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Regulating the Corporate Governance of State-Owned Enterprises in Investment Arbitration

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Abstract

The renaissance of sovereign investment is one of the defining economic trends of the 21st Century. While many States have benefitted, and continue to benefit, from an influx of state-backed foreign investment, this embrace is not without its hesitancies. Host States are particularly concerned that state-owned enterprises (SOEs) pursue non-commercial policy objectives, maintain lower levels of transparency than their private counterparts, and operate with inferior standards of responsible business conduct. In response, domestic regulators have enacted a series of countermeasures for SOE investment, including requirements that such enterprises must invest on a 'commercial basis'. However, the regulation of foreign investors does not occur in a regulatory vacuum. States are bound by obligations contained in international investment treaties. This article examines whether regulations targeting the corporate governance of SOEs comply with the substantive investment protections of investment law.

Key words: investment arbitration, state-owned enterprises, Chinese investment, corporate governance, national security, competitive neutrality, bilateral investment treaties

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I. INTRODUCTION

In Adam Smith's seminal work 'The Wealth of Nations', he wrote of 'an invisible hand' that would lead market producers to pursue their own interests in a way that advantages all of society.[1] At its core was the idea that market forces would shape the parameters of private activity, unencumbered by the distorting influence of the state. The development of this concept would provide the theoretical foundation of neoclassical economics and laissez-faire capitalism that has become prevalent in the Western World in the twenty-first century. However, the rise of state capitalism from emerging economies, most notably that of China, and a shifting economic consensus present a challenge to traditional conceptions of the free market, and indeed to the absolute distinction between 'public' states and 'private' individuals.[2]

Both the internationalisation of Chinese state-owned enterprises (SOEs) and the global financial crisis of 2008 has sparked a renaissance of sovereign investment and marked the return of the state as an economic actor.[3] Chinese SOEs are increasingly inclined to engage in cross border mergers and acquisitions and have undergone a more profound set of internal reforms, leading to considerable divergence and heterogeneity in character from one SOE to the next. Indeed, the investment activity of Chinese SOEs has provoked a backlash that has

[1] Adam Smith, *Selections from The Wealth of Nations* (John Wiley & Sons, 2014).

[2] Mark McLaughlin, 'Defining a State-Owned Enterprise in International Investment Agreements', 3 ICSID Rev - Foreign Invest Law J 34 (2019), at 595.; Mark Wu, 'The "China, Inc." Challenge to Global Trade Governance', Harv Int Law J 57 (2016), at 64.; Curtis J Milhaupt and Wentong Zheng, 'Beyond Ownership: State Capitalism and the Chinese Firm', Georgetown Law J 103 (2015), at 58.

[3] Larry Cata Backer, 'Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State-Owned Enterprises, and the Chinese Experience', Transnatl Law Contemp Probl 19 (2010), at 3.

necessitated further reflection on the role of the state in the global economy, and its interaction with the international investment regime.[4]

The effect of this phenomenon continues to cause disquiet in some host states that are frequent recipients of sovereign investment.[5] Concerns are raised that SOEs could threaten national security or act contrary to the principles of competitive neutrality. The premise underpinning such concerns is that the corporate governance of SOEs is fundamentally different than exists in their private counterparts. In particular, States have expressed fears that SOEs will pursue non-commercial policy objectives, maintain a reduced level of transparency, and operate under lower standards of responsible business conduct. In response, regulators have adopted a series of measures, including requirements that a foreign investor must operate on a 'commercial basis'.

It is against this background that the role of international investment agreements comes to the fore. Since the growth of bilateral investment treaties (BITs) after 1959, host states do not operate in a legal vacuum when taking measures regulating foreign investors in general, and SOEs in particular. Standards of international investment protection have emerged which provide investors with national and most-favoured treatment, fair and equitable treatment, as well as protection against expropriations without compensation.[6]

Given the preceding context, this essay seeks to fulfil two objectives. The first is to assess the extent to which international investment agreements afford host states the regulatory space to inquire into the corporate governance of state-owned foreign investors,

[4] Ming Du, 'The Regulation of Chinese State-owned Enterprises in National Foreign Investment Laws: A Comparative Analysis', 1 Glob J Comp Law 5 (2016), at 118.

[5] Jose E Alvarez, 'Sovereign Concerns' in Karl P Sauvant, Lisa E Sachs and Wouter P F Schmit Jongbloed, *Sovereign Investment: Concerns and Policy Reactions* (OUP USA, 2012).

[6] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP Oxford, 2012).; Peter Muchlinski, Federico Ortino and Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008).; Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales, *The Foundations of International Investment Law: Bringing Theory Into Practice* (OUP Oxford, 2014).

and impose elevated standards thereto. Secondly, it seeks to establish whether SOEs are afforded adequate protection from discriminatory or unfair treatment by the international investment regime.

Part II is an exposition of the common concerns often expressed by host states in relation to the corporate governance of SOEs, with particular attention to non-commercial policy objectives, levels of transparency and standards of responsible business conduct.[7] These concerns have provoked legislative responses by host states in order to protect them from negative effects. Part III will identify the corporate governance-related aspects of Australia's Foreign Investment Review Board to exemplify the approaches taken by some host states to the targeted regulation of SOEs.[8] These measures will be analysed against the requirements of particular investment protection standards to assess the potential for a substantive breach. Part IV questions whether a non-commercial objective may be a basis for discrimination under national treatment obligations; Part V considers the role of fair and equitable treatment in ensuring transparency and responsible business conduct. Finally, Part VI provides examples where CSR obligations have been embedded directly within investment treaties, which would prevent SOE investors from challenging the imposition of such regulation at a domestic level.

It will be argued that host states are able to implement regulations imposing standards of corporate governance standards on SOEs at the pre-establishment stage of an investment, in the absence of non-discriminatory treatment to the contrary. For the post-establishment phase of an SOE's investment, host states should be cognisant of their obligations under IIAs with regard to fairness and non-discrimination, but remain able to regulate to impose

[7] OECD, *State-Owned Enterprises as Global Competitors: A Challenge or an Opportunity?* (OECD Publishing, December 8 2016) 70.
[8] Australia's Foreign Investment Policy Document, 'Policy Documents – Foreign Investment Review Board' <https://firb.gov.au/resources/policy-documents/> accessed 6 September 2021.

corporate governance requirements, or take measures against SOEs that fail to comply with domestic regulations. The logical starting point of our enquiry is to identify the nature and scope of these concerns from the perspective of host states.

II. DEFINING CORPORATE GOVERNANCE AND EVALUATING HOST STATE CONCERNS RELATING TO SOE INVESTMENT

The definition of corporate governance of an enterprise is the structural organisation and processes by which an enterprise is influenced and controlled. Indeed, the OECD Guidelines on the Corporate Governance of State-Owned Enterprises explicitly aim to:

"(i) professionalise the state as an owner;

(ii) make SOEs operate with similar efficiency, transparency and accountability as good practice private enterprises; and

(iii) ensure that competition between SOEs and private enterprises, where such occurs, is conducted on a level playing field".[9]

As such, the corporate governance of any investor necessarily circumscribes the objectives, strategies and methods of implementation that will be pursued at any given time or in relation to particular circumstances. State-owned enterprises pose a unique regulatory challenge as the governance networks are not confined by the legal strictures of contract or internal hierarchical structures inherent to most enterprises, but may also necessitate an

[9] OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises*, (2015 Edn, OECD Publishing, Paris, 2015) 11..

understanding of the political economy within other nation-states.[10] The class of SOE investors should be thought of on a sliding scale, with some more private than public and others more public than private.[11]

Where an SOE sits on this scale can have tangible effects on its management and performance. For example, the nature of a state-owned foreign investor will necessarily depend, amongst other things, on the reasons for which it was established. The most common rationales for the creation of SOEs are the provision of public services; the fulfilment of industrial policy; the protection of fiscal revenues; to satisfy the demands of the domestic political economy; and the furtherance of strategic geopolitical interests.[12] Consequently, the levels of efficiency and investment strategies of SOE investors should therefore be seen in the context of these founding objectives.

However, two distinctions should be made before making broad generalisations about the behaviour of SOEs. Firstly, different home-state approaches to the role of the state in the economy lead to a drastically variable role for state goals in the formation of investment strategies.[13] Both the nature of the government and their role in the management of SOE will vary considerably from state to state. Secondly, even within a group of SOEs from the same

[10]Xu Yi-chong, *The Political Economy of State-Owned Enterprises in China and India* (Palgrave Macmillan 2012).; Curtis J. Milhaupt & Wentong Zheng, 'Beyond Ownership: State Capitalism and the Chinese Firm' (2015) 103 Georgetown Law Journal 665 ; Jiangyu Wang, 'The Political Logic of Corporate Governance in China's State-Owned Enterprises' (2014) 47 Cornell International Law Journal 631.

[11] Hillary Charlesworth H, '"Worlds Apart: Public/Private Distinctions in International Law"', *Public and Private: Feminist Legal Debates* (Oxford University Press 1995); Julie A Maupin, 'Public and Private in International Investment Law: An Integrated Systems Approach' (2014) 54 Virginia Journal of International Law.; Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 European Journal of International Law 387.

[12] Hans Christiansen and Antonio Capobianco, 'Competitive Neutrality and State-Owned Enterprises' (2011) OECD Corporate Governance Working Papers 1 <http://www.oecd-ilibrary.org/governance/competitive-neutrality-and-state-owned-enterprises_5kg9xfgjdhg6-en> accessed 6 Septemver 2021, 8.; OECD, *State-Owned Enterprises as Global Competitors: A Challenge or an Opportunity?* (OECD Publishing, December 8 2016) 60.

