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# “And you are . . .?”—Dual Nationals in Investment Treaty Arbitration

Hussein HAERI & David WALKER\*

## ABSTRACT

*The issue of dual nationals in investment treaty arbitration goes beyond self-identification and involves questions of treaty interpretation and, in some cases, principles developed within the framework of diplomatic protection. This article provides an overview of jurisprudence concerning “who” a person really is in international investment law. It addresses the complex interplay between national and international law with regard to nationality, as well as the contrasting treatment of natural persons and corporate bodies as investors.*

“I very much deplore the necessity to prove that I am who I am.”<sup>1</sup>

The question of *who* an individual is can transcend self-identification in investment treaty arbitration, not least where dual nationals are concerned. International law, and investment treaty tribunals, recognize that a state is free to determine who its nationals are.<sup>2</sup> Thus, the Permanent Court of International Justice (the “PCIJ”) observed in 1923 that “questions of nationality are, in the opinion of the Court, in

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<sup>1</sup> These were the words of the claimant quoted by the *ad hoc* committee in *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *Ad Hoc* Committee on the Application for Annulment of Mr Soufraki (June 5, 2007), ¶ 13.

<sup>2</sup> See e.g. *Flegenheimer*, (1958) 25 ILR 91 at 97, referring to the “unquestionable principle of international law according to which every State is sovereign in establishing the legal conditions which must be fulfilled by an individual in order that he may be considered to be vested with its nationality”; *Espahanian v. Bank Tejarat*, (1983) 2 Iran-US CTR 157 at 161; Decision in Case No. A/18 Concerning the Question of Jurisdiction over Claims of Persons with Dual Nationality, (1984) 5 Iran-US CTR 251 at 260; *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL *ad hoc* arbitration, Decision on Jurisdiction (April 30, 2010), ¶ 119; *Soufraki*, *supra* note 1, ¶ 60; *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction (April 11, 2007), ¶¶ 143–5; *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (September 24, 2008), ¶ 86.

principle within this reserved domain” of the jurisdiction of the state,<sup>3</sup> and Article 3 of the European Convention on Nationality provides that: “Each State shall determine under its own law who are its nationals.”<sup>4</sup> At a practical level, the most immediate effects of nationality are felt by individuals within a municipal legal system as it determines the exercise of many of their rights and duties within that system. However, on the international plane, the efficacy of a state’s conferral of nationality is not unconstrained, because it is limited by the rights of other states. Domestic recognition of nationality does not necessarily mean that nationality can be effectively asserted against another state; that would require the nationality to be recognized under international law.<sup>5</sup>

According to traditional international law theory, states are the principal subjects of international law. Individuals were typically considered as objects rather than subjects of international law, with no right of direct action against wrongs committed by other states.<sup>6</sup> However, nationality provided the nexus for an individual wronged by another state to seek redress through diplomatic protection under the law of nations. This was based on the legal conflation of individuals with the state whose nationality they possess and the legal fiction that an injury to an individual is an injury to the state whose nationality that individual possesses. In the words of the PCIJ in *Mavrommatis*: “By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights . . .”<sup>7</sup>

<sup>3</sup> Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion of February 7, 1923, [1923] PCIJ Ser. B No. 4 at 24. See also *Nottebohm* case (*Liechtenstein v. Guatemala*), second phase, Judgment of April 6, 1955, [1955] ICJ Reports 4 at 20: “It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality . . .”; Convention on Certain Questions Relating to the Conflict of Nationality Laws (April 12, 1930), 179 LNTS 89, Art. 1: “It is for each State to determine under its own law who are its nationals. . . .”

<sup>4</sup> European Convention on Nationality (November 6, 1997), ETS No. 166, Art. 3(1).

<sup>5</sup> *Nottebohm*, *supra* note 3 at 20–21: “To exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seise the Court.”; European Convention on Nationality (November 6, 1997), ETS No. 166, Art. 3: “(1) Each State shall determine under its own law who are its nationals. (2) This law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality.” See also Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion of February 7, 1923, [1923] PCIJ Ser. B No. 4 at 24: “the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law.”; *Flegenheimer*, *supra* note 2 at 97–8.

<sup>6</sup> W.R. Bisschop, “Nationality in International Law” (1943) 27 *Am. J. Int’l L.* 320 at 321. See also P.E. Mahoney, “The Standing of Dual Nationals before the Iran-United States Claims Tribunal” (1983–1984) 24 *Va. J. Int’l L.* 695 at 697.

<sup>7</sup> *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Judgment of August 30, 1924, [1924] PCIJ Ser. A No. 2 at 12. See also John Dugard, *First report on diplomatic protection*, International Law Commission, 52d Session, A/CN.4/506 (March 7 and April 20, 2000), ¶¶ 11–13; John Dugard, *Seventh*



The International Court of Justice (the “ICJ”) elaborated on this link between the individual and the state in the famous *Nottebohm* case:

According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual’s connection with the State which has made him its national.<sup>8</sup>

However, in today’s world, more than half a century after *Nottebohm*, the “legal bond” of nationality is not necessarily singular or exclusive: a large and growing number of people move from one country to another, or are connected to families of diverse nationalities. Individuals with two or more nationalities are often involved in investments across national frontiers, and they may claim more than one “genuine connection of existence.” They may have more than one nationality, conferred by law regardless of any “social fact of attachment.” The question thus arises as to *who* these individuals *really* are for the purposes of international law. As one commentator has explained,

The challenges of the globalized society, the complexity of the corporate structures through which investments are channelled and the reality that one person possesses more than one nationality or permanently lives in a state other than his state of nationality, brings novel hurdles in assessing nationality of investors.<sup>9</sup>

The question has great importance in international investment law, where treaty definitions of a qualifying investor are often, though not exclusively, based on the nationality of the home state.

When faced with a claim by a dual national, an arbitral tribunal must determine the scope of its own jurisdiction (which it is empowered to do under the “competence–competence” doctrine). It may be required to decide on the recognition or effect of a particular nationality for the purposes of an investment treaty claim where that nationality is theoretically in competition with another nationality. In that case, the tribunal must ask *who* a dual national *really* is for the purposes of jurisdiction. A number of investment treaty tribunals have had to consider and decide upon the issues raised by this question. This article will look at

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report on diplomatic protection, International Law Commission, 58th Session, A/CN.4/567 (March 7, 2006), ¶ 3.

