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**Roundtable on
States and State-Controlled Entities as Claimants in
International Investment Arbitration**

REPORT

by
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This is the report of the rapporteur on the “Roundtable on states and state-controlled entities as claimants in international investment arbitration,” organized by the Vale Columbia Center on Sustainable International Investment. The event, held at Columbia University on March 19, 2010, was sponsored by the Burford Group, Kind & Spalding and Freshfields Bruckhaus Deringer.

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Introduction

As an organizer observed in opening the conference, although the topic of the roundtable may seem esoteric to the uninitiated, it is cutting edge. Foreign direct investment (“FDI”) by state controlled entities (“SCEs”), including sovereign wealth funds and state-controlled enterprises, is on the rise. For example, China's outward FDI -- 80 percent to 90 percent of which is undertaken by state-owned enterprises -- doubled from \$27 billion in 2007 to \$52-\$55 billion in 2008. It appears to have reached that level again in 2009, even though global FDI flows dropped by 40 percent that year. Cumulative FDI by sovereign wealth funds approaches \$100 billion. More importantly, state-owned enterprises control a substantial amount of FDI. With SCEs responsible for such significant investments, it is only a question of time before the first wave of SCE investment disputes arises.

As the organizers noted, FDI by SCEs has led to new legislation in a number of countries, frequently triggered by concerns about sovereign wealth funds. Such legislation frequently seems to single out sovereign wealth funds specifically, or SCEs more generally, for special treatment. One example referenced was the US Foreign Investment and National Security Act of 2007, or US FINSA. This special treatment quite naturally leads to the question: Will there be claims by state-controlled entities that may feel discriminated against? What form can and will these claims take?

Alongside the rise of SCE investments in global importance, the number of treaty-based arbitrations has increased significantly. UNCTAD has identified 318 known treaty-based arbitrations by the end of 2008, and there may be others that are confidential, an organizer remarked. This number has increased substantially in a short time, with most of the arbitrations having been commenced during just the past five years. Private investors have become more assertive about their rights when aggrieved.

Governments are now investors in major auto companies and many ventures. Well over 70 percent of known petroleum is controlled by state-controlled oil companies, not only national oil companies. In Latin America in particular, there has been a resurgence of state-controlled oil companies. It may be expected to be only a matter of time before SCEs follow the example of private investors and take their claims to international, treaty-based arbitration.

The potential immediacy of this development toward arbitration by SCEs quickly became apparent at the conference: one participant, acting as counsel for a Brazilian state-controlled entity, said that he had recently commenced suit on behalf of that entity against a friendly state. It may never have been expected that Brazilian authorization would be given, but it was, he said. The case was quickly resolved, but nonetheless was said to illustrate the importance of the topic of the roundtable.

This anecdote underscored the practical importance of the topic of the roundtable set by the organizers: what is special or distinctive about investment arbitration cases brought by states and through SCEs? The participants -- not identified by name in this report because Chatham House rules applied, except with respect to Professor Smit's luncheon keynote remarks -- were a diverse group including representatives from academia, intergovernmental organizations, governments, the financial sector, arbitration counsels, and arbitrators. Their comments and ideas, summarized below, give food for thought about this cutting edge, yet so far little discussed, topic.

I. What do we know, and what are the issues?

Although the growing importance of SCEs for future investment claims was not disputed, the specific issues SCE involvement in such claims presents have not yet been defined clearly. As the

first panel of the day put it, the challenge of the day was to deal with a development that is clearly emerging, but as to which there are not yet many data to analyze. One participant described the objective of the first panel as being to know what we know and, as Donald Rumsfeld said famously, to know what we don't know -- itself a great achievement given the topic.

Two initial presentations were intended to provide a context for further discussion. The first was an overview of treaty-based investment arbitration cases involving states and state-controlled entities. The second was devoted to lessons from the similar or analogous environment of contract cases involving states and state-controlled entities.