[13] Curtis J Milhaupt and Li-Wen Lin, 'We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China' (2013) 65 Stanford Law Review 697.; Ming Hua Li, Lin Cui and Jiangyong Lu, 'Varieties in State Capitalism: Outward FDI Strategies of Central and Local State-Owned Enterprises from Emerging Economy Countries in Alvaro Cuervo-Cazurra, *State-Owned Multinationals - Governments in Global Business* (Palgrave Macmillan 2018).

state, there is likely to be considerable divergence as to their relationship with their home government, with some being exceptionally close and others very distant. As such, the corporate governance of SOEs should not be treated as one block of problematic corporate governance issues, but require individual, holistic assessments to uncover the true relationship between the home government and the state-owned foreign investor. Generalisation begets discriminatory and unfair treatment.

In general, there are three issues of corporate governance that are the leading concerns from the perspective of host states: non-commercial policy objectives, lower standards of transparency and lower standards of responsible business conduct.

a. Non-commercial Policy Objectives

Turning to the first of these, at the foundation of security concerns surrounding the investment activity of SOEs is the accountability of their executives to the respective home state. Rationales that spur the formation and subsistence of SOEs are almost always non-commercial: the provision of public services; the fulfilment of industrial policy; the protection of fiscal revenues; to satisfy the demands of the domestic political economy; and the furtherance of strategic geopolitical interests.[14] In the context of foreign investment, it is the final of these motivating factors that provoke the most anxiety from host states, but a common thread runs through all five: the pursuit of non-commercial policy objectives.[15]

[14] Hans Christiansen and Antonio Capobianco, 'Competitive Neutrality and State-Owned Enterprises' (2011) OECD Corporate Governance Working Papers 1 <http://www.oecd-ilibrary.org/governance/competitive-neutrality-and-state-owned-enterprises_5kg9xfgjdhg6-en> accessed 4 September 2021, 8.
[15] Curtis J Milhaupt and Mariana Pargendler, 'Governance Challenges of Listed State- Owned Enterprises Around the World: National Experiences and a Framework for Reform' (2017) ECGI Working Paper Series in Law Working Paper N° 352/2017.; George Gilligan and Megan Bowman, 'What is the State of Play? The Effects of State Capital Investment in Australia and Regulatory Implications', CIFR Working Paper No. 004/2013 17.

This has given rise to the 'trojan horse' theory, one that considers state-owned foreign investors instrumentalities of their government owners.[16] As such, the national security concerns raised by host states derive from the fear that these non-commercial policy objectives will threaten critical infrastructure, monopolise strategic resources or conduct military or industrial espionage.[17] Furthermore, the non-commercial policy objectives are intimately related to the supposed anti-competitive practices of SOEs. The argument goes thusly: if SOEs are not created for the furtherance of profit-making objectives, then home states necessarily will be less reticent about furnishing these enterprises with financial support even when they are not performing efficiently. As a result, SOEs may be more likely to achieve a dominant position in the market in which they operate, leaving open the possibility that this dominant position is abused by bad actors. Indeed, it has been suggested that the fact that the targets for acquisition by SOEs are typically valued at an above-market rate may suggest the existence of an 'SOE dividend' representing the additional non-commercial value of strategically important companies.[18]

However, some research has suggested that there are alternative, more benign, alternatives for the behaviour of state-owned foreign investors. In their analysis of Indian SOEs, Choudhury and Khanna propose that one of the factors that drive state-owned companies to become multinationals is to "achieve resource independence from other state actors".[19] Building on standard resources dependency theory, they argue that SOEs utilise cash flows to leverage for financial self-reliance.[20] Furthermore, it has also been suggested

[16] Milhaupt and Zheng (n 10).; Meg Lippincott, 'Depoliticizing Sovereign Wealth Funds Through International Arbitration'(2013) Chicago Journal of International Law 37.
[17] OECD, *State-Owned Enterprises as Global Competitors: A Challenge or an Opportunity?* (OECD Publishing, December 8 2016) 60.
[18] Ibid 58.
[19] Prithwiraj Choudhury and Tarun Khanna, 'Toward Resource Independence – Why State-Owned Entities Become Multinationals: An Empirical Study of India's Public R&D Laboratories' (2014) 45 Journal of International Business Studies 943.
[20] Ibid 944.

that SOEs internationalise in order to develop their own technological capacity, much in the same way private firms do.[21] Therefore, what host states consider as the pursuit of a national industrial policy is, in fact, merely a normal commercial actor seeking to evolve in accordance with traditional business interests. Two separate surveys from the Organisation for Economic Co-operation and Development (OECD) and the Business Council of Australia have bolstered this notion. The latter found that:

"Rather than being politically driven, respondents indicated that they are driven by commercial factors to invest in Australia just as other MNCs [multinational corporations]. The top three motivations for Chinese SOE managers investing in Australia are making profits, securing resources and access to global markets."[22]

These three motivators are akin to what one might expect from an equivalent privately-owned enterprise. While it is based on self-reporting rather than objective analysis, it is nevertheless worth considering in preventing generalisations of all foreign investment by SOEs.

Indeed, analysis by the OECD has concluded that "IM&A data suggests that while SOE investments are becoming more international, they are not necessarily growing more political".[23] Mergers and acquisitions in the oil and gas sector occur more frequently in relation to SOEs when compared with private firms, with the mining and energy sector also popular amongst SOEs, particularly European SOEs.[24] The concentration of SOE M&A activity varies considerably within countries and between countries.[25] Taking SOEs as a

[21] OECD, *State-Owned Enterprises as Global Competitors: A Challenge or an Opportunity?* (OECD Publishing, December 8 2016) 54.
[22] Business Council of Australia, 'Demystifying SOE Investment in Australia' (2014) <http://demystifyingchina.com.au/reports/N12035MKT-Demystifying-SOE-Investment.pdf> (accessed 2 September 2021) 44.
[23] OECD, *State-Owned Enterprises as Global Competitors: A Challenge or an Opportunity?* (OECD Publishing, December 8 2016) 67.
[24] Ibid.
[25] Ibid.

whole, the data suggests that they are less prone to acquiring a controlling interest than private companies, though Chinese SOEs prove an exception to this rule.[26]

As such, the extent to which SOEs can be said to pursue non-commercial policy objectives certainly requires a particularised assessment. Sweeping statements that assume the investment by SOEs is necessarily political is not supported by existing research.

The capacity of host states to ascertain the extent to which SOEs are operating commercial depends, to a significant extent, on their level of transparency.

b. Levels of Transparency

Anxieties over national security and competitive neutrality often stem from a lack of transparency as to the structural and financial organisation of SOEs.[27] A lack of cooperation from the government of the home state is often cited in this regard; if a state seeks to pursue strategic objectives utilising the vehicle of SOEs, it is patently not within their interest to share these strategies with enquiring host states. Furthermore, the absence of information exchange between host states and home states may reflect a broader lack of development in relation to the regulatory environment of either side.[28] States will be unable to share information on the corporate governance or level of subsidy afforded to state-owned investors if this information is not properly traced and tracked. The lack of transparency often ascribed to SOEs may therefore be an incidental consequence of state-ownership rather than a sinister, conscious feature of SOE policy.

[26] Ibid.
[27] Anthony P Cannizzaro and Robert J Weiner, 'State Ownership and Transparency in Foreign Direct Investment: Loose-Lipped Leviathan?' (2017) Institute for International Economic Policy Working Paper Series at 61.
[28] Ibid.

Research by Cannizzaro and Weiner has found that full state-ownership of multinational enterprises does indeed have a deleterious effect on transparency.[29] Specifically addressing the foreign investment by SOEs, they measured the "voluntary disclosure of firm-specific, value-relevant information", and concluded that there was a significant negative effect on transparency.[30] A key feature of this work to be considered was the heterogeneity of ownership structures among SOEs; mixed-ownership enterprises were likely to be far more transparent than their entirely state-owned equivalents. [31] Home states with conventionally better domestic governance structures also imbued their SOEs with heightened levels of transparency when compared with SOEs from countries with a lower standard of governance. In addition, analysis by Liu and Woywode similar found SOEs to be less transparent than their private counterparts in the Chinese context. [32]

On the contrary, Meyer et al. have argued that SOEs "will work extra hard to attain local legitimacy", and therefore be more transparent about their financing, structures and objectives in striving to overcome traditional assumptions about the negative effects of SOE investors.[33] The institutional pressures that act upon SOEs investors within host states to counteract ideological divergence, security and competition concerns induce them to tailor their investment strategies to alleviate possible conflicts.[34] Indeed, two enterprises with some government ownership were rated within the three most transparent amongst enterprises listen on stock exchanges, in a report by Transparency International.[35]

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[29] Ibid.
[30] Ibid 2.
[31] Ibid 31.
[32] Yipeng Liu and Michael Woywode, 'Light-Touch Integration of Chinese Cross-Border M&A: The Influences of Culture and Absorptive Capacity' (2013) 55 Thunderbird International Business Review 469.
[33] Klaus E Meyer and others, 'Overcoming Distrust: How State-Owned Enterprises Adapt Their Foreign Entries to Institutional Pressures Abroad'(2014) Journal of International Business Studies, vol. 45(8) 1005.
[34] Ibid.
[35] Anthony P Cannizzaro and Robert J Weiner, 'State Ownership and Transparency in Foreign Direct Investment: Loose-Lipped Leviathan?' (2017) Institute for International Economic Policy Working Paper Series 2.

