

Nationality of Investors: Legitimate Restrictions vs. Business Interests

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THE INVESTOR'S NATIONALITY IS RELEVANT for several purposes. The substantive standards guaranteed in a treaty will only apply to privileged investors. Typically these are nationals of the States parties to the treaty (although permanent residents are sometimes included). These treaties are often BITs but may also be regional treaties such as the NAFTA or the ECT. In addition, the jurisdiction of an international tribunal is determined, *inter alia*, by the claimant's nationality. In particular, if the host State's consent to jurisdiction is given through a treaty, it will only apply to nationals of a State that is a party to the treaty.

In order to gain access to dispute settlement under the ICSID Convention, there is a positive as well as a negative nationality requirement: an investor is required to be a national of a State that is a party to the ICSID Convention. Also, the investor must not be a national of the host State (Article 25).

In the case of arbitration based on a BIT, the host State must be one of the parties to the BIT and the investor must demonstrate that it is a national of the other party. Most BITs contain provisions on nationality distinguishing between natural persons and juridical persons or corporations.

An individual's nationality is determined primarily by the law of the country whose nationality is claimed. A certificate of nationality, issued by the competent authorities of a State, is strong evidence for the existence of the

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nationality of that State but is not necessarily conclusive. A tribunal will make its own decision as to the existence of an individual's claimed nationality and may even reject the probative value of a certificate of nationality.¹

Investment tribunals have generally been unimpressed by arguments based on the absence of a genuine link. What mattered was the BIT's definition of nationality, and that definition invariably pointed to the law of the country whose nationality was claimed.

In *Micula v. Romania*, the Tribunal rejected reliance on a genuine link test (as propounded in *Nottebohm*) where only a single nationality was at issue. It found that the BIT's clear definition of nationality, referring to the nationality law of the State in question, was decisive.²

But there is also indication that even in BIT cases involving dual nationality tribunals will not apply a doctrine of effective or dominant nationality.³ Therefore, it appears that at least as far as arbitration under BITs is concerned, *Nottebohm* has been laid to rest and a doctrine of genuine link will not overcome treaty provisions defining nationality in terms of the nationality legislation of the countries concerned.⁴

The arrangements concerning the nationality of corporations are somewhat more complex. The most commonly used criteria for corporate nationality are incorporation or the main seat of the business (*siège social*).⁵

Some treaties go beyond formal requirements such as incorporation or seat. They require a bond of economic substance between the corporate investor and the State whose nationality it claims.⁶ Such an economic bond may consist of effective control over the corporation by nationals of the State. Alternatively, it may consist of genuine economic activity of the company in the State. In some treaties the economic bond is required in addition to incorporation or seat in the country concerned.⁷ In other treaties, mere control by nationals is

¹ *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award, paras. 55, 63 (July 7, 2004), 12 ICSID Rep. 158 (2007).

² *Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction, paras. 98–106 (Sept. 24, 2008). See also *Feldman Karpa v. Mexico*, ICSID Case No. ARB(AF)/99/1, Decision on Jurisdiction, paras. 24–37 (Dec. 6, 2000), 7 ICSID Rep. 327 (2005); *Siag and Vecchi v. Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, paras. 195–201 (Apr. 11, 2007).

³ *Olguín v. Paraguay*, ICSID Case No. ARB/98/5, Award, paras. 60–62 (July 26, 2001), 6 ICSID Rep. 164 (2004); *Champion Trading Co. and Ameritrade Int'l, Inc. v. Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, sec. 3.4.1 (Oct. 21, 2003), 19 ICSID Rev.—FILJ 275 (2004).

⁴ But see United States Model BIT of 2004, art. 1 (“investor of a Party”).

⁵ See China Model BIT of 2003, art. 1(2)(b); German Model BIT of 2005, art. 1(3)(a) (Germany is in the process of switching from seat to incorporation as the decisive criterion); United Kingdom Model BIT of 2005, art. 1(d)(i).

⁶ See generally P. Acconci, “Determining the Internationally Relevant Link between a State and a Corporate Investor,” 5 J. World Invest. & Trade 139 (2004).