A. General procedural advantages of states and SCEs

The issues arising in the context of SCE investment claims relate to many of the same concerns that more commonly arise when states or state entities act as plaintiffs in domestic litigations. A participant observed that there are many types of cases in which state-controlled entities appear as plaintiffs in contract and domestic law matters, including employer disputes (example *Dubai World v. Jaubert* in Florida); asserting rights as a contractual counterparty (example PDVSA in connection with its dealings with refineries in Texas); tort and statutory claims, such as Microsoft as a defendant in cases relating to its browsers, with state entities claiming to be victims of antitrust activity due to state purchases, and tobacco-related suits in the U.S.; securities law violations, in connection with which CalPERS, the California pension fund, has become a paradigmatic plaintiff since the mid-1990's passage of PSLRA in US; *parens patriae* cases; and suits against private parties and suits by one government entity against another government entity.

In this context, the participants discussed whether there were specific advantages that crystallized from the domestic setting. One key perceived benefit identified by several speakers concerned sovereign immunity. Although there are exceptions, sovereign plaintiffs frequently are immune from counterclaims as a matter of domestic law in many countries. Private parties would not enjoy such immunities. If SCEs could assert such immunity in international arbitrations, they might secure for themselves a better position than would be available to a similarly situated private actor.

The participants also referred to asymmetric immunities for state claimants versus private parties in the context of the UN Convention on Jurisdictional Immunities of States and their Property (2004). The Convention is not yet in force -- there are 28 of 30 required signatories.¹ It is nevertheless influential.

The Convention states in its Article 9 that

“A State instituting a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counterclaim arising out of the same legal relationship or facts as the principal claim”.

Although this formulation facially deprives a state of immunities, its scope is significantly narrower than it might be in the context of a private party. The bar to immunity is facially limited to “any counterclaim arising out of the same legal relationship or facts as the principal claim”. By comparison, US law uses a similar test for compulsory counterclaims that must be asserted by a litigation defendant, distinguishing these claims from permissive claims that may be asserted by a defendant. Article 9, however, may not allow such claims to be asserted simply on the basis of the sovereign nature of the claimant.

¹ See Council of Europe, Committee of Legal Advisers on Public International Law, 39th Meeting, Strasbourg, Mar. 18-19, 2010, State Of Signatures And Ratifications Of The Un Convention On Jurisdictional Immunities Of States And Their Property And The European Convention On State Immunity.

It was emphasized that, even in situations of waiver of sovereign immunity, states do not waive immunity of execution. Articles 54 and 55 of ICSID Convention were referred to, as well as Argentina's refusals to date to comply with ICSID awards against it. The "need still to chase assets" was described by one participant as weakness of the investment arbitration system.²

One participant submitted that a further procedural advantage of SCE and state claimants included deference and a presumption of validity, basing his position on a favorable perception by domestic court of prosecutorial discretion or diplomatic deference. It was remarked, however, that this advantage may be diminished as states become more common claimants. It was also remarked that the extent of deference and the presumption of validity enjoyed by states depend upon the type of suit, with there being more deference in *parens patriae* actions, for example.

Another potential advantage the participants discussed was the ability of states and SCEs to mobilize public opinion. The extent to which SCEs actually held an advantage in marshalling public opinion was questioned, however, as one participant interceded that in his experience, governments had failed to marshal their public relations resources effectively.

Similarly, participants noted that the state had investigatory powers it could use to support SCE claims. Participants again observed, however, that the effectiveness of such investigations differed from case to case. As a participant observed by analogy, even when the state acts as a respondent in investment arbitration, investors typically submit far more exhibits than host states.

One other point was described as a "procedural bending over backwards" to the benefit of states, not in all but in many cases. The participant making this point said that arbitral tribunals may wish to avoid entering default judgments against sovereigns and engage in "procedural acrobatics" with respect to deadlines and the like. There also may be reluctance to award costs and fees against states, the participant stated.

