

# *The Representation of States before ICSID Tribunals*

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This article discusses different facets of the representation of States in investment arbitration with a focus on ICSID arbitrations. It reviews rules governing the determination of the representatives of a State, practical issues that arise with respect to such determination and the particulars of the ICSID system in appointing representatives of States. It then examines how problems relating to the representation of a State can be dealt with by curing the lack of authority of the person purporting to act on behalf of the State, by ratification of the acts in question, by reliance on the principles of estoppel and good faith and by invocation of the responsibility of the respondent State.

The question of who represents a State may seem to be a familiar topic to anyone interested in investment arbitration. Indeed, investment arbitration is almost invariably used by investors seeking damages allegedly caused by the conduct of a host State. The apparent familiarity of the topic should not, however, lead to the confusion between two distinct issues: State representation and State responsibility. As James Crawford explains in his commentaries on ‘the International Law Commission’s articles on State Responsibility’:

The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State. Thus the head of State or government or the minister of foreign affairs is regarded as having authority to represent the State without any need to produce full powers. Such rules have nothing to do with attribution for the purposes of State responsibility.<sup>1</sup>

Even if this statement may be qualified, it is important to make the distinction. Once it is made, one realizes that the representation of a State during an investment arbitration is an issue much less familiar than initially imagined.

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<sup>1</sup> James Crawford, *The International Law Commission’s Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge University Press, Cambridge 2002) 92.

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### 1. *ICSID Rules Dealing with the Representation of Parties*

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (ICSID Convention) created the International Centre for Settlement of Investment Disputes (ICSID). Only one article of the ICSID Convention deals with the representatives of the parties. It states that parties' representatives appearing in ICSID proceedings enjoy the same immunity from legal process as ICSID arbitrators or members of the ICSID Secretariat.<sup>2</sup>

The ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules) are more interesting in this respect. Article 18 of these Rules deals directly with the representation of the parties, providing that:

- (i) Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Tribunal and the other party.
- (ii) For the purposes of these Rules, the expression 'party' includes, where the context so admits, an agent, counsel or advocate authorized to represent that party.

The ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the Institution Rules) are also pertinent. Article 2(1)(a) of these Rules provides that the request for arbitration or conciliation 'shall designate precisely each party to the dispute and state the address of each'.

Notably, Article 2(1)(a) of the Institution Rules raises a minor difficulty to an investor who wishes to institute arbitration proceedings: the word 'address' is not appropriate for a State. A State does not have a registered address or a seat, unlike other juridical persons. This means that when the respondent party is a State, which is almost always the case in ICSID proceedings, the claimant must provide the address of at least one legal representative of that State.

The question therefore arises: who may be considered the legal representatives of the State? The ICSID Convention and the various ICSID regulations and rules do not address this issue. However, the issue is dealt with in the

<sup>2</sup> Art 22 states 'The provision of Article 21 shall apply to persons appearing in proceedings under this Convention as parties, agents, counsels, advocates, witnesses or experts; ...'.

Vienna Convention on the Law of Treaties, 1969 (Vienna Convention).<sup>3</sup> It is up to the party who files the request for arbitration (the claimant) to designate at least one representative for the respondent State, with the help of the Vienna Convention.

An alternate method to ascertain the legal representatives of a State would be for the ICSID Secretariat to keep a record of the identity and address of the representative of the States who ratified the ICSID Convention on behalf of each State. This solution, however, may be less than perfect: the representative of the State having the power to ratify an international treaty on behalf of the State may differ from the representatives competent to represent it before a Tribunal. Further, addresses of the representatives may change.

In sum, the investor may face some difficulty in determining the representatives of the States for an ICSID arbitration. I will illustrate some of the problems by reference to a case in which I was involved as [counsel].

## *2. Illustrative Case*

In this case, the claimant gave the ICSID Secretariat three addresses in its request for arbitration: the addresses of the Presidency, the State Litigation Office and the Embassy of the State in Washington DC. A reply was received only from the Head of the State Litigation Office.

Subsequently, the claimant/investor informed his counsel that in his opinion, the Head of the State Litigation Office had no power to act on behalf of the respondent. He therefore, refused to appoint an arbitrator until the problem was resolved.

