

# **Investment Arbitration and Double Nationality of the Investor**

## **Introduction**

International investment agreements (hereinafter: IIA) made a revolution in international investment law allowing a private investor to bring claim directly against a state without any involvement of the investor's home state. However, the protection of investment can be claimed only if certain jurisdictional conditions concerning the investor, the investment and the consent are met. In the essay the focus will be on the investor, *i.e.* the jurisdictional requirement *ratione personae*. Firstly, the significance of the nationality in international investment arbitration will be addressed (I). Secondly, the possible application of the doctrine of effective nationality in investor-state arbitration will be analyzed (II) and finally, the grounds for prohibiting investors to sue their own state before an international arbitral tribunal will be elaborated (III).

## **I Significance of the nationality in international investment arbitration**

The right to a nationality and the right not to be arbitrarily deprived of the nationality is considered as one of the main human rights by the Universal Declaration of Human Rights. Nationality is generally defined as “the legal bond between a person and a state”, as it is prescribed in the European Convention on Nationality. In an investor-state arbitration, nationality plays a crucial role, since the nationality of the investor is critical in determining an individual's rights and obligations. The jurisdictional requirement *ratione personae* depends on the determination of the investor's nationality. Namely, IIA

guarantees standards of treatment protection only to nationals of states that are parties to the agreement. Some treaties are more restrictive and require that the investor is a national of a state other than the state in which the investment is made. However, in an increasingly globalized world, a reality is that an investor can have more than one nationality, including the one of the host state, which can complicate the protection of the investment. In that sense, the recent concern in the international investment law is the issue of treaty abuse or the issue of treaty shopping. Namely, the question that was scrutinized by tribunals in recent arbitration cases is can an investor (that holds a dual nationality of both the state where an investment has been made and of the foreign country) initiate arbitration proceedings against his own country.

The situation seems to be easy to deal with when the IIA has an express provision relating to multiple nationals. That is the case of the Mauritius-Egypt BIT (treaty is not applicable to “a national of one state that is simultaneously a national of the other contracting state”), or the Switzerland-Egypt BIT (definition of investor “shall not include a natural person that holds the nationality of both Contracting Parties”), or the Romania-Canada BIT (in case of Romania, the investor is “in the case of Romania “any natural person who, according to the Romanian law, is considered to be its citizen and who does not possess the citizenship of Canada”). Also, the Convention of the International Centre for Settlement of Investment Dispute (hereinafter: ICSID) in its article 25 lists the jurisdictional requirements and explicitly deals with the issue of double nationals, prescribing that a definition of investor does not include a person who have a nationality of the contracting state that is a party to the dispute. However, even in cases when the IIA prohibits investor’s claims against his own country, it does not prohibit investor to

be a multiple national. Therefore, the tribunal still needs to determine the scope of its own jurisdiction by deciding whether it will take into consideration both nationalities as equal or it will identify the effective nationality which will eventually determine the tribunal's jurisdiction.

## **II Possible application of the doctrine of effective nationality in investor-state arbitration**

From the above mentioned, it is evident that ICSID and other mentioned treaties exclude from its scope investors that have the nationality of the host state, but it is not clear whether the doctrine of dominant and effective nationality should be applied or not. In order to decide on that matter, a few factors can be taken into account.

First, it should be noted that the principle of effective nationality was upheld in *Nottebohm case* where it was decided that the existence of a genuine link between a person and a state is required in order to get diplomatic protection. However, there is no agreement whether the nationality principles developed in the field of diplomatic protection can be automatically applicable in investor-state arbitration. On contrary, legal doctrine (led by Rudolf Dolzer and Christoph Schreuer) and case law (e.g. *C. F. Amerasinghe case*) have emphasized some striking differences between the two. The principle of effective nationality was established when the investor did not have other possible options to protect his rights, and nowadays the investor can directly bring a suit against the host state. What is more, it is reasonable for a state to insist on a particular

meaningful connection in case of diplomatic protection, since its engagement in the dispute against another state on behalf of its national is at stake.

Moreover, the ISCID drafting history can be of assistance, as the issue of dual nationals was debated by the Drafting Working Group, but the convention's final version does not contain the provision on effective nationality. Thus, it can be argued that there is no ICSID jurisdiction when the investor is a dual national with a nationality of the host state, since the provision was left out of treaty on purpose. That stance is supported by many scholars including Christoph Schreuer, and is confirmed in many cases such as *Champion Trading v. Egypt*, *Micula v. Romania*, *Saba Fakes v. Turkey case*, *Siag v. Egypt*, in which tribunals decided that the so-called negative nationality requirement was not satisfied. In other words, the negative nationality requirement deals with the investor's lack of a nationality, so in contrast to the positive nationality requirement, the negative one requires the investor to prove that it does not have the nationality of the respondent state, irrespectively of the effective nationality. It is respondent's duty to prove the lack of jurisdiction demonstrating that the investor has the nationality of a host state.

