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The Policy Landscape for International Investment by Government-controlled Investors: A Fact Finding Survey

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The Policy Landscape for International Investment by Government-controlled Investors: A Fact Finding Survey

by
Yuri Shima*

ABSTRACT

Government-controlled investors, including state-owned enterprises and sovereign wealth funds, have greatly expanded their international activities in recent years. This paper describes the existing policy landscape of international investments by government-controlled investors under both national and international frameworks.

The paper first examines host countries' regulatory provisions dealing with inward investments by foreign government-controlled investors. The paper then documents international investment treaty practice in relation to government-controlled investors by examining, in particular, whether they are explicitly dealt with in investment treaties and, if so, how they are handled in the treaties. Finally, the paper presents other international agreements including the OECD instruments in relation to state ownership.

Approved by Pierre Poret, Deputy Director, OECD Directorate for Financial and Enterprise Affairs

Keywords: foreign investment; international investment; international investment law; international investment agreements; investment treaties; foreign government-controlled investors; state-controlled investors; state-owned enterprises; sovereign wealth funds; investment policy; foreign investment review.

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EXECUTIVE SUMMARY

Government-controlled investors (GCIs) – including state-owned enterprises (SOEs) and state-owned investment funds such as sovereign wealth funds (SWFs) – have greatly expanded their international activities in recent years. Some countries have policies which specifically apply to inward investments by foreign GCIs, although most countries do not distinguish investors on the basis of ownership under their current investment policy frameworks.

Domestic policy frameworks dealing with inward investment by foreign government-controlled investors

In most cases, foreign GCIs are treated in the same manner as foreign private investors under the domestic regulatory frameworks. However, some countries have domestic rules and regulations that specifically apply to foreign GCIs. Among the forty-six adherent countries to the OECD Declaration on International Investment and Multinational Enterprises, seven countries – Australia, Iceland, Israel, Mexico, Spain, Costa Rica and Turkey – have reported specific restrictions on investments by foreign GCIs. Among countries having foreign investment review mechanisms, four countries – Australia, Canada, Russia Federation and the United States – are found to have rules specifically aimed at investments by foreign GCIs. These rules do not appear to seek to deter investments by foreign GCIs as such or to treat them less favourably. However, the fact that such rules have been the subject of clarifications in certain countries in the recent period signals heightened attention to investment by foreign GCIs on the part of recipient countries. Other G20 countries participating in the OECD Investment Policy Review programme and the OECD monitoring process mandated by G20 have not reported specific restrictions on investment by foreign GCIs.

Investment treaty practice in relation to government-controlled investors

International Investment Agreements (IIAs) have important implications for both investors and state parties to such treaties. The definition of "investor", along with the definition of "investment", are key treaty features that delimit the scope of primary beneficiaries of the protections provided by the treaty, including the rights to bring claims before international arbitral tribunals. Thus, treaties' definitions of "investor" play an important role in determining whether GCIs would benefit from protections provided under IIAs as covered investors.

The majority of IIAs do not distinguish between investors on the basis of ownership. Of the 1 813 agreements surveyed, 1 524 (84%) do not explicitly mention any type of GCIs – (i) SOEs, (ii) state-owned investment funds or (iii) government as such – in the definition of investor. The frequency of treaties that explicitly include GCIs among the protected investors is, however, clearly rising and the recent treaties tend to contain specific references to GCIs.

Among three types of GCIs surveyed, SOEs are most frequently referred to in the definition of investor of the surveyed IIAs – 287 (16%) IIAs specify that SOEs are covered and 3 specify that SOEs are not covered. The IIAs of Australia, Canada, and the United States most frequently refer to SOEs. Approximately 6% of the total IIAs surveyed include a contracting party or a government of a party themselves in the investor definition. Kuwait, Qatar, United Arab Emirates (UAE) and Saudi Arabia are the countries which most frequently contain their governments in the scope of investors under the IIAs that they concluded so as to explicitly extend the protection coverage to their governments as investors. This approach has clearly been taken in agreements involving countries where the government itself often plays a direct role as an international investor. Very few treaties mention

state-owned investment funds such as SWFs specifically – less than 1% of the surveyed IIAs contain an explicit reference to these investors in the investor definition. Again, such specific references are limited to IIAs concluded by certain countries which are known for having large SWFs. These include Saudi Arabia, Kuwait, and the UAE.

Certain IIAs contain provisions which attempt to ensure fair competition between SOEs and privately owned enterprises, or specifically mention the principles of competitive neutrality. This is mainly the case in IIAs negotiated by the United States, Australia, New Zealand and Singapore. These provisions can usually be found in the competition or state enterprise chapters of free trade agreements concluded since 2000s, while they can be also found in relatively old bilateral investment treaties concluded by the United States.

Other international agreements and state ownership

Most existing international agreements are generally ownership-neutral. In particular, OECD instruments, including the OECD Declaration on International Investment and Multinational Enterprises (which contains the National Treatment Instrument) and the OECD Codes of Liberalisation of Capital Movements and of Current Invisible Operations do not distinguish government-controlled investors from private investors unless the adherents to these instruments have lodged reservations to the Codes and/or notified National Treatment exceptions.

I. INTRODUCTION

Government-controlled investors (GCIs) – such as state-owned enterprises (SOEs) and state-owned investment funds including sovereign wealth funds (SWFs) – have greatly expanded their international activities in recent years. This could give rise to concerns in the host countries that receive such investments. Part of the discussion has focused on a perception that international investments by GCIs may be driven by non-commercial motivations. This, in turn, may raise national security concerns on the host country's side, in particular where the investment involves sensitive information for host countries. Another concern might be related to certain economic distortions that the GCIs may bring due to undue advantages and support from their home governments.

The countries participating in policy dialogue at the OECD Freedom of Investment (FOI) Roundtable, hosted by the OECD Investment Committee, considered the existing policy frameworks for international investments by GCIs at Roundtables held in March 2013, October 2013 and March 2014. This work has been prepared as a stocktaking of international investment by state-owned enterprises and of relevant elements of national and international policy frameworks, as part of the competitive neutrality project at the OECD.

