ICSID: Jurisdiction ratione materiae and ratione personae

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Any questions
Issues covered

- ICSID Jurisdiction – ratione personae
  - Personal jurisdiction
    - (party to agreement and to arbitration)
  - Nationality
  - Additional Facility Rules
- ICSID Jurisdiction – ratione materiae
  - Subject matter jurisdiction
    - (is it an investment dispute?)

Ratione Personae Jurisdiction

Who may be a party to ICSID proceedings?
Who may be a party to ICSID Proceedings

Article 25(2)

(2) “National of another Contracting State” means:
(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.
Contracting States

- Participation in ICSID Convention
  - Critical time

- Constituent subdivision or agency
  - State entities
  - Subdivision or agency
  - Designation to Centre (time and form)

Ratione personae jurisdiction

- Main issues
  - Contracting state and
  - National of other contracting state
  - Constituent subdivision or agency of state
  - Nationality requirement
  - Local companies under foreign control
  - ICSID Additional Facility
Definitions of nationality

- Bases of definition
  - Formal
  - Law – statute
  - Treaty
- Issues of contention
  - Corporation
  - Control
  - Dual / multiple nationality

Classic International Law

- Diplomatic Protection
- *Barcelona Traction* (1970 Belgium v Spain – ICJ) – discretion nature of State’s power
- *Nottebohm* case (1955 Liechtenstein v Guatemala – ICJ) – genuine connection
- Treaty Definitions
Definitions in Investment Treaties

- Natural person
  - “national”
  - “Investor”
- Juridical person
  - Three criteria
    - Incorporation
    - Control
    - Management

Definition in Multilateral Treaties

- NAFTA
- ECT
- ASEAN
- ICSID
**Natural Person**

- Nationality of individuals
  - Objective determination of nationality
    - No host state nationality
  Jurisdiction often denied over individuals (dual nationals) but see more recently
    - Waguih Elie George Siag and Clorinda Vecchi v Egypt ICSID Case No. ARB/05/15

**Nationality Requirement**

- Soufraki v United Arab Emirates ICSID Case No ARB/2/7 (Italy/UAE BIT)
  - Claimant award 30 year Concession agreement to develop, operate & manage the Port at Hamriya
  - Claim filed under Italy/UAE BIT 1995
  - Did claimant fall with definition of a “national of another Contracting State”
  - Claimant produced evidence of his Italian nationality
Soufraki Conclusion

- Tribunal rejected the claim as claimant had acquired Canadian nationality and residence in 1991
- Jurisdiction denied under ICSID Article 25 and Article 1(3) BIT
- Annulment application
  - Manifest excess of power
  - Failure to state reasons
  - Rejected by ad hoc committee majority decision 5 Jun 2007

Juridical person

- “Nationality” of corporations
  - Nationality of a contracting state
  - Agreement on nationality
    - MINE v Guinea, award 6 January 1988
  - Private nature of investor
    - CSOB v Slovakia, decision on jurisdiction, 24 May 1999
Local companies under foreign control

- **Rationale of Article 25(2)(b)**
  - Agreement to treat the investor as a national of another contracting state
  - Express agreement – model clause 7
  - Implied agreement
    - *Amco v Indonesia*
    - *Klöckner v Cameroon*
  - Presumption of agreement
  - Legislation and treaties

Foreign control

- **Control by nationals of other contracting state**
- **Objective requirement of control**
- **Elements of control**
  - Shareholding?
  - Management?
  - Other?
- **Indirect control**
  - *Amco v Indonesia*
  - *SOABI v Senegal*
AUCOVEN v Venezuela  
ICSID Case No ARB/00/2  
• “Like the other objective requirements of Article 25 of the ICSID Convention, foreign control is not defined. Article 25(2)(b) does not specify the nature, direct, indirect, ultimate or effective, of the foreign control.” [para 110]
• Aucoven originally 99% owned by non-Contracting State (Mexico) agreement confirmed that if majority shareholder changed to a national of Contracting Party, ICSID arbitration would apply.
• Tribunal upheld jurisdiction even though US affiliate 100% owned by Mexican holding company