The claimant's position was based on a provision found in the municipal law of the respondent State which stated that 'The Head of the State litigation office represents the State and government-owned corporations before foreign Courts and international arbitration proceedings in administrative, civil and

<sup>3</sup> Art 7 *Full powers*

- (i) A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:
  - (a) he produces appropriate full powers; or
  - (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.
- (ii) In virtue of their functions and without having to produce full powers, the following are considered as representing their State:
  - (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
  - (b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;
  - (c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

commercial matters'. The provision appears in a chapter titled '*Representation of the State and of government-owned corporations before all courts*'. Now, are ICSID proceedings 'international arbitration proceedings in administrative, civil and commercial matters'? The respondent State's legal system was inspired by French law. In French law, administrative, civil and commercial matters, strictly speaking, do not encompass investment law. Further, according to the *travaux préparatoires* of the provision in question, ICSID proceedings were excluded due to an unfortunate precedent: a previous ICSID case involving that State. Thus, the claimant's interpretation seemed correct: the Head of the State Litigation Office appeared to have no power to act on behalf of the State in an ICSID arbitration.

The ICSID Secretariat took this problem seriously. It addressed two letters to the respondent requesting its views on the issue.<sup>4</sup> However, the respondent did not reply.

According to the claimant, the Head of the State Litigation Office had no power to represent the State. Consequently, all his actions in the proceedings were unauthorized. These included his appointment of one of the arbitrators and the mandate he gave a law firm to act as counsel for the State. The claimant believed that this was a tactic of the respondent to create grounds for a future application for annulment.

It is true that Article 52(1)(a) of the ICSID Convention provides that 'one party may request annulment of an award on the ground that the Tribunal was not properly constituted'. An ICSID Tribunal would certainly be held not 'properly constituted' if a person having no power to do so purported to appoint one of its members.

Was the claimant right in his analysis? Were his fears justified? In order to answer these questions, we must first review the rules governing the determination of the representatives of States. We can then analyze the situation, and remedies, where a person pretending to act on behalf of a State in fact acts *ultra vires*.

### 3. *Rules Governing the Determination of the Representatives of a State*

Pursuant to the interim award rendered in 1901 in the case concerning '*Whaling and Sealing Claims against Russia, on account of arrest and seizure of four*

<sup>4</sup> Excerpt from the second letter sent by ICSID Secretariat to the Respondent:

*As far as the representation of X is concerned, we would be grateful for the Republic of X to confirm that Article 3 of the Law n°xxx does encompass arbitration proceedings initiated before the Centre. In any event, please note that each and every of our letters are sent to the Presidency, as per the instructions contained in the request for arbitration. We shall also now send a copy of our correspondence to the representative of X at the ICSID Administrative Council, HE Mr Y...*

*American vessels*<sup>5</sup>, it is undisputed in international law that a State in legal proceedings has the right to be represented by agents of its own choosing. This right, which also extends to counsel, appears in Article 42 of the Statute of the International Court of Justice<sup>6</sup> and in Article 18(1) of the ICSID Arbitration Rules. Additionally, it appears in Article 6 of the European Convention on Human Rights.<sup>7</sup> It is therefore recognized as part of the basic right to a fair trial.

This right of representation of choice is exclusive. It is difficult to imagine the representatives of a party in a proceeding being appointed by the opposing party. As absurd as this may seem, it is exactly what Article 2(1)(a) of the Institution Rules does by requiring the claimant to ‘designate precisely each party to the dispute and state the address of each’ in the request for arbitration.

This provision, however, is not entirely unreasonable. What would happen if the claimant does not designate the respondent and its representatives in the request for arbitration? Who, then, would the ICSID Secretariat contact in order to give notice to the respondent State that ICSID proceedings have been initiated against it? Waiting for the State to appoint its representative is not a solution as it could be used as a dilatory tactic.

In sum, the solution used in Article 2(1)(a) of the ICSID Institution Rules is pragmatic. The claimant has to designate the persons or organs who, according to him, are the representatives of the State for an ICSID proceeding. If the claimant errs, it is up to the respondent State to clarify and appoint such legal representatives.

What options are available if the claimant believes he has made a mistake and if the respondent State does not reply to queries seeking clarification of the issue? Can this silence be considered as a confirmation of the correctness of the designation made by the claimant? As notifications were not properly made, it may be argued that this silence has no effect as the State has not been made aware of the situation. However, some legal solutions must exist to remedy problems relating to the representation of States in ICSID arbitration. These are discussed below.