The purpose of this paper is to summarise such stocktaking work with a view to providing a fact-finding survey of the existing policy landscape for international investment by GCIs under both national and international policy frameworks. First, it outlines host countries' policies towards inward investments by foreign GCIs. Second, it presents investment treaty practice in relation to GCIs and then surveys other international agreements including OECD instruments and state ownership.

II. Domestic policy frameworks dealing with inward investment by foreign government-controlled investors

In most cases, foreign GCIs are treated in the same manner as foreign private investors under the domestic regulatory frameworks. However, some countries have domestic rules and regulations that specifically apply to foreign GCIs. Among the forty-six adherent countries to the OECD Declaration on International Investment and Multinational Enterprises[1], seven countries – Australia, Iceland, Israel, Mexico, Spain, Costa Rica and Turkey – have reported specific restrictions on investments by foreign GCIs in their policies relating to foreign GCIs by lodging reservations to the OECD Code of Liberalisation of Capital Movements and/or by notifying exceptions or including measures in the transparency list of the OECD National Treatment Instrument (See Box 1). Among these reservations or measures some apply to all investments by foreign GCIs across the sectors (e.g., Australia, Iceland, Spain), while others are sector specific which are applicable to investments by foreign GCIs in certain sectors (e.g., Costa Rica, Israel, Mexico, Turkey).

Among countries having foreign investment review mechanisms, four countries – Australia, Canada, Russia Federation and the United States – are found to have rules specifically addressing inward investments by foreign GCIs. In most instances, these rules do not appear to seek to deter investments by foreign GCIs as such or to treat them less favourably. However it might remain more likely that GCIs are subject to a review or they may be more thoroughly reviewed in certain countries. The fact that such rules have been the subject of clarifications in some countries in the recent period signals heightened attention to investment by foreign GCIs on the part of recipient countries. A description of specific policies for foreign GCIs under the foreign investment review frameworks of Australia, Canada, Russian Federation and the United States is included in Annex I.

Other G20 countries participating in the OECD Investment Policy Review programme and the OECD monitoring process mandated by G20 have not reported specific restrictions on investment by foreign GCIs.

[1] See www.oecd.org/daf/inv/investment-policy/oecddeclarationanddecisions.htm. Countries which have adhered to the Declaration on International Investment and Multinational Enterprises, as well as the related Decisions and Recommendations by the OECD Council, including the National Treatment instrument, are the 34 OECD member countries and 12 non-member countries: Argentina (22 April 1997), Brazil (14 November 1997), Colombia (8 December 2011), Costa Rica (30 September 2013), Egypt (11 July 2007), Jordan (28 November 2013), Latvia (9 January 2004), Lithuania (20 September 2001), Morocco (23 November 2009), Peru (25 July 2008), Romania (20 April 2005), and Tunisia (23 May 2012).

Box 1. Measures of the countries relating to foreign government-controlled investors reported under the OECD instruments

While the OECD instruments including the OECD Code of Liberalisation of Capital Movements ("Code")[2] and the OECD National Treatment Instrument ("NTI")[3] are generally ownership neutral and apply to all investors regardless of the ownership natures of the investors, some countries have reported their policies relating to GCIs by lodging reservations to the Code and/or notifying exceptions or including other measures in the transparency list for the NTI. The examples of such reporting relating to GCIs are described below.[4]

- Australia maintains reservations which apply to "proposals involving direct investment by foreign governments or agencies".
- Costa Rica has reported that concessions for mining or exploration of ores may not be granted to foreign governments or their representatives in the NTI exception list.
- Iceland prohibits "investment by foreign states or state-owned enterprises, unless an authorisation is granted", as reserved under the Code and notified under the NTI.
- Israel has reported that in cable broadcasting a license may not be granted to an applicant in which a foreign government holds shares, unless the Minister of Communications authorises an indirect holding in the licensee of up to 10% by such an applicant as reserved under the Code and notified under the NTI.
- Mexico limits direct investment by a foreign government and state enterprise in a number of specific activities including communications or transport activities, as reserved under the Code.
- Spain reserves a right to restrict "investment originating in non-EU member countries by governments, official institutions and public enterprises" under the Code.
- Turkey has reported in the NTI transparency list that "no real or legal person acting for or on behalf of financial or beneficial interests of a foreign state may hold petroleum rights or conduct any business activity related with petroleum without the authorisation of the Council of Ministers".

2 See http://www.oecd.org/daf/inv/investment-policy/codes.htm.

3 See http://www.oecd.org/daf/inv/investment-policy/nationaltreatmentinstrument.htm.

4 See also page 19 of "Foreign government-controlled investors and recipient country investment policies: A scoping paper" by the OECD (2009). www.oecd.org/daf/inv/investment-policy/42022469.pdf

III. Investment treaty practice in relation to government-controlled investors

Investment treaty law is based mainly in several thousand bilateral international investment agreements (IIAs) that provide substantive protections to foreign investors and establish procedures for enforcement of these protections. IIAs have important implications for both investors and state parties to such treaties, and the recent upsurge of treaty-based challenges by investors to state actions has focused public attention on these treaties. The definition of "investor", along with the definition of "investment", are key treaty features that delimit the scope of primary beneficiaries of the protections provided by the treaty, including the rights to bring claims before international arbitral tribunals. An investment agreement applies only to investors and investments made by those investors who qualify for coverage under the relevant provision (OECD 2008b). From the perspective of a capital exporting country, the definition of investor identifies the group of investors whose foreign investment the country is seeking to protect through the agreement, while from the capital importing country perspective, it identifies the investors that the country wishes to attract.[5] Thus, the definition of investor provision plays an important role in determining which type of investors are protected, in particular in examining whether GCIs are specifically covered (or not) under IIAs.

