IJDPP
International Journal of
Development and Public Policy
| e-ISSN: 2792-3991 | www.openaccessjournals.eu | Volume: 2 Issue: 5

Participation of Soes in International Investment Activities

Bakhodir Mirzaraimov
Lecturer at Tashkent state university of law

Alisher Bobonazarov
Student at Tashkent state university of law

Abstract: With the growing importance of state-owned enterprises in the international investment arena, there is a need to analyze the legislation and legal norms related to these relations. In addition, the use of state power by such enterprises in various forms, or the entry of another state's investment market as different business entities and or the implementation of its own policies by use of these entities sometimes creates problematic situations, which deprives state-owned enterprises of investor benefits, privileges and protection that foreign investor should be provided. This article discusses such core issues of the topic and highlights some of the issues of the concept of state-owned enterprises, their participation as a state-owned enterprise or investor in the investment relationship.

Keywords: investment market, state-owned, private-owned, foreign investment, ICSID, regulatory space, sovereign investor, Broches test, investment protection.

State-owned enterprises (SOEs) play an increasingly crucial role in the global economy as foreign investors. In principle, a SOE is a "juridical person" that may qualify as a "national of another Contracting State" within the meaning of Article 25 of the ICSID Convention.[1] A SOE from an ICSID Contracting State that invested in another Contracting State should be permitted to appear before the Centre from the start. Aron Broches, one of the ICSID Convention's key drafters, confirmed that SOE claims against states should be allowed under the Convention as long as the SOE was not "serving as an agent for the government" or "doing an essentially governmental activity." The "Broches test"[2] is a term that has been coined to describe this remark. The Broches test has been the subject of recent rulings, and the extent to which the test is likely to bar SOEs from standing before ICSID is discussed in this article.

In light of this, it is critical to investigate and assess whether and how the expansion of SOE investment affects the international investment law regime, as well as how the regime should respond to changing circumstances and uncertainty. However, it appears that little has been done in this area. As a result, this article attempts to meet the challenge by providing a systematic and novel review and analysis of the most important provisions of international investment treaties, in order to assess whether and to what extent the current investment law regime is adequately equipped to address the policy challenges posed by SOE investments. This article is concerned with apprehensions that are not limited to SOEs. In today's world, it encompasses a wide variety of concerns relating to investment safeguards, investment promotion and liberalization, and host state

[1] Farouk El-Hosseny, 'State-Owned Enterprises as Claimants before ICSID: Is the Broches Test on the Ebb?', (2016), 3, BCDR International Arbitration Review, Issue 2, pp. 371-387, https://kluwerlawonline.com/journalarticle/BCDR+International+Arbitration+Review/3.2/BCDR2016034

[2] Tariq Hassan, Publications of Aron Broches, *ICSID Review - Foreign Investment Law Journal*, Volume 6, Issue 2, Fall 1991, Pages 510–513, https://doi.org/10.1093/icsidreview/6.2.510;

Copyright (c) 2022 Author (s). This is an open-access article distributed under the terms of Creative Commons Attribution License (CC BY).To view a copy of this license, visit https://creativecommons.org/licenses/by/4.0/

IJDPP International Journal of Development and Public Policy
| e-ISSN: 2792-3991 | www.openaccessjournals.eu | Volume: 2 Issue: 5

regulatory rights. Over the last decade, the worldwide investment landscape has shifted dramatically, with a spike in SOE investments and the rise of state capitalism[3]. On the one hand, the expanding system of investment law and policy necessitates further international liberalization. On the other hand, it implements stronger protectionist policies at the national level. As a result, politicians, academics, lawyers, and stakeholders have debated the resultant international investment law system in order to achieve optimal balance and sustainability.

This article it will examine key provisions of international investment treaties, such as definitions of investor and investment, foreign investment admission, substantive treatment standards, and treaty exceptions, to determine whether and how international investment law regulates SOE investments. Because the SOE as global investor is a relatively new issue in international investment law, with relevant cases still limited at the time the research was completed, the article will use hypotheses or analogies to analyze regulatory responses and potential risks associated with SOE investments.

