States’ representation before ICSID Tribunals

« The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law process 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. »[1]

ICSID Rules

dealing with parties’ representation

ICSID Arbitration Rules

Rule 18

Representation of the Parties

(1) 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.

(2) 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.
ICSID Institution Rules

Rule 2
Contents of the Request

(1) The Request shall:
(a) designate precisely each party to the dispute and state the address of each.

Facts of the case and Claimant’s allegations
Municipal law of the Respondent State

Representation of the State and of government-owned corporations before all courts

article 3.

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 commercial matters.

(Free translation)

ICSID Convention

Article 52

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

(a) that the Tribunal was not properly constituted;
Rules governing the determination of States’ representatives

ÉTATS-UNIS/RUSSIE

SENTENCE ARBITRALE PRÉPARATOIRE SUR UN INCIDENT DE PROCÉDURE, RENDUE PAR M. T.-M.-C. ASSER DANS L’AFFAIRE DES NAVIRES CAPE HORN PIGEON, JAMES HAMILTON LEWIS, C. H. WHITE ET KA TE AND ANNA, EN DATE DU 19 OCTOBRE 1901

The right of each party to appoint an agent to represent him — The validity of communications emanating from this agent — Right of the opposing party to communicate directly with the agent.

« ATTENDU que, dans une procédure arbitrale, chaque Partie a incontestablement le droit de nommer un Agent ou Conseil, chargé de la représenter au procès (…) ;

Qu’un tel Agent ou Conseil devant être considéré comme le mandataire spécial de la Partie qui l’a nommé, les actes accomplis par lui dans les limites de son mandat ne sont pas moins valables que s’ils avaient été accomplis par le mandant; »
ICSID Arbitration Rules

Rule 18
Representation of the Parties

(1) 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.

European Convention on Human Rights

Article 6

(3) Everyone charged with a criminal offence has the following minimum rights:
(c) to defend himself in person or through legal assistance of his own choosing, (…)
ICSID Institution Rules

Rule 2
Contents of the Request

(1) The Request shall:
(a) designate precisely each party to the dispute and state the address of each.

Review of the appointment of States’ representatives within the ICSID System
24. The ICSID Convention and Rules do not, however, explicitly give the power to tribunals to exclude counsel. To the contrary, we readily accept that, as general rule parties may seek such representation as they see fit – and that is a fundamental principle.

25. Even fundamental principles must, however give way to overriding exceptions. In this case, the overriding principle is that of the immutability of properly constituted tribunals (Article 56(1) of the ICSID Convention).

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

21. The Tribunal is not therefore convinced that there is any necessary tension between the two basic principles: the independance 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. 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.

Rompetrol Group N.V. v. Romania (ICSID Case No ARB/06/3), Decision of the Tribunal on the participation of a Counsel, 14 January 2010
33. [The Tribunal] considers that as a judicial formation governed by public international law, [it] has an inherent power to take measures to preserve the integrity of its proceedings. In part, that inherent 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".

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

25. (…) the Tribunal does not consider, for the reasons that follow to do with the actual circumstances of the present case, that it is called upon to decide definitely what the limits are of any power an ICSID Tribunal might possess to exclude counsel, (…) [if such a power would exist, it would be one] to be exercised only rarely and in compelling circumstances.

Rompetrol Group N.V. v. Romania (ICSID Case No ARB/06/3), Decision of the Tribunal on the participation of a Counsel, 14 January 2010
Other legal solutions to remedy problems concerning States’s representation:

A) Curing the lack of authority of the acting person;
B) Giving validity to jeopardized acts;
C) Preventing lawsuits;
D) Engaging the responsibility of the Respondent State because of the agent’s behaviour.

A) Curing the lack of authority of the acting person

=> assumption of power
« (..), 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 Economic matters should be presumed, as is that of a Minister for Foreign Affairs in international relationships ».

B) Giving validity to jeopardized acts

⇒ Confirmation of void acts

« (…), for all the above reasons, the Tribunal reached the conclusion 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 ».

Framatome v. Atomic Energy Organization of Iran,
ICC case 3986 (1982), Decision on jurisdiction, 30 April 1982,
as published in Journal de Droit International, 1984,
(free translation from the French original)

C) Preventing lawsuits

⇒ Principles of Estoppel and Good faith
D) Engaging the responsibility of the Respondent State because of the agent’s behaviour

« 149. Mexico did not deny the existence of the Working Group, but took the position that no legal claims could be based on its activities, because under Mexican law the Working Group was not a Governmental organization with decision-making authority or power to bind the State. FFIC 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 its behalf vis-à-vis third parties such as FFIC.

150. Put in this abstract form, FFIC’s statement is correct. However, the evidence submitted to the Tribunal did not show a case of a commitment made on behalf of Mexico by the Working Group and subsequently repudiated by the State. »

Fireman’s Fund Insurance Company v. Mexico, award, 17 July 2006, ICSID Case No ARB(AF)/02/01