States were said by one participant to be able with impunity to fail to comply with orders. The same participant referred to the inability to compel a state to disclose evidence. Negative inferences may be drawn against states, but there is no sanction or penalty for a states refusal to disclose information, he said.

B. Judicial interference by sovereigns with arbitral proceedings

A different general concern raised by the participants concerned the ability of states to interfere with ongoing arbitral proceedings through their own judiciaries. One participant related his own experience, when getting on plane en route to an arbitral hearing, of being enjoined by state courts of the respondent state against proceeding with an UNCITRAL arbitration at its foreign seat. There were also said to be particular potential issues when one of the arbitrators is a national of the state in question or has property or family in the state in question. The Indonesian cases are well known; a tribunal famously moved an arbitration hearing outside of Indonesia and made a majority award after the incidence by state security forces of a panel member who was an Indonesian national. A participant intervened to say that, in the Himpurna case, the bottom line was that the award was never paid by Indonesia. Instead, OPIC paid, and OPIC then approached Indonesia and recovered full amount of the insurance, which was a good deal less than the award.

The SGS v. Pakistan case was said to be an example of Pakistan courts trying to prevent proceeding with ICSID arbitration. A "benefit" for states thus might be said to be their improper use of power, a participant observed. The extent to which similar tactics could be used to support an

² Nigel Blackaby remarks.

ongoing arbitration in which an SCE or a state acted as a claimant remains an open issue to be examined as more such cases are filed and prosecuted.

C. Disadvantages of states

The discussion also focused on potential procedural disadvantages of state actors in international arbitration from general experience. The disadvantages of states and state-controlled entities, however, were said by a participant to make for a much shorter list. Information control generally was said to be a disadvantage, with governments described as "leaky". An example was said to be the leaking to the public of Eli Lilly's settlement negotiations with the US FDA over Zyprexa claims. Legislative oversight can be intrusive for "legitimate" and often for "illegitimate" (meaning political) reasons, a factor that can disadvantage states in their choice and payment of counsel and negotiation of settlements.

It was also said that states are used to litigating in public, and thus may experience tension in treaty-based arbitrations conducted "semi-privately". The state-party may need greater transparency and public participation in the arbitral process.

D. Corruption

The participants discussed the significance in arbitrations involving states and state-controlled entities of allegations of bribery and corruption. Tribunals have held that they cannot rely on an arbitration clause when the contract at issue was procured by corruption. Who should lose out in such circumstances? The state? The individual? One participant remarked that the payer of the bribe is regarded as the party who should be disadvantaged in such circumstances, which is thought of as incentive against bribery. In the context of states acting as claimants in investment arbitrations, allegations of corruption would, however, be elevated to a different level as the bribing party in either case would be a state. This may lead to significant public international legal questions that have yet to be answered, not the least of which being whether the bribe itself could be asserted as a basis for claim or counterclaim in the arbitration as an independent international legal wrong.

E. Specific issues relating to investor-state arbitrations

The participation of states and SCEs as claimants in investor-state arbitrations also gives rise to specific issues arising out of bilateral investment treaties ("BITs") and the ICSID Convention, to the extent either are applicable. The participants discussed whether an SCE qualified as "investors" in typical BITs, whether SCEs or states could act as claimants under the ICSID Convention, the asymmetry of immunities under the ICSID Convention and the importance of counterclaims in past investment arbitrations as a guide to understanding the role of SCEs and states as direct claimants.

1. SCEs as BIT investors

One immediate threshold issue that must be overcome in treaty arbitrations is whether the entity acting as the claimant is in fact an "investor". As one participant asked, can state-controlled entities initiate claims under international investment agreements? The participant gave the answer: yes. The participant said that he had not looked at all 2,800-plus BITs, but that he had looked at all BITs signed by the US. Each one, he said, explicitly included state-controlled entities as an "investor", as does NAFTA. The BITs of the UK, Spain, Netherlands, and Italy were said by the same participant not to have this explicit language. But they do have definitions of "national", and it

is very rare for there to be a definition based upon ownership, he said. The relevant question in the view of the participant thus should be whether a state controlled-entity is established as required under law of host state. In most cases, the answer will be yes, and then there will be, in the view of that participant, coverage due to the definition of "investor".

