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Senate Bill Deprives State-Owned Enterprises of Sovereign Immunity as a Litigation Tactic in U.S. Courts

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State-owned enterprises (SOEs) have in recent years become more active in cross-border investment and other commercial activity.[1] The raised visibility has attracted public and official scrutiny of SOEs' corporate structures and governance, as well as the implications of SOE-involved transactions for antitrust/competition, national security, and consumer affairs.

In the United States, recently-concluded and proposed acquisitions by SOEs of companies based or active in the United States have raised national security and other concerns among some U.S. lawmakers (for example, as discussed in an April 2016 MassPoint Business Update about foreign investment in U.S. agriculture).

More recently, some lawmakers and private sector actors have turned their attention to the issue of whether SOEs should be permitted to assert sovereign immunity as a litigation tactic. Under established U.S. law—**the Foreign Sovereign Immunities Act of 1976 (FSIA)**—foreign states and their "agencies and instrumentalities" generally enjoy immunity, but they are ***not immune*** from the jurisdiction of U.S. courts in cases based on certain commercial activities. Nevertheless, the commercial activity exception to the FSIA's general rule of sovereign immunity does not preclude an SOE (or a foreign state) from ***asserting*** sovereign immunity, and thereby forcing opposing litigants to sort through sometimes complex corporate ownership structures to identify a specific state-owned enterprise to which relevant commercial activity can be attributed.

To deprive SOEs of the tactical advantage of asserting sovereign immunity in U.S. courts, Senator Chuck Grassley (R-IA) introduced on September 14 the State-Owned Entity Transparency and Accountability Reform (STAR) Act of 2016, "a bill to improve the Foreign Sovereign Immunities Act of 1976, and for other purposes." Specifically, the STAR Act would remove a level of specificity required to link a specific legal entity to commercial activity by amending the FSIA to make "commercial activity . . . attributable to ***any*** corporate affiliate of the agency or instrumentality that (A) directly or indirectly owns a majority of shares . . . and (B) is also an agency or instrumentality of a foreign state." (emphasis added)

The STAR Act's proposed amendment of the FSIA is significant as a matter of both sovereign immunity law and corporate law, as the STAR Act would appear to allow the separate legal identity

of one SOE that ***directly or indirectly*** owns a majority or more of a second SOE to be disregarded. The "directly or indirectly" language would potentially expose state-owned enterprises at the top or near-top of an ownership chain to the jurisdiction of U.S. courts, regardless of the number of intermediate entities in the ownership structure.

Of course, it remains to be seen whether the STAR Act will be enacted into law.[2] For litigants and those skeptical of state-owned enterprises in the marketplace, the introduction and potential adoption of the STAR Act are likely welcome developments. State-owned enterprises (including sovereign wealth funds) and their owning governments will naturally be less receptive. Whatever one's view, the STAR Act's amendments to the U.S. foreign sovereign immunity framework would be significant if adopted.[3] State-owned enterprises and other interested parties should take note.

NOTES

[1] For example, according to the OECD Business and Finance Outlook 2015, "[c]ross-border M&A by SOEs increased sharply starting in 2008 and accounted for over 20% of total cross-border M&A in 2009 . . .SOE activity has since come down but remains well above its historical levels at just under 10% of the total. Cross-border M&A by SOEs has played an important counter-cyclical role in the aftermath of the financial crisis, but has also given rise to concerns. . ." In 2016, outbound investment by Chinese state-owned enterprises has been robust (and has caused consternation in some quarters in the United States, Europe, Australia, and elsewhere). According to one news report: "The combined value of China's outbound mergers and acquisitions has reached about $68 billion so far this year, the strongest volume ever for this period and already more than half of 2015's record annual tally, according to deal tracker Dealogic. The biggest buyers are state-owned enterprises or companies run by China's government, such as ChemChina."

[2] While certainly not indicative of the extent of potential support in Congress of the STAR Act, it is notable that during a September 20, 2016 Senate Judiciary Committee hearing on consolidation in the agriculture sector, Senator Richard Blumenthal (D-CT) (a former Attorney General of Connecticut) asked the CEO of Syngenta AG to "commit" that the company would not, following its expected acquisition by ChemChina, assert a sovereign immunity defense in U.S. courts. (See hearing video at 2:15.30). In August, ChemChina's proposed takeover of Syngenta was cleared by CFIUS (the Committee on Foreign Investment in the United States).

[3] It is worth noting that the STAR Act was introduced less than a week after the U.S. House of Representatives passed the much-debated Justice Against Sponsors of Terrorism Act (JASTA) (often referred to in the news as the "9/11 bill"). If enacted, the JASTA would amend the Foreign Sovereign Immunities Act to deprive foreign states of sovereign immunity in certain cases arising out of acts of international terrorism or tortious acts that cause death or personal or property damage in the United States. The Senate agreed to the JASTA bill in May. The President is expected to veto the bill, setting the stage for a Congressional veto override that is currently understood to have the needed votes. If the STAR Act is enacted, or garners significant support in Congress, the development (following Congress's passage of the JASTA) ***may*** indicate an increasing willingness among some U.S. lawmakers to diminish foreign sovereign immunity in certain circumstances.