This section presents the results of a treaty survey designed to examine whether or not GCIs are explicitly included (or excluded) from the protections provided by IIAs as well as other provisions relating to GCIs.

Box 2. A large sample survey – Review of the provision of definition of investor in relation to GCIs

This treaty survey reviews the definition of "investor" of 1 813 treaties, which were concluded by the 46 surveyed countries with any other country, regardless of whether the treaties are in force or not. The surveyed treaties were limited to those available to the OECD secretariat at the time of conducting the survey. The treaty sample consists of the bilateral investment treaties (BITs) as well as other bilateral agreements such as free trade agreements (FTAs) or economic partnership agreements (EPAs) with investment chapters.

The survey aims to examine the factual basis of the coverage of GCIs and does not attempt in-depth analyses of the legal interpretation of such texts. Some treaties do not define the term "investor". For those treaties, an equivalent terms such as "nationals" and "companies" were reviewed. For the purposes of this survey, government-controlled investors (GCIs) include the following three categories: (i) state-owned enterprises (SOEs), (ii) state-owned investment funds such as SWFs and (iii) a government itself acting as investor.

The survey covers the treaties concluded by the following groups of countries:

- 34 OECD member countries: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States.
- 5 OECD key partners: Brazil, China, India, Indonesia, and South Africa.
- Malaysia, Kuwait, Qatar, Russian Federation, Saudi Arabia, Singapore, the United Arab Emirates on account of them being home to internationally large SWFs and/or non-financial SOEs[6].

5 *Ibid.*

6 The selection was based on data provided by the Sovereign Wealth Fund Institute (as of June 2013) as well as OECD calculations based on company annual reports and Fortune Global 500 2012

Overview of the survey results

The majority of IIAs do not distinguish between investors on the basis of ownership. Of the 1 813 agreements surveyed, 1,524 (84%) do not explicitly mention either type of GCIs, which are (i) state-owned enterprises (SOEs), (ii) state-owned investment funds such as SWFs or (iii) a government itself as investor, in the investor definition.[7]

Figure 1 presents the number of IIAs concluded annually between 1960 and 2013 (left-hand axis). It also shows the share of IIAs that explicitly refer to one or more categories of GCIs in the investor definition (right-hand axis). The frequency of treaties that explicitly include GCIs among the protected investors is clearly rising (see line plotted on the right axis). Until the early 1980s, very few treaties mentioned GCIs in the investor definition. The number of treaties referring to GCIs gradually increased along with the increase of number of IIAs starting in the early 1990s.[8] In the past few years, IIAs have come to address GCIs regularly. All five of the surveyed IIAs concluded in 2013 explicitly cover international investments by GCIs.[9] At the same time, a general trend towards more sophisticated and detailed treaties has been observed[10], thus the trend toward more frequent treaty references to GCIs would be part of a broader development in investment treaty practice. In addition, since most of the existing treaties were drafted before GCIs became prominent in the global marketplace, the relative infrequency of explicit references to GCIs may reflect the fact that not much attention would have been paid to them as investors at the time of drafting.

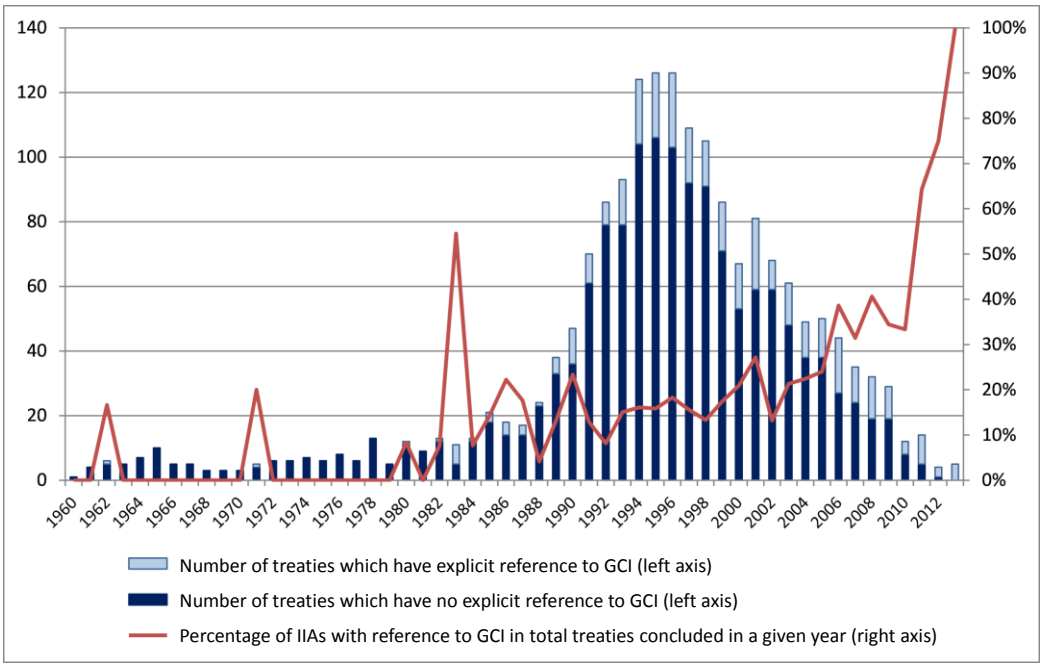
7 See also "State-controlled entities as "investors" under international investment agreements" by Jo En Low which examined the definition of "investor" and investor-state dispute resolution clauses in 851 international investment agreements. http://ccsi.columbia.edu/files/2014/01/FDI_80.pdf

8 Six of eleven IIAs in 1983 covered SOE investments. Three of these involved IIAs with Panama which expressly excluded state-owned enterprises.

9 These are Canada-Benin (BIT), Canada-Tanzania (BIT), Colombia-Korea (FTA), Japan-Mozambique (BIT), and Japan-Saudi Arabia (BIT).