2. SCE standing under the ICSID Convention

The same participant raising the BIT issue also raised the issue of sovereign standing as a claimant in the context of the ICSID Convention. The participant referred in this context to the history of the Convention and Aaron Broches' position on the issue. The participant noted that Broches held that government entities should not be disqualified unless acting as an agent of state. Notably, the same position underlies the position of Slovakia in the *CSOB* arbitration – the participant asserted that the objection in that case was not to state ownership as such, but to a lack of standing because the claimant allegedly was an agent of the government. In that case, the participant continued, the Tribunal's analysis was that the nature of the function of the claimant was critical. Participants observed in this context that a government entity can buy pencils for the government without the ICSID Convention excluding claims related to the purchase by that government entity as long as the claims concern commercial, rather than governmental, activities.

The discussion next explored the limitation of the concept of "commercial activities" in the ICSID Convention. A participant noted that Broches discussed the limitation as pertaining to jurisdiction *ratione personae*. The participant asked whether the limitation really concerned standing, or whether it concerned, in fact, the nature of the dispute. The participant preferred to look at this as a limitation *ratione materiae*. Thus, the participant contended that the first question should be whether the state-controlled entity has standing. If so, the second question should be whether there is activity of a commercial or governmental nature, the participant said. The participant also said that he found it difficult to imagine ownership and management of an investment in a foreign country being of a governmental nature, and thus difficult to imagine a situation in which an arbitral tribunal should find a lack of jurisdiction *ratione materiae* in a treaty-based case involving a state claimant.

There was no easy agreement on this assessment. Another participant intervened to ask, in determination of commercial activity for purposes of establishing *ratione materiae* jurisdiction under the ICSID Convention, whose criteria should be applied. The participant noted as an example that in the US, petroleum ownership is private. In OPEC countries, petroleum ownership is quintessentially public. Assuming that an SCE from an OPEC country invested in the petroleum industry of a third country, the question of whether the activity of the SCE was commercial or public for purposes of establishing jurisdiction under the ICSID Convention may not be as clear cut as originally suggested.

A different approach discussed by participants concerned reference to Article 4 of the International Law Commission's draft Articles on State Responsibility. Article 4 provides that

“1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

“2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”

The commentary to Article 4 notes that

“It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as ‘commercial’ or as *acta iure gestionis*. Of course, the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it might in certain circumstances amount to an internationally wrongful act.”

This approach, the participants discussed, may offer further insights into the ICSID Convention analysis of whether a claim can be heard.

3. Counterclaims as a potential yardstick

As discussions progressed, it was observed that counterclaims may be a good analogue for SCE claims. As one participant noted, in many treaty-based arbitrations commenced by investors, state-respondents had asserted counterclaims, making the state as claimant in investment arbitration less unusual than may at first appear. There was also reference in this regard to recent Ukrainian arbitration counterclaims, with one such claim having been recently dismissed in the AMTO arbitration.

There was also reference to the use of the "group of companies" theory for the extension of arbitral jurisdiction to non-signatories in commercial arbitration cases, especially in France. It was remarked that there does not seem to have been an extension by analogy of this theory to countries, and also that, in the commercial cases in which the group of companies theory has been employed, the participation of a non-signatory in the performance of a contract seems to have been centrally important.

4. Why so few claims by SCEs so far?

A representative of a state entity made several remarks about NAFTA Chapter 11, the 2004 Model US BIT and the ICSID Convention. These began with reiteration of the following question posed by an earlier speaker: Given that there are opportunities for state entities to bring claims, why do we not see more of them? It was said by way of response that government decision-making takes time and is not easy. It was said, for example, with respect to submissions by non-disputing parties in NAFTA arbitration, that a tremendous amount of work goes into what are typically three-to-four-page submissions. The positions are not those just of a part of government, they are positions of a government.

