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Untying the Knot: Estoppel and Implicit Designation of a Constituent Subdivision or Agency under the ICSID Convention

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Foreword

Designation by a State of a constituent subdivision or agency provided for in Article 25, paragraphs 1 and 3, of the ICSID Convention has recently sparked a debate particularly in terms of the manner in which the designation is made and communicated to the Center.

This is the subject of the present post.

I. Meaning of "constituent subdivision or agency of a Contracting State"

Past tribunals have noted that "the term 'constituent subdivisions' covers a fair range of subdivisions including municipalities, local government bodies in unitary states, semi-autonomous dependencies, provinces or federated States in non-unitary States and the local government bodies in such subdivisions." (*Government of the Province of East Kalimantan v. PT Kaltim Prima Coal, Rio Tinto PLC, BP P.L.C., Pacific Resources Investments Ltd., BP International Ltd., Sangatta Holdings Ltd.& Kalimantan Coal Ltd.*, ARB/07/3, Award, 28 December 2009, para. 191)

The term "agency" refers to "State corporations such as national petroleum corporations, utilities, mining corporations, etc." (NIKO Resources (*Bangladesh) Ltd. v. People's Republic of Bangladesh, BAPEX and PETROBANGLA*, ARB/10/11 & ARB/10/18, Decision on jurisdiction 19 August 2013, para. 286)

In either case, emphasis is put on the functions fulfilled by the given entity, i.e. they must be vested in the Government but delegated to the entity and the latter must be controlled in some measure by the Government. (*NIKO Resources*, paras. 228, 261)

II. What is a designation?

Designation is "an act by a Contracting State by which the State confers upon the

agency the capacity to conclude a valid ICSID arbitration agreement and become a party to an ICSID arbitration." (*NIKO Resources*, para. 325) The consent to ICSID arbitration expressed by such an entity needs to be approved by the State. This may be viewed as the so-called gate-keeping role of designation which allows the State to control an entity's dealings with foreign investors. Seemingly, approval needs to be made in written form. (*NIKO Resources*, paras. 301)

III. Purpose of the designation

The fairly neglected issue of designation assumes particular importance in terms of jurisdiction. Since the ICSID Convention gives jurisdiction with respect to disputes between an investor and a State, a State subdivision or agency may participate in proceedings only if designated.

The main function of designation is therefore to confer on the entity a "limited international capacity" and thus to enable it to become a party in the proceedings. (*NIKO Resources*, paras. 281, 329) In contract-based arbitration, if designation is made, this would even permit the entity to appear as a claimant in the case.

One shall distinguish between designation and attribution. Thus, in contract-based cases, if the State is not a party to the contract, the acts of the entity may or may not be attributable to the State, but this does not change the jurisdiction of the tribunal. In such cases, since arbitration is based on consent as expressed in the arbitration clause, the State will not be a proper respondent and the tribunal's jurisdiction will at all times depend on the existence of a valid designation. (See *NIKO Resources*, para. 248) The case of a treaty-based arbitration is not so problematic in the sense that the respondent State may not hide itself behind the separate personality of a subdivision and would not be able to escape jurisdiction in this way as far as treaty breaches are concerned. (See C. Schreuer et al., *The ICSID Convention: A Commentary* (CUP 2009) at 151)

IV. Who is competent to make the designation?

As the text of Article 25(1) shows, designation is made by the State, but this does not indicate which the competent State authority is. This will depend on the national law of the host State and may refer to the Government, the Ministry of Foreign Affairs, etc. For example, in the case of *NIKO Resources*, the tribunal had to deal with a dispute relating to the exploration of marginal gas fields – an issue falling within the competence of the Ministry of Energy and Mineral Resources. In view of this, the tribunal decided that this Ministry is the competent designating authority.

V. Means of effecting a designation

The jurisprudence of ICSID tribunals shows that there are three types of designation:
– **general** designations which are typically entered in the list of "*Designations by Contracting States Regarding Constituent Subdivisions and Agencies*" published by ICSID. An entry on the list of is not a requirement under Article 25(1);
– ***ad hoc*** designations which are limited to a specific investment and the corresponding arbitration agreement and

– **implicit** designations.