<sup>8</sup> *Nottebohm*, *supra* note 3 at 23.

<sup>9</sup> Crina Baltag, *The Energy Charter Treaty: The Notion of Investor* (Kluwer, 2012) at 70.

those issues and how international investment law defines *who* a person is. The subject is particularly relevant to the Middle East because a number of the leading investment arbitration cases that address the question relate to Middle Eastern countries and their nationality laws.

The article begins with a presentation of key concepts regarding nationality in the context of international claims. It then addresses the question of dual nationals in investment treaty arbitration. In doing so, it will consider treaty parameters, challenges to nationality, and national law. Lastly, the article looks beyond the nationality of natural persons to that of corporate bodies.

## 1 NATIONALITY IN THE CONTEXT OF INTERNATIONAL CLAIMS

Three notable concepts have emerged in international jurisprudence concerning an individual's nationality: (i) "genuine link" or effectiveness; (ii) non-responsibility for a state's own nationals; and (iii) dominant and effective nationality.

The "genuine link" or effectiveness doctrine runs through much of the international jurisprudence on the nationality of individuals. *Nottebohm* is cited frequently as a seminal case on the effectiveness of nationality conferred by a state, particularly the ICJ's reference to the need for a "genuine connection of existence" or "genuine link" between a state and its nationals. Although it was a single-nationality case, it is often referred to in relation to dual-nationality cases as well.<sup>10</sup>

Mr Nottebohm was a German citizen who immigrated to Guatemala and established a number of investments there, although he was never naturalized as a Guatemalan citizen.<sup>11</sup> Shortly after the outbreak of the Second World War, he purported to relinquish his German citizenship and acquire Liechtenstein nationality in what the ICJ described as "exceptional circumstances of speed and accommodation."<sup>12</sup> When Guatemala declared war on Germany, it treated Mr Nottebohm as a German citizen and deported him, and his assets were treated as enemy property.<sup>13</sup> Liechtenstein brought a claim against Guatemala before the ICJ for damages and reparation, arguing that Mr Nottebohm should have been treated as its national and, thus, a national of a non-combatant state. Guatemala objected to the admissibility of the claim and the ICJ thus had to decide "whether the nationality conferred on Nottebohm can be relied upon as against Guatemala in justification of the proceedings instituted before the Court."<sup>14</sup>

<sup>10</sup> *Nottebohm*, *supra* note 3.

<sup>11</sup> *Ibid.* at 13.

<sup>12</sup> *Ibid.* at 26.

<sup>13</sup> *Ibid.* at 6–7; Dissenting Opinion of Judge Read at 45.

<sup>14</sup> *Ibid.* at 17.

The ICJ found that states pursuing diplomatic protection had to prove a “genuine connection”:

a State cannot claim that its rules on nationality are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual’s genuine connection with the State . . .<sup>15</sup>

Mr Nottebohm had “extremely tenuous” connections to Liechtenstein and his naturalization was “lacking in the genuineness requisite to an act of such importance” and had the “sole aim” of substituting the nationality of a belligerent state with a neutral state.<sup>16</sup> Accordingly, Guatemala was under no obligation to recognize this nationality.

Some have interpreted *Nottebohm* as requiring the existence of a “genuine link” between a state and the individual upon whom its nationality is conferred for that nationality to be internationally effective.<sup>17</sup> While the ICJ did reflect on questions of effectiveness in *Nottebohm*, it was considering a sole national in the context of diplomatic protection.<sup>18</sup> Moreover, the ICJ was deciding whether Mr Nottebohm’s nationality could be asserted against a state in a particular context,<sup>19</sup> and the International Law Commission (the “ILC”) has emphasized the specific circumstances of the case that led to the ICJ’s findings.<sup>20</sup> Indeed, the ICJ itself expressed the reservation that:

what is involved is not recognition for all purposes but merely for the purposes of the admissibility of the Application and, secondly, that what is involved is not recognition by all States, but only by Guatemala. The Court does not propose to go beyond the limited scope of the question which it has to decide, namely whether the nationality conferred on Nottebohm can be relied upon as against Guatemala in justification of the proceedings instituted before the Court.<sup>21</sup>

The ambit and application of an “effective nationality” doctrine derived from *Nottebohm* in investment treaty claims is, thus, not straightforward. Arbitral tribunals have noted that bilateral investment treaties (“BITs”) do not pertain to diplomatic

<sup>15</sup> *Ibid.* at 23.

<sup>16</sup> *Ibid.* at 25–6.

<sup>17</sup> Robert D. Sloane, “Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality” (2009) 50:1 Harv. Int’l L.J. 1 at 25–6.

<sup>18</sup> *Ibid.* at 13.

<sup>19</sup> See John Dugard, *First report on diplomatic protection*, *supra* note 7, ¶¶ 107–20.

<sup>20</sup> *Draft Articles on Diplomatic Protection with commentaries*, International Law Commission, 58th Session, 2006, commentary on draft Art. 4, ¶ 5.

<sup>21</sup> *Nottebohm*, *supra* note 3 at 17. See also Alfred M. Boll, *Multiple Nationality and International Law* (Martinus Nijhoff, 2007) at 110–3.

protection under customary international law,<sup>22</sup> and the extrapolation of broadly applicable principles from *Nottebohm's* findings has been questioned.<sup>23</sup>

There are two further concepts that have been considered by international tribunals in relation to the effectiveness of an individual's nationality vis-à-vis a respondent state under international law.<sup>24</sup> One is non-responsibility, which is based upon the principle of the equality of states, whereby an individual who possesses the nationality of two states is barred from claiming against either of those states.<sup>25</sup> As once stated by the British and American Claims Commission, the practice was for one sovereign to "leave the person who has embarrassed himself by assuming a double allegiance to the protection which he may find provided for him by the municipal laws of that other sovereign to whom he thus also owes allegiance."<sup>26</sup> In relation to diplomatic protection, this traditional rule was set out as follows in Article 4 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws:<sup>27</sup>

A state may not afford diplomatic protection to one of its nationals against a State whose nationality such a person also possesses.