10 See Pohl, J., K. Mashigo and A. Nohen (2012), "Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey", *OECD Working Papers on International Investment*, No. 2012/02, OECD Publishing. DOI: 10.1787/5k8xb71nf628-en

Figure 1. Total number of IIAs concluded per year in comparison with IIAs with an explicit reference to government-controlled investors (GCI)



The fact that the majority of the IIAs do not mention GCIs in the definition of investor could give rise to some uncertainty with respect to the coverage of these agreements to GCIs, although it may be reasonably assumed that they are nonetheless covered by the treaties unless explicitly excluded. However, as the issue has not yet been tested frequently in treaty-based arbitration cases and considered fully, this assumption remains preliminary. In addition, the recent trend that more countries have started to include an explicit coverage of such types of investors in IIAs and the general increase in the specificities of these investors may in the future exacerbate the need for clarification.

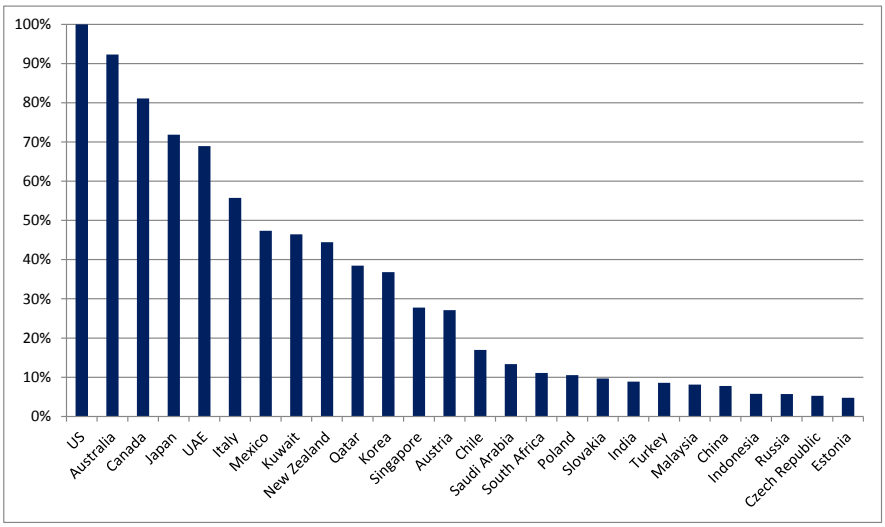
Specific reference to state-owned enterprises

In most cases where a treaty refers to either type of GCIs, it mentions SOEs only and explicit reference to state-owned investment funds or a government itself in the investor definition is rare. Thus, among three categories of GCIs, SOEs are most frequently referred to in the definition of investor of the surveyed IIAs: 287 (16%) IIAs specify that SOEs are covered and 3 specify that SOEs are not covered. SOEs are typically defined as either "governmentally owned" or "governmentally owned or controlled" under the surveyed IIAs. Expressions such as "public institutions"[11], "state corporations and agencies", "governmental institutions", etc, are also used. For example, the Mexico–India BIT (2007) defines an investor of a Contracting Party as a natural person or an enterprise of a Contracting Party and then separately defines an enterprise as "any entity…whether privately or governmentally owned…". The Austria–Georgia BIT (2001) likewise defines investors so as to explicitly cover SOEs; "a legal person or any entity…whether private or government owned or controlled …"

[11] For example, some treaties involving Italy contain the word "public institution" (instituti pubblici). A public institution in Italy is a juridical person established according to public law through which the public administration exercises its functions in the general interest. P.330, Brown, C. (2013).

Figure 2 presents the share of IIAs which explicitly include SOEs in the definition of investors in the IIAs of 26 countries.[12] The United States (100%), Australia (92%), and Canada (81%) are the countries which most often include SOEs explicitly in the investor definition. Japan (72%) and United Arab Emirates (69%) also tend to explicitly mention SOE in the investor definition of their IIAs.

Figure 2. Share of IIAs by country that explicitly cover SOEs under investor definition



Explicit exclusion of SOEs from IIA coverage is rare. Only 3 BITs with Panama exclude SOEs by providing that "companies" mean "all those juridical persons constituted in accordance with legislation in force in Panama…which have their domicile in the territory of the Republic of Panama, excluding State-owned enterprises."[13] Interestingly this exclusion is asymmetrical insofar as it does not apply to SOEs of the treaty partners (United Kingdom, Germany and Switzerland) in these agreements.[14]

Government itself as investor under IIAs

Some treaties include a contracting party or a government of a party themselves in the investor definition (approximately 6% of the total IIAs surveyed). Figure 3 presents the share of IIAs by country that explicitly cover governments as investors.[15] Kuwait, Qatar, United Arab Emirates (UAE) and Saudi Arabia are the countries which most frequently contain their governments in the definition

12 Figure 2 excludes the following 20 countries surveyed which have no or nominal share (less than 5%) of IIAs with a reference to SOE in the investor definition: Sweden, Hungary, Belgium/Luxembourg, Germany, Switzerland, Finland, United Kingdom, Brazil, Denmark, France, Greece, Iceland, Ireland, Israel, Netherlands, Norway, Portugal, Slovenia, and Spain.

