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Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)
Editor: Ken Davies (Kenneth.Davies@law.columbia.edu)
Managing Editor: Amanda Barnett (Barnett.Amanda@columbia.edu)

State-controlled entities as claimants in international investment arbitration: an early assessment

by

Michael D. Nolan & Frédéric G. Sourgens*

State-controlled entities (SCEs) are increasingly important participants in international investment flows and international trade. Cumulative FDI by sovereign wealth funds (SWFs) has reportedly reached US$100 billion. SWFs are significant equity investors in, and provide significant debt financing to, every kind of company, from professional sports franchises to container ports. In addition to the role of these funds, national oil companies are growing in regional and international importance. In many countries, other industries are also increasingly government-owned.

Not surprisingly, SCEs already act as claimants in contractual arbitrations, frequently conducted *ad hoc* or under the UNCTIRAL arbitration rules. Examples from the 2009 American Lawyer Arbitration Scorecard include arbitrations instituted by the National Property Fund of the Czech Republic against Nomura Bank, as well as by Sonatrach, the Algerian national gas company, against Repsol and British Petroleum.[1] Contractual arbitration thus may sidestep many of the complex issues treaty arbitrations may raise for SCEs. With that said, SCE cases may encounter some unique issues at the enforcement stage. The New York Convention allows the following reservation by member states: "This State will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the

*Michael D. Nolan (MNolan@milbank.com) is a partner practicing international arbitration at Milbank, Tweed, Hadley & McCloy LLP ("Milbank") in Washington, D.C.. Frédéric G. Sourgens (FSourgens@milbank.com) is an associate at Milbank in Washington, D.C.. This *Perspective* benefited from the Vale Columbia Center on Sustainable International Investment's *Roundtable on State and State-Controlled Entities as Claimants in International Investment Arbitration* on March 19, 2010 (for the report of that Roundtable, see www.vcc.columbia.edu). The authors also wish to thank Efi Chalamish, Robert Howse and Edward Kehoe for their helpful comments on this *Perspective*.

[1] Michael D. Goldhaber, *American Lawyer Arbitration Scorecard 2009 – Contracts*, available at http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202431683613&hbxlogin=1.

national law." This reservation has been made by such diverse states as Argentina, China, Cuba, Ecuador, Greece, India, Nigeria, the Philippines, the United States, and Venezuela.[2] Whether a dispute involving an SCE as Claimant would be considered "commercial" under the national law of these states may differ from situation to situation – leaving some SCE claimants with potential enforcement issues depending upon the case and jurisdiction in which enforcement might be sought.

How and when SCEs can participate in international investment arbitration, as opposed to strictly contractual arbitrations, likely soon will emerge as a complex question. SCEs facing a dispute with a host state government to which an international investment agreement (IIA) could apply may wish to use treaty arbitration as an alternative or additional means of dispute resolution. SCEs may prefer the enforcement mechanisms of the ICSID Convention. SCEs may consider that host state treatment violated a treaty provision without breaching the underlying contract. Finally, SCEs may seek to invoke access to market provisions in bilateral investment treaties if an investment contract is not concluded or revoked at an early stage in a transaction for the SCEs deems to be improper political reasons.

SCE treaty claims face two different types of jurisdictional hurdles: ***first***, a SCE must satisfy the requirements of the underlying IIA; ***second***, in the case of ICSID arbitration, the SCE also must fall within the scope of the ICSID Convention. SCEs can invoke IIAs only if they are qualifying "investors". Most definitions of "investors" in IIAs were drafted prior to considerations of SCE claimants. Some refer to "legal entities, including company, association, partnership and other organization, incorporated or constituted under the laws and regulations of either Contracting Party and have their headquarters in that Contracting Party."[3] Others, such as the definition of Saudi investors in the bilateral investment agreement between Saudi Arabia and the People's Republic of China, include expressly "Institutions and authorities such as the Saudi Arabian Monetary Agency, Public Funds, Development Agencies and other similar governmental institutions having their head offices in Saudi Arabia."[4] This issue will have to be parsed on a case-by-case basis. But as the Saudi example shows, treaties may expressly include some SCEs in the definition of investor.

The ICSID Convention may present additional hurdles. The ICSID Convention applies to disputes of host states and nationals of other states and not to disputes between two states. Whether an SCE is a "national" may be subject to a formal or a functional analysis. Many ICSID tribunals have applied a functional test that looks to whether the SCE acted as an agent of the state or performed a state function. This question also must be addressed on a case-by-case basis.[5]

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[2] *See* Status, 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (b), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited September 16, 2010) (listing both the reservation and the states that have made it).

[3] Agreement between the Government of the Republic of Uganda and the Government of the People's Republic of China concerning Reciprocal Protection of Investments, Art. 1(2)(b), IC-BT 525 (2004).

[4] Agreement between the Government of the People's Republic of China and the Kingdom of Saudi Arabia on the Reciprocal Promotion and Protection of Investments, Art. 1(2)(b)(3), IC-BT 462 (1996). SCEs were of particular importance to that agreement.

[5] *See Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, dated Jan. 25, 2000, at ¶ ¶ 74- 79, IIC 85 (2000) (dealing with a SCE as a defendant); *Ceskoslovenska Obchodni Banka AS v Slovakia*, Decision on Objections to Jurisdiction, ICSID Case No ARB/97/4, at ¶ 17, IIC 49 (1999). So far, at least two ICSID cases have been commenced by SCEs. *See Government of the Province of East Kalimantan v. PT Kaltim Prima Coal* (ICSID Case No. ARB/07/3) (the Award rendered in that case is not publicly available); *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited* (ICSID Case No. ARB/98/8) (that case is currently subject of an interpretation proceeding).

The role of SCEs as claimants in international investment arbitrations likely will evolve in the near future. It can be anticipated that, in some instances at least, these arbitrations will run in parallel to contract arbitrations. A key question in treaty arbitrations will be whether the SCE qualifies as an "investor" under the treaty. Similarly, SCE claims will explore the limits of disputes between two states and disputes between a state and a national of another state under the ICSID Convention. The answer to both questions will inform the ongoing global policy debate about the proper role of SCEs in international investment flows.

Given that jurisprudence and scholarship are still in an early stage of development, the challenge may be resolved first at the treaty drafting stage. As the example of the Saudi treaty shows, treaty parties may, if deliberate about the potential issues associated with SCEs acting as claimants, reflect their specific intentions in their negotiated definition of the term "investor." With progress on the treaty front, it is to be expected that the issues faced by tribunals applying IIAs, as well as the ICSID Convention, similarly would become clearer. Until that time, however, each case will have to be examined on its own merits. What can be said at this point is that it is likely that some SCEs would pass muster under both IIAs and the ICSID Convention in some instances. The trick is the question: which instances?

For further information please contact: Vale Columbia Center on Sustainable International Investment, Ken Davies, Senior Staff Associate (212) 854-7269, Kenneth.Davies@law.columbia.edu.

The Vale Columbia Center on Sustainable International Investment (VCC), led by Dr. Karl P. Sauvant, is a joint center of Columbia Law School and The Earth Institute at Columbia University. It seeks to be a leader on issues related to foreign direct investment (FDI) in the global economy. VCC focuses on the analysis and teaching of the implications of FDI for public policy and international investment law.

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