Another participant offered a number of observations as to why there has been a rise in the number of investment arbitrations, with it commonly being said that more than half of 300 plus known cases have been commenced within just the past five years. Prior lack of awareness of treaty-based arbitration was dismissed by the participant as an explanation, on the basis that investors are sophisticated. The following three possible answers were posited:

1. The collapse of the Soviet Union. A large number of cases have been against parts of the former Soviet Union. In the early 1990s, there was a big rush on the part of these countries to enter bilateral investment treaties, a trend that has "cooled" in the last few years.

2. The financial collapse of Argentina. About 40 out of 300-odd cases involve Argentina. Thus, more than 10 percent of known cases arise out of the Argentine situation.

3. Investors have become more confident. They are less afraid of going to court against the state-owner of an important resource. Any investor is very dependent on government of the host country to make money, but the historic level of reluctance to engage in confrontation has dropped. Investors are seeing that, when they bring these cases, they can be successful. Sometimes, governments settle. They get awards. Governments -- putting Argentina aside -- pay these awards with very little fuss.

The political pressures that governments face in settling these cases was also discussed, and one participant remarked that another practical problem of settlement from the investor's point of view had not been commented upon: In the Iran Claims Tribunal, it was assumed that Iran had substantial information through its government-appointed arbitrator. Are arbitrators from host states, the participant asked, thought to feed to governments information about what is going on in deliberations?

There were also two general points raised about the attitude of states toward participation in transnational legal disputes. First, a participant said that he believed we will see attitudes of states toward BITs change as state-owned investors become claimants. Just as the US, in the early NAFTA years, was surprised to realize that it was also a capital importing country that could be a respondent, some other countries will realize that they also play both roles. They need to think about their interests not just as a defendant in cases but also as a claimant in these cases, or as the home country of claimants. A participant remarked that 40 percent of Canadian outbound investment is by Canadian affiliates of US companies. A similar situation was said to exist with respect to other countries.

Second, a participant remarked upon the possibility eventually of states as sovereigns, not as investors, making use of BITs -- that is, of states deciding to take the initiative to try to solve dispute through arbitration. An example was given of a case about two years ago involving the Government of Indonesia. It was said that, going down to the wire, the Government of Indonesia did not just terminate the contract. Instead, it started arbitration. Why? In retrospect, it was clear to the participant that Indonesia had done so for political and diplomatic reasons. The Government did not want to be seen incompetent, he said. At the end of the day, Indonesia got what the speaker described as "about a third of a loaf", but he said that Indonesia nonetheless felt greatly vindicated.

The possible issue of investor consent to be sued was remarked upon. A participant observed that there is no "standing offer to arbitrate" by the investor, in contrast with the general consents to arbitrate that states provide by means of BITs. The participant remarked, however, that he did not believe there to be a practical problem because he believed that investors, faced with the option of providing consent to arbitrate or finding themselves in the courts of the host state, would readily consent to arbitration. How difficult, the participant put it, is it for a government to make an investor an offer it cannot refuse? This logic, however, may shift when the entity on the other side is not a private investor, but an SCE or a state.

One participant professionally involved with sovereign wealth funds stated his belief that there will be more disputes between sovereign wealth funds and states. The example of valuation was given. These issues will become more important as sovereign wealth funds become more transparent. These funds see themselves as operating in a world of greater protections for states, and one in which it has become easier to be distrustful of foreigners.

A participant remarked that the IMF had helped to make "the world become safer for sovereign wealth funds" by putting together the so-called Santiago principles. These are essentially intended to allay concerns that exist about sovereign wealth funds. But they also reflect considerable anxiety on part of sovereign wealth funds, which feel they are being singled out unfairly, even though it was said that the issues arising in the global financial crisis originated to a great extent in the most regulated part of the US financial system. The participant also remarked upon what he saw as a significant divide between sovereign wealth funds that are more established and confident and newcomers. As a general matter, however, he expressed reservations about the willingness of sovereign wealth funds to enter new arenas such as BIT-based arbitration.