The disparate nature of the literature is itself telling. Reaching a conclusion as to the transparency of a particular state-owned foreign investor as compared with their private counterparts is not possible through assumption and generalisation. Equally, mixed-ownership enterprises tend to be considerably more transparent than wholly state-owned enterprises. Therefore, it is unwise to assert that SOEs can be ascribed a collective character. Each should be assessed on its own merits with the context of a particular transaction. It is a similar case with regard to standards of responsible business conduct.

c. Responsible Business Conduct

The responsible business conduct of state-owned foreign investors is less directly related to the politics of the home state than the pursuit of non-commercial policy objectives. Indeed, issues of responsible business conduct apply also to privately-owned foreign investors. However, it is more pronounced in relation to SOEs because of the concerns over the comparative absence of enforcement by host states, *de facto* and *de jure*. [36] In sum, the argument is made that SOEs which engage in bad practices in their home territory may carry these practices across borders. Faced with the possibility of provoking a diplomatic dispute, host states may be unwilling to stringently enforce regulatory standards. In more extreme cases, SOEs may claim sovereign immunity from regulatory enforcement.[37] Common examples of where state-owned enterprises might fail to comply with standards of responsible business conduct are in relation to lower labour standards, such as the minimum

[36] Hans Christiansen and Antonio Capobianco, 'Competitive Neutrality and State-Owned Enterprises' (2011) OECD Corporate Governance Working Papers 1 <http://www.oecd-ilibrary.org/governance/competitive-neutrality-and-state-owned-enterprises_5kg9xfgjdhg6-en> accessed 1 September 2021, 8.
[37] AFM Maniruzzaman, 'Sovereign Immunity and the Enforcement of Arbitral Awards Against State Entities: Recent Trends in Practice' in American Arbitration Association Handbook on International Practice (New York: Juris Net, 2010).; *David Gaukrodger, Foreign State Immunity and Foreign Government Controlled Investors*, OECD Working Papers on International Investment 2010/02, (OECD Publishing, 2010).

wage or maternity leave, lax environmental compliance, such as the anti-pollution measures, the infringement of other local customs and regulations, and corruption.[38]

As with non-commercial policy objectives and transparency, some of these allegations and presumptions have some foundation, whereas others are less so. For example, the OECD has concluded that "there is little evidence that state-owned companies operating abroad differ substantially in their [responsible business conduct] from equivalent privately-owned companies.[39] In some cases, SOEs may actually be held to higher standards than equivalent other companies, because of the reputational risk otherwise incurred by the home government".[40] On the contrary, one report on the bribery of public officials revealed that SOE officials are statistically more likely to accept bribes than officials in privately-run enterprises.[41] 80% of the bribes involved in the study were received by SOE officials.[42] Of the 224 cases within the data set, SOE officials were bribed in 27% of them.[43]

Consequently, with responsible business conduct, and indeed non-commercial policy objectives and transparency, it is unwise to ascribe negative characteristics to SOE investment without further analysis. It may well be the case that the corporate governance standards of a particular SOE falls below acceptable standards. However, this requires an individual, holistic analysis, as opposed to broad generalisations. SOEs are a diverse group of foreign investors and should be treated as such. Legislative responses by host states have sought to address these corporate governance concerns through the enactment of investment

[38] OECD, *State-Owned Enterprises as Global Competitors: A Challenge or an Opportunity?* (OECD Publishing, December 8 2016) 70.
[39] Ibid.
[40] Ibid.
[41] OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials, OECD Publishing, Paris.
[42] Ibid 22.
[43] Ibid 23.

screening and reviews of SOE investment in particular. One such example is Australia's Foreign Investment Review Board.

III. CORPORATE GOVERNANCE ASPECTS OF SOE INVESTMENT REVIEWS: AN ANALYSIS OF AUSTRALIA'S FOREIGN INVESTMENT REVIEW BOARD

In the decades proceeding the Second World War, the admission of foreign investment in Australia was regulated by foreign exchange controls on capital inflows and outflows.[44] Demarcated sensitive sectors such as the media, civil aviation, and banking were either closed to foreign investors or subject to restrictions on non-Australian share ownership. From 1956, the *Broadcasting Act* contained provisions that restricted foreign investors to a maximum of 20% of the shares of television licence holders. [45] After 1965, the Gorton Government formally recognised the legitimacy of limiting foreign involvement in industries of 'national importance', and established the Australian Industries Development Corporation to raise funds and take equity stakes in infant industries.[46] The exponential growth of foreign ownership in energy fuels and metallic minerals provoked a cap of 15% on foreign share ownership in the emerging uranium industry in 1970. The first administrative architecture for FDI was established by the Companies (Foreign Take-overs) Act 1972.[47] It did not require pre-acquisition notice for screening, but introduced a regime of unilateral review of

[44] Chris Pokarier 'Australia's Foreign Investment Policy: A Historical Perspective | EABER Working Paper No.11' <http://www.eaber.org/node/25080> accessed 1 September 2021, 5.
[45] Phil Hanratty, 'Inward Direct Foreign Investment in Australia: Policy Controls and Economic Outcomes' (1996) Economics, Commerce and Industrial Relations Group <https://www.aph.gov.au/binaries/library/pubs/rp/1995-96/96rp32.pdf> accessed 1 September 2021, 5.
[46] Chris Pokarier, 'Australia's Foreign Investment Policy' (n 44), 5.
[47] The latter was passed by the McMahon Government, Ibid 8.

acquisitions by the Australian Treasury Department on the basis of an undefined 'national interest' test.[48]

Heightened popular opposition to high profile foreign takeovers spurred the economic nationalism of the Whitlam government, who had promised to "stop the great takeover of Australia". [49] After 1972, domestic and foreign investors became increasingly concerned with the discretionary controls over resource projects on questionable legislative authority and in the absence of clearly expressed policy guidelines. Greenfield investments in oil, natural gas, coal and uranium were prohibited, and investments in real estate were severely restricted.[50] In the face of an economic recession, and after representations by Japanese Prime Minister Kakuei Tanaka, a less restrictive policy was articulated to flesh out the scope or content of the 'national interest' review.[51] It provided for an equal foreign-local equity requirement, value thresholds to trigger a review, a system for reviewing greenfield investments, and a qualitative examination of economic benefit and Australian involvement in the post-acquisition investment.[52]

In the final years of the Whitlam government, these reforms were given a legislative basis in the Foreign Acquisitions and Takeovers Act 1975 (FATA).[53] Together with the establishment of the Foreign Investment Review Board (FIRB) in 1976, the passing of FATA is the foundation of the modern regime of foreign investment screening in Australia.

Numerous clarifications and reforms have been introduced in the forty years since, most notably in 2015, but the central test has endured.[54] Australia's Federal Treasurer decides

[48] Ibid.
[49] Ibid 9.
[50] Phil Hanratty, 'Inward Direct Foreign Investment in Australia'(n 45), 7.
[51] Chris Pokarier, 'Australia's Foreign Investment Policy' (n 44), 10.
[52] Ibid.
[53] Phil Hanratty, 'Inward Direct Foreign Investment in Australia' (n 45), 6.
[54] Other notable reforms to FATA include the Foreign Takeovers Amendment Act 1976 , the Foreign Takeovers Amendment Act 1989, and most recently in 2010 pursuant to the Foreign Acquisitions and Takeovers

if an investment is contrary to Australia's 'national interest'.[55] In order to identify the aspects of this investment review process that firstly, deal with corporate governance, secondly, apply specifically to SOEs, and thirdly, do both, it must first be established that investments by SOEs are reviewable transactions.

a. Lower Review Threshold for Transactions with SOE Investors

The Foreign Acquisitions and Takeovers Act 1975 and Australia's Foreign Investment Policy empowers the Federal Treasurer of Australia to examine proposals by 'foreign persons' to acquire a substantial interest of 20% in an Australian company over a certain value, or an interest in specified sensitive sectors, and determine whether they are contrary to the Australian' national interest'.[56] On that basis, the Treasurer takes a decision to approve the investment, attach conditions to the approval, or block the transaction. Interpretive guidance as to the meaning of the relevant terms is provided by FATA itself, the Foreign Acquisitions and Takeovers Regulations 1989, and Australia's Foreign Investment Policy 2019.[57]

A 'foreign person' is given a broad definition, including: non-residents, corporations or trustees in which a foreign corporation of government holds 20% of an interest; a corporation in which two or more non-resident or foreign corporations hold an aggregate interest of 40%; or a foreign government investor.[58] An entity will be a foreign government

Amendment Act 2010, see Vivienne Bath, 'Foreign Investment, the National Interest and National Security - Foreign Direct Investment in Australia and China' (2012) 34 Sydney Law Review 5;

[55] Ibid, 14.; George Gilligan and Megan Bowman, 'What is the State of Play? The Effects of State Capital Investment in Australia and Regulatory Implications', CIFR Working Paper No. 004/2013 17.

[56] Ibid.

[57] Australia's Foreign Investment Policy Document, 'Policy Documents – Foreign Investment Review Board' < https://cdn.tspace.gov.au/uploads/sites/82/2018/12/1-January-2019-Policy_.pdf > accessed 1 September 2021, 3.

[58] Ibid.

investor if a foreign government holds a substantial interest of at least 20%, or separate foreign governments hold a substantial aggregate interest of at least 40%.[59] The scope of significant or notifiable actions varies in accordance with the character of the investor (government or non-government), the sector in which the investment would take place, and the monetary value of the transaction.[60]

FATA makes a crucial distinction between 'significant actions', which are subject to voluntary notification, and 'notifiable actions', which are subject to mandatory notification.[61] For an acquisition by a foreign person to be a 'significant action' it must: firstly, result in a change in control of an Australian business, control defined as being in a position to 'determine the policy of the entity or business in relation to any matter', or having a substantial interest of 20% in the entity; and secondly meet the relevant monetary threshold.[62] The share and threshold limitations do not apply to foreign government investors or acquisitions in Australian media.

