Journal of Statistics, Computing and Interdisciplinary Research
ISSN (P): 2707-7101

J. Stat. Comp. & Interdis. Rese.
Volume 4(1) (2022), 11-18
http://scir.wum.edu.pk/index.php/ojs

The Responsibility of the State for the Conduct of its Entities in ICSID Jurisprudence

Ikram Ullah[1], Aisha Tariq[1], and Tauseef Iqbal[2]
[1]Department of Law, Faculty of Shariah & Law, International Islamic University Islamabad, Pakistan
[2]Legal Consultant, Ministry of Defence, Pakistan
[*]**Corresponding Author:** *ikram.mahar@gmail.com*

Abstract

It is a good omen that the tribunals have started applying International Law Commission's Articles on state's responsibility in a logical order. But this application has created another inconsistency. Tribunals neither interpret these Articles consistently nor do they apply the same tests developed under an individual Article to determine the attribution of a specific act to a state. This inconsistent attitude is affecting the predictability of investment law. After highlighting the importance of consistency in this subject, this paper suggests the preferable interpretation to be adopted consistently.

Keywords: State attribution, ILC Articles on state's responsibility, ICSID.

Introduction

A close link is needed for the attribution of an entity's act to a state, there must be a close link between the entity and the state. To determine this close link, the consistency in ICSID jurisprudence may now be witnessed as the ICSID tribunals have started applying, in a step by step manner, Articles 4, 5 and 8 from the International Law Commission's Articles on State Responsibility to ascertain the responsibility of a state for the acts of other entities. More specifically, the tribunals apply these three provisions gradually and logically, holding that the close link may be established if the entity is the organ of state structure (Structural Test, Art. 4). Suppose it is not a state's organ but is a separate entity. In that case, it can be found to have been vested with the authority to execute an act that may be attributable to the state. It should perform that act by exercising the governmental authority reposed in it by the state (Functional Test, Art. 5). If these two tests do not come up with attribution of an act of that entity to the state, for it may be a private entity, then it must have exhibited that conduct under the control and instruction of the state (Control Test, Art. 8) ((Schicho, L, 2011; Jan de Nul v. Egypt, Final Award, 2008; Gustav v. Ghana, Final Award, 2010).

But this very evolving consistent approach of bringing Articles 4, 5 and then 8 into use has given birth to another inconsistent attitude, that is, the tribunals neither interpret these Articles consistently nor do they apply the same tests developed under individual Article to determine the attribution of a specific act to a state. For instance, under Article 5, it is not certain whether the conduct should have been carried out only by governmental authority or the act performed by an

entity in its commercial capacity will also be attributed to the state. Similarly, under Article 8, it is not clear whether the general control of the state over the entity is sufficient or to extend the responsibility of the entity's conduct to the state; the effective control over that entity is mandatory. Thus, the benefits foreseen to be accomplished by the sophisticated application of these Articles cannot be achieved if the test developed under each Article is also not applied congruously.

Inconsistencies in ICSID cases have become an unavoidable evil that affects the predictability of law and challenges the legitimacy of the ICSID mechanism as a dispute resolution system. An example and its effects may be observed in the cases relating to treaty claims and contract claims (Shany, Y, 2005; Franc, S, 2005). Investor companies with specialised in-house investment lawyers, on the eve of entering into a contract with a state-owned or controlled entity, may be presumed to have pondered that in case of dispute with that entity, the acts (and contract) can be extended to the state or not. This matter is very pertinent because in case of aberrant attitude from such entities, the amount of damages claimed successfully by an investor is generally beyond the capacity or, most often, the total assets of that entity. In such a prospective scenario, what convinces an investor to step into an investment is the presence of state on the back of that entity. But confusion will accrue in the mind of investor who wants to decide beforehand whether the state will be called for an account for the deeds of a particular entity because, given inconsistent approaches among ICSID tribunals, the investor would not be able to identify with precision the requisite capacity of entity (Article 5) or type of state's control over the entity (Article 8) to hold the state responsible for such acts. The same kind of confusion exists on the side of the state, which also would be keen to decide if it would be responsible for the contracts and deeds of an entity that has a separate personality in domestic law. Suppose consistent jurisprudence is evolved on these issues, which seems possible after the tribunals have set about putting ILC Articles into use. In that case, it will become uncomplicated for an investor as well as state to decide whether or not they will be on the safe side after striking an investment transaction with a particular entity.

