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CASE COMMENT

CEAC v Montenegro[1]

When does an investor have a 'seat' in its home state?

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I. INTRODUCTION

In an Award dated 26 July 2016, a majority of the Tribunal in *CEAC Holdings Limited v Montenegro* declined jurisdiction on grounds that CEAC did not have a 'seat' in Cyprus and therefore did not qualify as an 'investor' under the Cyprus–Serbia and Montenegro BIT.[4] The majority reached this decision without making a final determination on the proper meaning of the term 'seat' in the BIT. The majority's approach was criticised by CEAC's appointee, William W. Park, who issued a Separate Opinion finding that CEAC's registered office in Cyprus met the nationality requirements under the BIT. CEAC has instituted annulment proceedings against the Award that remain pending at the time of writing.

This Case Comment reviews the background to the dispute (Section II), addresses the findings in the Award (Section III) and the Separate Opinion (Section IV), and provides comment on the usefulness *vel non* of the Award as a guiding precedent for future cases (Section V).

II. BACKGROUND TO THE DISPUTE

The case concerned an aluminium plant in Montenegro, Kombinat Aluminijuma Podgorica, A.D. (KAP) that was owned and managed by CEAC, a company established under the laws of Cyprus.[5] CEAC alleged that its investment failed as a result of state efforts to regain control of KAP, in alleged breach of the protections in the BIT.[6]

[1] *CEAC Holdings Limited v Montenegro*, ICSID Case No ARB/14/8, Award, 26 July 2016 [hereinafter *CEAC v Montenegro*]. The Tribunal comprised Bernard Hanotiau (President), William W. Park (Claimant's nominee) and Brigitte Stern (Respondent's nominee). CEAC was represented by King & Spalding; Montenegro was represented by Schönherr Rechtsanwälte. CEAC has filed an ICSID annulment proceeding that was registered in November 2016.

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[4] Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments (signed on 21 July 2005, entered into force on 23 December 2005) [hereinafter the BIT].

[5] *CEAC v Montenegro* (n 1) at para 29.

[6] ibid at paras 29–38.

The Tribunal bifurcated the proceedings to consider the jurisdictional question of whether the Claimant had a 'seat' in Cyprus in accordance with Article 1(3)(b) of the BIT.[7] That provision states in relevant part:

> The term 'investor' shall mean: . . .
> a legal entity incorporated, constituted or otherwise duly organized in accordance with the laws and regulations of one Contracting Party, *having its seat* in the territory of that Contracting Party and making investments in the territory of the other Contracting Party.[8]

CEAC submitted that it had established a seat in Cyprus within the meaning of Article 1(3)(b) and was therefore an 'investor' under the BIT.[9] According to CEAC, since the BIT does not define the term 'seat' and no uniformly accepted definition of the term exists under international law, the meaning of 'seat' under Article 1(3)(b) of the BIT must be determined by a *renvoi* to the municipal law of Cyprus.[10]

CEAC submitted through its expert witness, the former Attorney-General of Cyprus, that under Cypriot law, a corporate seat requires only a registered office and not a 'real seat'.[11] According to CEAC, this interpretation is supported by the treaty practice of Cyprus and Montenegro, which States have used the terms 'registered office' and 'seat' interchangeably.[12] At all relevant times, CEAC had maintained its registered office in Cyprus, as evidenced by several certificates of registered office issued by the competent authorities.[13] CEAC therefore argued that it satisfied the 'seat' requirement in the BIT.[14]

Montenegro countered that the Tribunal should interpret the term 'seat' autonomously in light of international law.[15] Because the interpretative rules of the Vienna Convention on the Law of Treaties (the 'Vienna Convention') do not contain any reference to national law, the term 'seat' must be interpreted autonomously under the BIT, without a *renvoi* to municipal law.[16]

Moreover, the overarching purpose of reciprocity would be defeated if the Contracting Parties applied their domestic laws in order to define the term 'seat'.[17] The 'seat' test must fulfil its function in an even manner with respect to both Contracting Parties, such that it must be conducted on the basis of 'reciprocal and identical criteria'.[18] Otherwise, the circle of protected Montenegrin investors would be different from the circle of protected Cypriot investors.[19]

Montenegro submitted that the term 'seat' requires something more than incorporation and a 'registered office' under both international law and Cypriot

[7] ibid at para 10.
[8] BIT (n 4), art 1(3)(b) (emphasis added).
[9] *CEAC v Montenegro* (n 1) at para 50.
[10] ibid at paras 51–70 (submitting that 'where no accepted definition of a term exists under international law or is given in an investment treaty, international law requires that tribunals refer to municipal law to obtain the precise meaning of a legal concept').
[11] ibid at paras 71–88.
[12] ibid at paras 85–88.
[13] ibid at para 89 (submitting certificates for the years 2005–2008 and 2010–2013).
[14] ibid at para 89.
[15] ibid at paras 99–109.
[16] ibid at para 98.
[17] ibid at para 101.
[18] ibid.
[19] ibid.