However, in the words of the Iran-US Claims Tribunal (the "IUSCT"), "this provision must be interpreted very cautiously . . . great changes have occurred since then in the concept of diplomatic protection,"<sup>28</sup> and commentators have questioned whether non-responsibility remains good law.<sup>29</sup>

The third concept is that of dominant and effective nationality, based on the principle that an individual possessing dual nationality should be considered a national of the state with which he or she has the more substantial connection.<sup>30</sup> It

<sup>22</sup> *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (October 31, 2011), ¶ 213; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (August 3, 2004), ¶ 141. On the debate over the relevance of diplomatic protection, see e.g. Crina Baltag, *supra* note 9 at 74.

<sup>23</sup> See *Flegenheimer*, *supra* note 2 at 148. Some commentators have said that the ICJ's real reasoning was based on a general principle of abuse of rights; see Robert D. Sloane, *supra* note 17 at 17–21. However, see also *Nottebohm*, *supra* note 3, Dissenting Opinion of Judge Read at 37.

<sup>24</sup> See James Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (OUP, 2008) at 709–10; P.E. Mahoney, *supra* note 6 at 700–11; Zvonko R. Rode, "Dual Nationals and the Doctrine of Dominant Nationality" (1959) 53 Am. J. Int'l L. 139 at 139–44.

<sup>25</sup> See e.g. P.E. Mahoney, *supra* note 6 at 700–11; "Claims of Dual Nationals in the Modern Era: The Iran-United States Claims Tribunal" (1984) 83:3 Mich. L. Rev. 597.

<sup>26</sup> *Executors of R.S.C.A. Alexander v. the United States*, reprinted in J Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* (1898), quoted in P.E. Mahoney, *supra* note 6 at 701.

<sup>27</sup> Convention on Certain Questions Relating to the Conflict of Nationality Laws (April 12, 1930), 179 LNTS 89.

<sup>28</sup> Decision in Case No. A/18, *supra* note 2 at 260–1.

<sup>29</sup> See e.g. Craig Forcese, "The Capacity to Protect: Diplomatic Protection of Dual Nationals in the 'War on Terror'" (2006) 17:2 Eur. J. Int'l L. 369 at 386–9.

<sup>30</sup> See e.g. P. E. Mahoney, *supra* note 6 at 696–711.

is a concept to which the ICJ referred in *Nottebohm*, noting that international arbitrators had “given their preference to the real and effective nationality, that which accorded with the facts” in deciding cases of dual nationality.<sup>31</sup> Article 5 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws requires third states to follow this rule:

a third State shall, of the nationalities which any such person possesses, recognise exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.

However, the theory of effective nationality was limited by the principle of the unopposability of the nationality of a third state.<sup>32</sup> Article 6, paragraph 1, of the ILC Draft Articles on Diplomatic Protection provides that: “Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national.” The situation becomes more complex, however, when a dual or multiple national has the nationality of the respondent state, because that would effectively mean disregarding one of the individual’s nationalities.

In 1955, the Italian–United States Conciliation Commission considered the case of Mrs Mergé, an American national who had subsequently acquired Italian nationality through marriage and had used the latter nationality extensively. She brought claims under the 1947 Peace Treaty with Italy for the loss of property owned by her as a result of the war, but Italy rejected her claim on the grounds that she was an Italian national.<sup>33</sup> The commission said the US government was not entitled to present a claim against Italy on her behalf,<sup>34</sup> but it considered dual nationals more widely and found that arbitral tribunals had permitted claims by dual nationals where individuals could prove that their “real and effective” nationality was not that of the respondent state.<sup>35</sup> Similarly, in the *Canevaro* case between Italy and Peru, the tribunal found that an individual possessing Italian and Peruvian nationality had “on several occasions conducted himself as a Peruvian

<sup>31</sup> *Nottebohm supra* note 3 at 22. This was also noted by the Italian–United States Conciliation Commission in *Mergé* (1955) 22 ILR 443 at 452.

<sup>32</sup> *Salem* (1932) 6 ILR 188 at 192–3; *Flegenheimer, supra* note 2 at 149: “The theory of effective or active nationality was nevertheless limited in its application by the principle of the unopposability of the nationality of a third State, which, in an international dispute caused by a person with multiple nationalities, permits the dismissal of the nationality of the third State, even when it should be considered as predominant in the light of the circumstances.”; *Loss of Property in Ethiopia Owned by Non-Residents—Eritrea’s Claim 24 (The State of Eritrea v. The Federal Democratic Republic of Ethiopia)*, Partial Award (December 19, 2005), ¶¶ 8–11. See also James Crawford, *supra* note 24 at 710; Timothy G. Nelson, “Passport, s’il vous plaît?: Investment Treaty Protection and the Individual Investor’s Citizenship” (2008) 32:2 *Suffolk Transnat’l L. Rev.* 101 at 108–9.

<sup>33</sup> *Mergé, supra* note 31 at 443.

<sup>34</sup> *Ibid.* at 457.

<sup>35</sup> *Ibid.* at 455. See also Timothy G. Nelson, *supra* note 32 at 107–8.

citizen,” including standing as a candidate for the Senate, and so Peru had “the right to consider him as a Peruvian citizen and to deny his status as an Italian claimant.”<sup>36</sup>

The IUSCT, when faced with cases involving individuals having both US and Iranian nationality, similarly applied the dominant and effective nationality principle. In *Esphahanian v. Bank Terjat*, Chamber Two held that a US–Iranian dual national had standing to claim against a nationalized Iranian bank by adopting the principle of dominant and effective nationality.<sup>37</sup> The claimant was born in Iran but later became a naturalized US citizen. He was found to have had long and consistent ties with the USA, as opposed to his “much more limited” contacts with Iran.<sup>38</sup> However, in applying the concept of dominant and effective nationality, Chamber Two was specifically “supported by the general structure of the Algiers Declarations and the circumstances in which they were concluded.”<sup>39</sup> It analogized the claim to that of a dual national appearing before the court of a third state and, thus, to Article 5 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws.<sup>40</sup>

The Full Tribunal affirmed the reasoning of Chamber Two and found that the theory of dominant and effective nationality applied in all cases involving the claims of dual nationals, unless an exception was clearly stated.<sup>41</sup> The IUSCT subsequently applied this principle in a number of other dual-nationality cases by examining various aspects and circumstances of the claimant’s life.<sup>42</sup> However, the principle of dominant and effective nationality was not unqualified and exceptions were carved out. For instance, Chamber Two framed “an important caveat” that:

There is precedent for denying jurisdiction on equitable grounds in cases of fraudulent use of nationality. Such a case might occur where an individual disguises his dominant or effective nationality in order to obtain benefits with his secondary nationality not otherwise available to him.<sup>43</sup>

<sup>36</sup> *Canevaro Claim*, Permanent Court of Arbitration, Award of the Tribunal (May 3, 1912), Unofficial English Translation at 2.