For non-government investors, an acquisition of 20% in an Australian entity valued above USD 261 million will require approval, unless the investor is from Chile, China, Japan, Korea, New Zealand, Singapore and the United States.[63] In accordance with Australia's FTA commitments, the threshold for investors from these countries in non-sensitive sectors is USD 1,134 million. Sensitive sectors, in relation to which the lower threshold will subsist, are 'media; telecommunications; transport; defence and military-related industries; and the extraction of uranium or plutonium or the operation of nuclear facilities'.[64] Foreign acquisitions of interests in media, agribusiness and land are subject to lower share and value

[59] Ibid.
[60] The thresholds for review are contained in Annex 1 of the Policy.
[61] Australia's Foreign Investment Policy Document 3.
[62] Foreign Acquisitions and Takeovers Act Section 54 (4)(a).
[63] This is by virtue of trade and investment agreements, most notable the CPTPP, see Australia's Foreign Investment Policy Document (n 57), 3.
[64] Ibid 4.

thresholds to require approval.[65] Acquisitions of interest in residential real estate are subject to approval, regardless of value. Other legislation provides for a cap of 49% on foreign ownership interests in Australian international airlines, some Australian airports, and Australian-registered ships.[66]

These requirements also apply to what the regulations call "foreign government investors".[67] However, these are additional regulations and thus should be viewed in conjunction with more stringent approval requirements. Approval is required by a foreign government investor before acquisitions of any direct interest, greenfield investments and any interest in land, regardless of value. A 'direct interest' is defined broadly, encompassing an interest of at least 10%, or the ability to influence, participate in or control an enterprise.[68] Foreign government investors are also required to get approval for the acquisition of a legal or equitable interest (as opposed to a direct interest) in relation to a tenement or 10% interest in securities in mining, production or exploration. Any acquisition of land by foreign government investors is to be reviewable. Exemptions in relation to the acquisition of securities apply to foreign government investors in the business of moneylending. Obviously, SOEs (or foreign government investors) are subject to lower thresholds to trigger the review process. They are also subject to enhanced review standards for their transparency, character and commercial purpose.

b. Transparency, 'Character' and 'Commercial Purpose' Tests Applicable SOEs

[65] Ibid.
[66] See the Air Navigation Act 1920 and Qantas Sale Act 1992
[67] Ibid 3.
[68] Ibid.

Upon notification of a proposed investment, the Foreign Investment Review Board is tasked with advising the Treasurer as to the 'national interest' implications of a particular investment, and monitoring compliance with the framework. Crucially, it is a non-statutory body and thus provides advice, and only advice, to the Treasurer. The advisory nature of the FIRB is particularly important in relation to investment proposals that have become politicised. [69] In such cases, that that ultimate decision-making power resides with the Treasurer can have a significant influence on the final determination.

The concept of 'national interest' on which the examination by the Treasurer and FIRB rests, is not given a specific definition in FATA. [70] There are several references to 'national interest' as a basis for ministerial decisions in Australian and Commonwealth legislation, but most of these similarly do not provide clarification as to its exact scope and content.[71] Instead, the Australian Foreign Investment Policy document furnishes investors with limited guidance as to the content of the national interest test. It acknowledges that 'foreign investment is beneficial, given the important role it plays in Australia's economy', before recognising the 'community concerns' raised by such investment.[72] The size, sensitivity, impact and market-motivation of an investment influences the relative weighting afforded to the stated factors to be considered when assessing 'national interest'. These

[69] Ming Du, 'The Regulation of Chinese State-Owned Enterprises in National Foreign Investment Laws: A Comparative Analysis' (2016) 5 Global Journal of Comparative Law 118, 126.
[70] Megan Bowman, George Gilligan and Justin O'Brien, 'Foreign Investment Law and Policy in Australia: A Critical Analysis' (2014) 8 Law and Financial Markets Review 65.
[71] In the National Environmental Protection Measures Act, 'a matter of national interest' concerns: 'Australia's relations with another country; or Australia's international obligations; or national security; or national defence; or a national emergency; or a prescribed matter relating to a telecommunications activity…or the management of aviation airspace…or any other matter agreed between the Commonwealth, the States and the Territories.'
It is apparent that ministers have considerable discretion when taking decisions on the basis of the Australian national interest. National security and national defence are included within these definitions but they also invite consideration of broader economic interests and international legal obligations.
[72] Australia's Foreign Investment Policy Document (n 57), 9.

factors are: national security, competition, impacts on other Australian Government policies, impact on the economy and community, and character of the investor.[73]

None of these terms are given comprehensive definition, but the accompanying statements may provide some guidance. Three are of particular relevance in the context of SOEs. Firstly, national security considerations' affect Australia's ability to protect its strategic and security interests', as determined by its security agencies.[74] Secondly, 'competition' is given a slightly fuller definition, and offers a clarifying statement that "the Government favours diversity of ownership within Australian industries and sectors to promote healthy competition" and will "consider whether a proposed investment may result in an investor gaining control over market pricing and production of a good or service in Australia". Moreover, it also cites some factors that will be considered in this review, such as a broader analysis of the international marketplace with respect to particular industries, and the deleterious effects of a concentration of ownership on the price or supply of particular goods. It is made explicit that this analysis is independent of competition review under Australia's regime for competition policy.[75]

Thirdly, the character of an investor will be assessed to test that it operates on a transparent commercial basis, including an analysis of the corporate governance of foreign investors, and the enterprises' compliance with the "spirit and the letter" of Australian law, as well as good faith in cooperating with Australian authorities as regards conditions imposed on an investment.[76] It is made explicit that "proposals by foreign-owned or controlled

[73] Ibid.
[74] Ibid.
[75] Ibid 10.
[76] Ibid.

investors that operate on a transparent and commercial basis are less likely to raise national interest concerns than proposals from those that do not".[77]

Going further, foreign government investors are subject to enhanced scrutiny. The Policy provides that the government will consider whether the investor is 'commercial in nature' or 'pursuing broader political or strategic objects that may be contrary to Australia's national interest'. This assesses governance arrangements that could facilitate 'actual or potential control by a foreign government' and the nature and extent of non-government interests in the enterprise. While government-directed investment is not blocked as a matter of policy, it is subject to a higher level of scrutiny. Alongside an assessment of the size, importance and potential impact of an investment, stipulated factors could be advanced in mitigation to reduce the possibility that a proposed investment by a foreign government investor would be found to be contrary to Australia's national interest:

- "the existence of external partners or shareholders in the investment;
- the level of non-associated ownership interests;
- the governance arrangements for the investment;
- ongoing arrangements to protect Australian interests from non-commercial dealings;
- whether the target will be, or remain, listed on the Australian Securities Exchange or another recognised exchange."[78]

Investment screening in Australia is therefore particularly cognisant of establishing the relationship between the foreign government and the investing enterprise. According to the procedural provisions of FATA, the Treasurer has 30 days to decide as to whether to approve the investment, impose mandatory conditions or block the proposal, though they may extend

[77] Ibid.
[78] Ibid 12.

this deadline by 90 days by publishing an interim order.[79] A fee is payable by all applicant investors which ranges from AUD 2,000 to AUD 103,400, depending on the value and sector of the investment.[80] Both civil and criminal penalties are levied for failure to provide pre-acquisition notification or breaches of conditional approval.[81] There is no right of appeal or administrative or judicial review under FATA or the Policy. The FIRB provides a detailed annual report to the Treasurer of the activity of the Board and trends in applications by foreign investors.

These enhanced standards of transparency and substantive review are exceptionally wide-ranging and are accompanied by limited guidance as to their precise scope.

c. Corporate Governance Reviews for SOEs are Potentially Discriminatory and Highly Discretionary

Transactions involving State-owned foreign investors are far more likely to be subject to the system administered by Australia's Foreign Investment Review Board, and also subject to an elevated standard of review in the course of its administration. Put simply, the approach discriminates on the basis of ownership or control of an enterprise by a foreign government. In light of the heightened fears with regards to the non-commercial policy objectives, levels of transparency and standards of responsible business conduct, the policy-makers in host states would argue that such targeted provisions for review are necessary.[82] However, these

[79] Ibid 13.
[80] Foreign Acquisitions and Takeovers Fees Impositions Act 2015
[81] Ibid.
[82] Roman Tomasic and Ping Xiong, 'Chinese State-Owned Enterprises in Australia — Legal and Investment Challenges'(2015) 30 Australian Journal of Corporate Law 151.

systems of review are more intrusive that those applicable to privately-owned enterprises, and the standards remain highly discretionary. Therefore, the process remains open to arbitrariness, politicisation and unpredictability. There are several points to be made in bolstering this conclusion.

Firstly, the fact that 'national interest' is itself not legislatively defined gives the Treasurer considerable discretion to decide on almost any basis whatsoever.[83] It is, by design, amorphous and absent external objective factors against which to measure its precise content and scope. The guidance provided in the Australian Foreign Investment Policy does provide some limited guidance as to the standards that will be applied, in the form of national security, competition, impacts on other Australian Government policies, impact on the economy and community, and character of the investor. However, not only are these criteria only defined very briefly, but this stipulated list is also non-exhaustive, allowing ministers to assess the national interest more or less unencumbered. Indeed, Australian courts have been disinclined to interfere with the exercise of ministerial discretion in this regard.[84]

Secondly, the standards are significant not only for what they don't say (with regard to the absence of an in-depth definition), but also for what they do say. In particular, the standard relating to the 'impact on the economy and the community', envisions an analysis based on the "the impact of any plans to restructure an Australian enterprise following an acquisition", the "nature of the funding" and the extent to which there is Australian participation in the business after the acquisition has been concluded.[85] Such a requirement may simply be a form of economic protectionism, seeking to veil domestic enterprises from

[83] Megan Bowman, George Gilligan and Justin O'Brien, 'Foreign Investment Law and Policy in Australia: A Critical Analysis' (2014) 8 Law and Financial Markets Review 65
[84] Cathay Pacific Airways Limited v Assistant Treasurer and Minister for Competition Policy and Consumer Affairs [2010] FCA 510.
[85] Australia's Foreign Investment Policy (n 57) 10.

foreign competition. Although there is explicit provision for the view that Australia welcomes foreign investment, with accompanying references to the positive impact on employment and production, this particular provision, coupled with the aforementioned origins of the Australian system for foreign investment review, does give insight into underlying protectionist inclinations.

Thirdly, the statement that 'foreign owned or controlled investors that operate on a transparent and commercial basis are less likely to raise national interest concerns than proposals from those that may be not' equally applied to state-owned foreign investors and privately-owned foreign investors. As highlighted by Andrew Rozanov, the non-commerciality requirement is accompanied by an inherent indeterminacy of definition.[86] Privately-owned investors taking into account extra-financial considerations when making strategic decisions is a fixture of the landscape of global finance.[87] Ethical or 'responsible' investments are common to many investment funds, and indeed such diversity of strategic incentives may prove to be beneficial to financial markets overall.[88] Consequently, for the requirement that foreign investors may act 'commercially' to be enforced consistently, this would necessitate equally close scrutiny of investment funds.