In that regard, exploring the ICSID judgments to demonstrate the inconsistent interpretation becomes essential. After investigating the relevant judgments from the ICSID tribunal, this paper concludes with suggestions as to what interpretation should preferably be opted for to construct a predictable and consistent approach.

Article 4

Article 4 states:

> *Conduct of organs of a State:*
>
> *1. 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, whatever position it holds in the organisation of the State, and whatever its character as an organ of the Central Government or a territorial unit of the State.*
>
> *2. An organ includes any person or entity that has that status by the State's internal law.*

The rule incorporated in Article 4 pertains to the *state's de jure organs, which* are explicitly empowered to perform acts in their competence for the state (Noble v. Romania, Final Award, 2005). To decide if an entity is an organ of state under Art 4, a tribunal would have to look to the law of the host state if it categorises that entity as an organ of the state, i.e. structural test, or an independent and separate entity (Noble v. Romania, Final Award, 2005; Jan de Nul N.V.

Dredging International v. the Arab Republic of Egypt, Final Award, 2008; Bayindir Insaat Turizm. v. Islamic Republic of Pakistan, Final Award, 2009). After the entity is established to be the state's organ, the presumption will be that every act of that entity will be attributed to that state until proved contrary (EDF v Romania, Final Award, 2009).

Article 5

Suppose an entity is not turned out to be an organ of the state. In that case, the attribution of its acts to that state may be examined by employing the rule enshrined in Article 5, which is also relevant to determine whether or not the entity functioned as an agent of the state (EDF v Romania, Final Award, 2009). It states that:

> *Conduct of persons or entities exercising elements of governmental authority:*
> *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.*

The single fact that an entity is bestowed with the power to employ governmental authority is not sufficient to attribute its acts to a state. Instead for such attribution, one needs to establish that the entity empowered with governmental authority exercised such governmental authority in the performance of this act vis-a-vis investor (Bayindir v. Pakistan, Final Award, 2009). Thus, to ascertain the attribution under the functional test given in Article 5, tribunals extracted two cumulative conditions:

> *First, the act must be performed by an entity empowered to exercise elements of governmental authority;*
> *Second, the act itself must be performed in the exercise of governmental authority. (*Jan de Nul v. Egypt, Final Award, 2008; Gustav v. Ghana, Final Award, 2010; EDF v Romania, Final Award, 2009)

The private or public or nature of the entity, state's existence or ownership in the capital and assets of the entity are not criteria to decide the phenomenon of attribution, but it is only the test of 'governmental authority that plays a decisive role *(*Jan de Nul v. Egypt, Final Award, 2008; EDF v Romania, Final Award, 2009). In *EDF*, it was specifically stated that "for an act of a legally independent entity to be attributed to the State, it must be shown that the act in question was an authorised exercise of specified elements of governmental authority" (EDF v Romania, Final Award, 2009).

One way to comprehend whether or not the exercise of governmental authority brought about the act is to differentiate between the governmental conduct and commercial one because the actions executed by an entity in its commercial capacity are not attributable to the state *(*Jan de Nul v. Egypt, Final Award, 2008; Ulysseas v. Ecuador, Interim Award, 2010). Such distinction is not necessitated in the case of acts of organs of the state since all the acts of state organs are attributed to the state, whether they are commercial or otherwise. In contrast, when an entity is independent of the state, then its acts would be attributed to the state only if it has carried out those acts by exercising the governmental authority with which it was bestowed generally (Gustav v. Ghana, Final Award, 2010). For example, dealings of an entity in the public property or public assets reposed on it like airport runways, its taxiways etc., can be done only by the discharge of governmental authority conferred upon the entity in that regard. Still, its affairs in its private property, which is the entity's matrimony's part like "all retails and commercial spaces at the airport", are not affected in its governmental authority but are considered corporate

pursuits in its commercial capacity. In EDF case ((EDF v Romania, Final Award, 2009), the tribunal underlined the conducts which are commercial and governmental.