<sup>37</sup> *Esphahanian*, *supra* note 2.

<sup>38</sup> *Ibid.* at 166–7.

<sup>39</sup> *Ibid.* at 165.

<sup>40</sup> *Ibid.* at 162, 165–6. See also P.E. Mahoney, *supra* note 6 at 711–4.

<sup>41</sup> Decision in Case No. A/18, *supra* note 2 at 265. See also Mohsen Aghahosseini, “The Claims of Dual Nationals Before the Iran–United States Claims Tribunal: Some Reflections” (1997) 10 *Leiden J. Int’l L.* 21; Nancy Armoury Combs, “Toward a New Understanding of Abuse of Nationality in Claims before the Iran–United States Claims Tribunal,” William & Mary Faculty Publications, Paper 1503 (1999). It has been argued, however, that the Iran–US Claims Tribunal misapplied the meanings of “dominant” and “effective” in this context by using them interchangeably, whereas the dominance of a nationality can be decided only in relation to one or more nationalities that are effective under international law. See Mohsen Aghahosseini, *op. cit.* at 31.

<sup>42</sup> See George H. Aldrich, *The Jurisprudence of the Iran–United States Claims Tribunal* (Clarendon, 1996) at 59–76. See also John Dugard, *First Report on Diplomatic Protection*, *supra* note 7, ¶ 153.

<sup>43</sup> *Esphahanian*, *supra* note 2 at 166.

The Full Tribunal also noted that in “cases where the Tribunal finds jurisdiction based upon a dominant and effective nationality of the claimant, the other nationality may remain relevant to the merits of the claim.”<sup>44</sup> This caveat was later applied in cases where, for example, a claimant’s Iranian nationality had been used to secure benefits available only to Iranian nationals under Iranian law, or where allowing recovery would constitute an abuse of rights.<sup>45</sup>

IUSCT cases, such as those discussed above, are highly dependent on the specific wording of the tribunal’s constituent charter.<sup>46</sup> They are not determinative of issues beyond their context, and the application of these concepts to investment treaty arbitration in general is complex and contested. Nevertheless, the three concepts—the “genuine link” addressed in *Nottebohm*, non-responsibility of a state whose nationality an individual possesses, and the search for a “dominant and effective” nationality—have echoes in a number of arguments presented before investment treaty tribunals dealing with dual nationals.

## 2 DUAL NATIONALS AND INVESTMENT TREATY ARBITRATION

### 2.1 TREATY PARAMETERS: “YOU ARE WHO THE TREATY SAYS YOU ARE”

Faced with an investment treaty claim by a dual national, a tribunal must decide the scope of its own jurisdiction. Above all, claimants must show the tribunal that they meet the necessary requirements under the relevant treaty or treaties as to *who* they are. Investment treaties almost always contain provisions defining qualifying investors and, in the case of individuals, who they need to be. Some treaties also contain express provisions about who someone *cannot* be, such as provisions excluding applicability to dual nationals,<sup>47</sup> and even provisions about whether concepts such as dominant and effective nationality are to be applied in deciding *who* someone *really* is.

When states negotiate international investment treaties, it is within their mutual discretion to decide upon the parameters of who will qualify as an “investor” for the purposes of protection under the treaty. Consent “always is the essential condition precedent to arbitration and, indeed, to any form of consensual adjudication,”<sup>48</sup> and the agreed terms of the treaty will set out the conditions of a state’s consent to the jurisdiction of an arbitral tribunal. Nationality is the most

<sup>44</sup> Decision in Case No. A/18, *supra* note 2 at 265–6.

<sup>45</sup> See George H. Aldrich, *supra* note 42 at 76–9.

<sup>46</sup> Timothy G. Nelson, *supra* note 32 at 109.

<sup>47</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), Art. 25(2)(a).

<sup>48</sup> *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award (April 3, 2014), ¶ 117.

frequently used criterion to identify qualifying investors who are natural persons (but not the only one). To give an example, the Bahrain–Mexico BIT defines a qualifying “investor” as including “a natural person having the nationality of a Contracting Party in accordance with its applicable laws.”<sup>49</sup> However, other treaties contain more expansive definitions. For example, Article 1(7)(a)(i) of the Energy Charter Treaty and Article 201 of the North American Free Trade Agreement (“NAFTA”) include permanent residents in addition to nationals as qualifying natural persons.

Where nationality is the relevant criterion, a tribunal may have to decide on the recognition or effect of a particular nationality that is theoretically in competition with another nationality. Some BITs contain express restrictions or clarifications regarding dual nationals who hold the nationality of the host state. The Mauritius–Egypt BIT, for example, excludes from its scope a national of one contracting state who is “simultaneously a national of the other Contracting Party.”<sup>50</sup> Similarly, the Switzerland–Egypt BIT provides that a qualifying investor “shall not include a natural person that holds the nationality of both Contracting Parties.”<sup>51</sup> Other treaties expressly incorporate the doctrine of dominant and effective nationality in defining the scope of their application. Thus, for example, the Canada–Jordan BIT states that a dual national “shall be deemed to be exclusively a national of the Party of his or her dominant and effective nationality.”<sup>52</sup>

A particularly significant example of an express provision relating to multiple nationals appears in the Convention of the International Centre for Settlement of Investment Dispute (“ICSID”), which excludes investors having the nationality of the host state.<sup>53</sup> While there is no definition of nationality in the ICSID Convention, Article 25 states:

- (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of

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<sup>49</sup> Agreement between the Government of the Kingdom of Bahrain and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments (2012), Art. 1(6)(a).