<sup>5</sup> Whaling and Sealing Claims against Russia, on account of arrest and seizure of the American vessels ‘Cape Horn Pigeon’, ‘James Hamilton Lewis’, ‘C. H. White’ and ‘Kate and Anna’, IX 1960 RIAA 51–78.

<sup>6</sup> Art 42.

- (i) The parties shall be represented by agents.
- (ii) They may have the assistance of counsel or advocates before the Court.
- (iii) (. . .).

<sup>7</sup> Art 6 lays down in its para (3) the right ‘to defend himself in person or through legal assistance of his own choosing’. Cf. also the exactly similar provisions in Art 14 of the International Covenant on Civil and Political Rights of 16 December 1966. It is true that art 6 deals with defence against criminal charges, but which arises from the overall context of the Convention, and there is no room for any suggestion that the provision is not simply one illustration of a more fundamental principle still about a litigant’s basic rights in pursuing or defending legal proceedings.

#### 4. *The Appointment of Representatives of States within the ICSID System*

The ICSID Secretariat performs a purely administrative function. It has no power to control the appointment of the representatives of parties or to require modifications to such appointments. In the case illustrated above, the ICSID Secretariat gave up its attempts to obtain a clarification from the respondent after its two queries were left unanswered.

The same cannot be said for ICSID Tribunals. Recently, two ICSID Tribunals dealt with the appointment of a party's representative because of his alleged links with one of the members of the Tribunal. Both Tribunals recognized the fundamental principle that parties are free to organize their representation.<sup>8</sup> However, beyond this general statement, the reasoning of the Tribunals differ.

In *Hrvatska Elektroprivreda d.d. v Slovenia* (ICSID Case No ARB/05/24), the Tribunal held that 'Even fundamental principles must, however give way to overriding exceptions', and added that 'in this case, the overriding principle is that of the immutability of properly constituted tribunals (Article 56(1) of the ICSID Convention)'.<sup>9</sup> Indeed, the alternative solution would have been the resignation of the relevant member of the Tribunal (the Chairman in this case). Neither party wanted this. Moreover, such a measure would have run afoul of the rule of immutability of Tribunals.<sup>10</sup>

In *Rompetrol Group N.V. v Romania* (ICSID Case No ARB/06/3), the Tribunal stated that it was not 'convinced that there is any necessary tension between the two basic principles: the independence and impartiality of the Tribunals (coupled with the associated principle of the immutability of a Tribunal duly established) vs. the litigant's right to be represented by persons of his or her free choice.'<sup>11</sup> The Tribunal added that 'If special circumstances were to arise in a specific case such that these two basic principles did come into collision with one another, it would be the Tribunal's duty to find a way of bringing them into balance, not to assign priority to either over the other'.<sup>12</sup> The Tribunal did not specify how this could be done.

In *Hrvatska Elektroprivreda*, the Tribunal considered that it had 'an inherent power to take measures to preserve the integrity of its proceedings' and that

<sup>8</sup> ICSID Case No ARB/05/24 *Hrvatska Elektroprivreda d.d. v Slovenia*, 6 May 2008 Tribunal's ruling regarding the participation of David Milton QC in further stages of the proceedings, s 24; ICSID Case No ARB/06/3 *Rompetrol Group N.V. v Romania*, 14 January 2010 Decision of the Tribunal on the participation of a Counsel, s 20.

<sup>9</sup> ICSID Case No ARB/05/24 *Hrvatska Elektroprivreda d.d. v Slovenia*, 6 May 2008 Tribunal's ruling regarding the participation of David Milton QC in further stages of the proceedings, s 25.

<sup>10</sup> *Ibid.*, s 32.

<sup>11</sup> ICSID Case No ARB/06/3 *Rompetrol Group N.V. v Romania*, 14 January 2010 Decision of the Tribunal on the participation of a Counsel, s 21.