Fourthly, the elevated standards of review that will be applied to SOEs may essentially have the effect of shifting the burden onto foreign government investors to demonstrate that their corporate governance arrangements do not cause it to act in a way contrary to Australia's national interest. A key section in this regard is the phrase 'actual or potential control' by the foreign government. Thus, to satisfy the standards imposed by these provisions does not require examples of when such foreign government control has been

[86] Andrew Rozanov, 'Definitional Challenges of Dealing with Sovereign Wealth Funds' (2011) 1 Asian Journal of International Law 249, 262.
[87] Ibid.
[88] Ibid.

exercised, but merely that the legal and structural arrangements of the enterprise would permit such an occurrence. Furthermore, the non-commerciality requirement applicable to foreign investors is reinforced in relation to SOEs. It addresses not only non-commerciality, but "if the investor may be pursuing broader political or strategic objectives".[89] This is a welcome clarification that avoids the pitfalls of the stand-alone 'non-commercial' requirement. However, it remains unclear what objectives will be perceived to be political and contrary to Australia's national interest. Would investment to promote facilities connectivity throughout the region fall foul of such standards?[90] Enhanced transparency comes with a corresponding rise in costs.[91] There is little guidance as to the nature of this assessment, nor how it would be carried out.

Finally, this review process, including the enhanced corporate governance aspects, lacks transparency and has no process of review or appeal. As such, investors would have no legal recourse to domestic mechanisms in order to challenge a finding by the Treasurer.

In summary, the extended scope for establishing SOEs reviewable transactions, highly discretionary standards of review, lack of transparency, and absence of an appeal mechanism leave investment by SOEs open to mistreatment in a system akin to that implemented by Australia. Whether or not it will be operated in such a way is a different question, but the potential is there for it to be so. Combined with the heightened politicisation of some investment by SOEs, there remains is a real risk that SOEs could be the subject of protectionist regulatory measures or unfair restrictions because of concerns related to corporate governance.[92]

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[89] Australia's Foreign Investment Policy (n 57) 11.
[90] 'Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road' <http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html> accessed 2 September 2021.
[91] Rozanov (n 86), 261.
[92] Lauge N. Skovgaard Poulsen, 'Investment Treaties and the Globalisation of State Capitalism: Opportunities and Constraints for Host States' in R. Echandi and P. Sauvé (eds.), *Prospects in International Investment Law and Policy* (Cambridge: Cambridge University Press, 2012 83.

Nonetheless, States do not instigate measures for the admission and regulation of foreign investment on a barren legal landscape. Voluntary assumption of obligations by virtue of the conclusion of international investment agreements provide an additional legal context into which national foreign investment regulations should be placed. Significant in this regard, and the starting point for our analysis, are the non-discrimination's provisions under international investment agreements.

IV. COULD A 'NON-COMMERICAL' PURPOSE OF STATE-OWNED FOREIGN INVESTORS BE A BASIS FOR DISCRIMINATION?

National treatment and most-favored nation (MFN) provisions are commonly embedded in contemporary IIAs.[93] Together, they ensconce the principle of non-discrimination within a State's international legal obligations. National treatment prohibits treatment less favourable to a foreign investor when compared to a domestic investor. MFN treatment prohibits treatment less favourable to a foreign investor from the contracting parties and foreign investors from third countries.

As has been discussed, the corporate governance regulations that applied are to SOEs often differ from those which apply to domestic investors. They are, to a certain extent, 'discriminatory' in the broadest sense. However, there are several features of such clauses that are particularly relevant for assessing a breach of non-discrimination obligations: firstly, the limited protection offered to investors at the pre-establishment phase of an investment;

[93] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP Oxford 2012) 198.; Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2017) 238.; Peter Muchlinski, Federico Ortino and Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 259.; Chin Leng Lim, Jean Ho and Martins Paparinskis, *International Investment Law and Arbitration* (Cambridge University Press 2018) 293.; Tony Cole, 'The Boundaries of Most Favored Nation Treatment in International Investment Law' (2012) 33 Michigan Journal of International Law 51.;

secondly, the uncertain criteria of 'like circumstances' that is used to identify an appropriate comparator; thirdly, whether 'treatment less favourable' necessitates an enquiry into the aims or effects of the measure; and finally, whether less favourable treatment could be justified by rational public policy.

a. Limited Protection at the Pre-establishment Phase

The absence of pre-establishment national treatment in most international investment agreements will confer on host states the regulatory autonomy to enact investment screening measures unburdened by investment obligations.[94] There is no general right of admission in international law. In such cases, discrimination at the 'admission' phase of an investment, as described above, be without legal redress from the perspective of SOEs, and indeed foreign investors more generally. Investment treaties routinely provide that protection only attaches after the investment has been admitted 'in accordance with the law', to make this requirement explicit.[95] Even where pre-establishment non-discrimination treatment is provided, sectoral limitations are often included, therefore carving-out industries that could be most likely affected by the non-commercial policy objectives of state-owned foreign investors. In both instances, the protection of non-discrimination will not apply at the pre-establishment phase, and host states are unrestrained when deciding whether or not to admit an investment.

b. Defining 'Likeness' – Is Non-commerciality a Basis for Discrimination?

[94] Rahim Moloo and Alex Khachaturian, 'The Compliance with the Law Requirement in International Investment Law' 34 Fordham International Law Journal 6 1473.;Christina Knahr, 'Investments "in accordance with host state law' (2007), 5 Transnational Dispute Management <www.transnational-dispute-management.com/article.asp?key=1070> accessed 3 September 2021.
[95] Jarrod Hepburn, 'In Accordance with Which Host State Laws? Restoring the "Defence" of Investor Illegality in Investment Arbitration' (2014) 5 Journal of International Dispute Settlement 531.

The second relevant aspect of non-discrimination clauses for our purposes is the definition of 'like circumstances'. Occasionally, national treatment and MFN treatment make this requirement explicit, by providing that the obligation of non-discrimination only exists to foreign investors 'in like circumstances' to their counterparts.

The central importance of this likeness qualification for the corporate governance of SOEs is thus: if a 'commercial purpose' or 'strategic purpose' is a criterion of likeness, then a state-owned foreign investor is not entitled to receive the same treatment as a domestic investor, even if they are operating in the same sector. In such an instance, the appropriate comparator, for the purposes of establishing a breach under national treatment obligations, would be other investors with the same non-commercial orientation or political purpose. However, there is little explicit support for this argument when analysing the traditional 'competitive relationship' test as applied by arbitral tribunals.

The root of the national treatment standard is in its role to counter protectionism.[96] Such a view can be seen in the first tribunal in which the national treatment standard was squarely addressed, that of *S.D. Myers v. Canada*.[97] At issue was the competitive relationship between the foreign investor and domestic investor that were operating in the same sector.[98] Indeed, several subsequent tribunals followed similar approaches, aside from derogations in *Occidental* and *Methanex*.[99] It will be difficult to make a claim that a 'political' motivation for SOE investors is a suitable ground on which to justify

[96] Jurgen Kurtz, 'Balancing Investor Protection and Regulatory Freedom in International Investment Law: The Necessary Complex and Vital Search for State Purpose' in Andrea K Bjorklund, *Yearbook on International Investment Law and Policy, 2013-2014* (Oxford University Press, 2015).; Jurgen Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and Its Discontents' (2009) 20 European Journal of International Law 749.
[97] *SD Myers Inc. v. Canada* Partial Award (UNCITRAL, 13 Nov. 2000).
[98] Ibid at para 252.
[99] Methanex Corporation v. USA, Final Award (UNCITRAL, 3 Aug. 2008). *Occidental Exploration and Production Company v. Ecuador*, Final Award (UNCITRAL, 1 Jul. 2004) 177.

discriminatory treatment at the comparison phase. However, one possible route might be to suggest that this political motivation means that the state-owned foreign investor is not seeking to compete with those operating in the same sector. Arbitrators might reasonably retort that the test requires a competitive relationship, and not necessarily a competitive motivation. In any case, a test based on the 'political' nature of investment is likely difficult to foresee within existing interpretations.

One more fruitful argument that could be made in favour of such a determination exists in relation to the possible inclusion of a test as to the 'political' nature of the investor as a criterion of likeness. DiMascio and Pauwelyn have argued that the interpretation of 'like circumstances' that results in a competitive relationship test is flawed.[100] They argue that the word 'circumstances' calls for an examination of the broader context in which regulation would be enacted.[101] This argument has its origins in their assessment of the history of the international investment regime as developed in response to threats and concerns raised in respect of foreign investment.[102] The focus on security and fairness in investment obligations, as opposed to primarily competition issues, is primary evidence of this orientation. In their own words:

"What matters is not the positioning of those investments in relation to each other within the market ("competition test"), but rather the factual support for the government's distinction between the two when taking regulatory action ("regulatory context")" [103]

Underpinning this analysis is the notion that investment has a fundamentally enlarged footprint with regard to business operations in the host country than is the case in the trade

[100] Nicholas DiMascio and Joost Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' (2008) 102 American Journal of International Law 48 81.
[101] Ibid.
[102] Ibid 83.
[103] Ibid 81

regime. Possible regulatory responses therefore span a far wider range of options and legitimate objectives than mere competition.

Applying the 'regulatory context' test envisioned here, the argument for the inclusion of a commercial purpose, and indeed the issue of ownership that was tackled above, as a criterion of likeness is much stronger. For example, in United Parcel Service (UPS) v Canada the tribunal considered that as the SOE undertook special obligations from the state, it was, therefore, appropriate that it should enjoy special benefits.[104] UPS had not assumed the same obligations and thus was not in like circumstances. Given the additional potential threats to national security posed by an investment by state-owned enterprises that have a 'political' objective, the factual support in favour of distinguishing between them in regulations may well be considerable. If a tribunal were to adopt such an approach, ownership and commercial purpose may be a legitimate reason for less favourable treatment, and therefore claims to a violation that the national treatment standard would be breached would fall at this hurdle.

c. The Aim of Corporate Governance Measures and 'Treatment Less Favourable'

Respondent host states have often argued that discriminatory intent is a condition of establishing a breach of non-discrimination protections. This position also has support in scholarship.[105] However, the treatment of discriminatory intent within the jurisprudence of

[104] United Parcel Service of America Inc v. Government of Canada (UPS v Canada), UNCITRAL, Award (24 April 2007). para.173.