II. Luncheon discussion

Professor Hans Smit, Stanley H. Fuld Professor of Law, Columbia Law School, delivered the luncheon keynote address, identifying as his topic, "What I think about arbitration in general and how it reflects upon investment arbitration in particular". Professor Smit began with reminiscence about an early arbitral appointment, by a former classmate, in a dispute between a U.S. brewery and a Belgium brewery. His chief qualification, Professor Smit said, was that he spoke Flemish. In the case, \$5 million was requested and \$36 million awarded, thus providing Professor Smit with an introduction to the institution of the party-appointed arbitrator. In the beginning, Professor Smit thought this institution "not bad", and that it could provide opportunities for people "not in the clique" to get a chance for appointment due to peculiar qualifications, such as his own language skills, or his education and ability to operate in both civil and common law systems.

But Professor Smit stated his more recent conclusion that "it is time for the party-appointed arbitrator to depart". The only concern of the arbitral party is an arbitrator who will win the case for its side, and arbitrators know that. Professor Smit described his own practice of making it known that he will "call them like I see them", but also said that, in actual practice, it is extremely difficult for a party appointed arbitrator "to be completely neutral and not to have anywhere in mind the way he got there". Professor Smit said that he had decided not to accept party appointments for that reason, and stated his hope that arbitral institutions "will see the light", even though he recognizes the reality that all institutions use party appointments because their users want them. Professor Smit described an advantage of arbitration as being that parties can pick arbitrators particularly suited to a purpose. He also said, however, that the purpose should be to serve justice, and that this would be better done by institutional appointment.

Professor Smit then spoke specifically about arbitrators in investment disputes, saying that what is wanted are arbitrators who have earned the respect of the bar for performance of their professional function and that institutional, rather than party appointment, is sensible in such cases. He stated his view that, especially in investment arbitration, we should have a cadre of arbitrators who have the qualifications and respect to decide these cases. The institutions should make the appointments, and not in consultation with the parties. Professor Smit drew a comparison to the WTO, which does train trade arbitrators for its cases. There is no reason, he said, why this should not be done on a more global scale.

Professor Smit then spoke about his concerns relating to the financing of arbitrations. In investment arbitration recently, we have seen a number of instances of contingency fee arrangements which he described as "not hidden, but not disclosed". Professor Smit raised the question of to what extent these arrangements are permissible in the context of states that prohibit them. Contingency fees were given as an example. Merely because lawyers are from a jurisdiction that permits them may not suffice, Professor Smit said.

Especially for investment arbitration, it would be desirable if we could form a fund so that parties who are impecunious can pursue claims, Professor Smit said. He referred to similar arguments he had made about class actions. In the class actions context, funds could be made available from the large amounts of settlement money that often is not claimed.

In another remark about the potentially expanded role of the arbitral institutions, Professor Smit asked why institution cannot identify groups of experts who might be useful in connection with determination of damages. The institutions, Professor Smit said, fall short of their mission in just setting rules and not working with the parties to make the product as good as it possibly can be.

What happens when arbitrators make a mistake? Professor Smit remarked that arbitrators in his experience often make mistakes that judges do not make because judges have more experience in avoiding certain types of mistakes. Professor Smit spoke approvingly of the ICC review, of which he said he was initially skeptical. He said that the ICC review did identify mistakes that could then be corrected. Professor Smit gave the further example of his experience in a case involving many computations in which he gave both sides his award in draft. He had asked for a stipulation that the award would not be subject to challenge procedurally. In the end, both parties found errors, which he changed, with the result that subsequent fights were avoided. Professor Smit asked why not put into institutional rules provisions such that, within one week or ten days, any party could come back and say that the arbitrator has made a mistake. Counsel fees could be awarded automatically, not at the discretion of the arbitrator, to limit misuse of such provisions, Professor Smit said.