law.[20] The term 'seat' is best interpreted as the place where the investor is 'effectively managed and financially controlled and where it carries out its business activities'.[21]

According to Montenegro, regardless of the Tribunal's interpretation of the term 'seat' in Article 1(3)(b) of the BIT, CEAC did not have a seat in Cyprus. The address provided by CEAC for its alleged office did not qualify as a 'registered office' within the meaning of Cypriot law.[22] The certificates of registered office were not conclusive evidence, since they were issued without any independent investigation.[23] The Tribunal had the power to make its own nationality determination, even if its 'ultimate conclusions contradict official documents issued on the basis of municipal law'.[24] Further, the building where CEAC allegedly had its seat had 'no street number and no brass plate for CEAC'.[25] An attempt to courier a package to CEAC's address in Cyprus failed three times because CEAC was not known at that address.[26]

III. THE MAJORITY DECISION

The majority of the Tribunal did not consider it necessary to determine the precise meaning of the term 'seat', as employed in the BIT, because the evidence in the record purportedly did not support a finding (i) that CEAC had a registered office in Cyprus at the relevant time, nor (ii) that it was managed and controlled from Cyprus.[27] Therefore, even on CEAC's interpretation, CEAC did not have a 'seat' in Cyprus within the meaning of the BIT. Consequently, CEAC was not an 'investor' within the meaning of the BIT, and the Tribunal lacked jurisdiction to hear the case.[28]

In reaching this conclusion, the majority of the Tribunal addressed CEAC's submission that the existence of its registered office in Cyprus was 'conclusively' proven by the certificates of registered office in the record. The majority observed that:

> The question of jurisdiction is a matter for international, and not domestic, law. The Tribunal therefore has to determine the probative value in the international legal order of certificates of registered office issued by Cypriot (i.e., domestic) authorities.[29]

The majority then stated that under international law, certificates of registration issued by a domestic authority only constitute *prima facie* evidence of the facts they attest to.[30] According to the majority:

> An international tribunal is therefore not bound by the nationality determinations and the certificates issued by domestic authorities, but must make its own determination under

[20] ibid at paras 110–18, 120 (submitting that the term 'seat' is 'a practical concept, which requires a subject and an activity' and cannot 'represent something which is an inseparable consequence of incorporation').
[21] ibid at paras 119–29.
[22] ibid at para 130.
[23] ibid at para 131.
[24] ibid at para 132 (citing *Hussein Nuaman Soufraki v United Arab Emirates*, ICSID Case No ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr Soufraki (5 June 2007) para 78).
[25] *CEAC v Montenegro* at para 133.
[26] ibid.
[27] ibid at para 148.
[28] ibid.
[29] ibid at para 154.
[30] ibid at para 155. See also paras 156–57.

> international law. This finding does not in any way diminish the probative value of such certificates under domestic law.[31]

The majority found that 'under Cypriot law, certificates of registered office are not conclusive evidence that a registered office exists'.[32] This is because the Cypriot authorities do not carry out any official and independent verification as to whether company declarations concerning their registered offices correspond with reality.[33] A certificate of registered office merely confirms that a notification of a registered office has been made by a company to the registrar of companies.[34] A certification of registration, with nothing more, therefore was not sufficient to establish that CEAC possessed Cypriot nationality under Cypriot law.[35]

The majority proceeded to examine the available evidence and concluded that it did not support a finding that CEAC had an office at its registered address in Cyprus at the time it filed the request for arbitration in March 2014.[36] The registered office was not accessible to the public and appeared to show no sign of CEAC's presence or of any activity.[37] CEAC had failed to offer any plausible explanation for the state of the building (which appeared unoccupied), for the lack of any outside indication that it was being used for business purposes by CEAC, nor for why, on nine different occasions during the previous two years, the building had been inaccessible for courier delivery or for purposes of inspecting CEAC's registers.[38] Since no other office in Cyprus had been claimed, CEAC lacked Cypriot nationality for the purpose of the Tribunal's personal jurisdiction.[39] The majority also noted 'out of an abundance of caution' that CEAC did not appear to have been managed and controlled from Cyprus in March 2014.[40]

IV. THE SEPARATE OPINION

Park signed the Award subject to a Separate Opinion that dissented on the central issue of the seat.[41]

Park was critical of the majority having concluded that CEAC had no seat in Cyprus in circumstances where the majority had declined to determine the meaning of the term 'seat'.[42]

Park also disagreed with the majority's finding that a 'seat' requires more than a 'registered office'.[43] He stressed that CEAC's local law expert had served for eight years as the Attorney General of Cyprus and was a particularly-experienced expert in Cypriot company law; no reason therefore existed to discredit his expert testimony.[44] CEAC's local law expert had not endorsed the more elaborate test that