<sup>12</sup> *Ibid.*

this power ‘finds a textual foothold in Article 44 of the ICSID Convention which authorizes the Tribunal to decide ‘any question of procedure’ not expressly dealt with in the Convention, the ICSID Arbitration Rules or ‘any rule agreed by the parties’<sup>13</sup>. The Tribunal concluded that it had the power to exclude counsel and that the circumstances of the case required it.<sup>14</sup>

In *Rompetrol*, the Tribunal did not consider that given the circumstances of the case, it was ‘called upon to decide definitely what the limits are of any power an ICSID Tribunal might possess to exclude counsel’.<sup>15</sup> The Tribunal added that if such a power existed, it would be one ‘to be exercised only rarely and in compelling circumstances’.<sup>16</sup>

What lessons can be drawn from these two decisions? First, ICSID Tribunals certainly possess an implied power to control a party’s representation before them. Second, the scope and extent of such power is still unresolved. Third, it is certainly easier for an ICSID Tribunal to exercise this control with respect to counsel (appointed for a specific case) than with regard to legal representatives of a respondent State. Nevertheless, as seen below, an ICSID Tribunal does exercise a kind of control over the legal representatives of a State.

There are other solutions to the problem of determination of the legal representatives of a State. These are considered below.

### 5. Other Legal Solutions to Remedy Problems Concerning the Representatives of States

Problems relating to the representation of a State can be dealt with in at least four ways: (i) by curing the lack of authority of the person purporting to act on behalf of the State, (ii) by ratification of the acts in question, (iii) by relying on the principles of estoppel and good faith or (iv) by invoking the responsibility of the respondent State.

#### (A) Curing the Lack of Authority of the Acting Person

There is a trend in international law to presume that some persons have the power to act on behalf of a juridical person, with no need to produce full powers. Regarding States, the rule is recalled by James Crawford in the quotation extracted above. In *Aminoil v Kuwait* it was held that: ‘the Tribunal only needs to point out that it is entirely normal and useful that, in transnational economic relations, the capacity of the Minister in charge of

<sup>13</sup> ICSID Case No ARB/05/24 *Hrvatska Elektroprivreda d.d. v Slovenia*, 6 May 2008 Tribunal’s ruling regarding the participation of David Mildon QC in further stages of the proceedings, s 33.

<sup>14</sup> *Ibid* s 34.

<sup>15</sup> ICSID Case No ARB/06/3 *Rompetrol Group N.V. v Romania*, 14 January 2010 Decision of the Tribunal on the participation of a Counsel, s 25.

<sup>16</sup> *Ibid*.

Economic matters should be presumed, as is that of a Minister for Foreign Affairs in international relationships'.<sup>17</sup> It might be pointed out that the Tribunal in fact erred in its reasoning. It decided in terms of 'capacity' instead of 'power' in order to ascertain whether the Minister of Finance and Oil could legally bind the State of Kuwait. Such confusion between 'capacity' and 'power' is commonly made. Nevertheless, the assumption of full powers applies to the power to act on behalf of a person.

This rule applies to both States and companies. For the latter, reference may be had to the *Soerni v ASB* case. In that case, Soerni, a French company, challenged the enforceability of an international arbitration award rendered in London on the grounds that the arbitration agreement had not come into existence as the person who signed the arbitration agreement had no power to represent the company under French company law.

The Court of Appeal of Paris upheld the enforcement order, on the grounds of the existence of a principle of capacity in international arbitration law that validated the arbitration agreement. This decision was, in turn, upheld by the French *Cour de Cassation* in a decision dated 8 July 2009. The Court held: 'the commitment of a company to refer disputes to arbitration does not fall within the law of any particular jurisdiction but is governed instead by a substantive law rule pursuant to which the validity of an arbitration agreement results from the common will of the parties, the requirement of good faith and the legitimate belief in the powers of the signatory of the agreement to conclude ordinary business transactions on behalf of the company'.<sup>18</sup>

It is true that this substantive rule, adapted to the needs of international arbitration but strongly criticized,<sup>19</sup> is based on the 'principle of capacity', which is, in turn, based on the 'principle of validity' of arbitration agreements. It can certainly be extended to the representation of States before ICSID Tribunals, providing that the function of the acting person is compatible with this assumption.

### (B) *Ratification*

The irregular actions of a person who acted on behalf of a juridical person without having the power to do so may be confirmed subsequently by the conduct of the person who had authority to perform such actions.

The rule makes perfect sense. Once informed that an unauthorized person has acted on behalf of a juridical person, the true representative of this juridical person may inform the third party of the irregularity committed. If he does not do so, it leads one to assume that the representative agrees with this conduct,

<sup>17</sup> *Aminoil v Kuwait*, Award of 24 March 1982, 21 ILM 1982, s 33, 976–1053.

<sup>18</sup> Civ. 1<sup>re</sup>, 8 July 2009, n° 08-16025 <[www.legifrance.gouv.fr](http://www.legifrance.gouv.fr)> accessed 15 October 2010.