13 Article 1(d)(i) of Panama–United Kingdom BIT (1983).

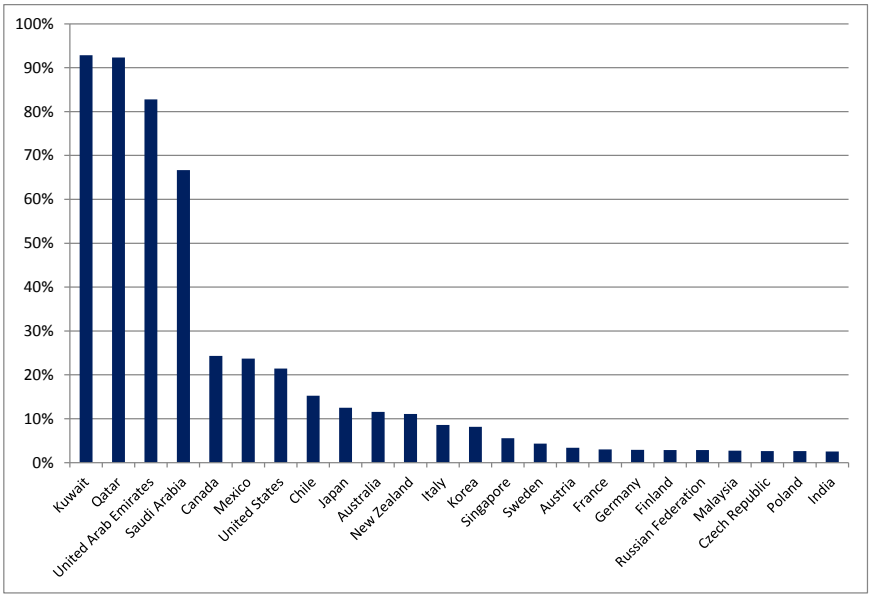
14 Panama–Germany BIT (1983), Panama–Switzerland BIT (1983) and Panama–United Kingdom BIT (1983).

15 Figure 3 excludes the following 22 countries which have no or nominal share (less than 3%) of IIAs with a reference to a contracting party or a government of a contracting party: Belgium/Luxembourg, South Africa, Denmark, Hungary, Switzerland, Turkey, United Kingdom, Netherlands, Brazil, China, Estonia, Greece, Iceland, Ireland, Indonesia, Israel, Norway, Portugal, Slovakia, Slovenia, and Spain.

of investor of IIAs that they concluded. This approach has clearly been taken in agreements involving countries where the government itself often plays a direct role as an international investor.

For example, the Kuwait–South Africa BIT (2005) includes "the Contracting Party itself" and "any State entity" in the definition of investor.[16] "State entity" is defined as "a department of government, corporation, institution or undertaking wholly or partially owned or controlled by government and engaged in activities of a commercial nature". Likewise, the definition of UAE investors in UAE–China BIT (1993) explicitly includes the Federal Governments of the UAE, as well as the Local Governments and their local and financial institutions.[17] Since the investor definition for China does not include its government, the intention of UAE to include government investors appears to be distinctive.

Figure 3. Share of IIAs by country that explicitly cover governments under investor definition



Specific reference to state-owned investment funds

Very few treaties mention state-owned investment funds such as SWFs specifically – less than 1% of the surveyed IIAs contain an explicit reference to those investors in the investor definition. Such specific references are limited to IIAs concluded by countries that have large SWFs. These include Saudi Arabia, Kuwait, and UAE, which are a similar set of countries to those that tend to include explicit references in their treaties to the "government" or state parties in their definition of investor as mentioned earlier.

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16 Article 1 (Definitions) (2) provides that "investor" with respect to a Contracting Party means: (a) a natural person holding the nationality of that Contracting Party in accordance with its applicable domestic law; (b) the Contracting Party itself; and (c) any State entity or judicial person or other entity ….

17 Article 1 (Definitions) (2)(b) provides that the term "investor" shall mean for the United Arab Emirates:
1. the Federal Government of the U.A.E.
2. the Local Governments and their local and financial institutions.
3. the natural and legal persons who have the nationality of the U.A.E.
4. companies incorporated in the U.A.E.

For example, Saudi Arabia–India BIT (2006) provides that, in respect of Saudi Arabia, the term "investor" means "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". The definition of investor for India has no such reference. In Kuwait–Germany BIT (1994), the term "investor", in respect of Kuwait, is defined to include "the Government of the State of Kuwait acting either directly or indirectly through the Kuwait Investment Authority (KIA) or its offices abroad, as well as development funds, agencies or other similar government institutions having their seats in Kuwait". The definition for German investors has no mention of government or SWFs. UAE–Germany BIT (1997) likewise covers "the Government of the State of the UAE acting either directly or indirectly through their local and federal financial institutions as well as development funds, agencies or other similar government institutions" in the investor definition.

Provisions on competition between SOEs and privately owned enterprises

Some IIAs contain specific provisions relating to GCIs. For instance, certain IIAs include provisions which attempt to ensure fair competition between SOEs and privately owned enterprises, or specifically mention the principles of competitive neutrality (CN). This is mainly the case in IIAs negotiated by the United States, Australia, New Zealand and Singapore. These provisions can usually be found in the competition or state enterprise chapters of FTAs concluded since 2000s, while they can be also found in relatively old BITs concluded by the United States.

Some IIAs concluded by the United States include provisions referring to competition between SOE investments and privately owned or controlled investments, including some relatively old BITs. For example, US–Panama BIT (1982) provides an example of early treaty practice dealing with competition between private and government investors. Article II.3 provides that:

> *Each Party agrees to provide fair and equitable treatment and, in particular, the treatment provided for in paragraph 1 of this Article*[18]*, to privately owned or controlled investment of nationals or companies of the other Party, where such investment is in competition, within the territory of the first Party, with investment owned or controlled by the first Party or its agencies or instrumentalities. In no case shall such treatment differ from that provided to any privately owned or controlled investment of nationals or companies of the first Party which is also in competition with investment owned or controlled by the Party or its agencies or instrumentalities*.

The US–Haiti BIT (1983), which has not entered into force, contains similar provisions. The US–Senegal BIT (1983) contains provisions that intend to maintain competitive equality between investments governmentally owned or controlled by one Party and privately owned or controlled investments of nationals or companies of the other Party. US–Congo BIT (1984) and US–Turkey BIT (1985) have similar provisions. For example, Article II.7 of US–Senegal BIT (1983) provides:

> *The Parties recognize that, consistent with paragraphs 1 and 2 of this Article, conditions of competitive equality should be maintained where investments owned or controlled by a Party or its agencies or instrumentalities are in competition, within the*

[18] Paragraph 1 provides that a Party shall permit and treat investment by nationals and companies of the other Party, on a basis no less favorable than that accorded in like situations to investment of its own nationals or companies, or of nationals or companies of any third country, whichever is the more favorable.

territory of such Party, with privately owned or controlled investments of nationals or companies of the other Party.