[31] ibid at para 155. See also paras 156–57.
[32] ibid at para 160.
[33] ibid at para 166.
[34] ibid at para 164.
[35] ibid at paras 168–69.
[36] ibid at paras 173–99.
[37] ibid at para 177.
[38] ibid at para 191.
[39] ibid at para 200.
[40] ibid at para 202–08.
[41] *CEAC v Montenegro* (n 1), Separate Opinion of William W Park.
[42] ibid at para 1.
[43] ibid at para 9.
[44] ibid at para 8.

was advanced by Montenegro's local law expert and embraced by the majority of the Tribunal.[45]

According to Park, international law 'as it currently stands provides no uniformly accepted 'ordinary meaning' of corporate seat', which remains 'essentially a municipal law concept derived from Continental systems, whereas Claimant's incorporation occurred in a common law country lacking such notions'.[46] Although the notion of 'seat' is alien to the English legal tradition from which Cyprus derives its company law, 'analogues can be found in the [Brussels] Regulation, providing that for Cyprus a statutory seat means, alternatively, registered office, place of incorporation or the place under the law of which the company formation took place'.[47]

Moreover, Park opined that while the term 'seat' is sometimes married with a qualifier such as 'real seat', the BIT in question did not do so, and it would be 'bold indeed to add adjectives' when the 'Treaty drafters introduced no such additional requirements'.[48] Adding criteria to the BIT's definition of 'seat', so as to demand 'real' or other presence would require the arbitrators to assume a policy-making mission in excess of their authority.[49] According to Park:

> [A]n arbitral tribunal bears a duty of fidelity to the treaty text as drafted, and cannot rewrite the contracting states' bargain. If the negotiators of this Treaty had wished to require investors to prove 'management and control' they could have done so by adding those three words.[50]

Park concluded that the test that 'best matches the meaning of "seat" in Cyprus'[51] is 'an office that is registered'.[52]

Applying this standard, Park found that CEAC had a registered office, and therefore a 'seat', in Cyprus, thus precluding the dismissal of the arbitration on this ground alone.[53] The evidence in the record showed that notices, including 16 communications from Montenegro, were delivered on multiple occasions to CEAC's registered address in Cyprus.[54] Park observed that 'no evidence supports the position that constant accessibility constitutes a precondition to a registered office, or that inability to remain open triggers disregard of the office by the Register'.[55]

[45] ibid at paras 9–10.

[46] ibid at para 18. See also ibid at para 12 (citing International Law Commission, 'Draft Articles on Diplomatic Protection with commentaries' UN Doc A/61/10, ILC YB, vol II/2, art 9, cmt 3: 'international law has no rules of its own for the creation, management and dissolution of a corporation or for the rights of shareholders and their relationship with the corporation, and must consequently turn to municipal law for guidance on this subject'). *See also Tenaris SA and Talta - Trading e Marketing Sociedade Unipessoal Lda v Bolivarian Republic of Venezuela*, ICSID Case No ARB/11/26, Award, 29 January 2016, para 144 (finding that international law and practice do not contain a consistent definition of 'seat' for the purposes of determining jurisdiction *ratione personae*).

[47] ibid at para 14 (citing Dicey, Morris and Collins, *Conflicts of Law* (15th edn, Sweet & Maxwell 2012), para 11-079: 'a company has a seat in the UK if either (i) incorporated under UK law with registered office or some other official UK address or (ii) possessing central management and control exercised in the UK').

[48] ibid at para 16.

[49] ibid at para 21.

[50] ibid at para 20.

[51] ibid at para 22.

[52] ibid at para 19.

[53] ibid at para 22.

[54] ibid at para 5.

[55] ibid at para 9. See also para 10 ('Defective compliance with corporate obligations (such as name plate, ledgers and accessibility) may result in fines, but does not make the office disappear').

IV. COMMENTS

Irrespective of the outcome of the pending annulment proceedings in *CEAC v Montenegro*, the utility of the Award as a guiding precedent for future cases will be impaired by deficiencies in the majority's reasoning.

It is regrettable that the majority of the Tribunal did not deem it necessary to determine the precise meaning of the term 'seat' as employed in Article 1(3)(b) of the BIT.[56] It is well-settled that the question of the existence of jurisdiction based on consent must be examined by an arbitral tribunal *proprio motu*, including through the examination of jurisdictional requirements, *sua sponte*, if necessary.[57] It was not possible for the majority to render a final legal judgement on the place of CEAC's 'seat' without first deciding on the applicable legal test for determining the existence of a 'seat' within the meaning of Article 1(3)(b) the BIT. Contrary to the majority's reasoning, the need for such a definition certainly did arise.