In general, states encourage foreign private investment through corporate vehicles or conglomerates formed by State-owned enterprises. Eventually, these individuals may commit wrongful acts that, in certain circumstances, should be attributed to the states[4]. Foreign investors may establish State liability by attributing the actions of State-owned enterprises to States, gaining access to treaty-based resolution mechanisms in the process. As a result, state attribution serves as a gateway to investor-state dispute resolution. In essence, it is a rule of customary international law, but special rules (lex specialis) on State attribution can also be found in investment treaties. The Energy Charter Treaty, for example, contains State attribution rules in Article 22 when it discusses "State and Privileged Enterprises"[5]. Broches makes the following reasoning to assert the (State or non-State) capabilities in which State-owned enterprise is acting: In today's world, the classical distinction between private and public investment, based on the source of capital, is no longer meaningful, if not outdated. There are many companies that combine capital from private and governmental sources, as well as corporations that have all of their shares owned by the government but are virtually indistinguishable from a completely privately owned enterprise in terms of legal characteristics and activities. As a result, it appears that, for the purposes of the Convention, a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless acting as an agent for the government.

A common understanding of SOEs is critical for a rules-based system of global economic governance. Only when there is clarity about the form and behavior of 'caught' entities can regulatory disciplines be developed. The fact that this has remained elusive thus far reflects the relative youth of existing scholarship on the subject. Even recent literature on the subject has failed to take into account the phenomenon of SOEs as a whole. As a result, I propose five definitional criteria within which States can adequately distinguish SOEs from both private investors and other forms of sovereign investment, as well as express their specific policy preferences regarding acceptable behavior.

---

[3] The Oxford handbook of international investment law/ edited by Peter Muchlinski, Federico Ortino and Christoph Schreuer.Oxford University Press, 2008;

[4] Bungenberg, Marc, Jörn Griebel, Stephan Hobe, August Reinisch, and Yun-i Kim. 2015. *International investment law*;

[5]https://kluwerlawonline.com/journalarticle/BCDR+International+Arbitration+Review/3.2/BCDR2016034;

ISSN 2792-3991 (online), Published under Volume: 2 Issue: 5 in May -2022
Copyright (c) 2022 Author (s). This is an open-access article distributed under the terms of Creative Commons Attribution License (CC BY).To view a copy of this license, visit https://creativecommons.org/licenses/by/4.0/

IJDPP International Journal of Development and Public Policy
| e-ISSN: 2792-3991 | www.openaccessjournals.eu | Volume: 2 Issue: 5

While Public institutions are not new in market, their rapid globalization is a relatively new and very important phenomenon in the twenty-first century international economy. The rationale for the emergence of SOEs varies by country and industry. Historically, the establishment of SOEs has been a result of some governments' ideology and political strategy, with the belief that state ownership could hasten national development and achieve public policy objectives. In economics, governments may intervene in the economy through SOEs to address market failures[6]. Apart from private-owned firms that seek to maximize profits, SOEs are thought to be motivated by both political and economic motivations, with the state-owned nature playing a significant role. Despite this, there is no universally accepted definition of SOEs.

In legislation, the bottom line is that a State-owned enterprise is distinct and legally independent from the State, and as such, it should be treated "in the same manner as a private enterprise, being neither privileged nor disadvantaged by its relation to the State." However, no matter how logical this statement appears to be, it is not always fully reflected in arbitral practice. There are two possible scenarios: first, they can act as a host state, and second, they can participate in investment activities as an investor.

In particular, states promote international private investment through corporate vehicles or conglomerates that are facilitate the implementation by State-owned enterprises. Eventually, these could commit wrongdoings that, in certain conditions, should be attributed to the states. Overseas companies may establish Subject to at least by attributing the actions of Government enterprises to States, having access to treaty-based resolution mechanisms. As a result, state attribution becomes, in a sense, a gateway to investor-state dispute resolution. In essentially, it is a rule of customary international law, but special rules (lex specialis) on state attribution can also be discovered in investment agreements. The Energy Charter Treaty, for instance, includes State attribution rules in Article 22 when it discusses "State and Privileged Enterprises".

