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State-Funded Arbitration Institutions and Responsibility under International Law: The Case of Istanbul Arbitration Centre

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The Istanbul Arbitration Centre's (the Centre) inception, driven by the Turkish Government's ambition to elevate Istanbul as a global financial centre, presents a compelling case for legal scrutiny. This blog post seeks to unravel the intricate web of legal complexities surrounding the Centre's statutory foundation, organisational structure, and financial framework, alongside the potential attribution of its conduct to the State under international law. By examining the dual nature of the Centre, straddling both public and private law domains, this post aims to shed light on the consequential issues of State responsibility and conflicts of interest in international arbitration. Ultimately, the post serves as a cautionary narrative for state parties and foreign investors navigating the terrain of arbitration within institutions of similar dual character.

I. Legislative History, Legal Structure and Financing of the Centre

The Istanbul Arbitration Centre, a recent addition to the existing arbitration institutions in Türkiye, commenced its operations by registering its first case in 2016.

The Centre's establishment aligns with the Turkish Government's objective of positioning Istanbul as a global financial centre. The idea can be traced back to a [resolution by Türkiye's State Planning Organisation](#) in 2009, prioritising the creation of an independent arbitration centre. In accordance with this strategic direction, the Turkish Parliament enacted the [Law on Istanbul Arbitration Centre](#) (the Law) to establish the Centre as a legal entity subject to private law. It operates under a unique legal framework and does not adhere to the conventional legal forms like NGOs or companies.

The Law defines the Centre's organisational structure, including a general assembly responsible for electing members of the executive board, advisory board, and auditors. The general assembly consists of members appointed by various independent State agencies and public organisations, including the country's Ministry of Justice. The Prime Minister's Office financed the Centre's operations for the initial two years (spanning from January 1, 2015 to December 31, 2016), with the expectation of generating revenues from dispute resolution services afterwards. If there is a deficit, certain State agencies and public organisations represented in the general assembly must contribute proportionately to eliminate it.

Despite being initiated and funded by the public sector, the Centre has made significant progress in

promoting arbitration among its potential users, particularly legal practitioners. Although it is referred to as a non-exclusive forum, the Centre has also been included in bilateral investment treaties (BITs), such as the renewed [BIT between Türkiye and Ukraine](#) signed on October 9, 2017. Article 10(d) of the BIT mentions the Centre as one of the options for dispute resolution through arbitration, subject to the parties' agreement. It is arguable that the public support behind the Centre may have contributed to these achievements.

II. Potential Conundrums Between the Centre and International Law

One can argue that certain *de facto* and *de jure* aspects of the Centre, as described in its historical context, create factual complexity under international law. The Centre exists in a grey area where elements of both public and private law can be identified. Although the Law defines the Centre as a subject of private law, its administration and budget seem to have public links. Additionally, it could be argued that the Centre benefits from public endorsement. Therefore, there is a legal issue concerning whether the Centre may exercise elements of governmental authority.

While this dilemma is hypothetical, its resolution could have significance in the realm of international arbitration from at least two perspectives. The first question that arises is whether the conduct of the Centre may lead to international responsibility of Türkiye under the rules of attribution. The second question is whether the public character of the Centre may give rise to allegations of conflicts of interest, particularly in disputes where Türkiye is a party.

III. A Review Under the Rules of Attribution of Conduct

In relation to the first question, guidance can be found in the Draft Articles on Responsibility of States for Internationally Wrongful Acts ([Draft Articles](#)) adopted by the UN International Law Commission in 2001. Article 4 of the Draft Articles addresses the conduct of State organs, stating that:

...the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial, or any other functions... An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 4 is not applicable to the present case since the Law describes the Centre as an independent legal entity of private character, and it is the internal law that determines the organ status.

However, the next rule of attribution, Article 5 of the Draft Articles, provides a basis for considering the conduct of an entity that is not a State organ under Article 4 as an act of the State under international law. Article 5 states:

The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the

governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

According to the commentaries on the Draft Articles, for the purposes of Article 5, the classification of an entity as public or private under national law is not decisive. What matters is whether the entity is empowered to exercise specified elements of governmental authority. Article 5 does not define the elements of governmental authority. Additionally, it appears that this rule has rarely been applied in relation to the conduct of an arbitral tribunal with public characteristics but has primarily been used in the context of *parastatal* entities.

The issue, though, seems more apparent than real. If a foreign party is dissatisfied with the outcome of proceedings conducted under the auspices of an arbitration institution, they can generally resort to local courts to challenge the award if they believe the proceedings were tainted by irregularities caused by the arbitration institution. If the breach is not remedied by the local courts, the foreign entity can potentially invoke Article 4 (rather than Article 5) to attribute the conduct of the local courts to the State, provided they have grounds to seek recourse before an international tribunal. Furthermore, due to the consensual nature of arbitration, it is challenging to envision a scenario in which the conduct of an arbitration institution could infringe upon the rights of the parties. One could argue that only gross negligence or deliberate acts by the arbitration institution itself, manifestly depriving a foreign party of its rights in violation of the principles of due process and fair trial, could trigger the application of Article 5 before an international tribunal. Such would be grounds to challenge the award in domestic courts under most arbitration laws. It is also important to differentiate between the conduct of arbitrators and the arbitration institution itself since the former is unlikely to be attributable to any State.

IV. Conflicts of Interest in Cases Involving the State?

The second issue concerning conflicts of interest is twofold. First, one may argue that if a dispute administered by the Centre involves Türkiye as a party, a State organ, or a State-owned entity, this could give rise to conflicts of interest due to the perceived public character of the Centre. This may be especially relevant if the Centre has appointed one or more of the arbitrators or is involved otherwise in the proceedings under its rules.

Secondly, doubts regarding the independence of an arbitrator affiliated with the Centre may arise in a dispute being heard outside the Centre but involving Türkiye as a party, a State organ, or a State-owned entity. This may be particularly relevant if an entity with a public character appoints the affiliated person as an arbitrator.

V. Concluding Remarks

It appears that these scenarios, in and of themselves, may not automatically raise questions of conflicts of interest or state responsibility. A detailed examination of the facts surrounding each case is essential for further discussion and analysis.

With that said, both State parties and foreign investors, as parties to an investor-state dispute before an arbitration institution of a certain level of public character, should be mindful of the potential implications of this situation. For the States, it is arguable that a State that obtains a successful award on the merits may face the risk of having a second dispute due to unintended irregularities relating to the arbitration institute or the arbitrators.

On the other hand, foreign investors may encounter arbitral proceedings that are not entirely free from governmental influence, despite choosing arbitration with the sole aim of accessing a neutral and impartial adjudication.

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