Some tribunals say that the distinction of conduct into commercial and governmental is not essential for attribution. For example, in *Noble Ventures, Inc. v. Romania*, the tribunal, after having established that the SOP/APAPS was empowered generally to bring the governmental authority to bear, immediately also held, without indulging in a detailed analysis of the acts of SOP/APAPS, that SOP/APAPS was going about in governmental capacity in those particular instances (Noble v. Romania, Final Award, 2005). In this regard, the tribunal declined to engender any differentiation between the governmental and commercial behaviour of the entity - commercial acts of entity (*acta jure gestionis*) would not be attributed towards states, and only governmental acts of entity (*acta iure imperii*) would be attributable - and worded that such distinction is only pertinent when a state wants to claim immunity from the courts of other states. Tribunal further buttressed its conclusion with the fact of nonattendance of such distinction in ILC Draft. It reasoned that ILC Draft's approach for not making such distinction is owing to the impenetrability in establishing the parameters to define or determine the governmental nature of specific acts because of the nonappearance of any common understanding for the determination of public or governmental act. Tribunal said that the lack of this "common understanding in international law of what constitutes a governmental or public act" became the basis of the need for the formulation of ILC Draft Rules (Noble v. Romania, Final Award, 2005).

Article 8

Article 8 states:

> *Conduct directed or controlled by a State:*
> *The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is, in fact, acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.*

In *White Industries Australia Limited v The Republic of India*, the tribunal elaborated the test for whether "a state "controls" or "directs" the acts and omissions of a person or group of persons". It referred to two cases of International Court of Justice, namely *Nicaragua v United States of America* and *Genocide case* [2007] ICJ Rep 43, 208. It derived the "effective control" test, which by the time had also been utilised in *Jan de Nul NV and Dredging International NV v Egypt* as follows:

> *International jurisprudence is very demanding to attribute the act of a person or entity to a State, as it requires both a general control of the State over the person or entity and specific control of the State over the act the attribution of which is at stake; this is known as the 'effective control' test.* (White Industries v. India, Final Award, 2013).

In White Industries Case, the tribunal also referred to *Gustav Case.* In the *Jan de Nul case (*Jan de Nul N.V. Dredging International v. Arab Republic of Egypt, Final Award, 2008), the tribunal held that the act an entity shall be attributed to the state if the state has both a general control over such entity as well as specific control over the act fo such person which is under consideration; this is termed as 'effective control' test.

Tribunal concluded by saying that:

> *Thus, for the allegedly wrongful conduct of Coal India to give rise to the responsibility of India, White has to show that India had both general control over Coal India as well as specific control over the particular acts in question. And to the Tribunal's mind, White*

has failed to make such a showing (White Industries v. India, Final Award, 2013).

The same principle was reiterated and applied in *Gustav v. Ghana*, wherein the tribunal said that to attribute the acts of a private entity to state, the threshold is very demanding as in these cases, both the general control over the entity and effective control of the state over the specific act performed by that entity should be proved (Gustav v. Ghana, Final Award, 2010). An entity's organisational structure, like the appointment of directors from government or consultation on policy or operational matters, is irrelevant to decide the attribution under Article 8 (White Industries v. India, Final Award, 2013). If a state "directs or controls the specific operation and conduct complained of is an integral part of that operation", only then the test outlined in Article 8 will be fulfilled to attribute the conduct to the state (White Industries v. India, Final Award, 2013). The phenomenon of State's 'control' may be penetrated by applying the 'particular result' test as given in Commentary on The International Law Commission's Articles on State Responsibility (Crawford, J, 2002): Introduction, Text and Commentaries by James Crawford which enunciates that where there "was evidence that the corporation was exercising public powers, or that the State was using its control of a corporation specifically to achieve a particular result, the conduct in question has been attributed to the State" (EDF v Romania, Final Award, 2009).