[105] Jurgen Kurtz, 'Balancing Investor Protection and Regulatory Freedom in International Investment Law: The Necessary Complex and Vital Search for State Purpose' in Andrea K Bjorklund, *Yearbook on International Investment Law and Policy, 2013-2014* (Oxford University Press, 2015).

international investment law has been inconsistent. Therefore, whether discriminatory intent is necessary, and whether it has a determinative significance, is unclear.

Notably, many arbitral tribunals have held that there is no absolute requirement of protectionist intent in determining a breach of non-discrimination treatment.[106] The *Siemans* tribunal stated that the requirement was not "not decisive or essential for a finding of discrimination", and it would be the impact of the measure that would be ultimately determinative as to a breach.[107] On the contrary, the tribunal in *Methanex* stated that "Methanex must demonstrate, cumulatively, that California intended to favor domestic investors by discriminating against foreign investor".[108]

The *S.D. Myers* award considered that an intent to discriminate was not 'decisive on its own'.[109] An actual discriminatory effect was required. In the same vein, the tribunal in *Occidental Exploration* stated that even though a measure 'not been done with the intent of discriminating against foreign-owned companies', such discrimination was a consequence of the policy that the state had enacted and therefore constituted less favourable treatment.

Occasionally, the treaty itself furnishes arbitrators with the criteria as to the proper role of discriminatory intent. One formulation highlights that 'the aim of the measure of concern' is the proper area of enquiry.[110] Consequently, if measures addressing corporate governance are found to have protectionist intent, SOEs may indeed have grounds to claim a breach of non-discrimination treatment.

The more convincing approach is one that includes a purpose-based test of the impugned measure. The guidance provided alongside the OECD National Treatment

[106] Dolzer and Schreuer (n 17).
[107] Siemens AG v. Argentina, Award and Separate Opinion, ICSID Case No ARB/02/8, 6 February 2007, para 321
[108] Methanex (n 842) para. 12.
[109] *S.D. Myers Inc. v. Canada*, First Partial Award (13November2000), para.254.
[110] Article 4(2), Croatia-Azerbaijan BIT 2007

instrument can be utilised in support of this view. It states that the central test of the instrument "is to ascertain whether the discrimination is motivated, at least in part, by the fact that the enterprises concerned are under foreign control".[111] The tribunal in *Pope and Talbot* referenced the guidance to the OECD National Treatment instrument in arguing that state action will not breach the non-discrimination obligations where it "bears a reasonable relationship to rational policies".[112] Nevertheless, even amongst proponents of approaches that incorporate a purpose-based test, there is diverging opinion as to whether protectionist intent is the sole criterion that arbitrators much apply in order to assert a breach, or whether this is merely one criterion of a two-part test, incorporating a test that considers whether measures are "rationally connected to the least restrictive means of achieving a non-protectionist purpose".[113]

On this basis, overtly protectionist measures adopted in the name of disciplining the corporate governance of SOEs would be considered 'treatment less favourable' under national treatment provisions. Moreover, under one analysis, it may also be relevant whether a less restrictive measure was available. For example, if the concern is about the non-commercial motivations of an SOE, requiring that investors disclose all correspondence with the ministers of their home government may be considered more restrictive (and intrusive) than performing an objective, evidence-based analysis of previous mergers and acquisitions. Despite these factors, non-protectionist corporate governance regulations should not be considered a breach of national treatment.

[111] OECD Declaration on International Investment and Multinational Enterprises forms part of the 1976 OECD Declaration on International Investment and Multinational Enterprises 1976.
[112] *Pope & Talbot Inc.* (n 205) para 79.
[113] Andrew D Mitchell, David Heaton and Caroline Henckels, *Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law* (Edward Elgar Publishing 2016) 173

For those government measures for which a tribunal has identified an appropriate comparator and considered that constitute treatment less favourable, the final stage of analysis is whether this treatment may be justified.

d. Justifying Corporate Governance Measures as Rational Public Policy

A discriminatory measure may be justified by reference to rational public policy. This test can be provided expressly by IIAs, or some arbitrators have taken the step of reading questions of regulatory autonomy on top of matters of obligation. As such, discriminatory treatment may well be justifiable, even in the absence of explicit exceptions clauses. Therefore, the question arises, would the 'political' motivation of an SOE be an adequate ground on which to base distinguishing regulatory measures?

In *Pope and Talbot*, the tribunal held that a measure would not breach the standard where it "bears a reasonable relationship to rational policies".[114] The exact scope of the 'rational policy' objective referred to *Pope and Talbot* is not clear. Its precise content is somewhat amorphous. However, host state arguments proposing that the prevention of 'political' investment in their territories should be approached carefully. For example, the previous definitional challenges in relation to the 'non-commerciality' requirement would be equally applicable if it was argued in these terms.[115] Similarly, a state which had accepted investors in pursuance of strategic motivations such as building infrastructure may also have to be careful in framing its arguments. A better approach would be to specifically target

[114] Pope & Talbot Inc. v. Canada, 7 ICSID Rep. 120-121 (2005), NAFTA/UNCITRAL Trib., Award on the Merits of Phase 2 (Apr. 10, 2001) para. 79.
[115] Rozanov,(n 86), 262.

issues of competitive neutrality or national security, rather than the more indirect inquiry into motivation. Indeed, from a purely practical standpoint, establishing a 'political' objective of a specific investment is likely to be a highly complex, if not impossible, exercise.[116] As I have argued in another context:

"Even if one accepts the existence of a solid line between SOEs that are 'principally commercial' and those that are not, its constituent parts make this determination exceptionally difficult. On a purely evidentiary basis, there would have to be full transparency of all the activities of an SOE in order to determine the extent to which it operates on a commercial basis. For larger SOEs, this would be a colossal undertaking potentially encompassing an examination of activity in multiple jurisdictions, as well as the motivating factors behind this activity. It is also something of a moving target: at what point does an unprofitable entity become a non-profit entity?"[117]

Therefore, even if a state was able to argue that the political motivation of investors was justification for discriminatory regulation – itself a questionable proposition – the practical difficulties of establishing this political motivation are prohibitive.

From the foregoing analysis, it is apparent that establishing the 'political' motivation of state-owned foreign investors as a basis for the discriminatory treatment is a difficult exercise. It would require host states to argue in favour of the 'regulatory context' test as opposed to the 'competitive relationship' test and for this to be accepted by arbitrators. In this way, host states would be able to take discriminatory regulatory measures without violating the

[116] For an account of the difficulty in tracing the origins of a transaction from SOE to its host government, see Minwoo Kim, 'Regulating the Visible Hands: Development of Rules on State-Owned Enterprises in Trade Agreements', 58 Harvard International Law Journal 225 (2017), at 233.
[117] Mark McLaughlin, 'Defining a State-Owned Enterprise in International Investment Agreements', 3 ICSID Rev - Foreign Invest Law J 34 (2019), at 595.

provisions on national treatment. However, these measures would likely still have to be absent protectionist intent, and would be very difficult to establish in fact.

As well as the national treatment, the fair and equitable treatment provision may also constrain the extent of host state action with regard to the imposition of measures with regard to the corporate governance of SOEs, as well as offer protection to SOEs from unfair and inequitable regulatory measures.

V. FAIR AND EQUITABLE TREATMENT AND THE REGULATION OF THE CORPORATE GOVERNANCE OF STATE-OWNED FOREIGN INVESTORS

The non-relational standard of fair and equitable treatment is a central substantive concept of the international investment regime.[118] Its content is "maddeningly vague, frustratingly general, and treacherously elastic".[119] Indeed, the notions of 'fairness' and 'equity' are intrinsically amorphous and defies closer interpretation by virtue of traditional rules on interpretation as provided for in the Vienna Convention on the Law of Treaties.

The requirement to afford SOE investors administrative justice and procedural fairness will apply in relation to matters of corporate governance review.[120] Contractual arrangements or overt representations, particularly where such acts constitute an inducement, will create legitimate expectations to which arbitral tribunals will attach considerable

[118] Marc Jacob and Stephan Schill, "Fair and Equitable Treatment: Content, Practice and Method' in Marc Bungen and others (eds), International Investment Law: Handbook (CH Beck/Hart/Nomos 2015) 700.
[119] Jeswald Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010) 221.
[120] Campbell McLachlan, Laurence Shore and Matthew Weiniger, International Investment Arbitration: Substantive Principles (Oxford University Press, 2007) 227.; *International Thunderbird Gaming Corp v. Mexico*, UNCITRAL (NAFTA), Arbitral Award, 26 January 2006, para. 200.

weight.[121] Host states should retain some degree of predictability and consistency as to the structure of their regulatory frameworks.[122] These principles of 'fairness' and 'equity' will necessarily apply to the substance and process of investment screening mechanisms and their imposition of corporate governance standards. However, it is submitted that there are three issues of particular relevance in this regard, the first of which is transparency as an inherent aspect of FET.

a. SOE Transparency as an Inherent Aspect of FET

The requirement that host states enact and maintain a transparent regulatory framework is well established in the jurisprudence of arbitral tribunals.[123] A categorical description of the levels of transparency required has thus far proven elusive, but it has nevertheless been found to be a standard that can be violated by the acts or omissions of states in receipt of foreign investment. For example, the tribunal in *Metalclad* instituted a very broad test for the transparency requirement, considering that the standard to be met was that host states were to act:

"totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives"[124]

[121] Michele Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28 ICSID Review - Foreign Investment Law Journal 88.; Elizabeth Snodgrass, 'Protecting Investors' Legitimate Expectations - Recognizing and Delimiting a General Principle' (2006) 21 ICSID Review - Foreign Investment Law Journal 1.
[122] Jean Kalicki and Suzana Medeiros, 'Fair, Equitable and Ambiguous: What Is Fair and Equitable Treatment in International Investment Law?' (2007) 22 ICSID Review - Foreign Investment Law Journal 24 48.
[123] Peter Muchlinski, '"Caveat Investor"? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard' (2006) 55 The International and Comparative Law Quarterly 527..; *Waste Management v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004.
[124] *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1 Award, 30 August 2000.