Moreover, the Award does not answer the question of whether a *renvoi* to municipal law is appropriate to obtain the precise meaning of a legal concept when no accepted definition of such a concept exists under international law. Rather than address head-on CEAC's submission that the meaning of the term 'seat' should be determined by a *renvoi*,[58] the majority noted only that 'the question of [the Tribunal's] jurisdiction is a matter for international, and not domestic, law'.[59]

The International Court of Justice (the 'Court') has long held that where legal issues arise concerning matters that are not covered by international law, reference shall be made to the relevant principles of municipal law.

In the seminal decision in *Barcelona Traction*, the Court found it necessary to identify the rights of shareholders that formed the object of a diplomatic protection claim and to determine whether or not those rights attracted the protection of international law.[60] The Court held that since international law was silent as to the rights of the shareholders, the Court was compelled to revert to municipal law to construct a rule relating to shareholder claims:

> whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law.[61]

The Court clarified the rationale for its *renvoi* to municipal law as follows:

> If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court

[56] *CEAC v Montenegro* (n 1) at para 148.

[57] See eg *Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador*, ICSID Case No ARB/04/19, Award (18 August 2008) para 163; *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/00/2, Award (15 March 2002) para 56; *Ioan Micula, Viorel Micula and others v Romania*, ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008) para 65. The International Court of Justice has also observed that it must always examine *proprio motu* the question of its own jurisdiction, even where one of the parties does not appear or fails to adequately plead its case: see *Aegean Sea Continental Shelf* (*Greece v. Turkey* (Judgment) [1978] ICJ Rep 3, para 15, page 116.

[58] For a summary of CEAC's submissions on this issue, see *CEAC v Montenegro* (n 1) at paras 51–61.

[59] ibid at para 154. This statement was made in the context of the majority's discussion of the probative value of CEAC's certificate of registered office.

[60] *Barcelona Traction, Light and Power Co., Ltd.* (*Belgium v Spain*) (Judgment) [1970] ICJ Rep 3 [hereinafter *Barcelona Traction*].

[61] ibid at 33–34.

> could resort. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it. It is to rules generally accepted by municipal legal systems which recognise the limited company whose capital is represented by shares, and not to the municipal law of a particular state, that international law refers. In referring to such rules, the Court cannot modify, still less deform them.[62]

Judge Fitzmaurice made the same point in his Separate Opinion:

> Since the limited liability company with share capital is exclusively a creation of private law, international law is obviously bound in principle to deal with companies as they are – that is to say by recognizing and giving effect to their basic structure as it exists according to the applicable private law conceptions. . . . These distinctions must obviously be maintained at the international level: indeed to do otherwise would be completely to travesty the notion of the company as a corporate entity.[63]

In *Ahmadou Sadio Diallo*,[64] the Court confirmed the basic principles governing the analytical approach applied in *Barcelona Traction*. In that case, the Republic of Guinea had instituted legal proceedings against the Democratic Republic of the Congo (the DRC), claiming by way of diplomatic protection that the latter had violated various international rights of its national Ahmadou Sadio Diallo, a businessman who had previously operated companies in the DRC. Addressing the question of whether or not the companies in question had independent legal personality for the purposes of founding a diplomatic protection claim under international law, the Court held that in 'determining whether a company possesses independent and distinct legal personality, international law looks to the rules of the relevant domestic law'.[65]

An investment treaty does not purport to create a new international legal concept of 'seat' any more than general international law does. Since the BIT does not define the term 'seat' and none of the sources of international law, listed in Article 38 of the Statute of the International Court of Justice, provides an 'ordinary meaning' of that term for the purposes of Article 31 of the Vienna Convention, an investment treaty tribunal is bound to make a *renvoi* to the applicable municipal law and its provisions concerning the scope and content of such a concept. In the words of one commentator, such 'renvoi does not confuse the role of international law and municipal law or affect international law's supremacy in determining international responsibility', but rather preserves it by allowing 'a *renvoi* to municipal law only if international law does not provide a substantive discipline of rights subject to investment treaties'.[66]

[62] *Barcelona Traction* (n 60) at 37.
[63] Separate Opinion of Judge Fitzmaurice, ibid at 71.
[64] *Ahmadou Sadio Diallo* (*Guinea v Congo*) Preliminary Objections (Judgement) [2007] ICJ Reps, 582.
[65] ibid at 605. See also Separate Opinion of Judge *ad hoc* Mampuya, ibid at 635 ('Had it reasoned otherwise, the Court would either have imperiously altered Congolese corporate law . . . or have chosen without reason to disregard the municipal law of a party in an area and a case in which it is precisely this body of law alone which applies').
[66] Monique Sasson, *Substantive law in investment treaty arbitration: The unsettled relationship between international and municipal law* (Kluwer Law International 2010) 207. The cited commentator provided expert testimony on behalf of the claimant in the *CEAC* case [*CEAC v Montenegro* (n 1) at para 22].