The tribunals have not always followed bifurcation of control into general and effective. In *Limited Liability Company Amto v. Ukraine, the* tribunal relied only on the 'general control' test when it concluded that Energoatom, a separate state entity, has very close links to the state which are apparent from the fact that Cabinet of Minister of Ukraine appoints and dismisses the President, the vice-Presidents of the company. Moreover, Ministry of Fuel and Energy appoints and dismisses its board members. In these circumstances, the tribunal came to a conclusion that "where it is shown that Energoatom was exercising puissance publique (governmental authority) or acted on the instructions of, or under the direction or control of, the State in carrying out the conduct." (Amto v. Ukraine, Final Award, 2008). Similarly, in *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v Islamic Republic of Pakistan*, the tribunal seems to have leaned only on the 'general control' test when it adjudged that "each specific act allegedly in breach of the Treaty was a direct consequence of the decision of the NHA to terminate the Contract, which decision received express clearance from the Pakistani Government" (Bayindir v. Pakistan, Final Award, 2009). These other acts subsumed the expulsion of the claimant from the investment project; after such expulsion payments and monetary claims against the claimant in a local forum and the acts done with regard to guarantees which infracted the rights of Claimants (Bayindir v. Pakistan, Final Award, 2009). The state's 'effective control' with regard to specific acts occurred after the termination of the contract was not discussed by the tribunal. Actually, the breach of rights occurred due to these conducts, should have been adjudged on the effective control specific to each act. Another instance of attribution of acts on the basis of 'general control' test is *EnCana Corporation v Republic of Ecuador* wherein acts of the entity like its entry into contract, performance thereof and then renegotiation were held by tribunal to be attributable to the state because of the facts that the entity was subject to president's instructions and "Attorney-General pursuant to the law had and exercised authority ―to supervise the performance of... contracts and to propose or adopt for this purpose the judicial actions necessary for the defence of the national assets and public interest" (EnCana v. Ecuador Final Award, 2006).

In *Nykomb v The Republic of Latvia*, the tribunal again seemed to have relied on 'general control' test. In this case, the contract concluded between Latvenergo, a state-owned entity and

Windau entitled the later with statutory right to benefit from double tariff for certain period of electric power generation. Later the statute entitling the claimant with double tariff was repealed. After such repeal, Latvenergo declined to award double tariff neither as a statutory right nor as a contractual right and no reason for such refusal was rendered to the tribunal which led the tribunal to assume that Latvenergo turned down to pay such tariff because it thought itself to be bound for the legislative repeal. In the field of electricity generation and its distribution over the national grid, the position of Latvenergo was dominating the market. Tribunal pronounced it to be a clear instrumentality of the state having no commercial freedom in an extremely regulated market because of the fact that it was bound to purchase the electric powers from cogeneration plants at prices determined by Legislature and Regulatory bodies and it had no freedom to negotiate these prices. In this situation, the tribunal maintained it was patent that Latvenergo is merely an instrument for the state to implement its policies through it and hence concluded that the state was responsible for Latvenergo's declination to make the payment of the double tariff (Nykomb v. Latvia, Award, 2003).

Conclusion

If it is established that tribunal should interpret the ILC articles on state's responsibility consistently, the next question would be whether, under Article 5, the bifurcation into governmental behaviour and commercial conduct should be preferable and similarly, the control under Article 8 should mean only the general control or there must be an effective control for extending the liability of an act to the state.

