

Low, Jo En

Research Report

State-controlled entities as "investors" under international investment agreements

Columbia FDI Perspectives, No. 80

Provided in Cooperation with:

Columbia Center on Sustainable Investment (CCSI) - A joint center of Columbia Law School and the Earth Institute, Columbia University

Suggested Citation: Low, Jo En (2012) : State-controlled entities as "investors" under international investment agreements, Columbia FDI Perspectives, No. 80, Columbia University, Vale Columbia Center on Sustainable International Investment (VCC), New York, NY

This Version is available at:

<https://hdl.handle.net/10419/253914>

Standard-Nutzungsbedingungen:

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

Terms of use:

Documents in EconStor may be saved and copied for your personal and scholarly purposes.

You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.

If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.



Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues by
the Vale Columbia Center on Sustainable International Investment

No. 80 October 8, 2012

Editor-in-Chief: Karl P. Sauvart (Karl.Sauvant@law.columbia.edu)

Managing Editor: Jennifer Reimer (jreimer01@gmail.com)

State-controlled entities as “investors” under international investment agreements

by

Jo En Low*

A review of the definition of “investor” and investor-state dispute resolution clauses in 851 international investment agreements (IIAs)¹ reveals that, except in two, state-controlled entities (SCEs) (sovereign wealth funds and state-owned enterprises (SOEs)) have equivalent standing to their purely private counterparts as investors under such IIAs.

In particular, of the 851 IIAs reviewed:²

- 691 IIAs do not define “investor” such that it would exclude SCEs as the definition is not based on the nature of ownership but, rather, on whether a legal person was duly constituted, incorporated, established, or organized in accordance with the law of a contracting party. Therefore, if an SCE is established as required under the law of a contracting party, it qualifies as an “investor.”

* Jo En Low (jl3742@caa.columbia.edu) is a graduate of Columbia University School of Law (LL.M., 2012) and the University of New South Wales (B.A., LL.B., 2006). The author would like to thank Loren Anderson, John Coleman, Martin Delaroche, Tomasz Koziel, Rabih Maalouf, and Vera Shikhelman for their assistance in reviewing the non-English IIAs. The author wishes to thank Stanimir Alexandrov, Mark Feldman and Thomas Johnson for their helpful peer reviews. **The views expressed by the author of this Perspective do not necessarily reflect the opinions of Columbia University or its partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

¹ The IIAs reviewed include the bilateral investment treaties (BITs) of countries that account for 70% of world foreign direct investment outflows in the period 2008-2010; BITs of certain countries, such as the United Arab Emirates, that are home to the top ten largest SWFs as ranked (by assets under management) by the Sovereign Wealth Fund Institute; the model BITs of Canada, France, Germany, Norway, United States, and United Kingdom; a cross-section of regional free trade agreements (FTAs) with investment chapters, such as the North-American Free Trade Agreement and the Association of South East Asian Nations Comprehensive Investment Agreement; as well as bilateral FTAs to which at least one of the sample states is a party; and multilateral agreements such as the Energy Charter Treaty.

² The figures below do not add up to 851 as the IIAs falling in the second and third category below overlap in some cases.

- 81 IIAs define an “investor” to include a “state enterprise” as well as entities that are government owned and controlled, thereby expressly capturing SCEs.
- 52 IIAs explicitly provide that an “investor” includes the government of a contracting party and/or such contracting party itself. Such IIAs do not preclude a contracting party from acting in the capacity of an investor through an SCE.
- None of the IIAs exclude SCEs from the definition of an “investor” on the basis that such entities have not been organized primarily for the purpose of profit or do not carry out investments motivated by pecuniary gain. Thus, the IIAs do not appear to disqualify certain SCEs, such as government institutions, development funds and monetary agencies that may not strictly be established for pecuniary gain.
- Only two IIAs expressly exclude the SOEs of one contracting party.³ Both IIAs were concluded in 1983 and are otherwise silent on the status of SOEs.
- 33 IIAs do not contain a definition of “investor.”

Therefore, SCEs generally have recourse to the investor-state dispute resolution provisions of IIAs as “investors.” In particular, as approximately 78% of the IIAs surveyed allow for investor-state dispute resolution before the International Centre for Settlement of Investment Disputes (ICSID) pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), in most cases, SCEs will have recourse to the ICSID dispute resolution framework as “investors.”