The latter type of designation has split past tribunals. In *Cambodia Power* case, the tribunal held that a written communication is inherent in the notion of designation, otherwise the words "to the Centre" would be otiose. Nevertheless, the tribunal endorsed the view that a valid designation may also be made in a national legislation or a bilateral investment treaty insofar as it achieves public notoriety. (*Cambodia Power Company v. Kingdom of Cambodia and Electricité du Cambodge*, ICSID Case No. ARB/09/18, Decision on jurisdiction 22 March 2011, paras. 225, 245) Based on this view, the tribunal concluded that the designation made *in casu* in a private contract lacks the necessary notoriety. The tribunal also held that since no step had been taken on the part of the State to bring the private contract to the attention of the Centre, a designation cannot be validly communicated by the claimant with its request for arbitration. (*Cambodia Power*, paras. 246, 254) In this case, the tribunal was concerned with achieving stability and security, however its conclusion does not answer the question what would happen if the State has led the investor to believe that it would make the designation but eventually does not take the necessary measures in order to escape jurisdiction.

By contrast, in the *East Kalimantan* case the tribunal accepted that designations may be made *ad hoc* and that Article 25(1) does not set out any formal requirements. Consequently "the designation requirement may in particular be deemed fulfilled when a document that emanates from the State is filed with the request for arbitration and shows the State's intent to name a specific entity as a constituent subdivision or agency…" (East Kalimantan, paras. 192-193) The tribunal therefore put the emphasis on the clear intention to designate and eventually held that the minutes on which the claimant relied in this case did not meet this threshold since they only related to the allocation of certain shares and did not concern designation at all.

Recently, the tribunal in the *NIKO Resources* case turned the tide. Taking the word "designation" into context and comparing it with the word "notification" which appears in different texts in the ICSID Convention, the tribunal held that designation is not the same as formal notification. The tribunal thus held that designation may even be made implicitly. (*NIKO Resources*, para. 299) The tribunal was seised with a case in which the State had approved the arbitration clause contained in the contract whose breaches gave rise to the dispute. The tribunal decided that this amounts to a valid implicit designation. The tribunal highlighted that *ad hoc* and implicit designations are by their very nature not given general publicity. (NIKO Resources, paras. 291, 301)

VI. Made to the Center

It has been generally accepted in the jurisprudence of ICSID tribunals that a designation must be made known to the Centre. Consequently, under Article 25(1) of the ICSID Convention the designation must reach the Center.

VII. Who is competent to communicate the designation to the Center?

This question has split tribunals. As noted in the previous section, the tribunal in

Cambodia Power case decided that only the State may communicate the designation to the Center. On the other hand, and this seems to be the preferred view, the tribunal in *NIKO Resources* accepted that "an arbitral tribunal may give effect to an existing *ad hoc* designation which *may be made known to ICSID by an investor when filing a Request for Arbitration by a statement pertaining to a specific dispute, particular facts, and in accordance with Institution Rule 2*." (*NIKO Resources*, para. 327) The tribunal underlined that the objective of protecting the State against poorly considered commitments by agencies is achieved by the requirement of approval under Article 25(3).

VIII. Timing of the communication

As the preceding section shows, in principle, a designation is made and communicated to the Center before the proceedings are instituted. However, in the case of *ad hoc* and implicit designations, they may be communicated by the investor when filing the request for arbitration.

IX. Obligations of good faith and estoppel

In *NIKO Resources*, Bangladesh had approved the consent to arbitration by Petrobangla and BAPEX but did not communicate the designation to the Center. Without the recognition of the implicit designation, the completion of the procedure would depend on the State and the investor would be left with no remedy. In this regard, it must be noted that in *East Kalimantan*, the tribunal accepted the applicability of the doctrine of estoppel as to designation. It held that the following test reflects customary international law: (i) a clear and unambiguous statement; (ii) made voluntarily and unconditionally; (iii) on which the other party has relied either to its detriment or to the advantage of the party making the statement. (*East Kalimantan*, para. 211) However, the first element was not satisfied, and, therefore, no situation of estoppel had occurred. Nevertheless, the case shows that considerations of good faith require that the State be held to its side of the bargain.

Conclusion

The above discussion shows that an implicit designation by way of approval on the part of the State of an arbitration clause is a valid means of designating a State entity for the purpose of Article 25 of the ICSID Convention. The communication of the designation may be made by the investor along with its request for arbitration. Additionally, future tribunals should pay specific regard to considerations of estoppel. As a consequence, in some cases even a promise to designate given by the host State may reach the threshold of implicit designation.

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