Investment Arbitration and Double Nationality of the Investor

Under 'traditional' international law, individuals seeking redress of private nature against foreign states had to request action from their home state in the remedial form of diplomatic protection. This system was considered inefficient and highly unpredictable as it triggered concerns of political and diplomatic nature. To promote and protect foreign investments, states began to conclude investment treaties providing for substantive standards for protection and mechanisms in which states and private investors could settle disputes directly. Investor-to-State dispute settlement both departed from fundamental characteristics of international law. Allowing for such direct dealings and placing individuals as subjects of international law was, aside from human rights disputes, novelty. Conversely, it retained characteristics such as having nationality as the legal bond between the aggrieved individual and the state party to investment treaty.

Claims brought by dual-nationals against one of the states of their nationality presents an issue to investment dispute resolution. This essay will address some arguments of the debate and take a position. To do so, it will address *i)* the objectives of ISDS and the role of nationality therein; *ii)* present the competing approaches put forward to deal with dual-nationality cases; *iii)* revisit the concept of nationality to challenge how the debate is framed; and finally, *iv)* argue in favour of a specific position on the debate.

i) **Investor-to-State Dispute Settlement: a special regime?**

It is largely considered that ISDS mechanisms are geared towards protecting foreign investors. Indeed, often BITs are largely consistent of provisions setting substantive and procedural guarantees for investors and duties for states. However, ISDS sought mostly to compensate for the vulnerabilities faced by foreign investors. Diplomatic protection required going through the national courts of the host State, which could be overly cumbersome (some jurisdictions require upfront payment of legal fees), unfair (decisions were prone to nationalistic biases or hostility towards foreign investors), inefficient (diplomatic protection requires the exhaustion of local remedies available in the host state) or outright ineffective, because national courts may be bound by the very legislative measures that affected the investments.

Albeit narrow in scope, ISDS mechanisms sought to de-politicize the redress of investors, insulating investments from considerations of foreign policy of the investors' home states and from (unreasonable) internal policies of host states. However, this regime of dispute settlement was not created in a legal vacuum. Instead, it drew massively from the *acquis* of international law, not least by binding investors and states parties to investment agreements through the bond of nationality. As it did with diplomatic protection, occasionally nationality (especially dual-nationality) presents challenges for adjudicators of investment disputes.

Many scholars agree on the point of controversy, namely that whenever the applicable treaty is not explicit on how to determine the relevant nationality of a claimant investor,

the approach to be used is dependent on the degree to which one understands international investment law to depart from 'general' international law. That is, if one takes investment protection to be a special, self-contained, legal regime (*lex specialis*), one should reach a conclusion different than that which, conversely, one reaches if one understands investment protection to reaffirm the core tenets of international law. I shall reject this frame of debate, but firstly review the contending approaches.

***ii)* The competing tests for ascertaining nationality in ISDS.**

In investment disputes, nationality is a requirement for the jurisdiction of arbitral tribunals and the enforcement of the rights granted in investment treaties. Yet, often BITs fail to provide comprehensive criteria for nationality. Many which do give similar if not identical definitions of nationality as that present in the ILC Draft Articles on Diplomatic Protection – and most provide no express answer to how tribunals should deal with dual nationality. Two competing approaches to how to address dual-nationality issues in investment disputes have emerged: the *dominant and effective nationality* approach and the *formalistic* approach.

The *dominant and effective nationality* approach is often traced back to *Nottebohm*, a case dealing with diplomatic protection of an individual who held a nationality objected by the Respondent state. The rule states that a home state may exercise diplomatic protection in respect of a dual national (or a national whose nationality is contested) only if the individual has stronger, genuine connection with that state. Genuine connection can be ascertained by various means, including, but not limited to, place of usual

residence, centre of main interests, family ties, participation in public life, attachment, etc. This approach is credited with two main functions: Firstly, to preserve the principle of sovereign equality, in that it precludes an individual to make a defendant of a country to which that individual has sworn allegiance. Secondly, to prevent an otherwise purely domestic dispute from being dealt with at international level. This doctrine was used in *Esphahanian* before the Iran-US Claims Tribunal, to reject the claim of a dual-national, despite the lack of express prohibition in the treaty, because the tribunal found it would be absurd to allow a national to bring a claim against their own home state.

The *dominant and effective nationality* test has been rejected under ICSID arbitration. A claimant sought to consider his Egyptian nationality not dominant and effective and, thus, bypass the legal obstacle. The tribunal however denied the request, arguing that Art. 25(2)(a) of the ICSID Convention provided for an express rule disallowing for dual-nationals to bring claims against their own state, indeed following the same reasoning as *Esphahanian* (‘*unless a rule is clearly stated*’) and deciding it on a *formalistic* ground.

