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Managing Editor: Jennifer Reimer (jreimer01@gmail.com)

The standing of state-controlled entities under the ICSID Convention: Two key considerations

by
Mark Feldman*

The ICSID Convention, under Article 25(1), applies only to those investment disputes that are between a contracting state and a "national" of another contracting state. Given that limitation, and in light of the significant and growing amount of foreign investment by state-controlled entities (SCEs),[1] ICSID tribunals likely will need to address one fundamental issue with greater frequency: whether disputes arising from SCE investments constitute investor-state disputes falling within, or state-to-state disputes falling outside of, the scope of the ICSID Convention.[2]

For claims submitted to ICSID arbitration by SCEs, arbitral tribunals consistently have found that such entities meet the "national" requirement under Article 25(1), often without analysis of how investor-state and state-to-state disputes should be distinguished under the provision.[3]

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* Mark Feldman (mef31@columbia.edu) is Assistant Professor of Law at Peking University School of Transnational Law. He previously served as Chief of NAFTA/CAFTA-DR Arbitration in the Office of the Legal Adviser at the US Department of State. The views expressed in this article do not necessarily reflect those of the US Government or the US Department of State. The author would like to thank Tom Johnson, Bart Legum and Jeremy Sharpe for their helpful comments on an earlier text.

[1] See, e.g., Karl P. Sauvant and Jonathan Strauss, "State-controlled entities control nearly US$ 2 trillion in foreign assets," *Columbia FDI Perspective,* No. 64, April 2, 2012.

[2] For fuller discussion of the issue, see Mark Feldman, "The standing of state-owned entities under investment treaties," in Karl P. Sauvant, ed., *Yearbook on International Investment Law & Policy 2010/2011* (New York: OUP, 2011).

[3] See, e.g., Hrvatska v. Slovenia, ICSID Case No. ARB/05/24, *decision on the treaty interpretation issue* (June 12, 2009); CDC v. Seychelles, ICSID Case No. ARB/02/14, *award* (December 17, 2003); Telenor v. Hungary, ICSID Case No. ARB/04/15, *award* (September 13, 2006).

One tribunal, however, has addressed that distinction. In the *CSOB v. The Slovak Republic* case, the tribunal first observed that Article 25(2) defines "National of another Contracting State" to include both "natural" and "juridical" persons, but that neither of those terms is "defined as such in the Convention."[4] The tribunal then turned to "the accepted test" -- formulated by Aron Broches -- for analyzing the "national" requirement with respect to a "mixed economy company or government-owned corporation": whether the entity acts as an agent for the government or discharges an essentially governmental function.[5]

Applying that test, the *CSOB* tribunal concluded that, so long as a state-controlled claimant's activities are commercial in nature, the claim does not give rise to a state-to-state dispute, even if the claimant's activities are "driven by" governmental policies and even if the entity is controlled by the state such that it is "required" to do the state's "bidding."[6] According to the *CSOB* tribunal, the purpose -- as distinguished from the nature -- of a state-controlled claimant's activities is not relevant when determining whether the claimant meets the "national" requirement under Article 25(1).[7]

That finding is in tension with two key aspects of the ICSID Convention. First, the ICSID Convention was intended to apply to private, but not public, foreign investment. Second, the ICSID Convention was intended to respond to a procedural gap that existed between state-to-state disputes (which could be resolved in, among other fora, the International Court of Justice), and disputes between private entities (which could be resolved through domestic courts or commercial arbitration).[8] Each of those factors supports consideration of not only the nature, but also the purpose, of a state-controlled claimant's activities when determining whether the claimant meets Article 25(1) requirements.

First, regarding private foreign investment, the World Bank had considered, prior to the adoption of the ICSID Convention, how to contribute to the investment climate in light of the quantitative and qualitative importance of private foreign investment for development.[9] That contribution ultimately took the form of the ICSID Convention, which opens by recognizing "the need for international cooperation for economic development, and the role of private international investment therein...." Consistent with that preambular clause, "States acting as investors have no access to the Centre in that capacity."[10]

Second, regarding the ICSID Convention's role in addressing a procedural gap between state-to-state and purely private disputes, "there was general agreement" from the outset

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[4] CSOB v. The Slovak Republic, ICSID Case No. ARB/97/4, *decision on objections to jurisdiction* (May 24, 1999), at 16.
[5] Ibid., at 17.
[6] Ibid., at 20 and 24.
[7] Ibid., at 21.
[8] See Aron Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (Dordrecht: Martinus Nijhoff Publishers, 1995), p. 167.
[9] Ibid., p. 193..
[10] Christoph Schreuer et al., *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2009), p. 161.

of ICSID Convention negotiations that state-to-state, as well as purely private, disputes should be excluded from ICSID jurisdiction.[11] That exclusion is reflected not only in Article 25(1), but also Article 27, which prohibits diplomatic protection and thus denies the investor's state of nationality access to the Centre.[12] In addition, a proposal by "a number of governments" to create a limited exception to the state-to-state exclusion -- which would have permitted contracting states to submit subrogation claims to ICSID arbitration -- faced "vigorous" opposition and ultimately "was dropped."[13]

Given the above two factors, the motivations driving the activities of a state-controlled claimant should be considered under Article 25(1). A failure to consider such motivations risks sweeping into ICSID arbitration public foreign investment disputes between states, which would exceed clear ICSID Convention boundaries.

For further information please contact: Vale Columbia Center on Sustainable International Investment, Jennifer Reimer, jreimer01@gmail.com or jreimer@lyhplaw.com.

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[11] Broches, op. cit., p. 167.
[12] Schreuer et al., op. cit., pp. 186–187.
[13] Broches, op. cit., p. 167.

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