Professor Smit remarked that in effect in investment arbitration there is appeal through the ICSID annulment mechanism "but the grounds of appeal -- I do not know who came up with these". Professor Smit believes that there should be an appropriate appeal for all arbitrations. He also remarked that one "can load the dice" against the appellant by requiring posting of security for performance and an automatic award of counsel fees, thereby addressing concerns about abuse of an appellate mechanism in arbitration.

In response to a question as to whether he was, in effect, advocating arbitration that would more closely resemble litigation, by for example eliminating party appointment and introducing routine review of awards, Professor Smit described arbitration procedure as having developed to be superior to anything in common law or civil law. Arbitrators, he said, can fashion procedure to fit the circumstances and not get hung up on rules that the lawyers will use to complicate the case, which he said none of his proposed reforms would in any way diminish.

III. New frontiers

The afternoon session began with the remark that arbitral "legitimacy" is the word one participant took away from Professor Smit's remarks. This became an organizing concept for a number of observations. The participant began by distinguishing three types of state and state-owned potential claimants in investment arbitration: (i) state-owned entities in the "traditional" sense, (ii) sovereign wealth funds that are asset managers and (iii) sovereign wealth funds that are becoming long-term investors in the sense that we are familiar with in international investment arbitration.

A. Potential investment claim theories

What kind of claims can be conceived, the participant asked, as most likely for such potential claimants? Participants observed in this connection that sovereign wealth funds confront sentiments that can be motivated by protectionism. An example was that of the French President's announcement in October 2008 of the creation of a French investment fund to protect strategic

industries and bid against investment by foreign sovereign wealth funds. It was remarked that, in the mid-term, meaning the next 3-5 years, there may be a return to the sort of protectionism apparent in the context of Chinese steel and Dubai ports matters.

As to claims potentially assertable in this context, participants first identified national treatment. A significant problem associated with such a basis of claim in some countries, and for some investments, may be identification of a local competitor. The fair and equitable treatment standard was also referenced and discussed.

Other possible theories were said by a participant to seem "a little exotic". Examples given included differing tax treatment for state-owned entities. A participant asked how investors can bring claims based on lack of equality in financial crisis bail out programs, in connection with which the participant said one could argue that foreign banks were not treated the same as US banks.

B. Potential procedural issues for SCE claims

Participants then discussed the enforcement of arbitral awards and in particular of state vs. state arbitral procedure, which most BITs were said to allow. Although such provisions of BITs generally are said to have been included to allow for interpretation, a controversial possible interpretation of them might be that state compliance with a duly rendered award is an independent obligation, and thus one as to which one state might bring a proceeding against another.

The discussion turned to parallel proceedings. It was remarked that reported cases are lacking, and thus that discussion of the topic is of necessity conceptual. Two assumptions were identified before the unique considerations for state-controlled entities were discussed: (i) in some cases, a state may have "wobble room" as to what state-controlled entity will pursue the claim and (ii) all the considerations that apply in parallel proceedings generally will apply with respect to states or state-controlled entities as claimants, including for example the use of strategic delay to impose costs on an adversary.

The participant then remarked that state entities as claimants turn investment arbitration into state vs. state proceeding. This was said potentially to open up additional fora for parallel action, such as WTO, the ICJ and regional human rights bodies. This was also said to impose additional strain upon ICSID that were never intended. It was said that forum selection considerations may be unique for state-controlled entities. For example, there may be ambiguity as to how certain aspects of procedure would be applied to state claimants. There was said also to be potential for participation and amici and the like. Because BITs and trade proceedings allow states to invoke interpretation proceedings, a possible advantage for the overall arbitral system of states and state-controlled entities as claimants was said to be the potential for clarification of legal obligation.

States and state-controlled entities were said to have "unique vulnerabilities" as claimants in investment arbitration. The host state, for example, may be drawn into arbitration simply as leverage in contract arbitration. As to sovereign wealth funds in particular, the hostile public opinion that they face may cause sovereign wealth funds to shy away from use of ICSID to avoid "fanning fires" and making public relations problems more serious, even when the selection of ICSID would be perfectly legitimate.