There is some debate among scholars regarding whether SCE access to the ICSID framework as investors should be limited if the IIA otherwise covers SCEs in the definition of an “investor.” The text and negotiating history of the ICSID Convention do not unequivocally address the standing of SCEs as a diverse class of investors. In addition, the handful of ICSID arbitral decisions which have addressed this issue did not establish clear guidelines regarding the extent to which SCEs are able to initiate claims as investors under IIAs.⁴

We should be mindful that if indeed SCE access to the ICSID framework as investors is somehow limited as suggested by certain scholars,⁵ SCEs might well turn to other avenues of dispute resolution. The majority of IIAs that grant SCEs access to ICSID also enable SCEs to elect to refer an investment dispute to an arbitral institution other than ICSID, such as the International Chamber of Commerce, and/or pursuant to arbitral rules

³ The Panama BITs with Germany and Switzerland.

⁴ See e.g. *Československa Obchodní Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, *decision on objections to jurisdiction* (May 24, 1999).

⁵ See e.g. Paul Blyschak, “State-owned enterprises and international investment treaties: When are state-owned entities and their investments protected?,” *Journal of International Law and International Relations*, vol. 6 (Spring 2011), pp. 1-52, at 29-34; and Mark Feldman, “The standing of state-owned entities under investment treaties,” in Karl P. Sauvant, ed., *Yearbook on International Investment Law and Policy 2010-2011* (New York: OUP, 2011), pp. 615-637.

other than the ICSID Convention, such as those of the United Nations Commission on International Trade Law.

As the number of treaty-based investment arbitrations is growing alongside increased levels of foreign direct investment by SCEs,⁶ it is likely that investment disputes involving SCEs as claimants will occur with greater frequency going forward. Thus, in the long term, any limits on the access of SCEs to ICSID may diminish the institutional significance of ICSID.

The material in this Perspective may be reprinted if accompanied by the following acknowledgment: “Jo En Low, ‘State-controlled entities as “investors” under international investment agreements,’ Columbia FDI Perspectives, No. 80, October 8, 2012. Reprinted with permission from the Vale Columbia Center on Sustainable International Investment (www.vcc.columbia.edu).” A copy should kindly be sent to the Vale Columbia Center at vcc@law.columbia.edu.

For further information, including information regarding submitting to the *Perspectives*, please contact: Vale Columbia Center on Sustainable International Investment, Jennifer Reimer, jreimer01@gmail.com or jreimer@lyhplaw.com.

The Vale Columbia Center on Sustainable International Investment (VCC – www.vcc.columbia.edu), led by Lisa Sachs, is a joint center of Columbia Law School and The Earth Institute at Columbia University. It seeks to be a leader on issues related to foreign direct investment (FDI) in the global economy. VCC focuses on the analysis and teaching of the implications of FDI for public policy and international investment law.

Most recent Columbia FDI Perspectives

- No. 79, Lise Johnson, “Absent from the discussion: The other half of investment promotion,” Columbia FDI Perspectives, September 24, 2012.
- No. 78, Elizabeth Broomfield, “Reconciling IMF rules and international investment agreements: An innovative derogation for capital controls,” Columbia FDI Perspectives, September 10, 2012.
- No. 77, Sandy Walker, “A new economic nationalism? Lessons from the PotashCorp decision in Canada,” Columbia FDI Perspectives, August 27, 2012.
- No. 76, Perrine Toledano and Julien Topal, “A good business reason to support mandatory transparency in extractive industries,” Columbia FDI Perspectives, August 13, 2012.
- No. 75, Alex Berger et al., “Attracting FDI through BITs and RTAs: Does treaty content matter?,” Columbia FDI Perspectives, July 30, 2012.
- No. 74, M Sornarajah, “Starting anew in international investment law,” July 16, 2012.
- No. 73, Lorenzo Cotula, “Law at two speeds: Legal frameworks regulating foreign investment in the global South,” June 29, 2012.
- No. 72, Torfinn Harding and Beata Javorcik, “Roll out the red carpet and they will come: Investment promotion and FDI inflows,” June 18, 2012.
- No. 71, Thomas Jost, “Much ado about nothing? State-controlled entities and the change in German investment law,” June 4, 2012.
- No. 70, Terutomo Ozawa, “FDI, catch-up growth stages and stage-focused strategies,” May 28, 2012.

All previous *FDI Perspectives* are available at <http://www.vcc.columbia.edu/content/fdi-perspectives>.

⁶ UNCTAD, *World Investment Report 2011* (Geneva: UNCTAD, 2011) and UNCTAD, *IIA Issues Note*, no. 1 (April 2012).