This interpretation has been the submit of criticism for its extensive imposition of transparency obligations on host states.[125] The notion that host states have an obligation – a positive obligation – to ensure that foreign investors are cognisant of every regulatory measure that is or will be imposed is an onerous obligation indeed. Furthermore, some commentators have argued that if the logic of this position was taken to its conclusion, it could constitute the imposition of an advisory function with the processes of enacting this legislation.[126] A narrower interpretation was adopted by the tribunal in *Tecmed*, which indicated that the transparency requirement did not extend beyond obligations in relation to procedural fairness and due process.[127]

In any case, the relevance of this inherent inclusion is that transparency requirements may apply not only to host states but also to foreign investors. In *Azanian v Mexico*, the investors were able to secure a concession agreement on the basis of a claim that they had demonstrable and proven competence in the industry in which they were seeking to invest, and a partner with which the project would be carried out, and the resources to do so.[128] When this turned out not to be the case, with the third-party investor withdrawing from the project, the tribunal considered this non-disclosure to constitute 'unconscionable' conduct.[129] Similar facts and analogous reasoning can be seen by the award in *SPP v Egypt*.[130] More directly, the award in *Genin v Estonia* found that non-disclosure can negate the poor conduct of a host state where it was the non-disclosure that caused the supposed discriminatory

[125] Marc Jacob and Stephan Schill, "Fair and Equitable Treatment: Content, Practice and Method' in Marc Bungen and others (eds), International Investment Law: Handbook (CH Beck/Hart/Nomos 2015) 700.
[126] Stephan W. Schill, 'Revisiting a Landmark: Indirect Expropriation and Fair and Equitable Treatment in the ICSID Case Tecmed' (2006) 3(2) Transnational Dispute Management 1.
[127] *Tecnicas Medioambientales Tecmed S.A v United Mexican States*, ICSID Case No. ARB/AF/00/2 May 19 2003, Award, 29 May 2003 para 154.
[128] *Azanian v Mexico,* ICSID Case No ARB(AF)/97/2 Award 1 Nov 1999.
[129] Ibid para 110.
[130] *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Award (20 May 1992); Muchlinski, (n 116) 537.

conduct.[131] Indeed, the tribunal stated: "Mr. Genin's failure to disclose the true ownership of the companies in question was one of the very reasons for the Bank of Estonia's suspicions", and thus "its ultimate decision cannot be said to have been arbitrary or discriminatory against the foreign investors".[132] Indeed, it might be argued that the failure of an investor to be transparent in its dealings with the host state will necessarily lead to an adverse finding at arbitral tribunals, in part because of the principles of reasonableness and proportionality that have often been found to be inherent.[133]

Furthermore, it might reasonably be argued that regulation to increase standards of transparency might comprise part of an investor's legitimate expectations. Time and again, tribunals have held that these expectations must be 'reasonable'.[134] However, in light of the issuance of the OECD Guidelines on the Corporate Governance of State-Owned Enterprises, a reasonable expectation might be that a host state would indeed seek to ensure that these standards are being upheld. As to transparency, the guidelines provide:

"State-owned enterprises should observe high standards of transparency and be subject to the same high quality accounting, disclosure, compliance and auditing standards as listed companies."[135]

The provisions of the OECD Guidelines are not binding, but may come to inform an aspect of an investor's legitimate expectations if they have been referenced in legal instruments or policy documents.

From the foregoing analysis, it appears clear that the imposition of transparency requirements for SOEs will not breach standards of fair and equitable treatment, as non-

[131] *Genin v. Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, para 363.
[132] Ibid.
[133] Jacob and Schill (n 118) 700.
[134] *Duke Energy Electroquil Partners & Electroquil SA v. Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 para. 340; *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 359;
[135] *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (OECD Publishing, Paris 2015) 24.

disclosures by investors have frequently been balanced against host state conduct. Heightened disclosure requirements, and possible measures taken in response to non-disclosure, will therefore likely fall within a host state's regulatory autonomy. From the SOEs perspective, there is an expectation of transparency in relation to the laws adopted by the host state. Therefore, the transparency issue can be said to cut both ways.

While failure to comply with the laws relating to disclosure may lead to adverse findings at arbitral tribunals, this is also true of issues in relation to which SOEs have a lower standard of business conduct.

b. Irresponsible Business Conduct as 'Unconscionable Conduct'

The responsible business conduct of an enterprise generally relates to failure to comply with labour standards, environmental standards, the infringement of other local customs and regulations, and engaging in corruption.[136] The FET standard accords host states regulatory space in order to address these concerns.

Firstly, the issue of corruption or, more accurately, 'irregular contacts and connections' with government officials was raised before the award in *SPP v Egypt*.[137] Although the tribunal found itself unable to substantiate the claim, it held that:

"Nowhere, however, is there any specific allegation of unlawful conduct on the part of the Claimants which could conceivably vitiate the relevant agreements or excuse non-performance of the Respondents obligations under those agreements."[138]

[136] OECD, *State-Owned Enterprises as Global Competitors: A Challenge or an Opportunity?* (OECD Publishing, December 8 2016) 70.
[137] *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Award (20 May 1992).
[138] Ibid para 128; Muchlinski (n 116) 538.

Thus, there is a clear recognition on the part of the arbitrators that if such actions were to have been carried out by the investor, this could mean that the obligations on which the investor might seek to rely have been vacated. However, this does raise the possibility that there was, in fact, illegality on both sides. In such circumstances, should the investor be able to rely on the unlawful acts of officials? Or should host states be permitted to escape their international obligations by claiming illegality by the authorities? This is a debate that is currently ongoing amongst scholars.[139] The legal position is, therefore, uncertain.

Moreover, host states measures taken to address clear violations of their domestic law will clearly fall within the scope of being fair and equitable, if those laws have been transparently communicated. For example, if a host state should set a minimum wage, lay it out in legislation as well as in publicly-available policy documents, then measures taken to enforce these rules will have no redress in international arbitration. In these respects, host states will likely have the regulatory autonomy to address the lower standards of responsible business conduct often attributed to SOEs. If an executive from an SOE was to take a bribe or offer to pay one, this may well vitiate the international protections to which they would otherwise be able to turn.

c. Is a 'Commercial Purpose' Requirement a Breach of FET Non-Discrimination?

A requirement to act commercially is included in many national foreign investment regulations. It is attended by a series of definitional challenges. In the context of SOEs, it is clearly utilised as a way in which to ensure that SOEs are not acting for the pursuance of their home state. However, in some jurisdictions, this requirement is not couched in negative terms

[139] Stephan Schill, 'Fair and Equitable Treatment, the Rule of Law and Comparative Public Law' in Stephan W Schill, *International Investment Law and Comparative Public Law* (OUP Oxford 2010).

– i.e. it does not say the SOEs are prevented from pursuing such a strategy – but is instead expressed in positive terms. This traditionally takes the form of words such as 'should have commercial considerations' or should 'act commercially'.

However, an issue might arise in the context of the FET standard if this requirement is applied discriminately. While FET is considered an absolute standard, thereby not requiring comparison with other investors in order to find a breach, the act of treating foreign investors discriminately may constitute unfair treatment in and of itself. This principle stems from the notion of FET as an aspect of the international rule of law that was referred to by the International Court of Justice in the *Asylum* case, where it referenced "arbitrary action" being "substituted for the rule of law."[140]

However, the bar for the invocation of these standards has been set very high. The tribunal in *Loewen* held that a decision was taken contrary to the municipal law and also was discriminatorily applied to the foreign investor.[141] Whether or not a measure must both be illegal under national law and discriminatory is unclear from the jurisprudence, or indeed whether non-discrimination is an aspect of FET at all. Indeed, the tribunal in *Genin* stated that "customary international law does not… require that a state treat all aliens (and alien property) equally, or that it treats aliens as favourable as nationals."[142] Consequently, the exact content or existence of the FET standard is not entirely clear. What is certain is that treatment that merely distinguishes between one investor and another, absent illegality or the existence of bad faith, is unlikely to breach the standard. One particularly relevant point raised related to the inconsistent application of domestic law with respect to foreign

[140] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* Judgment [1989] ICJ Reports 15 para 128.
[141] *Loewen Group Inc and Raymond L Loewen v. USA*, ICSID Case No. ARB(AF)/98/3 (NAFTA), Award, 26 June 2003, para 135.
[142] *Alex Genin v. Estonia* para. 368;

investors. It has been held that where differential treatment resulted from the application of the same methodological test, then this would not constitute a violation of fair and equitable treatment.[143]

With this in mind it is pertinent to return to the commerciality requirement often expressed in national regulatory frameworks. Rozanov has highlighted that privately-owned investors also factor extra-financial matters into determinations or strategies as to their investment activity.[144] So-called responsible or 'ethical' investment strategies are a unique selling point among many businesses within the financial sector, be it investment funds or otherwise. Furthermore, such a phenomenon is considered advantageous for the creation of a diversified and healthy financial sector.[145] Given this context, the 'commerciality' requirement must be applied very carefully in order to avoid the risk of potential breach of FET in IIAs. For example, if measures were taken against an SOE by virtue of its 'non-commerciality', and this decision was absent further clarification as to the precise nature of this non-commerciality, then a host state might argue that the selective enforcement of this provision amounted to discriminatory treatment. It is unclear whether or not arbitral tribunals would be receptive to such a suggestion, but it is nevertheless worth bearing in mind when formulating regulations or taking decisions on the basis of supposed non-commerciality. One remedy might be to adopt the measures taken by Australia, above, in relation to 'political' investment.