More recently this *formalistic* approach was used in an opposite manner in a recent claim against Venezuela, carried out under the UNCITRAL Rules. The tribunal rejected the *dominant and effective nationality approach*, finding that determination of nationality, should be assessed solely with reference to the investment treaty itself. It considered investment treaties to be a special regime within international law and, thusly, *lex specialis* vis à vis customary international law. Although the BIT was ‘silent’ on the matters of dual nationality, the tribunal inverted the ‘*unless a rule is clearly stated*’ logic

to argue that, only if there were an express prohibition, should a dual national be barred from bringing a claim against their home state. Because it found that was not the case, the tribunal found itself to have jurisdiction over the dispute. The *formalistic* approach was developed from an argument used to bar claims of dual nationals to one used to allow them. Consequently, a new issue for debate arose: when tribunals are faced with the situation of a dual national presenting a claim against a state of its nationality and there is no express provision allowing or barring such claim, should tribunals accept or decline jurisdiction?

As I understand, framing the debate as a question of whether investment protection law is *lex specialis* in respect to customary international law is misguided. I will argue that the competing approaches to determining nationality are, in fact, not contradictory, but rather express different aspects of nationality. To support such argument, a brief historical review follows below.

iii) The formal and the substantive in the discourse of nationality: a false dichotomy?

As Jorge Soto wrote, "*we are 21st-Century citizens, trying to communicate with 20th-Century Institutions that are underpinned by 19th-Century processes and ideas*". In fact, the idea of nationality may well pre-date the 19th Century. And whereas such concept may be without problems most of the time, issues of dual nationality evidentiate the limitations of such legal construct.

Notions of citizenship already existed since the Ancient Greek city-states and throughout the Roman civilization. But they were certainly distinct from ours. In the Middle Ages, the belonging of an individual to a certain geographical location and its subjection to authority were determined mostly through the regime of fiefdom. Overarching the decentralized power relations of feudal Europe was religious authority. And even though in the European Christendom, kingdoms and empires existed, there was understandably no conception of nationality as it came to be thought of after the emergence of nation states. Nationality, as we understand it today, emerged most likely with the Treaty of Westphalia.

With the introduction of the Westphalian system, the notion of sovereignty was fully embraced. Formally, every State had equal standing in the international order and was deemed to have absolute power over its citizens and territory. Borders, therefore, had to be clearly delimited and stable. Also, the individuals under its rule. Furthermore, the relationship between citizens and their nation state was a matter entirely left to domestic policy and law, one which, as all internal affairs, warranted no intervention from other states. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws demonstrates the persistence of these ideas, where first sentence of Article 1 reads: '*It is for each State to determine under its own law who are its nationals*'. Nationality, within the Westphalian system was a legal bond between states, sole subject of international law, and natural and legal persons. This purely legal, *formal*, notion of nationality is symbolic of the relation between the state and its citizens.

The *substantive*, non-legal, meaning of nationality, started most likely in the post-Enlightenment and Romanticism periods, as a reaction to the moral, ideological and social instability set with the Enlightenment. One thinks of the *substantive* aspect when one associates nationality with cultural, linguistic, sociological and or ethnic elements. Until the French Revolution, insurgences concerned episodic problems and claims were grounded on principles supposed to be acknowledged by all men. Against tyranny, for instance, arguments were grounded on the fidelity to ancient laws. But the Revolution, with its deep and traumatic breaking apart with tradition, encouraged revolutionaries to fight the dissatisfactions of the old regimes with aspirations that were spontaneous, sometimes aggressive, which did not require great theoretical foundations nor prophets: An extreme adherence to free-will. Amidst this chaos, new ideals were proposed with aim to promote some form of social stability. Discourses of equality, communism and nationality emerged. Nationality became a discourse that could unite masses around a sense of commonality against ruling classes, foreign invaders, evoke notions of civic duty and glory ('*Allons enfants de la patrie*…"). This substantive element eventually permeated law in many aspects: criteria for naturalization, eligibility for political offices, military conscription, etc. In a broader sense, this *substantive* aspect of nationality represents the *moral element* of nationality, ie. the allegiance to the commonwealth of a specific country and inherent obligations.

iv) The importance of a moral element to nationality.

One may now draw the main argument of this thesis: the *formal* and *substantive* notions of nationality are not conflicting conceptions. Rather, they express different levels of the

relation that a national and state have. When a BIT fails to expressly address whether nationals may bring claim against their home state and a tribunal must decide on its jurisdiction, framing the competing possibilities as a matter of ascertaining whether international investment law is or is not a self-contained legal regime fails to properly account for all dimensions that the legal construct of nationality presents. The debate, I claim, should not be framed as a matter of applicable law, between an absent treaty provision or customary international law. Instead, it should be framed as a matter of acknowledging or disregarding the moral, *substantive* element of nationality.

The *formalistic* approach dispenses with the moral element of nationality and, for that reason, I argue that, whenever no express legal provision is available, arbitrators should prefer the *dominant and effective nationality* approach. Moral considerations, after all, allow adjudicators to rectify occasional unfairness of formalistic provisions. Substantive tests for nationality allow arbitrators to reject abusive use of nationality rights; distinguish between dual-nationals by choice (like business entrepreneurs), from those who fled crises, wars, religious or ideological persecution. Furthermore, as seen, the *formalistic* approach can be argued both ways. Reserving the *formalistic* approach only for cases under express legal provisions, whilst ascertaining the *dominant and effective nationality* in cases where there is a legal gap, I claim, brings ISDS closer to its initial objectives.