Tokios Tokeles v Ukraine  
• Tokios Tokelės v Ukraine (Case No. ARB/02/18)  
  • Claimant, Lithuanian company, engaged in business of advertising, publishing and printing in Lithuania and outside its borders
  • Incorporated Taki spravy in Ukraine, wholly owned subsidiary into which claimant invested over $6million
  • Alleged unreasonable & unjustified actions of Ukraine against Taki amounted to breach of Lithuania/Ukraine BIT 1994
• Dissent by President of Tribunal – Professor Prosper Weil
Objections to Jurisdiction Raised by Respondent

- Claimant not a genuine Investor of Lithuania
- Claimant did not make an investment in accordance with the laws and regulations of Ukraine
- The dispute does not arise from the Investment
- Claimants written consent was Improper and untimely
- Claimants and Respondents were not Parties to the Negotiation required by Article 8 of the BIT
- The “Dispute “ was not the subject of Negotiation as required by Article 8 of the BIT

Decision of tribunal

- In reaching its majority decision on jurisdiction the Tribunal was guided by Article 25 of the ICSID Convention
- as well as Articles 1 and 8 of the Ukraine-Lithuania BIT
Discussion Time

- Why does the ICSID Convention preclude persons with dual nationality from submitting a claim under the ICSID Convention?
- Why does Art. 25(2)(b) of the ICSID Convention permit foreign-controlled corporations to be deemed investors of the state from which the control is exercised? What effect does this have on the payment of damages?

Discussion Time

- How and when should a tribunal “pierce the corporate veil” to determine whether a foreign entity is a sham corporation set up for purposes of taking advantage of the BIT? Does it matter whether the sham entity is set up before or after a dispute arises, or before or after the dispute is seen on the horizon?
- Should indirect or minority shareholders be permitted to submit claims? Is granting them standing consistent with the requirement that there be an investment in order to support a tribunal’s jurisdiction?
Ratione Materiae
Jurisdiction

- Which disputes may be submitted to ICSID?
- What is “investment”?

What is an Investment
Article 25(1)

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

Ratione materiae jurisdiction

- Subject matter – investment disputes
  - Legal dispute
  - Arising directly
  - Investment
- Additional Facility
Three elements

- Legal dispute
  - Arise directly out of underlying transaction
  - The underlying transaction qualifies as investment
  - Article 41, 36
  - Additional Facility Rules

Legal dispute

- Dispute
- Political and commercial disputes
- Legal dispute
  - Legal nature
  - Legal basis
  - Claims for renegotiation?
  - See Executive Directors Report para 26 “scope of legal right” not “mere conflicts of interest”
Siemens AG v Argentina
ICSID Case No ARB/2/8

- “For the purposes of Article 25(1), a dispute may arise directly out of an investment made directly or indirectly by an investor. Whether in that situation the investor qualifies as such will depend on the definition of investor in the treaty or the terms of the investment contract. The direct requirement under the ICSID Convention is related to the investment dispute, not to whether the investor is direct or indirect.” [para 150]

- See Parkerings-Compagniet AS v Lithuania, ICSID Case No. ARB/05/8 award of Sept 2007 confirming:-
  - Direct 100% ownership interest …constitutes an investment [paras 249-255]

Indirect Interest

- Gas Natural SDG SA v Argentine Republic, Case No. ARB/03/10 (Spain/Argentina BIT)
  - Argentina argued that claimant was not an investor as it was only an “indirect shareholder” in the company
  - Tribunal rejected this as it clearly qualified as an investment under the terms of Article 1(2) BIT
  - Affirmed CMS v Argentina award
    - US company owned 29.42% of Argentinian company
Definition

- No definition in text
- Drafting history
- Report of the World Bank Executive Directors
- Objective requirement
  - Article 41

Discussion Time

- Why is dispute settlement under the ICSID Convention limited to those who have made an investment?
- How should investment under the ICSID Convention be construed – broadly or narrowly?
- Should the secretary-general of ICSID make that determination in the first instance, or should it be left to the arbitral tribunal?
Typical features of investment

- The project should have a certain duration
- There should be a certain regularity of profit and return
- There is typically an element of risk for both sides
- The commitment involved would have to be substantial
- The operation should be significant for the host State’s development

Other definitions

- Arguably, *Fedax v Venezuela* provides the first definition
- *Fedax v Venezuela*
  - Borderline case
  - Beneficiary by way of endorsement of debt instruments issued by Venezuela
  - Tribunal expects:
    - Certain duration, certain regularity of profit and return, assumption of risk, substantial commitment and significance for the host State’s development
Other definitions

- **Eureko v Poland**
  - Look at the overall picture
- **Joy Mining v Egypt**
  - Look at the overall picture
  - No jurisdiction
- **Franz Sedelmayer v Russian Federation**
  - Look at the overall picture
  - Exclude parts of claim(s)
- **Jan de Nul v Egypt** – duration!