⁷ U.S. Model BIT, *supra* note 4, art. 1 (“enterprise of a Party”).

sufficient even without the formality of incorporation. For instance, BITs of the Netherlands often define nationals as follows:

- (b) The term 'nationals' shall comprise with regard to either Contracting Party:
- i. natural persons having the nationality of that Contracting Party;
 - ii. legal persons constituted under the law of that Contracting Party;
 - iii. legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii) above.⁸

In other words, incorporation *or* control by incorporated companies will suffice to attract the benefits of the treaty.⁹

Some treaties contain a complex combination of incorporation, economic activity in the country in question and control by nationals. For instance, the BIT between Iran and Switzerland grants investor status to a legal entity that is established under the law of the State in question and has its seat there, provided it also has real economic activities in that country. Alternatively, the same BIT grants investor status to a legal entity not incorporated in that State if it is effectively controlled by natural or juridical persons of the State.¹⁰

Some treaties contain so-called denial of benefits clauses. Under such a clause the States reserve the right to deny the benefits of the treaty to a company that does not have an economic connection to the State on whose nationality it relies. The economic connection would consist of control by nationals of the State of nationality or substantial business activities in that State.¹¹

To some extent it is within the investor's disposition whether it meets these various criteria, especially if the criterion of incorporation in a particular country is sufficient to establish nationality. A prudent investor may organize its investment in a way that affords maximum protection under existing treaties. Most often this will be done through the establishment of a company in a State that has favorable treaty relations with the host State and accepts incorporation as a basis for corporate nationality. That company will then be used as a conduit for the investment.

⁸ Netherlands–Venezuela BIT, art. 1.

⁹ See also French Model BIT, art. 1(2).

¹⁰ Iran–Switzerland BIT, art. 1(1)(b), (c).

¹¹ ECT, art. 17(1); NAFTA, art. 1113; Argentina–United States BIT, art. I(2); U.S. Model BIT, *supra* note 4, art. 17; Austria–Jordan BIT, art. 10.

This leads to the question of the permissibility and limits of nationality planning. Attitudes towards these techniques vary widely and are reflected in the terminology used. Those disapproving of it typically speak of treaty shopping and refer to corporations thus established as corporations of convenience.

In principle, there is no reason why a prudent investor should not organize its investment in a way that affords maximum protection under existing treaties. It is neither illegal nor improper for an investor of one nationality to establish a new entity in a jurisdiction perceived to provide a beneficial regulatory and legal environment, including the availability of an investment treaty. The establishment of companies so as to obtain benefits from domestic law and treaties is neither unethical nor illegal and is standard practice in international economic relations. Nationality planning has become as much a standard feature of diligent management as tax planning.

In *Soufraki v. United Arab Emirates*, the claimant, an individual, failed in his attempt to assert Italian nationality in order to rely on the BIT between Italy and the United Arab Emirates. The Tribunal found that he did not possess Italian nationality at the relevant time. At the same time, the Tribunal pointed out how Mr. Soufraki could have avoided this unfavorable result by incorporating a corporate vehicle in Italy rather than contracting in his personal capacity.¹²

The Tribunal in *Aguas del Tunari v. Bolivia* was even more explicit. It stated that it was neither illegal nor uncommon for investors to locate their operations in a jurisdiction that offers a beneficial legal environment in terms of taxation or the availability of a BIT. The Tribunal said that “[t]he language of the definition of national in many BITs evidences that such national routing of investments is entirely in keeping with the purpose of the instruments and the motivations of the state parties.”¹³

At the same time, there is a certain ambivalence with tribunals faced with protestations by host States that corporations of convenience should not be tolerated. In a number of cases the tribunals accepted the nationalities claimed by investors on other grounds. But they still made reference to the fact that the corporations in question had not been established purely for jurisdictional purposes.¹⁴ This might be interpreted as meaning that nationality planning, pure and simple, has some negative implications.

¹² *Soufraki v. United Arab Emirates*, Award, *supra* note 1, para. 83.