<sup>19</sup> Pros, see for instance Thomas Clay, 'Arbitrage et modes alternatifs de règlement des litiges' (2009) Dalloz 2961; cons, see for instance Louis d'Avout and Sylvain Bollée, 'Droit du commerce international' (2009) Dalloz 2384–85.

which can then be said to be ratified. This rule appears in Article 8 of the Vienna Convention<sup>20</sup> and has been used, at least once, in international arbitration. In the ICC case *Framatome v Atomic Energy Organization of Iran*, for instance, the Tribunal ruled that ‘in any event, the initial irregularities could not be opposed to the French party, mainly because of the confirmation of the contract through its performance’.<sup>21</sup>

Although the *Framatome* case was concerned with the conclusion of a contract and the representative of a State entity, it should also apply to the acts allegedly made on behalf of a State during an ICSID arbitration.

This rule could apply in the case illustrated above. All notifications in the arbitration were addressed to the ‘true’ representatives of the respondent State (the President and the ambassador of the country in Washington DC). These representatives were duly informed of each step of the procedure, but nonetheless never reacted.

### (C) Estoppel and Good Faith

In the case illustrated above, the true representatives of the respondent State did not react to the claimant’s allegation that the Head of the State Litigation Office had no power to act on behalf of the State in an ICSID arbitration. Further, they did not reply to the queries of the ICSID Secretariat about the issue. Thus, the respondent State will be precluded to assert at the annulment stage before an *ad hoc* Annulment Committee that one of its civil servants, the Head of the State Litigation Office, had acted *ultra vires* and that all his acts are null and void. Principles of estoppels and good faith would preclude any legal action on this ground.

### (D) State Responsibility

In the highly unlikely event of nullification of an award rendered in his favour, the claimant in the case at hand may engage the responsibility of the respondent State through the acts of the Head of the State Litigation Office.

The link between representation and responsibility has been underlined in the NAFTA case *Fireman’s Fund Insurance Company v Mexico*.<sup>22</sup> In this case, one of the claims made in the arbitration was based on the negotiation, development and ultimate rejection of a Recapitalization Program by a Working Group. Mexico did not deny the existence of the Working Group. It took the position that no legal claims could be based on the Working

<sup>20</sup> Art 8, *Subsequent confirmation of an act performed without authorization*

Any act relating to the conclusion of a treaty performed by a person who cannot be considered under art 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State.

<sup>21</sup> ICC Case 3986 *Framatome v Atomic Energy Organization of Iran*, 1982, Decision on jurisdiction, 30 April 1982, as published in *Journal de Droit International* (1984) 58–80, (spec p 67, free translation from the French original).

<sup>22</sup> ICSID Case No ARB(AF)/02/01 *Fund Insurance Company v Mexico*, Award of 17 July 2006, s 149.

Group's activities because under Mexican law the Working Group was not a Governmental organization with decision-making authority or power to bind the State. The claimant replied, in essence, that regardless of its internal administrative law, Mexico could not, under international law, avoid responsibility for the conduct of a body that acts on Mexico's behalf *vis-à-vis* third parties (such as Fireman's Fund Insurance Company).

The Tribunal found that the claimant's statement was correct. However, the evidence submitted to the Tribunal did not show a commitment made on behalf of Mexico by the Working Group, which was subsequently repudiated by the State.<sup>23</sup>

The shift in the claimant's reasoning from State representation to State responsibility is discernable. It shows that these two issues are not strangers to each other.

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In the case illustrated in this article, the claimant could not be convinced to refrain from bringing up the matter before the Tribunal. The claimant failed to be impressed by the argument that he would benefit from the possible lack of power of the Head of the State Litigation Office (provided this was not raised at the initial stage of the procedure).

When the question was raised at the first hearing, the ICSID Tribunal, composed of eminent lawyers, simply asked the Head of the State Litigation Office: 'Do you have full powers to act on behalf of the Respondent?'. The Head of the State Litigation Office replied 'Yes', and that was all. The manner in which these eminent lawyers resolved the issue is astonishing. The person whose power is challenged is obviously not entitled to assert his power by a single affirmation.

The Tribunal's approach there perhaps will not be the final word on the issue of representation of a State in ICSID arbitration.

<sup>23</sup> Ibid s 150.