<sup>50</sup> Agreement between the Government of the Republic of Mauritius and the Government of the Arab Republic of Egypt on the Reciprocal Promotion and Protection of Investments (2014), Art. 1(3)(a).

<sup>51</sup> Agreement between the Swiss Confederation and the Arab Republic of Egypt on the Promotion and Reciprocal Protection of Investments (2010), Art. 1(2)(b). See also Agreement on Reciprocal Promotion and Protection of Investment between the Government of the People’s Republic of China and the Government of the Islamic Republic of Iran (2000), Art. 1(2); Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia (2010), Art. 1.

<sup>52</sup> Agreement between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments (2009), Art. 1(w). See also US Model BIT (2012), Art. 1.

<sup>53</sup> The exclusion applies to all natural persons, but only to those corporate bodies that are not under foreign control.



another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) “National of another Contracting State” means:

- (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, *but does not include any person who on either date also had the nationality of the Contracting State party to the dispute*; and
- (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.<sup>54</sup>

The Report of the Executive Directors points out that this “ineligibility” in Article 25(2)(a) “is absolute and cannot be cured even if the State party to the dispute had given its consent.”<sup>55</sup> As the *National Gas v. Egypt* tribunal observed, this “general limitation” in Article 25(2)(a) was “interpreted to apply not only to nationals of the respondent Contracting State, but also to dual nationals of the respondent Contracting State and of another State.”<sup>56</sup> However, there is no such prohibition in the ICSID Convention for dual nationals holding the nationality of a third state (rather than the host state).

The ICSID bar on claims by dual nationals holding the nationality of the host state was emphasized in *Champion Trading v. Egypt*, which concerned a claim by a corporation and three individuals alleging unlawful expropriation of an investment in a cotton company. Egypt argued that the claimants who were natural persons held American and Egyptian nationality and so Article 25 of the ICSID Convention precluded a claim.<sup>57</sup> The tribunal agreed and found that the individuals were Egyptian as well as US nationals and, thus, it did not have

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<sup>54</sup> Emphasis added.

<sup>55</sup> Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1964), ¶ 29. See also *National Gas*, *supra* note 48, ¶ 122: “the plain meaning of this text precludes any consent by parties to ICSID jurisdiction where the claimant party has the nationality of the respondent Contracting State”.

<sup>56</sup> *National Gas*, *supra* note 48, ¶ 123.

<sup>57</sup> *Champion Trading Company, Ameritrade International, Inc., James T Wahba, John B. Wahba, Timothy T. Wahba v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction (October 21, 2003), ¶ 3.2.1.

jurisdiction over their claim, even though their Egyptian nationality was acquired involuntarily at birth.<sup>58</sup>

However, the tribunal went on to note that there could be situations where the exclusion of dual nationals could lead to “manifestly absurd or unreasonable” results within the meaning of Article 32(b) of the Vienna Convention on the Law of Treaties.<sup>59</sup> Perhaps mindful of the involuntary nature of the claimants’ acquisition of their Egyptian nationality, the tribunal stated:

One could envisage a situation where a country continues to apply the *jus sanguinis* over many generations. It might for instance be questionable if the third or fourth foreign born generation, which has no ties whatsoever with the country of its forefathers, could still be considered to have, for the purpose of the Convention, the nationality of this state.<sup>60</sup>

This is an interesting, if somewhat amorphous, potential exception to the prohibition on claims by dual nationals under the ICSID Convention. It is, however, unclear when this exception would apply and at what point the involuntary acquisition of nationality through an investor’s ancestors would become “manifestly absurd.” While there may be concerns over potential abuses of nationality by individual investors, there is also the risk of an exorbitant extension of nationality by states. Indeed, in *Flegenheimer* the Italian–United States Conciliation Commission acknowledged the power of international tribunals to resolve questions of nationality because otherwise a defendant state would be “powerless” to prevent another state from vesting “any given person” with its nationality.<sup>61</sup> The *Champion Trading* tribunal was, at least indirectly, demonstrating an awareness of the potential—albeit hypothetical—absurdity or unfairness that could result from an overly clinging nationality. Moreover, it was also affirming that possession of the host state’s nationality could not be used to negate the tribunal’s jurisdiction to decide on the effectiveness of such nationality under international law.

Beyond the ICSID context, the situation may be different in cases where the applicable investment treaty does not prohibit claims by dual nationals. In *Armas v. Venezuela*, conducted under the UNCITRAL Arbitration Rules, the tribunal decided that dual Spanish–Venezuelan nationals could rely on the BIT between

<sup>58</sup> *Ibid.*, ¶¶ 3.4.1.10–3.4.1.38.

<sup>59</sup> *Ibid.*, ¶ 3.4.1.33.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Flegenheimer*, *supra* note 2 at 98: “The profound reason for these broad powers of appreciation which are guaranteed to an international court for resolving questions of nationality, even though coming within the reserved domain of States, is based on the principle, undenied in matters of arbitration, that complete equality must be enjoyed by both parties to an international dispute. If it were to be ignored, one of the parties would be placed in a state of inferiority vis-à-vis the other, because it would then suffice for the Plaintiff State to affirm that any given person is vested with its nationality for the Defendant State to be powerless to prevent an abusive practice of diplomatic protection by its Opponent.” See also Robert D. Sloane, *supra* note 17 at 41.