On the other hand, one can argue that BITs are being a part of a wider system that integrates rules from other sources of international law, including customary law, and that tribunals could apply customary international law when determining investor's compliance with the nationality requirements. Prominent authors including Noah Rubins and Zachary Douglas commented the issue, saying that in cases when BIT does not contain provision excluding the application of the effective nationality principle, the

tribunal's jurisdiction should extend to an investor only if his dominant nationality is that of the home State. This approach could be in line with the multinational reality where an investor can have nationality of the host state obtained by birth, but never having a substantial connection with it. However, below will be elaborated why that ground cannot be accepted for allowing an investor to sue his own country.

### **III The grounds for prohibiting investors to sue their own state before an international arbitral tribunal**

When deciding whether the claim against the investor's own country should be allowed or not, one must follow the interpretation rules of the Vienna Convention on the Law of Treaties that prescribe that a treaty should be interpreted in accordance with its object and purpose usually stated in its preamble. IIA are negotiated by home states willing to protect the investment of their own nationals in a host state and by host states trying to attract foreign investments. Thus, the main IIA's objective is to protect investments made by nationals of the *other* state party – *foreign investors*. Furthermore, if we look at the text of ICSID Convention we can see the unambiguous wording that expressly states that in order to gain access to dispute settlement, an investor is required to be a “national of *another* Contracting State”. In that sense, professor Weil's dissenting opinion in *Tokios Tokelès v. Ukraine case* is of major importance. Having in mind the ICSID Convention's Preamble, he stated that the “transborder flux of capital” is required for ICSID mechanism to be applied.

Although some treaties do not contain the provision dealing with the dual nationals, a possible argument that dual nationals are allowed to sue their own country on the simple ground that there is no provision in the IIA prohibiting them from doing so, is not sufficient. The purpose of IIA is to encourage the settlement of disputes between a host state and a private foreign investor and to avoid resolving a possible dispute before a host state's local court. It should have kept in mind that, when negotiating and concluding a treaty, state never gave its consent to arbitration against its national. Thus, even if we accept the possible approach that tribunals should apply the customary rule of effective nationality and uphold jurisdiction if the investor has a stronger connection with his home state, the interpretation of the state's consent would be interpreted too broad and would contradicts the parties' intent.

However, a recent practice shows that an investor can find his way to 'internationalise' his claim against his own states through the acquisition of a second nationality when the treaty is silent on the issue of the standing of dual nationals. That happened in UNCITRAL case - *Serafin García Armas and Karina García Gruber v. Republic of Venezuela* - where the tribunal ruled that the sufficient ground for its jurisdiction is the fact that the Spain-Venezuela BIT fails to regulate the status of dual nationals, so it allowed the two Venezuelan-Spanish investors to sue Venezuela. This award sets an important precedent, but opens a door for manipulation of the nationality by investor as a tool to gain access to the dispute settlement mechanism contained in the relevant BIT. In any event, having in mind all the above said, the outcome of the case would have been different if it was decided before another forum (for example the ICSID arbitration).

Before going to the conclusion, we should mention the recent developments in the EU. Namely, the *Achmea case* put a spotlight on the future of intra-EU disputes based on BIT, but the EU system might affect the future approach of the issue of the dual nationals as well. The concept of European citizenship has raised concerns regarding the claims brought by investors under BIT between EU member states. In that sense, it can be argued that the investor with “the European citizenship”, meaning that he has a nationality of one of EU member states, would be precluded to sue a host state if it is another EU member state. However, professor Ian Brownlie contends that the EU represents only an association of states and not a state itself, so that the EU citizenship is not a self-standing citizenship, but can only exist where an individual has the nationality of a particular member state. Thus, we hope that no problem will arise in that context.

### **Conclusion**

It is reasonable to expect that claims against state of inventor’s nationality will continue to increase. In order to uniformly resolve this issue, states should consider addressing the issue of dual nationality in the relevant treaties. First, treaties should explicitly deal with the possibility of the application of the doctrine of effective nationality. The example of the US Model BIT can be followed, and it provides that “a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality”. Second, treaties should explicitly prescribe whether it is possible for a national of a host state to bring claim against his own state. That way the legal certainty in investment arbitration will be secured and the potential abuse of nationality by individual investors will be avoided.