UNCLEAR

- Conceptually

is it meaningful to distinguish politics from law in this way?

- Empirically

is there actual evidence for the proposition?

TRUE COMPLAINANT AND TRUE DEFENDANT

- When it comes to sovereign investors operating in low transparency environments it can be more than difficult to identify who the true complainant actually is


NEW SILK ROAD
ECONOMIC BELT
MOSCOW
RUSSIA
URUMQI
CHINA
BEIJING
CHINA
ISTANBUL
TURKEY
VENICE
ITALY
XI'AN
CHINA
NEW MARITIME
SILK ROAD
FUZHOU
CHINA
NAIROBI
KENYA
KUALA LUMPUR
MALAYSIA


RioTinto
CHINALCO

Nasdaq

HOW ARBITRATOR SHOULD ANSWER THESE QUESTIONS?

- The investment chapter in TPP, for instance, follows standard US practice by allowing sovereign investors to file claims against host States but includes no clarification on how arbitrators should draw the public–private distinction in practice

- The investment chapter leaves it up to determine the core question of whether sovereign investors should be considered private or public for the purpose of investment disputes

RISKY POLITICAL CHOICE

- "An increasing perception that courts and tribunals are not at all well equipped for dealing with certain kinds of international disputes"
- A single incident of an adventurist arbitrator going beyond the proper scope of his jurisdiction in a sensitive case may be sufficient to generate a backlash

OPTIONS

- Sovereign entities should only be allowed to adjudicate investment treaty claims through diplomatic espousal— and thus outside of ICSID
- Sovereign investors would have access to investor–State arbitration if neither home or host State vetoes the claim in which case disputes would have to be settled in domestic courts or between the treaty parties themselves
- Substantive treaty protection

SUBSTANTIVE TREATY PROTECTIONS

- Security
  - exceptionally sensitive cases
  - self-judging ‘safety-valve’ provisions
- Corporate governance
  - anxieties about non-commercial motives
  - disclosure requirements for sovereign investors

WHAT IF…

- If lawmakers are not clearer in their treaty language, national laws and regulations, targeting sovereign investors could come under serious scrutiny by investment arbitral tribunals for being arbitrary and/or discriminatory

- Should investment tribunals be allowed to question these often-sensitive political decisions?

WHAT CAN MAKE TREATY LANGUAGE MORE CLEAR?

- References to the OECD Guidelines for Multinational Corporations, where section III refers to the obligation of all companies to disclose information on matters such as ownership and voting rights, intra-group relations, governance policies and enterprise objectives
- Explicitly target sovereign investors by making reference to the OECD's Guidelines for Corporate Governance of SOEs
- References to the Santiago Principles on the structure and management of SWFs

WHAT TO DO ABOUT THE THOUSANDS OF EXISTING TREATIES IN PLACE?

- Re-negotiation is often costly, so past treaties would probably have to be addressed with **binding interpretative statements**

❖ This could be done

- **Jointly**

among two or more treaty partners (NAFTA)

- **Plurilaterally**

United Nations Conference on Trade and Development or United Nations Commission on International Trade Law

QUESTION OF TRUST

- Policy-makers and other stakeholders in the investment regime would be well advised to query whether arbitrators should be given such considerable leeway in resolving what could be highly politically charged disputes surrounding sovereign investment