Spain and Venezuela. Venezuela argued that the claimants' dominant and effective nationality was Venezuelan, but the tribunal held that under the BIT, it was sufficient for the claimants to hold Spanish citizenship and no restrictions were placed on dual nationals.<sup>62</sup>

The tribunal took the position that the clear definition and the specific regime established by the terms of the BIT should prevail, rejecting the application of nationality rules from customary international law. The BIT did not expressly exclude dual nationals, whereas Venezuela's treaty practice demonstrated that they were excluded in some of the state's other investment treaties.<sup>63</sup> It was not permissible to introduce restrictions on investors' nationality from customary international law when these were not written into the BIT.<sup>64</sup> The tribunal also referred to *Pey Casado v. Chile*,<sup>65</sup> in which the tribunal decided that the notion of dominant and effective nationality was not relevant to the Spain–Chile BIT, which did not exclude dual nationals even if their dominant nationality was that of the host state.<sup>66</sup> Although the *Pey Casado* tribunal decided that the claimant was in any case not a dual national at the relevant time,<sup>67</sup> it noted that the BIT did not specifically address the issue of dual Spanish–Chilean nationals and so it would not be justifiable to read in a restriction.<sup>68</sup>

Interestingly, Venezuela also argued in *Armas* that the inclusion of ICSID arbitration as the primary method of dispute resolution in the BIT confirmed the intent of the contracting parties to exclude the possibility of being sued by their own nationals. However, the tribunal disagreed and found that the ICSID Convention's restriction on dual nationals was not applicable.<sup>69</sup>

The *Armas* tribunal's decision on jurisdiction was recently set aside by the Paris Court of Appeal on the basis that the claimants did not have Spanish nationality on the date of their investment in Venezuela.<sup>70</sup> However, the French court rejected Venezuela's argument that the BIT did not confer jurisdiction over claims by dual nationals and held that the bar on dual nationals under the ICSID

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<sup>62</sup> *Serafin García Armas and Karina García Gruber v. Bolivarian Republic of Venezuela*, UNCITRAL, PCA Case No. 2013-3, Decisión sobre Jurisdicción (December 15, 2014), ¶¶ 199–200.

<sup>63</sup> *Ibid.*, ¶¶ 176–81.

<sup>64</sup> *Ibid.*, ¶¶ 197–206.

<sup>65</sup> *Ibid.*, ¶ 204.

<sup>66</sup> *Victor Pey Casado and President Allende Foundation v. Chile*, ICSID Case No. ARB/98/2, Award (May 8, 2008), ¶ 415.

<sup>67</sup> *Ibid.*, ¶¶ 307–23.

<sup>68</sup> *Ibid.*, ¶ 415.

<sup>69</sup> *Armas*, *supra* note 62, ¶¶ 189–96.

<sup>70</sup> *République Bolivarienne du Venezuela v. Monsieur Serafin García Armas et Madame Karina García Gruber*, Paris Cour d'appel, 1st Chamber, RG no. 15/01040 (April 25, 2017).

Convention had no implications for cases proceeding under the UNCITRAL Arbitration Rules.<sup>71</sup>

*Armas* is not the only case to have been initiated by dual nationals under the UNCITRAL Arbitration Rules,<sup>72</sup> so jurisprudence on dual nationals not subject to the ICSID Convention's express restriction can be expected to increase.

## 2.2 CHALLENGING NATIONALITY

Leaving aside expressly worded inclusions and exclusions in treaties, the application and scope of concepts such as effectiveness has arisen in many investment treaty cases.<sup>73</sup> Commentators have observed that tribunals have “generally been unimpressed by arguments concerning the effectiveness of a nationality,”<sup>74</sup> and where a treaty requires only that an investor be a national, they have generally been reluctant to apply other pre-requisites.<sup>75</sup> In its recent decision on *Armas*, the Paris Court of Appeal noted that there was no consensus on the principle of effective nationality in investment treaty jurisprudence.<sup>76</sup> Indeed, in many investment treaty cases the doctrine of dominant and effective nationality, or the *Nottebohm* rule of a genuine link, have been used to argue a lack of jurisdiction. Conversely, in at least one case, claimant investors have tried to rely on their dominant and effective nationality to circumvent the ICSID prohibition on claims by dual nationals holding the nationality of the host state.

### 2.2[a] “You’re Not Effectively Who You Say You Are”

In some investment treaty cases, host states have argued that the investor was a dual national with a more effective nationality aside from that of the home state, and

<sup>71</sup> *Ibid.*

<sup>72</sup> The claimant in *Rawat v. Mauritius* is relying on the France-Mauritius BIT, despite being a national of both states, and has contended that dual citizens are not excluded from its protections. The arbitration is being conducted under the UNCITRAL Arbitration Rules and the tribunal has decided, on a *prima facie* basis, that the claimant may benefit from the BIT. See *Dawood Rawat v. Republic of Mauritius*, UNCITRAL, PCA Case No. 2016-20, Order Regarding Claimant's and Respondent's Requests for Interim Measures (January 11, 2017). See also *Sergei Viktorovich Pugachev v. Russian Federation*, UNCITRAL *ad hoc* arbitration.

<sup>73</sup> See, e.g. *Champion Trading*, *supra* note 57; *Micula*, *supra* note 2; *Oostergetel* *supra* note 2; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (July 14, 2010); *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (November 3, 2015).

<sup>74</sup> Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2nd ed. (OUP, 2012) at 46; Christoph Schreuer, “Nationality of Investors: Legitimate Restrictions vs. Business Interests” (2009) 24:2 ICSID Rev. 521 at 522.

<sup>75</sup> *Crina Baltag*, *supra* note 9 at 77.

<sup>76</sup> *Supra* note 70.

that this should serve as a bar to jurisdiction.<sup>77</sup> Although such arguments have usually been unsuccessful, there are hints in the jurisprudence that there may be instances, or exceptions, where the test of a dominant and effective nationality could be applicable.

*Fakes v. Turkey*, for example, concerned a claim under the Netherlands–Turkey BIT. Although Turkey accepted that the claimant was a dual Dutch and Jordanian national,<sup>78</sup> it disputed the effectiveness of Mr Fakes’ Dutch nationality. Turkey argued that *Nottebohm* established an effectiveness test of general application in international law and that the evidence suggested that the claimant’s effective nationality was Jordanian.<sup>79</sup> However, the tribunal decided that the effective nationality test was not applicable and rejected Turkey’s argument on account of two main considerations. The first was the language of the BIT and the ICSID Convention. The tribunal considered the absolute bar in Article 25(2)(a) of the ICSID Convention to be “the only jurisdictional bar relating to a natural person’s nationality that was contemplated by the drafters of the Convention.”<sup>80</sup> It added that the bar was not subject to a test of the effectiveness of nationality, and it was “of particular importance” that the ICSID Convention did not exclude dual nationals who had the nationality of a third state.<sup>81</sup> The tribunal considered that the regime established by the terms of the BIT should prevail and noted that the definition of a qualifying investor in the Netherlands–Turkey BIT did not require an investor’s nationality to be effective.<sup>82</sup>