¹³ *Aguas del Tunari, S.A. v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, paras. 330, 332 (Oct. 21, 2005).

¹⁴ *Autopista Concesionada de Venezuela, C.A. v. Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, para. 122 (Sept. 27, 2001), 6 ICSID Rep. 419 (2004); *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, paras. 24–52 (Apr. 29, 2004), 11 ICSID Rep. 313 (2007); *Aguas del Tunari v. Bolivia*, Decision on Jurisdiction, *supra* note 13, para. 321.

An analysis of practice indicates that tribunals have given effect to the definitions of corporate nationality contained in BITs. If the requirements for corporate nationality under the respective BIT were met, the tribunals typically refused to second guess it.

The classical case is *Tokios Tokelés v. Ukraine*.¹⁵ The Claimant was incorporated in Lithuania but was controlled by Ukrainian nationals. For the Tribunal's majority, incorporation in Lithuania met the BIT's definition of nationality and was hence sufficient. The Tribunal noted that the parties to the treaty could have inserted a "denial of benefits clause" but had not done so. It was not for the tribunal to read such a clause into the text. Similarly, the Tribunal refused to look at the existence of a substantial business activity in Lithuania since the treaty did not contain this criterion.¹⁶

In *Aguas del Tunari v. Bolivia*¹⁷ the Tribunal also strictly adhered to the terms of the applicable BIT and refused to introduce additional criteria. Under the applicable Bolivia–Netherlands BIT, the definition of nationals included legal persons controlled by nationals of the Netherlands. Indirect control of the Claimant by Netherlands companies was sufficient even if these companies were in turn controlled by companies of other countries.

In *Saluka v. Czech Republic*,¹⁸ the Claimant was a legal person incorporated under the laws of the Netherlands. The Tribunal was unimpressed by Respondent's objection that Saluka was merely a shell company controlled by its Japanese owners. Under the Czech–Netherlands BIT, incorporation in the Netherlands was sufficient for nationality and hence decisive.¹⁹

Other cases, such as *ADC v. Hungary*²⁰ and *Rompetrol v. Romania*,²¹ also demonstrate that where an applicable BIT adopts incorporation as the criterion for nationality, this has to be interpreted as a sufficient criterion. It is not permissible to look behind the company nor to examine the existence of a genuine link.

Relying on a doctrine of piercing of the corporate veil under customary international law to deny a nationality that exists under a BIT is unlikely to be successful. Veil piercing takes place under exceptional circumstances only. The ICJ

¹⁵ *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction, *supra* note 14.

¹⁶ *Id.* paras. 18–71. The more controversial question in *Tokios Tokelés* was the compliance with the negative nationality requirement under the ICSID Convention.

¹⁷ *Aguas del Tunari v. Bolivia*, Decision on Jurisdiction, *supra* note 13.

¹⁸ *Saluka Investments BV v. Czech Republic* (UNCITRAL), Partial Award (Mar. 17, 2006).

¹⁹ *Id.* paras. 229, 241.

²⁰ *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. Hungary*, ICSID Case No. ARB/03/16, Award, paras. 334–341, 350, 357–359 (Oct. 2, 2006).

²¹ *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Jurisdiction and Admissibility, paras. 71–110 (Apr. 18, 2008).

in *Barcelona Traction*,²² as well as a number of investment tribunals,²³ has held that veil piercing is permissible only in cases of fraud or malfeasance which involve a misuse of the corporate personality. But structuring investments through the establishment of corporations in different jurisdictions or “national routing”²⁴ does not as such constitute a wrongdoing and is not a basis for a doctrine of veil piercing.

So does this mean that there are no limits to nationality planning, treaty shopping or corporations of convenience, whatever one prefers to call the phenomenon? May an investor at any time simply put on the attire of a desirable nationality in order to obtain protection under a favorable treaty? It is clear that there must be some limits to nationality planning.

It appears from current practice that prospective planning within the framework of existing treaties will be accepted by tribunals. Prospective means that the corporate arrangements must have been in place before the facts which led to the dispute occurred. What appears to be impossible is to create a remedy for existing grievances, in particular after a dispute has arisen, by arranging for a desirable nationality through incorporation, assignment or otherwise.