US–Bangladesh BIT (1986) has similar provisions with additional language aimed at ensuring that private investors enjoy similar economic advantages granted to SOEs. Article II.5 provides that:

> *The Parties recognize that, consistent with paragraph I of this Article*[19]*, conditions of competitive equality should be maintained where investments owned or controlled by a Party or its agencies or instrumentalities are in competition, within the territory of such Party, with privately owned or controlled investments of nationals or companies of the other Party. In such situations, the privately owned or controlled investments shall receive treatment which is equivalent with regard to any special economic advantage accorded the governmentally owned or controlled investments.*

The Singapore–Australia FTA (SAFTA) (2003) contains provisions under Article 4 of Chapter 12 (Competition Policy) which state that "[t]he Parties shall take reasonable measures to ensure that governments at all levels do not provide any competitive advantage to any government-owned businesses in their business activities simply because they are government owned". It clarifies that this Article applies to business activities of government-owned businesses and not to non-business, non-commercial activities. Similar provisions are found in Article 15.4 of Singapore–Korea FTA (2005) and Article 14.5 of Australia–Chile FTA (2008).

The US–Australia FTA (AFTA) (2004) (Article 14.4 on State Enterprises and Related Matters) provides that "the Parties recognize that state enterprises should not operate in a manner that creates obstacles to trade and investment" and then describes different commitments that each Party made. Australia specifically committed to competitive neutrality by promising that "Australia shall take reasonable measures, including through its policy of competitive neutrality, to ensure that its governments at all levels do not provide any competitive advantage to any government businesses simply because they are government-owned. As in the SAFTA, this provision excludes non-business/non-commercial activities of SOEs from its scope. The commitments of the United States provide that "the United States shall ensure that anticompetitive activities by sub-federal state enterprises are not excluded from the reach of its national antitrust laws solely by reason of their status as sub-federal state enterprises". The term "state enterprise" is defined as "an enterprise that is owned, or controlled through ownership interests, by the central or a regional government of a Party".

The free trade agreement between New Zealand and Chinese Taipei (2013) contains provisions which ensure equal application of competition policies to public and private business activities. Article 2 (b) of Chapter 8 (Competition) provides that the Parties will apply competition policies to economic activities, including public and private business activities, in a manner that does not discriminate between or among economic entities in like circumstances.

[19] Article II.1 provides that each Party shall permit and treat investment by nationals and companies of the other Party on a basis no less favorable than accorded in like situations to investment of its own nationals or companies, or of nationals or companies of any third country, whichever is the more favorable.

IV. Other international agreements and state ownership

Most existing international agreements, including OECD instruments (See Box 3), are generally ownership-neutral and do not explicitly distinguish on the basis of ownership For example, the Energy Charter Treaty defines an investor as a natural person or a company and the definition does not refer to state ownership.[20] On the other hand, the Multilateral Investment Guarantee Agency Convention (MIGA Convention) clearly includes non-privately owned investor in the definition of "eligible investors" by providing that an eligible investor is a natural person or juridical person, whether or not it is privately owned, if it operates on a commercial basis.[21]

Box 3. OECD instruments and state ownership

OECD instruments, including the OECD Declaration on International Investment and Multinational Enterprises (which contains the National Treatment Instrument) and the OECD Codes of Liberalisation of Capital Movements and of Current Invisible Operations (Codes) do not distinguish government-controlled investors from private investors, unless the parties have lodged reservations to the Codes and/or notified National Treatment exceptions (See Box 1). In particular, the Users' Guide for the Codes explains that "government-owned industrial, commercial or financial enterprises are treated like private enterprises under the Codes. Where government owned enterprises act, for instance, as service suppliers, host countries should accord them the same rights to provide cross border services as are enjoyed by private enterprises."

The 2008 OECD Declaration on Sovereign Wealth Funds and Recipient Country Policies represents perhaps the first example of an international agreement specifically addressed to the issue of keeping markets open to international investment involving governments. It was followed by the 2009 OECD Guidelines for Recipient Country Investment Policies relating to National Security, providing specific recommendations for recipient country policies that help to make these policies both effective and to ensure that they are not used as disguised protectionism.

OECD Guidelines on Corporate Governance of State-Owned Enterprises (2005) are the first international recommendation to help governments in improving the governance of SOEs. The Guidelines are backed by subsidiary guidance documents, which provide additional standards and good practices as well as advice on implementation. Chapter I of the Guidelines states that governments should ensure a level playing field in markets where SOEs and private companies compete in order to avoid market distortions.

The 2010 update to the Model Tax Convention[22] approved by the OECD Council in July 2010 added the commentary dealing with the application of tax treaties to state-owned entities, including sovereign wealth funds.

20 Article 1 (7) of the Energy Charter Treaty.

21 Article 13 (a)(iii) of the Multilateral Investment Guarantee Agency Convention (MIGA Convention).

22 Available at http://www.oecd.org/tax/transfer-pricing/45689328.pdf.

V. CONCLUSION

This paper presents fact-finding research on the existing policy landscape of international investments by GCIs under both national and international policy frameworks. The first section of the paper looked at host country's regulatory frameworks dealing with inward investments by foreign GCIs. In most economies, there are no specific provisions for foreign GCIs; however, some countries have policies which specifically apply to foreign GCIs.

The second section presented international investment treaty practice in relation to GCIs by examining whether they are explicitly dealt with in investment treaties and, if so, how they are handled in the treaties. The survey of treaties' definitions of investor of 1 813 treaties shows that the majority (84%) of the surveyed treaties do not specifically mention GCIs, such as SOEs and SWFs, in the investor definition and thus do not generally distinguish between investors on the basis of ownership. There is a trend, however, that the recent treaties tend to explicitly refer to GCIs, mainly SOEs in most cases, in the investor definition so as to explicitly extend the protection coverage to such investors.

