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Bringing not-for-profit investment claims to ICSID

Luke Eric Peterson (Investment Arbitration Reporter) · Sunday, April 26th, 2009

In a post last month, I queried whether not-for-profit organizations could use bilateral investment treaties to challenge abusive treatment by host states.

My guess (and that of a colleague with whom I've written on this topic) is that such organizations would have little difficulty qualifying as investors under most BITs – and that at least some forms of not-for-profit activities might constitute foreign investments covered by such treaties.

If would-be claimants opted for arbitration under the UNCITRAL rules, they would simply need to make a case that their activities are covered by the relevant investment treaty.

However, things get much more complex if such claimants plump for arbitration under the rules of the International Centre for Settlement of Investment Disputes (ICSID).

Under the ICSID system, claimants also need to demonstrate that their activities qualify as investments under the ICSID Convention, the multilateral agreement binding all ICSID member-states.

While the ICSID doesn't define the term "investment", many arbitrators have stepped into this vacuum and offered various criteria or requirements – and, over time, things have become muddier and muddier.

Indeed, in the last fortnight, a pair of ICSID panels have issued decisions which sit rather uncomfortably alongside one another. I won't even try to compare and contrast the approaches in the Phoenix Action v. Czech Republic and Malaysian Historical Salvors v. Malaysia cases. (I've already devoted considerable attention to the two decisions in recent editions of my newsletter.)

Suffice to say that arbitrators differ as to the hallmarks or features that characterize "ICSID investments". They also vary as to whether each box in such lists needs to be ticked – or whether a more holistic assessment can be taken – but that's a topic for another day.

On the basic question as to whether profit-seeking is one of the characteristics or hallmarks of an ICSID investment, there does not appear to be any unanimity on the part of ICSID arbitrators.

When devising their short-lists of characteristics, many arbitrators like to invoke the so-called Salini test, a reference to the 2001 jurisdictional decision in Salini v. Morocco.

However, on occasion, the elements of the Salini test can get lost in translation.

If you take a look at the 2001 ruling in Salini v. Morocco, four characteristics of an ICSID investment were identified: 1) a contribution, 2) a certain duration of performance of the contract, 3) a participation in the risks of the transaction, and 4) contribution to the economic development of the host state.

However, in the intervening years, the "Salini test" is sometimes defined so as to include a fifth element, which was not mentioned in the actual Salini decision: the regularity of profit or return.

For instance, the RSM v. Grenada tribunal in its recent award, writes that the Salini v. Morocco decision endorsed five characteristics, including the "regularity of profit or return". Similarly, the tribunal in the Biwater v. Tanzania case suggests in its 2008 award that the Salini v. Morocco decision identified 5 criteria.

While the Salini case did not stipulate that investments should be profit-seeking, several early ICSID decisions have stressed such a requirement. For instance, arbitrators in the Fedax v. Venezuela and Joy Mining v. Egypt cases have included profit/return on their respective lists of investment characteristics.

Moreover, tribunals have sometimes cited Prof. Christoph Schreuer's classic text on the ICSID Convention, where five criteria (including profit and return) are identified as characteristics drawn from the ICSID jurisprudence.

But, in more recent times, Prof. Schreuer has questioned whether the criterion of profit/return belongs on this list.

At a 2007 conference, Prof. Schreuer made the following observation on the inclusion of profit/return on the list: "That actually is debatable, and I am not sure if I would insist on this particular criterion, and I see that tribunals have actually dispensed with it so perhaps it should be discarded."

I'm inclined to agree.

Assume for instance that a multinational water services company contracts to run a local water concession in a major city on a for-profit basis. Meanwhile, in the more rural parts of the same country, a major charitable organization commits to drill for water, and to develop a rudimentary water services infrastructure in less-developed communities where profit-making is utterly out of the question.

Both will entail the commitment of resources and a certain duration. Likewise, risks may plague such projects, including project failure or running afoul of political authorities. As for contribution to economic development, it seems inarguable that both types of projects make some contribution.

Does it make sense to say that the decision by one contractor to operate on a for-profit basis is the pivot-point upon which the ICSID protection of an otherwise functionally-equivalent project should hinge?

Or to put it another way, should the decision by the other operator to re-invest all revenues into the maintenance and expansion of the project – rather than to repatriate them as profits or dividends –

disqualify that project from the protection of the ICSID?

My view is that the profit criterion, while a useful hallmark of many investments, should not be a prerequisite to ICSID jurisdiction. An argument can certainly be made that not-for-profit investments hew to the broader purpose of the ICSID system, particularly where they have the long-term development goals of the host state at their core.

Mind you, just this month, a panel of ICSID arbitrators parted ways with respect to the purpose of the ICSID Convention – with a majority and a minority drawing sharply different lessons from some of the historical documents that chronicle the establishment of the ICSID.

If I were a prospective claimant, I'm not sure I'd roll the dice by electing for ICSID arbitration if some other alternative were readily available.

Luke Eric Peterson, InvestmentArbitrationReporter.com

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