Second, the tribunal rejected the applicability of the effective nationality test set out in *Nottebohm* and *A/18*. *Nottebohm* was not about dual nationality, but about diplomatic protection of an individual with no genuine link to the country whose nationality he held,<sup>83</sup> and the IUSCT jurisprudence was based on the Algiers Declarations, which adopted a very different solution to the ICSID Convention.<sup>84</sup> Referring to commentary and case law, the tribunal found that neither the rules of customary international law applicable in the context of diplomatic protection nor the *Nottebohm* and *A/18* precedents applied to investor–state arbitration, for which the ICSID Convention had established a separate mechanism allowing direct recourse by investors against host states.<sup>85</sup> It held that, pursuant to Article 31 of the Vienna Convention on the Law of Treaties,

<sup>77</sup> See e.g. *Fakes*, *supra* note 73; *Al Tamimi*, *supra* note 73.

<sup>78</sup> *Fakes*, *supra* note 73, ¶ 54. It appears that Turkey initially contested the claimant’s Dutch nationality but subsequently abandoned that stance; see *ibid.*, fn. 39.

<sup>79</sup> *Ibid.*, ¶ 54.

<sup>80</sup> *Ibid.*, ¶ 61.

<sup>81</sup> *Ibid.*, ¶¶ 61–3.

<sup>82</sup> *Ibid.*, ¶ 64.

<sup>83</sup> *Ibid.*, ¶ 68.

<sup>84</sup> *Ibid.*, ¶ 71.

<sup>85</sup> *Ibid.*, ¶¶ 69–76.

it was precluded from elaborating an interpretation that imposed additional limitations on Article 25(2)(a) of the ICSID Convention.<sup>86</sup> Similarly, the *Nottebohm* and *A/18* decisions could not supersede the clear language of the BIT.<sup>87</sup>

Although the *Fakes* tribunal rejected the importation of the dominant and effective nationality principle, it added, obiter, that there could be exceptions. Echoing concerns expressed in *Champion Trading*, it admitted that “several instances” could be envisaged where the application of the effective nationality test “could be justified in light of the particular circumstances of a given case,”<sup>88</sup> such as where a nationality of convenience was acquired in exceptional speed or where nationality was passed down over several generations without any real ties with the country.<sup>89</sup>

The *Micula v. Romania* tribunal was similarly unpersuaded by an attempt to read an effective link test into a BIT, although the investors in the case were not dual nationals. The two claimants who were natural persons were born in Romania, but they moved to Sweden, obtained Swedish nationality, and renounced their Romanian nationality in the 1990s.<sup>90</sup> When they brought a claim under the Sweden-Romania BIT, Romania argued, *inter alia*, that the rule of effective nationality applied under both the BIT and the ICSID Convention and the claimants’ Swedish nationality was not effective. As the two claimants had no “effective link to Sweden” but maintained their effective links with Romania, Romania argued that they were barred from invoking their Swedish nationality against Romania.<sup>91</sup>

The tribunal considered that Article 25(1) of the ICSID Convention required it to determine whether the claimants were Swedish nationals and not Romanian nationals at the time of consent to arbitration and at the time the request for arbitration was registered.<sup>92</sup> This was a single-nationality case and it was not disputed that the claimants had renounced their Romanian nationality.<sup>93</sup> While questioning generally the purpose of the genuine link doctrine, the tribunal concluded that Article 25 of the ICSID Convention “does not leave room for a test of dominant or effective nationality,” that the BIT included no additional requirements to establish Swedish nationality, and that to hold otherwise “would

<sup>86</sup> *Ibid.*, ¶ 76.

<sup>87</sup> *Ibid.*, ¶ 70.

<sup>88</sup> *Ibid.*, ¶ 77.

<sup>89</sup> *Ibid.*, ¶¶ 77–8. The tribunal went on to find that Mr Fakes did have effective Dutch nationality.

<sup>90</sup> *Micula*, *supra* note 2, ¶ 1.

<sup>91</sup> *Ibid.*, ¶¶ 49, 70–4.

<sup>92</sup> *Ibid.*, ¶ 85.

<sup>93</sup> *Ibid.*, ¶ 98.

result in an illegitimate revision of the BIT.”<sup>94</sup> The Miculas had no need to maintain closer links with Sweden than any other Swedish national. In addition, the tribunal pointed out that Romania had acknowledged the Miculas’ Swedish nationality when it accepted their renunciation of their Romanian nationality, so it could not now argue that their Swedish ties were insufficient or had tapered off.<sup>95</sup> As they were sole nationals, there was no question of that nationality being less effective or less dominant than any other nationality.

The tribunal stated that, in any event, *Nottebohm* could not be read as requiring a state to disregard an individual’s sole nationality on the basis that the person had not resided in the country of their nationality for a period of time.<sup>96</sup> The tribunal considered that even if the genuine link test could be applied, the Miculas’ links with Sweden were not of such a nature so as to require the tribunal to question the effectiveness of their Swedish nationality.<sup>97</sup>

*Oostergetel v. Slovak Republic* also rejected the effectiveness test where a respondent state had alleged that investors were not, effectively, who they claimed to be. The claimants were two Dutch nationals seeking redress under the Netherlands–Czechoslovakia BIT, but the Slovak Republic argued their nationality was not effective because Belgium had been their place of habitual residence for many years.<sup>98</sup> The tribunal noted that the relevant BIT defined qualifying investors as “natural persons having the nationality of one of the Contracting Parties in accordance with its law.”<sup>99</sup> The Slovak Republic had not shown that Dutch law required an effective link or that the claimants’ Dutch citizenship had been lost. Under Dutch law, the claimants were thus still Dutch nationals. Nor, the tribunal held, did the BIT require the nationality to be effective or impose further conditions such as the requirement of a genuine link.<sup>100</sup> Nonetheless, in a manner reminiscent of *Micula*, the tribunal went on to opine on the application of effectiveness. Referring to the analysis in *Micula*, the tribunal observed that the genuine link test should be applied to single nationals only in exceptional factual circumstances of the kind encountered in *Nottebohm*, and these did not exist in *Oostergetel*.<sup>101</sup>

In *Fakes*, *Micula* and *Oostergetel* there was no express reference to the principles of effectiveness or dominant and effective nationality in the treaty

<sup>94</sup> *Ibid.*, ¶¶ 99–101.