The last section introduced other international agreements including the OECD instruments in relation to state ownership. The OECD instruments are generally ownership-neutral and do not explicitly distinguish on the basis of ownership.

ANNEX I: EXAMPLES OF SPECIFIC POLICIES FOR FOREIGN GOVERNMENT-CONTROLLED INVESTORS UNDER FOREIGN INVESTMENT REVIEW FRAMEWORKS

Australia

Under the Foreign Acquisitions and Takeovers Act 1975 (FATA), the Australian government is empowered to examine proposed foreign investments and to decide if they are contrary to Australia's national interest. Foreign governments and their agencies (including SOEs and SWFs), in particular, must obtain prior approval before making direct investments, irrespective of the size of the investment, while in the case of private foreign investors, prior approval is in general necessary only if their investment exceeds certain thresholds (based on total assets or transaction values)[23].

In reviewing an application lodged by a foreign investor, the Australian government looks at whether the investment is contrary to the national interest. National interest concerns are determined on a case-by-case basis and factors such as national security, competition, impact on the economy and the community and character of the investor are typically considered. For the purpose of enhancing the transparency of the foreign investment screening regime, the government produced Guidelines for Foreign Government Investment Proposals in 2008.[24] These Guidelines explain that proposed investments by foreign governments and their agencies are assessed on the same basis as private sector proposals and national interest implications are determined on a case-by-case basis.[25] However, the fact that these investors are owned or controlled by a foreign government raises additional factors that must also be examined. Those additional factors to be examined include whether the investment is commercial in nature or whether the investor may be pursuing broader political or strategic objectives that may be contrary to Australia's national interest.[26]

In the Australia's Foreign Investment Policy issued in January 2013 (Policy 2013), "Foreign government investors" are defined as (i) a body politic of a foreign government, (ii) entities in which governments, their agencies or related entities from a single foreign country have an aggregate interest (direct or indirect) of 15 per cent or more, (iii) entities in which governments, their agencies or related entities from more than one foreign country have an aggregate interest (direct or indirect) of 40 per cent or more, or (iv) entities that are otherwise controlled by foreign governments, their agencies or related entities, and any associates, or could be controlled by them including as part of a controlling

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23 Based on total assets or transaction values. The threshold amounts are set annually on 1 January and are found at www.firb.gov.au/content/monetary_thresholds/monetary_thresholds.asp. There are some exceptions: for example, for New Zealand investors and U.S. investors, the threshold applies only for investments in certain sensitive sectors. See also page 70 of "State-Owned Enterprises: Trade Effects and Policy Implications" by Kowalski, et al. (2013).

24 See http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/009.htm&pageID=003&min=wms&Year=&DocType.

25 In the speech to the 3rd China Overseas Investment Fair held on 9 November 2011, Frank Di Giorgio, General Manager Foreign Investment and Trade Policy Division Australian Treasury and Executive Member Foreign Investment Review Board stated that the national interest considerations are non-discriminatory and are applied equally to all investments whether they are private investors or government investors. (http://www.firb.gov.au/content/Publications/pressreleases/2011/001.asp)

26 See also "Australia's Foreign Investment Policy issued in 2013" (www.firb.gov.au/content/_downloads/AFIP_2013.pdf).

group. The definition has been modified from the one contained in the previous version of the Policy published in January 2012.[27]

Canada

The Investment Canada Act (ICA) stipulates rules and regulations on the notification and review procedures for certain investments in Canada by non-Canadian investors. Two types of review are covered by the ICA: national security reviews and net benefit reviews. As a result of amendments to the ICA, a national security review was introduced in 2009 as a separate process from a net benefit review.[28] A foreign investment is subject to a national security review where the Governor in Council orders a review on the recommendations of the Minister of Industry if he believes the investment could be injurious to national security, after consultation with the Minister of Public Safety. Net benefit reviews occur when investments exceed certain financial thresholds.[29]

Section 20 of the ICA enumerates the factors that the Minister must consider in the net benefit determination. These include: the effect of the investment on the level and nature of economic activity in Canada, the degree and significance of participation by Canadians, the effect of the investment on productivity, efficiency, technological development, product innovation and variety, the effect of the investment on competition within any industry in Canada, the compatibility of the investment with national and provincial policies, and the contribution of the investment to Canada's ability to compete in world markets. With respect to foreign SOE investments, Canada issued SOE Guidelines in 2007 to outline some of the key considerations taken into account when reviewing foreign investments made by SOEs.[30] These were revised in December 2012 to clarify that free enterprise principles and industrial efficiency are considered in reviews where the investor is owned, controlled or influenced by a foreign state. Also in 2012, the government issued the "Statement Regarding Investment by Foreign State-Owned Enterprises"[31], in which the government announced that it will find the acquisition of control of a Canadian oil sands business by a foreign SOE to be of net benefit to Canada on an exceptional basis only.

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27 The previous version of the Policy (2012) provided the definitions of "foreign governments and their related entities", which includes (i) a body politic of a foreign country, (ii) companies or other entities in which foreign governments, their agencies or related entities have more than an aggregate 15% interest, or (iii) companies or entities that are otherwise controlled by foreign governments, their agencies or related entities.

This modification of the definition was discussed at the OECD FOI Roundtable 19 held in October 2013. The summary of discussions of the Roundtable 19 is available at www.oecd.org/daf/inv/investment-policy/19thFOIroundtableSummary.pdf.

28 The National Security Review of Investments Regulations was registered and came into force on 17 September 2009. See www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81131.html.

29 Thresholds for review differ for investors from WTO member countries and non-WTO member countries. Thresholds for WTO member investors are announced at the following website: www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00050.html.

30 See www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#p2.

31 See www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81147.html. See also page 16 of "Inventory of investment measures taken between 15 November 2008 and 15 February 2013" by the OECD (www.oecd.org/daf/inv/investment-policy/FOIinventorymeasures_march_2013.pdf).