Additionally, State-owned enterprises can invest in third-party countries and thus become foreign investors. They may act commercially as non-State actors or under the color of the constituent State in doing so. If it is discovered that they are acting in the capacity of the State in that particular instance, they should be treated as such. In other words, where they act as a State's alter ego, they should be denied all treaty-based benefits that would otherwise be available to nationals[7]. In the case of ICSID, for example, a State could never qualify as a "national of another Contracting State" under Article 25(1) or (2)(b) of the ICSID Convention, and claimant State should never be granted rationae personae jurisdiction.

Due to the increased volume and importance of SOE investments from emerging economies, Western countries' investment policies may increasingly be influenced by political retaliation against specific countries. Furthermore, given the call for the establishment of a multinational framework for foreign investment, the IIA regime may become a product of political games among powerful states. Nonetheless, in light of global efforts to promote long-term FDI, it is possible to progress toward a more balanced, non-discriminatory, and liberal regime of international investment law that can best accommodate needs for investment protection, advancement, and legislation in investors and (both home and host) states.

[6] https://jusmundi.com/en/document/wiki/en-state-owned-enterprises;

[7] Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View' in Stephan W Schill (ed), International Investment Law and Comparative Public Law (OUP 2010);

ISSN 2792-3991 (online), Published under Volume: 2 Issue: 5 in May -2022
Copyright (c) 2022 Author (s). This is an open-access article distributed under the terms of Creative Commons Attribution License (CC BY).To view a copy of this license, visit https://creativecommons.org/licenses/by/4.0/

Bibliography

1. Bungenberg, Marc, Jörn Griebel, Stephan Hobe, August Reinisch, and Yun-i Kim. 2015. *International investment law*;
2. The Oxford handbook of international investment law/ edited by Peter Muchlinski, Federico Ortino and Christoph Schreuer.Oxford University Press, 2008;
3. Harm Schepel, M. Sornarajah. Resistance and Change in the International Law on Foreign Investment, *European Journal of International Law*, Volume 26, Issue 4, November 2015, Pages 1050–1052, https://doi.org/10.1093/ejil/chv068;
4. Dolzer, R., & Schreuer, C. (2012). Principles of International Investment Law. Oxford University Press https://doi.org/10.1093/law/9780199651795.001.0001;
5. Polatjonogli, T. M. A., & Abdulajonovich, S. M. (2022). HUNTING A SUITABLE TYPE OF LEGAL ENTITYFOR CENTRAL ASIAN BUSINESSMEN IN CHINA. *Ижтимоий Фанларда Инновация онлайн илмий журнали*, *2*(1), 75-77.
6. Akramov, A., Mirzaraimov, B., Akhtamova, Y., & Turdaliyev, M. A. (2020). Prospects For The Development Of Trust Management In Uzbekistan. *Psychology and Education Journal*, *57*(8), 530-535.
7. Turdialiev, M. A., & Komilov, B. (2020). The Legal Issues Of International Investment Activity In Uzbekistan: Critical Analysis And Legal Solutions. *The American Journal of Political Science Law and Criminology*, *2*(12), 16-21.
8. Narziev, O., Turdialiev, M. A., Khodjimurotov, S., & Mamanazarov, S. (2021). The Perspectives of the Establishment of International Financial Centers in Uzbekistan and the Implementation of English Law. *PSYCHOLOGY AND EDUCATION*, *58*(1), 113-119.
9. ТУРДИАЛИЕВ, М. А. (2020). ЭРКИН ИҚТИСОДИЙ ЗОНАЛАР ДОИРАСИДА ИНГЛИЗ ҲУҚУҚИНИ ЖОРИЙ ЭТИШНИНГ ХОРИЖ ВА МИЛЛИЙ ТАЖРИБАСИ. *ЮРИСТ АХБОРОТНОМАСИ*, *1*(6), 151-158.
10. Younas, A. ., & ogli, T. M. A. P. . . (2021). Multinational Enterprises in Global Market Economy. *International Journal of Development and Public Policy*, *1*(7), 137–143. Retrieved from http://openaccessjournals.eu/index.php/ijdpp/article/view/820
11. Юнас, А., Каландаров, А., & Турдиалиев, М. А. (2021). Legal progress of e-commerce legislation in Central Asia during the COVID-19 period. *Общество и инновации*, *2*(6), 170-176.
12. Turdialiev, M. A. (2021). REGULATION OF MNES BY DOMESTIC AND INTERNATIONAL POLICIES. *Збірник наукових праць SCIENTIA*. вилучено із https://ojs.ukrlogos.in.ua/index.php/scientia/article/view/17095
13. Kinza Fatima, & Mukhammad Ali Turdialiyev. (2022). UNDERSTANDING THE SOCIAL CHANGE AND DEVELOPMENT IN THE "THIRD WORLD": A BOOK OVERVIEW. *World Bulletin of Management and Law*, *6*, 1-2. Retrieved from https://scholarexpress.net/index.php/wbml/article/view/439
14. Fatima, K., & Turdialiyev, M. A. UNDERSTANDING THE SOCIAL CHANGE AND DEVELOPMENT IN THE "THIRD WORLD": A BOOK OVERVIEW.