Take in its entirety, the standard of fair and equitable treatment in many IIAs offers adequate regulatory space in order for host states to regulate the corporate governance standards of state-owned enterprises. Under the circumstances laid out above, it is unlikely

[143] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 10.3.47
[144] Rozanov (n 86) 262.
[145] Ibid.

that an arbitrator would find that imposition of such standards is, in themselves, unfair or inequitable. One caveat to this conclusion is that there remains a requirement that measures taken in response to these supposed actions be proportionate. For example, the tribunal in *Pope and Talbot* referred to the "reasonableness of the conduct of an administrative agency" in rejecting a violation of the FET standard.[146] Indeed, the tribunal in *Saluka v. Czech Republic* spoke of "a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other", before being justified by a "reasonable relationship to rational policies".[147] Despite the fact that this approach has been criticised for its somewhat tautological reasoning, tribunals have been inclined to take an approach that seems to balance the investor's interests with state interests.[148] As such, SOE investors may well be protected from measures taken to enforce corporate governance measures that are disproportionate, but a lack of transparency for SOEs will still be capable of being addressed by host states.

VI. THE INCLUSION OF CORPORATE SOCIAL RESPONSIBILITY AND TRANSPARENCY REQUIREMENTS FOR SOES IN IIAS

There are various ways through which requirements as to corporate social responsibility and transparency can be included in international investment agreements, both directly and indirectly. One method of indirect inclusion is to reference an investor's compliance with

[146] Pope & Talbot Inc v Government of Canada UNCITRAL/NAFTA, Award on the Merits of Phase 2, 10 April 2001, para. 123.
[147] Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006, para. 305.
[148] Roland Kläger, 'Fair and Equitable Treatment' in International Investment Law (Cambridge University Press, 2011) 243.

domestic law as a condition for investment protection. For example, the Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area provides:

"COMESA investors and their investments shall comply with all applicable domestic measures of the Member State in which their investment is made."[149]

Therefore, the transparency requirements provided for state owned foreign investors in domestic law would be a condition for application under the IIA.

Alternatively, international investment agreements could contain an explicit provision for a host state's authority to collect or request information with respect to a foreign investor. Such a clause is contained in the Azerbaijan-Croatia BIT 2007, which states:

"Host Contracting Party has the right to seek information from a potential investor or its home state about its corporate governance history and its practices as an investor"[150]

This inclusion would clearly insulate the regulation of the host state from finding that their imposition of regulations of transparency and disclosure violated the provisions of the BIT.

Furthermore, particularly relevant in the case of SOEs, the provisions may impose responsibilities on the contracting parties to ensure that investors in their territory comply with anti-corruption legislation, labour standards and environmental standards.[151] Article 72 of the European Community–Caribbean Forum (CARIFORUM) Economic Partnership Agreement contains such a provision, which includes a provision that "Investors act in accordance with core labour standards as required by the International Labour Organization

[149] Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area.
[150] Article 3 Azerbaijan-Croatia BIT (2007)
[151] UNCTAD, 'Transparency' UNCTAD Series on Issues in International Investment Agreements II UNCTAD/DIAE/IA/2011/6 34.

(ILO) Declaration on Fundamental Principles and Rights at Work, 1998, to which the EC Party and the Signatory CARIFORUM States are parties".[152]

Similarly, standards of transparency or corporate social responsibility could be included by direct reference to the OECD Guidelines on the Corporate Governance of State-Owned Enterprises within international investment agreements.[153] This author has been unable to find any such instances where this inclusion has in fact occurred.[154] However, several international investment agreements do indeed contain provisions for corporate social responsibility, some of which contain a direct reference to such guidelines. This is most apparent in Norway's Model BIT and the treaty practice of Canada and the European Union. The Canada-Benin BIT provides:

"'Each Contracting Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognised standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Contracting Parties. These

[152] Article 72: Behaviour of investors
The EC Party and the Signatory CARIFORUM States shall cooperate and take, within their own respective territories, such measures as may be necessary, inter alia, through domestic legislation, to ensure that:
(a) Investors be forbidden from, and held liable for, offering, promising or giving any undue pecuniary or other advantage, whether directly or through intermediaries, to any public official or member of his or her family or business associates or other person in close proximity to the official, for that person or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, or in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an investment.
(b) Investors act in accordance with core labour standards as required by the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work, 1998, to which the EC Party and the Signatory CARIFORUM States are parties.
(c) Investors do not manage or operate their investments in a manner that circumvents international environmental or labour obligations arising from agreements to which the EC Party and the Signatory CARIFORUM States are parties.
(d) Investors establish and maintain, where appropriate, local community liaison processes, especially in projects involving extensive natural resource-based activities, in so far that they do not nullify or impair the benefits accruing to the other Party under the terms of a specific commitment.
[153] *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (OECD Publishing, Paris 2015).
[154] Lauge N. Skovgaard Poulsen, 'Investment Treaties and the Globalisation of State Capitalism: Opportunities and Constraints for Host States' in R. Echandi and P. Sauvé (eds.), *Prospects in International Investment Law and Policy* (Cambridge: Cambridge University Press, 2012) 86.

principles address issues such as labour, the environment, human rights, community relations and anti-corruption."[155]

There are several features of this provision that are particularly notable. Firstly, it is pertinent to highlight the softness of the language used – phrases like 'should encourage' and 'voluntarily incorporate' – indicate that these do not constitute obligation in relation to which a party could easily claim a breach. Moreover, unlike the Norway Model BIT, it does not reference a specific set of standards to which investors should be encouraged to conform.[156] As such, both the nature of the obligation on the extent of state's efforts and the substance of the standards they are supposed to be promoting are unclear, and do not yet have the teeth to directly discipline investors, nor require host states to do so. It does not impose an obligation on investors. Consequently, there is likely to be real difficulties in the enforcement of such provisions.[157]

Nevertheless, their inclusion may well help in interpreting other provisions. For example, were an investor to challenge measures taken after a failure to disclosure information, the existence of the corporate social responsibility requirement may way lead arbitrators to conclude that a minimum standard of corporate governance was envisaged as part of the treaty. As such, they help provide context to the rest of the treaty, but are, as yet, without the requisite teeth to constitute binding obligations.

a. Conclusion

[155] Article 13 Canada-Benin BIT (2013).
[156] Article 31 Norway Model BIT (2015).
[157] Ying Zhu, 'Corporate Social Responsibility and International Investment Law: Tension and Reconciliation' (2017) Nordic Journal of Commercial Law 30 117.

This article has sought to explore the extent to which international investment agreements leave requisite regulatory autonomy for host states to address the corporate governance of state-owned foreign investors, whilst also establishing whether these investors are protected from the imposition of treatment in relation to their corporate governance which is unfair, discriminatory, or motivated by protectionism.

Firstly, it is important to establish that not all of the concerns surrounding the corporate governance of state-owned foreign investors stand up to empirical scrutiny, nor do they apply equally across the entire class of investors. Non-commercial policy objectives are indeed an inherent feature of some SOEs, most notably those for whom a non-commercial policy objective is their founding purpose. To that extent, host state concern, and indeed legislative countermeasures, are justified, to the extent that they seek to prohibit political or strategically motivated investment. On each of these grounds, each SOE requires a case-by-case assessment, as does each transaction.

Contained in Australia's foreign investment regulations is a reduced standard to categorise transactions involving SOEs as reviewable standards to assess whether they are in Australia's 'national interest' - which involves and analysis of their transparency, character and commerciality - and separate, target regulations for foreign government investors. The latter of these contains provisions specifically on the prevention of political investment, and for an in-depth analysis of the corporate structures of SOEs in order to ensure their autonomy. However, it has been argued that these provisions are highly discretionary. By definition, they impose different corporate governance standards for SOE investors when compared to private investors. As such, it is pertinent to examine their compatibility with IIAs.

In relation to national treatment, the central issue was around whether or not the supposed political purpose of an enterprise was a sufficient ground for differential treatment.

Considering the 'regulatory context' test envisaged by DiMascio and Pauwelyn, it has been argued that the existence of a political purpose may be grounds for discriminatory treatment, as the investor would raise different public policy concerns. Even on the 'competitive relationship' test, the absence of striving to compete may be grounds to establish a ground for discriminatory treatment, but this remains open to question. In this author's opinion, the best route for host states would be to claim that the discriminatory treatment was justified by a legitimate public policy such as national security, in the case of SOE pursuing non-commercial objectives.

The fair and equitable treatment standard is a little more helpful to host states seeking to impose measures resulting from an SOE's lack of candour, for two reasons. The first is that transparency has been held to be an inherent aspect of FET on a number of occasions. In particular, a failure to comply with the requisite disclosure may prevent an adverse finding under FET, where an arbitral tribunal would otherwise have done so. Secondly, arbitral tribunals have consistently held that foreign investors have an obligation not to act 'unconscionably'. Corruption could be an example of such unconscionable conduct, and SOE investors may not be able to rely on the FET standard to seek redress for host state measures taken in response to this conduct. Furthermore, host states should apply 'commerciality' requirements carefully, in order to apply them equally to private and state-owned investors, in order to avoid breaching standards of non-discrimination.

Finally, perhaps the most effective way to ensure that host states have regulatory autonomy to regulate the standards of corporate governance to which SOEs must adhere, is to explicitly provide for this in the text of IIAs. Whether through explicit provision for the compliance with national law, host state's authority to collect such information, or indeed obligation to do so. Going further, explicit reference to the OECD Guidelines on the Corporate Governance of State-Owned Enterprises would establish concrete standards

against which the conduct of SOEs could be judged. While standards of corporate social responsibility are beginning to emerge in international investment agreements, these obligations are as yet in their infancy, but may help to contextualise other provisions.

In general, host states are able to implement regulations imposing standards of corporate governance standards on SOEs at the pre-establishment stage of an investment, in the absence of non-discriminatory treatment to the contrary. For the post-establishment life of an SOE's investment, host states should be cognisant of their obligations under IIAs with regard to fairness and non-discrimination, but remain able to impose corporate governance requirements or take measures against SOEs that fail to comply with domestic regulations.