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State-controlled entities as "investors" under international investment agreements

by
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A review of the definition of "investor" and investor-state dispute resolution clauses in 851 international investment agreements (IIAs)[1] reveals that, except in two, state-controlled entities (SCEs) (sovereign wealth funds and state-owned enterprises (SOEs)) have equivalent standing to their purely private counterparts as investors under such IIAs.

In particular, of the 851 IIAs reviewed:[2]

- 691 IIAs do not define "investor" such that it would exclude SCEs as the definition is not based on the nature of ownership but, rather, on whether a legal person was duly constituted, incorporated, established, or organized in accordance with the law of a contracting party. Therefore, if an SCE is established as required under the law of a contracting party, it qualifies as an "investor."

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[1] The IIAs reviewed include the bilateral investment treaties (BITs) of countries that account for 70% of world foreign direct investment outflows in the period 2008-2010; BITs of certain countries, such as the United Arab Emirates, that are home to the top ten largest SWFs as ranked (by assets under management) by the Sovereign Wealth Fund Institute; the model BITs of Canada, France, Germany, Norway, United States, and United Kingdom; a cross-section of regional free trade agreements (FTAs) with investment chapters, such as the North-American Free Trade Agreement and the Association of South East Asian Nations Comprehensive Investment Agreement; as well as bilateral FTAs to which at least one of the sample states is a party; and multilateral agreements such as the Energy Charter Treaty.

[2] The figures below do not add up to 851 as the IIAs falling in the second and third category below overlap in some cases.

- 81 IIAs define an "investor" to include a "state enterprise" as well as entities that are government owned and controlled, thereby expressly capturing SCEs.

- 52 IIAs explicitly provide that an "investor" includes the government of a contracting party and/or such contracting party itself. Such IIAs do not preclude a contracting party from acting in the capacity of an investor through an SCE.

- None of the IIAs exclude SCEs from the definition of an "investor" on the basis that such entities have not been organized primarily for the purpose of profit or do not carry out investments motivated by pecuniary gain. Thus, the IIAs do not appear to disqualify certain SCEs, such as government institutions, development funds and monetary agencies that may not strictly be established for pecuniary gain.

- Only two IIAs expressly exclude the SOEs of one contracting party.[3] Both IIAs were concluded in 1983 and are otherwise silent on the status of SOEs.

- 33 IIAs do not contain a definition of "investor."

Therefore, SCEs generally have recourse to the investor-state dispute resolution provisions of IIAs as "investors." In particular, as approximately 78% of the IIAs surveyed allow for investor-state dispute resolution before the International Centre for Settlement of Investment Disputes (ICSID) pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), in most cases, SCEs will have recourse to the ICSID dispute resolution framework as "investors."

There is some debate among scholars regarding whether SCE access to the ICSID framework as investors should be limited if the IIA otherwise covers SCEs in the definition of an "investor." The text and negotiating history of the ICSID Convention do not unequivocally address the standing of SCEs as a diverse class of investors. In addition, the handful of ICSID arbitral decisions which have addressed this issue did not establish clear guidelines regarding the extent to which SCEs are able to initiate claims as investors under IIAs.[4]

We should be mindful that if indeed SCE access to the ICSID framework as investors is somehow limited as suggested by certain scholars,[5] SCEs might well turn to other avenues of dispute resolution. The majority of IIAs that grant SCEs access to ICSID also enable SCEs to elect to refer an investment dispute to an arbitral institution other than ICSID, such as the International Chamber of Commerce, and/or pursuant to arbitral rules

[3] The Panama BITs with Germany and Switzerland.
[4] See e.g. Československa Obchodní Banka, A.S. v. Slovak Republic, ICSID Case No. ARB/97/4, *decision on objections to jurisdiction* (May 24, 1999).
[5] See e.g. Paul Blyschak, "State-owned enterprises and international investment treaties: When are state-owned entities and their investments protected?,' *Journal of International Law and International Relations*, vol. 6 (Spring 2011), pp. 1-52, at 29-34; and Mark Feldman, "The standing of state-owned entities under investment treaties," in Karl P. Sauvant, ed., *Yearbook on International Investment Law and Policy 2010-2011* (New York: OUP, 2011), pp. 615-637.

other than the ICSID Convention, such as those of the United Nations Commission on International Trade Law.

As the number of treaty-based investment arbitrations is growing alongside increased levels of foreign direct investment by SCEs,[6] it is likely that investment disputes involving SCEs as claimants will occur with greater frequency going forward. Thus, in the long term, any limits on the access of SCEs to ICSID may diminish the institutional significance of ICSID.

For further information, including information regarding submitting to the *Perspectives*, please contact: Vale Columbia Center on Sustainable International Investment, Jennifer Reimer, jreimer01@gmail.com or jreimer@lyhplaw.com.

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[6] UNCTAD, *World Investment Report 2011* (Geneva: UNCTAD, 2011) and UNCTAD, *IIA Issues Note*, no. 1 (April 2012).