In *Banro v. DR Congo*²⁵ the dispute had arisen when the Claimant attempted to make the necessary nationality arrangements in order to bring a claim to ICSID. The Claimant attempted to base jurisdiction not on a BIT but on an investment agreement concluded between a Canadian company and the Democratic Republic of Congo which contained an ICSID consent clause. The Canadian company transferred the investment to its U.S. affiliate which was not a party to the investment agreement just a few days before initiating ICSID arbitration. Canada, unlike the United States, was (and still is) not a party to the ICSID Convention. Therefore, the original investor did not meet the nationality requirement under the ICSID Convention. Applying the principle *nemo plus iuris transferre potest quam ipse habet*, the Tribunal held that the Canadian investor could not effectively assign the claim to its American subsidiary which was not party to the arbitration agreement with the respondent State in order to bypass this fundamental defect of jurisdiction.²⁶

²² *Case Concerning the Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, 1970 ICJ Rep. 3, para. 56.

²³ *Tokios Tokelès v. Ukraine*, Decision on Jurisdiction, *supra* note 14, para. 55; *Saluka v. Czech Republic*, Partial Award, *supra* note 18, para. 230; *ADC v. Hungary*, Award, *supra* note 20, para. 358; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, para. 328 (July 29, 2008).

²⁴ *Aguas del Tunari v. Bolivia*, Decision on Jurisdiction, *supra* note 13, para. 332.

²⁵ *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. DR Congo*, ICSID Case No. ARB/98/7, Award (Sept. 1, 2000). Only excerpts of the Award have been published at 17 ICSID Rev.—FILJ 380 (2002).

²⁶ See also *Mihaly Int'l Corp. v. Sri Lanka*, ICSID Case No. ARB/00/2, Award (Mar. 15, 2002), 6 ICSID Rep. 308 (2004).

Attempts to obtain the protection of a BIT *ex post facto*, *i.e.* after the facts giving rise to the dispute, are usually doomed to failure for the simple reason that the treaty will not apply retroactively. An obligation of a State party to the BIT exists only in relation to investors who at the time of the act in question are nationals of the other State party to the BIT.²⁷ Protection under the BIT is available only prospectively and not retroactively. Any claims based on the BIT's substantive standards must relate to facts that have occurred after the company became an investor. Under these circumstances there can be no question of nationality planning or treaty shopping to make a BIT's standards apply to past events.

In *Phoenix v. Czech Republic*²⁸ most of the incriminated facts had occurred and the dispute was in full swing when the Czech investor tried to acquire a seemingly convenient nationality by selling the investment to an Israeli company established for that purpose. The company then sought to rely on the BIT between Israel and the Czech Republic. The Tribunal found that it had no jurisdiction *ratione temporis* to consider claims that had arisen prior to the alleged investment by the Israeli company. Obligations under the BIT were capable of being breached by the Czech Republic only after there was an investment by an Israeli investor.²⁹

There is a general paradox about this whole business of nationality. When it comes to access to investment arbitration, or generally to protection under BITs, nationality is extremely important. A lot of ink is spilt and a lot of time is spent to prove a particular nationality. But when a case reaches the merits, strangely enough, distinctions on the basis of nationality are taboo. Discrimination on the basis of nationality is prohibited: there are rules against arbitrary and discriminatory treatment. Discrimination on the basis of nationality would be a violation of the fair and equitable treatment standard. In addition, nearly all treaties contain national treatment and MFN clauses. Therefore, distinctions on the basis of nationality are prohibited.

Human rights law has found a solution to this. Human rights are enjoyed regardless of nationality. Perhaps in the long run, this will be the future of investment arbitration. But we are still a long distance from that.

²⁷ See Article 13 of the ILC Articles on State Responsibility: "An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."

²⁸ *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (Apr. 15, 2009). See also *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, paras. 116–117, 122–123, 136, 153–157 (Sep. 17, 2009).

²⁹ *Id.* paras. 67–71.