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State owned enterprises as claimants

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While investment arbitration was initially conceived to protect private international investment in foreign countries, in a number of recent cases State-owned enterprises have successfully established standing to bring claims against foreign States.

In the context of the emergence of a great many State-owned enterprises in Asia, and their active participation in the BRI, it is likely that State-owned enterprises will increasingly be seeking to act as investor claimants in the region.

For State-owned enterprises (SOEs) to qualify as investor claimants, there are three key questions to consider.

1. **Does the investment treaty or contract give standing to SOEs?**

An investment treaty or contract can define an "investor" to include or to exclude SOEs. For example, the US-Korea Free Trade Agreement (2012) includes a State "or state enterprise thereof" in its definition of investors, while the China-Japan-Korea Trilateral Investment Agreement (2012) includes in its definition of investor entities that are "government-owned or controlled". Where the treaty or contract expressly confers standing on SOEs, the question whether the SOE can be an investor claimant is relatively straightforward. SOEs entering into contracts should seek to clarify their standing in their investment contracts, so as to avoid any possible jurisdictional objection when a dispute arises. That clause will need to be carefully formulated and adapted to the particular circumstances of the SOE, and the arbitration forum, so it is a matter on which counsel's advice should be sought at the earliest possible stage of an investment.

2. **Where the forum is ICSID arbitration, one needs to consider the specific functions of the SOE in relation to the investment**

The ICSID Convention was primarily conceived to protect "private international investment", as recorded in the preamble to the Convention and the preparatory materials. In an arbitration under the ICSID Arbitration Rules or the ICSID Additional Facility Arbitration Rules, a claimant has to comply with the jurisdictional requirements of the ICSID Convention, which include the requirement to be a "national of [a] Contracting State". In several ICSID arbitrations, respondent States have raised objections to the standing of SOEs as claimants, on the basis that the SOE was either acting as an agent for their government or was discharging an essentially governmental function. Those two elements reflect a test proposed by Aron Broches, the first Secretary-General of ICSID, which has come to be known as the "Broches test" and mirror the customary international law rules on attribution of internationally wrongful acts to States which are codified in Articles 4 and 5 of the International Law Commission's Articles on State Responsibility.

There are three published ICSID awards which have addressed jurisdictional objections to the standing of SOEs, including a decision on jurisdiction in a case involving a Chinese SOE, *Beijing Urban Construction Group v Yemen*, issued in 2018. All three published awards have taken a uniform approach: they have focused on the functions of the claimant in relation to the particular investment, rather than the direction and control exercised over the claimant by their State or its functions in advancing their government policies more broadly. The cases confirm that the following evidence will be relevant in applying the Broches test:

- For the FIRST limb of the test: the extent to which the SOE acts as an agent of the State, rather than a commercial contractor or investor, in the particular context of the investment; and
- For the SECOND limb of the test: the extent to which the SOE discharges an essentially governmental function in the particular context of the investment.

This requires a focus on the nature of the activities of the SOE in relation to the particular investment, rather than the extent to which they are directed or controlled by the State, or its underlying State policies. The authorities suggest that the scope and meaning of "essentially governmental function" is one which depends on the particular society, its history and traditions, and thus require consideration on a case-by-case basis, taking account of the content of the powers, the way they have been conferred on the SOE, the purpose for which they are exercised and to the extent to which the SOE is accountable to the government for their exercise.

In any case brought by an SOE, early consideration should be given to the strategy for both the claimant SOE and the respondent State. On the claimant side, an SOE needs to anticipate a challenge to jurisdiction and be prepared to explain why its functions in relation to the investment are commercial, rather than government. On the respondent side, the State needs to consider what evidence it can obtain about the functions of the SOE in relation to the investment, taking account of the situation of the particular State of nationality of the SOE.

3. What about non-ICSID arbitration?

Are there any hurdles to the standing of an SOE as investor claimant in arbitration under other institutional rules (e.g. SIAC, HKIAC, ICC, SCC, LCIA, or UNCITRAL)?

While those rules do not generally contain additional jurisdictional requirements, if the claim is brought under an investment treaty, an SOE might face an objection to jurisdiction. If the treaty expressly defines an investor to include an SOE then the situation will be relatively straightforward. But where it does not, an SOE might be required to establish that it is an "investor" to take advantage of the investor-State dispute resolution clause in the treaty. If the investment treaty has an inter-State dispute resolution clause, it is arguable that the investor-State dispute resolution clause implicitly includes "States", and by extension, its enterprises, as investor claimants.

On that basis an SOE may be required to clear additional hurdles to establish that it has standing. So far, there have been no public investment treaty decisions addressing these questions, but given the increasing role of SOEs in the global economy, and their increasing use of investment treaty arbitration, we can expect to see these issues being addressed in the near future.

The views and opinions expressed in this article are those of the author and do not necessarily reflect the position of other members of 20 Essex Street.

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