Commercial litigation funding was the next topic of discussion. It was said by one participant to be, in something of an oversimplified summary, a third party advancing money in a commercial dispute in return for a portion of the possible recovery. If there is no recovery, then there is no return for the funder. Although a newer phenomenon in the US, such third party funding has been used in Australia for over 20 years, and in certain other jurisdictions, principally the United Kingdom.

One third party funder, the Burford Group Ltd., was said to have raised \$130 million last year and became a public company on the UK exchange. Burford was said to consider investments of \$3 to \$15 million in many areas, with one of its focus areas being international arbitration. Within the area of international arbitraiton, ICSID was said to be an important part of the Burford Group strategy.

Third party commercial litigation funding was said to be distinct from contingency financing of litigation in a number of ways. One illustration of the difference is that, with third party commercial litigation funding, parties retain the ability to select their own lawyers. Another illustration is that, in a situation in which there may be an arrears (of, say, \$2 or \$3 million) to the firm, a third party funder is a potential source of assistance to pay that amount or some part of it. In addition, it was said that third party funders might in certain circumstances consider using the collateral of a claim, if strong enough, to advance money for not only a litigation or arbitration but also the business itself. Third party funders were said to be able to the defense side as well in the case of poor claims, but the defense financing side was said to be in its infancy.

C. Contract arbitrations involving states and SCEs

There was next discussion of an ongoing study of ICC case. The following preliminary statistics were provided. Since 1989, the ICC court has handled approximately 1,000 cases involving states or state-controlled entities either as claimants or respondents. The vast majority of those cases were contract arbitrations, as opposed to treaty arbitrations. According to recent research, among the 9 BIT cases filed with the ICC, there was an instance several years ago of a state-controlled entity suing a state under a BIT.

Of all ICC cases involving states, there have been very few in which the state was claimant. From 2000 to 2009, states were respondents 15 times more frequently than they were claimants. But for state-controlled entities, there have been only twice as many cases in which state-controlled entities were respondents rather than claimants. The number of cases in which states were claimants has gone down in the past ten years, but the percentages for SCEs have remained constant. The region of the world that has produced the largest number of cases in which states and state-controlled entities were claimants is central and eastern Europe, with central and western Asia being in the next place.

When a state has been a party to ICC arbitration, the arbitral tribunals generally have had three members, the participant said. The place of arbitration rarely has been fixed in arbitration clauses involving states or state-controlled entities, making it the task of the ICC International Court of Arbitration to fix the place of arbitration pursuant to the ICC Rules of Arbitration. The most common seat for ICC arbitrations with states or state-controlled entities as parties has been Paris, probably due to the location of the ICC court and a perception of French law as arbitration friendly, the participant said. But it also seems from the ICC cases, he said, that some states are able to impose seats in their own territories.

Closing remarks

The concluding discussion of the afternoon referred back to observations with which the day had begun, specifically that the data to be drawn upon for cases of states and state-controlled entities as claimants are quite limited. There thus was said to be a need to draw inferences from other data sets, which was reflected in much of the preceding discussion. One participant then remarked that, at the end of the day, it was important to observe, in addition to what states and state-controlled entities

may do affirmatively, what they refrain from doing. Why is it that state-controlled entity have refrained from bringing a lot of disputes, the participant asked, remarking that it is much easier to take note of a case than the case that was not brought.

There was comment on a theme that was said to have been crystallized during Professor Smit's luncheon keynote address: a convergence of institutions. The depoliticization of disputes was said to be always touted, but it was remarked that the luncheon keynote indicated that we have moved, or may be moving, into a different area, including for example a cadre of arbitrators rather than party-appointed arbitrators, appeals and "judge-managed" discovery. One participant remarked that such movement would be toward institutionalization that would result in arbitration more closely resembling WTO proceedings.