At the same timing, Canadian government approved two acquisitions of Canadian energy companies by foreign SOEs: an acquisition of Nexen by a Chinese SOE, CNOOC and an acquisition of Progress Energy by a Malaysian SOE, Petronas.

In June 2013, several amendments to the ICA were enacted.[32] These (i) added a definition of "state-owned enterprise" (SOE) to the ICA, (ii) created distinct net benefit thresholds for private sector investors and SOE investors in order to maintain the existing asset value threshold ($354 million in 2014) for SOE investors, while allowing a higher, enterprise-value based threshold for private sector investors, and (iii) provided the ability for the Canadian government to consider "control in fact" for investments by SOEs. The stated purpose of the amendments is to clarify how Canada assesses investments by SOEs.[33]

With respect to the definition of SOE introduced into the ICA, it[34] covers a broad range of government-related entities, including foreign governments acting as investors in their own right as well as individuals acting on behalf of a government.[35] The amendments also created distinct thresholds for private sector and SOE investors. The general threshold triggering a net benefit review will be raised to C$600 million in enterprise value and eventually be increased to C$1 billion in enterprise value over a four-year period; the threshold for SOE investments, however, will remain subject to the existing asset value threshold ($354 million in 2014), adjusted annually to reflect the change in Canada's nominal gross domestic product in the previous year.[36] Regulatory changes are required to implement the threshold amendments to the ICA.

Investments in Canadian businesses by non-Canadians are reviewable or notifiable where there is an acquisition of control in respect of owning sufficient voting interests or shares, such as acquisition of one-third or more of the voting shares of a corporation or a majority of the economic interests of an entity (such as corporation, partnership, joint venture, or trust). The control-in-fact amendments to the ICA mean that an investment may be subject to a net benefit review if an acquisition could lead to "control in fact" of a Canadian business by a foreign SOE.

The Russian Federation

The Procedures for Foreign Investments in the Business Entities of Strategic Importance for Russian National Defence and State Security (Strategic Investments Law)[37] set out the rules on foreign investment in sectors of strategic importance to Russia's national security. Article 6 lists the

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32 The amendments to the Investment Canada Act are contained in Bill C-60.

33 The Economic Action Plan 2013 Act explains: "the Government announced on December 7, 2012, clarifications regarding how it will assess proposed investments in Canada by foreign state-owned enterprises, and allowing for the extension of timelines for national security reviews, where necessary. Economic Action Plan 2013 proposes to amend the Investment Canada Act to implement these reforms".

34 "state-owned enterprise" means (a) the government of a foreign state, whether federal, state or local, or an agency of such a government; (b) an entity that is controlled or influenced, directly or indirectly, by a government or agency referred to in paragraph (a); or (c) an individual who is acting under the direction of a government or agency referred to in paragraph (a) or who is acting under the influence, directly or indirectly, of such a government or agency.

35 The definition of SOE has been provided in the SOE Guidelines, but does not cover foreign government and individuals acting on behalf of a government. The SOE Guideline provides that "an SOE is an enterprise that is owned, controlled or influenced, directly or indirectly by a foreign government". (www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#p2)

36 The threshold is C$5 million if an investor is not from a WTO member country or if it involves a cultural business in Canada.

37 Federal Law No. 57-FZ approved by the Federal Council in April 2008.

businesses covered, including development and production of encryption aids, trading weapons, TV/radio broadcasting, etc.[38]

The Strategic Investments Law contains specific rules for investments by government-controlled investors. It provides that "foreign states, international organizations, as well as organizations under their control cannot consummate transactions to gain majority interest in the business entities of strategic importance for national defence and state security".[39] It also establishes lower thresholds for a transaction by government-controlled investors. They must obtain preliminary approval if they plan to acquire 25% or more of the voting shares or gain the power to block decisions made by management.[40] The threshold for any other investors is generally 50%.[41]

The United States

In the United States, a national security review process is essentially voluntary, though the Committee on Foreign Investment in the United States (CFIUS) has the authority to initiate reviews of transactions that may be "covered transactions" and that may raise national security concerns. There is no mandatory filing or prior approval requirement for any foreign investment.

Under the review process, a "foreign government-controlled transaction" is automatically subject to investigation, unless it falls into a limited exception.[42] Investigation is the second phase of a review process. Transactions will proceed to the investigation phase after the initial review if the CFIUS determines that the transaction threatens to impair the national security of the United States and that threat has not been mitigated during or prior to the review of a covered transaction.[43]

The Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons[44] define a foreign government-controlled transaction as "any covered transaction that could result in the control of a U.S. business by a foreign government or a person controlled by or acting on behalf of a foreign government". According to "the Guidance Concerning the National Security Review Conducted by the CFIUS",[45] foreign government-controlled transactions may include transactions resulting in control of a U.S. business by, among others, foreign government agencies, state-owned enterprises, government pension funds, and sovereign wealth funds. The Guidance also notes that although foreign government control is considered a national security factor, foreign government-control does not, in itself, constitute a national security risk. In a review, CFIUS has the authority to consider all the facts and circumstances deemed relevant to national security.

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38 In addition, Russia has the general investment regulation, the Federal Law No. 160-FZ of July 9, 1999 on Foreign Investment in Russian Federation.

39 Article 2.2 of the Strategic Investments Law.

40 Article 2.3. The threshold is 5% for acquisitions in certain natural resource sectors.

41 The threshold for a prior approval requirement is 5% or more for a foreign state, an international organisation or entities controlled by them and 25% or more for any other investors when they plan to acquire voting shares of an enterprise which uses subsoil plots of federal importance as defined by the Subsoil Law (no. 2395-1).

42 Investigation of a foreign government-controlled transaction is not required, if the Secretary of the Treasury and the lead agency jointly determine that the transaction will not impair the national security of the United States. (Section 721 (b)(2)(D))

43 Section 721 (b)(2)(B).

44 31 CFR Part 800.

45 Federal Register / VOL. 73, No.236, starting at page74567 (dated 8 December 2008).

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