As far as Article 5 is concerned, acts of an entity performed in its commercial capacity should not be attributed to the state. This may be subject to an exception that where commercial and governmental conducts or capacities are so closely intertwined that it becomes almost impossible to determine the nature of capacity in which a specific act has been performed. The statement of tribunal given in *Noble Ventures v. Romania* seems to be spot on that; in such a situation the distinction of one capacity from other is not important. But the case is not always of impossibility and both the conducts are separable from each other as is clear from the statement itself given in the same judgment when tribunal said that states take the defence of commercial capacity of an entity against the enforcement of award against it. It implies that when commercial capacity may be distinguished from governmental one, the act and hence award should not be attributed to the state. Hence, a state's liability may come under discussion either at enforcement stage or in pre-enforcement stage in front of the tribunal. The tribunal, in *Noble Ventures v. Romania*, accepted that defence of commercial capacity may be taken by a state at enforcement stage which gives rise to another question as to why such ground cannot be taken by the state before the tribunal.

With regard to Article 8, it is submitted that the test should be confined to the general control only. As the principle of preponderance is applicable for the evidence in civil matters, so along with the fact that the principle of preponderance may govern to establish the presence of 'effective control,' to require effective control, in addition to general control, may be inferred as a demand for the proof of state's involvement beyond doubt and it is submitted that the evidence beyond doubt is the requirement in criminal cases. Investment cases fall into the category of civil cases. Therefore, in investment cases, to require such a strong evidence for effective control is very cumbersome for the claimant. It is also noteworthy that the sufficiency of general control has been accepted even for certain situations in international criminal law cases. For example, in

Gustav v. Ghana, tribunal said, in the jurisprudence of International Criminal Law, for the attribution of an act of military or para-military acts to the state, the presence of general control is sufficient and there is no need to prove the effective control because in these matters the control over the head of the military group or para-military group is like controlling the whole of army and its acts (Gustav F W Hamester v. Republic of Ghana, Final Award, 2010).

Another point to be noted is that this situation is very much similar to a corporation subsidiary to a multinational company which is held liable to heavy amount of damages and the holding or parent multinational company successfully avoids the liability on the basis of independent personality of its subsidiary. This happens despite the fact that the parent multinational company is dominating rather regulating whole of the affairs of its subsidiary and in this case lifting of corporate veil does not prove to be effective. This argument is very much relevant to the entity-state relationship. It may be put forward that when the state is a major shareholder and the corporate structure as well as corporate governance of that entity is run by the will of the state, in that case, such general control should be considered to suffice to hold a state responsible.

Acknowledgement

We are thankful to the editorial team for the constructive guideline and support.

References

Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan Respondent, ICSID Case No. Arb/03/29, Final Award (August 27, 2009)

EDF (Services) Limited v Romania, ICSID Case No. ARB/05/13, Final Award, (October 8, 2009).

EnCana Corporation (Claimant) v. Republic of Ecuador (Respondent), LCIA Case No. UN 3481, UNCITRAL, Final Award, (February 3, 2006).

Gustav F W Hamester GmbH & Co KG, Claimant v. Republic of Ghana, Respondent, ICSID Case No. ARB/07/24, Final Award, (June 18, 2010)

James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (CUP, 2002).

Jan de Nul N.V. Dredging International N.V. CLAIMANTS v. Arab Republic of Egypt Respondent, ICSID Case No. ARB/04/13, Final Award, (November 6, 2008)

Limited Liability Company Amto v. Ukraine, SCC,080/2005, Final Award, v 102 (March 26, 2008).

Luca Schicho, *Attribution and State Entities: Diverging Approaches in Investment Arbitration*, 12(2) (2011) JWIT 283.

Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Final Award, (October 12, 2005)

Nykomb Synergetics Technology Holding AB v. The Republic of Latvia, SCC, Award, (December 16, 2003).

Susan D. Franc, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 (2004, 2005) FORDHAM L. REV. 1521

Ulysseas, Inc. v. The Republic of Ecuador, Panama Court of Justice, Interim Award, (September 28, 2010)

White Industries Australia Limited v. The Republic of India, Final Award, (November 30, 2013)

Yuval Shany, *Notes and Comments: Contract Claims Vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims*, (2005) 99 AM. J. INT'L L. 835