ISSN 2792-3991 (online), Published under Volume: 2 Issue: 5 in May -2022
Copyright (c) 2022 Author (s). This is an open-access article distributed under the terms of Creative Commons Attribution License (CC BY).To view a copy of this license, visit https://creativecommons.org/licenses/by/4.0/

15. Ammar Younas, & Turdialiev Mukhammad Ali Polatjon Ogli. (2021). Special Features Of International Financial Centres And Its Establishment In Uzbekistan. *The American Journal of Political Science Law and Criminology*, *3*(08), 17–21. https://doi.org/10.37547/tajpslc/Volume03Issue08-04
16. Tariq Hassan, Publications of Aron Broches, *ICSID Review - Foreign Investment Law Journal*, Volume 6, Issue 2, Fall 1991, Pages 510–513, https://doi.org/10.1093/icsidreview/6.2.510;
17. McLaughlin, Mark (2020). *Defining a State-Owned Enterprise in International Investment Agreements. ICSID Review - Foreign Investment Law Journal, (), siz011–*. doi:10.1093/icsidreview/siz011;
18. Kalicki J, Evseev D and Silberman M, 'Legality of Investment' in Meg Kinnear and others (eds), Building International Investment Law: The First 50 Years of ICSID (Kluwer Law International 2016);
19. Younas, A., & ogli Mirzaraimov, B. T. (2021). To What Extent are Consumers Harmed in the Digital Market from the Perspective of the GDPR?. *International Journal of Multidisciplinary Research and Analysis*, *4*(8)
20. Mirzaraimov, B. (2020). Effective Measures Of Preventing Due Process Paranoia In International Arbitration. *The American Journal of Political Science Law and Criminology*, *2*(11), 72-80.
21. 'Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View' in Stephan W Schill (ed), International Investment Law and Comparative Public Law (OUP 2010);

Web sources:

- ✓ https://jusmundi.com/en/document/wiki/en-state-owned-enterprises;
- ✓ https://academic.oup.com/icsidreview/articleabstract/34/3/595/5740018?redirectedFrom=fulltext;
- ✓ https://kluwerlawonline.com/journalarticle/BCDR+International+Arbitration+Review/3.2/BCDR2016034;
- ✓ https://heinonline.org/HOL/Page?handle=hein.journals/jilwirl6&div=10&g_sent=1&casa_token=

ISSN 2792-3991 (online), Published under Volume: 2 Issue: 5 in May -2022
Copyright (c) 2022 Author (s). This is an open-access article distributed under the terms of Creative Commons Attribution License (CC BY).To view a copy of this license, visit https://creativecommons.org/licenses/by/4.0/