Other definitions

- **BITs**
  - UK Model BIT
    - Enumeration – non-exhaustive
  - US Model BIT
    - Different approach
**UK Model BIT**

- “investment” means every kind of asset and in particular, though not exclusively, includes:
  - movable and immovable property and any other property rights such as mortgages, liens or pledges;
  - shares in and stock and debentures of a company and any other form of participation in a company;
  - claims to money or to any performance under contract having a financial value;
  - intellectual property rights, goodwill, technical processes and know-how;
  - business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.
  - A change in the form in which assets are invested does not affect their character as investments and the term “investment” includes all investments, whether made before or after the date of entry into force of this Agreement;

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**US Model BIT**

“investment” means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.
Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

The term "investment" does not include an order or judgment entered in a judicial or administrative action.

Discussion Time

- Why is the definition of investment in the U.S. Model BIT so broad?
- Should tribunals rely on past arbitral decisions when they are deciding cases? What are the benefits of this approach? What are the drawbacks?
Recent move away from five criteria

- “The Tribunal states that the requirements that were taken into account in some arbitral precedents for purposes of denoting the existence of an investment protected by a treaty (such as the duration and risk of the alleged investment) must be considered as mere examples and not necessarily as elements that are required for its existence.”
  
  M.C.I. Power Group L.C. and New Turbine, Inc. v Ecuador

- In the Tribunal’s view, there is no basis for a rote, or overly strict, application of the five Salini criteria in every case. These criteria are not fixed or mandatory as a matter of law. They do not appear in the ICSID Convention. On the contrary, it is clear from the travaux préparatoires of the Convention that several attempts to incorporate a definition of “investment” were made, but ultimately did not succeed.” para 312

  - Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania
  - Saba Fakes v Turkey

Malaysian Salvors ad hoc Committee decision

- *Malaysian Historical Salvors v Malaysia* ICSID Case No. ARB/05/10 (UK/Malaysia BIT)
  “...the Tribunal exceeded its powers by failing to exercise the jurisdiction with which it was endowed by the terms of the Agreement and Convention…” [para 80]

  Because it elevated these criteria “to jurisdictional conditions, and exigently interpreted the alleged condition of a contribution to the economic development of a host State so as to exclude small contributions, and contributions of a cultural and historic nature.” [para 80(b)]

  - Award of sole arbitrator of 17 May 2007 annulled
  - Dissent of Judge Shahabuddeen on ‘economic development of host state
Other contributions by Arb Tribunals

- Timing issues – when is the investment made?
- Pre-contract investment
- Territorial issues – where is the investment made?
- Role of host state in determining the nature of investor’s rights
- Specific investment requirements

Party agreement

- Express agreement
  - ICSID Model Clause 3
- Implied agreement
- BITs
  - Examples (Singapore – US)
- Multilateral treaties
  - Article 1139 NAFTA
  - Article 1(6) Energy Charter Treaty
Decision on Jurisdiction

- Secretary General has a screening power pursuant Art 36(3)
- Tribunal decides on basis of Arts 41 and 25
- Classification of the dispute on the basis of (re-)presentations by parties

Investment NOT ‘in accordance with local laws’

- *Inceysa Vallisoletana SL v El Salvador*, (Spain/El Salvador BIT)
- *Fraport v Philippines*
  “Because there is no “investment in accordance with law”, the Tribunal lacks jurisdiction ratione materiae.” [para 401]
- Bribery
  - *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7
P. Mitchell v Congo
ICSID Case No. ARB/99/7

- First time an award was annulled for failure to comprise an ‘investment’
  - Law firm (first such case) providing legal counselling for US investors in Congo
  - Failure to contribute to the economic development of host state
  - Ad hoc committee decided to annul award-
    - For a manifest excess of power; and
    - Failure to state reasons
  “the award is incomplete and obscure as regards what it considers an investment…” [para 40]

Additional Facility

- Article 2(b)
  - … not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State.
- No cases
- Article 4(3):
  - Approval of access provided:
    - (a) Conditions are met
    - (b) More than an “ordinary commercial transaction”