<sup>95</sup> *Ibid.*, ¶ 103.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*, ¶ 104.

<sup>98</sup> *Oostergetel*, *supra* note 2, ¶¶ 122–3.

<sup>99</sup> Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (April 29, 1991), Art. 1(b), as quoted in *Oostergetel*, *supra* note 2, ¶ 118.

<sup>100</sup> *Oostergetel*, *supra* note 2, ¶ 130.

<sup>101</sup> *Ibid.*, ¶¶ 131–2.

wording. By contrast, the case of *Al Tamimi v. Oman* was based on a treaty that explicitly incorporated the concept of dominant and effective nationality. The case concerned a claim brought by an individual under the US-Oman Free Trade Agreement<sup>102</sup> in relation to a limestone quarry. Article 10.27 of the Free Trade Agreement provides that “a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.”

The claimant was born a citizen of the Emirate of Sharjah in 1971 (prior to the Act of Union of December 1971 under which the United Arab Emirates (UAE) was formed by Sharjah and other Emirates including Abu Dhabi and Dubai), and in 1980 became a US citizen. As Sharjah had become part of the UAE, Oman argued that the claimant should be considered a national of the UAE. Relying on Article 10.27 of the Free Trade Agreement, Oman asserted not only that the claimant was a US-UAE dual national, but that he should be considered as solely a UAE national for the purposes of the treaty because that was his dominant and effective nationality.<sup>103</sup> The claimant, on the other hand, argued that, even if he had involuntarily become a UAE national upon the federation’s formation after his birth, he lost that nationality under US and UAE law when he became a naturalized US citizen,<sup>104</sup> and that even if he had citizenship, his dominant and effective nationality was American.<sup>105</sup>

The tribunal found that Oman had provided no factual basis under US law for finding that the claimant was anything other than a US national, and there was insufficient evidence that the claimant was a dual national. Under UAE law, he had lost whatever citizenship he had when he voluntarily adopted US nationality.<sup>106</sup> The tribunal therefore assumed jurisdiction *ratione personae*, although it went on to dismiss the claim on other grounds. Interestingly, in a narrow and specific reading of Article 10.27 of the Free Trade Agreement, the tribunal observed, obiter, that the dominant and effective nationality standard was meant to apply only to dual nationals of the contracting states and not dual nationals of a contracting state and a third state.<sup>107</sup>

## 2.2[b] *Dominant and Effective Nationality as a “Sword”*

Investors have also attempted to use the doctrine of dominant and effective nationality as a “sword” to make a positive assertion of jurisdiction. As noted

<sup>102</sup> Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area (entry into force January 1, 2009).

<sup>103</sup> *Al Tamimi*, *supra* note 73, ¶¶ 86–8.

<sup>104</sup> *Ibid.*, ¶ 89.

<sup>105</sup> *Ibid.*, ¶ 90.

<sup>106</sup> *Ibid.*, ¶¶ 270–3.

<sup>107</sup> *Ibid.*, ¶ 274.



above, the *Champion Trading* tribunal found that the claimants who were natural persons were Egyptian and thus it did not have jurisdiction over their claim, even though this nationality was acquired involuntarily at birth.<sup>108</sup> The claimants had referred to *Nottebohm* and *A/18* to argue that even if they were Egyptian nationals, their real and effective nationality was American.<sup>109</sup>

The tribunal dismissed the relevance of both cases, noting that *Nottebohm* was about whether a state could exercise diplomatic protection and not about dual nationality, and that *A/18* concerned the interpretation of a specific international treaty under the Algiers Declaration.<sup>110</sup> However, it did not entirely ignore the latter case as it referred to Article 25(2)(a) of the ICSID Convention as an example of a clear “exception” to the “real and effective” nationality test identified by the IUSCT in *A/18*.<sup>111</sup> The tribunal found that a good faith interpretation of Article 25(2)(a) of the ICSID Convention, in line with Article 31 of the Vienna Convention on the Law of Treaties, excluded dual nationals. Its interpretation was buttressed by the facts, because, when setting up the vehicle of their investment in Egypt, the claimants had used their Egyptian nationality without mentioning their US nationality, which, according to the tribunal, put them squarely within the bar contained in Article 25(2)(a) of the ICSID Convention.<sup>112</sup>

### 2.3 THE NATIONAL LAW DIMENSION

As noted above, nationality is a question of domestic law and states are free to determine who their own nationals are. However, when nationality becomes a question of jurisdiction, the reference to a state’s domestic law is limited by both the principles of international law and the power of a tribunal to assess such nationality. International tribunals will usually apply national law in the first instance to determine whether investors are who they say they are. When the nationality is challenged, “the international tribunal is competent to pass upon that challenge.”<sup>113</sup> This can lead states to mount arguments over the nationality of investors based on national law (both their own and that of the other state).

*Soufraki* concerned a claim brought under the Italy-UAE BIT in relation to a port concession agreement. In the request for arbitration, the claimant described himself as an Italian national. However, the UAE objected that the claimant had not met the nationality requirement under Article 25(2)(a) of the ICSID

<sup>108</sup> *Champion Trading*, *supra* note 57, ¶¶ 3.4.1.10–3.4.1.38.

<sup>109</sup> *Ibid.*, ¶ 3.3.1.

<sup>110</sup> *Ibid.*, ¶ 3.4.1.28.

<sup>111</sup> *Ibid.*, ¶ 3.4.1.31.

<sup>112</sup> *Ibid.*, ¶ 3.4.1.37.

<sup>113</sup> *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award (July 7, 2004), ¶ 55.

Convention because he lost his Italian nationality when he acquired Canadian nationality and took up residence in Canada.<sup>114</sup> Mr Soufraki was under no doubt that he was who he said he was—namely, an Italian. The tribunal recognized that Mr Soufraki may not even have been aware of any loss of Italian citizenship and it respected the “sincerity of Mr Soufraki’s conviction that he was and remains a national of Italy.”<sup>115</sup>

While the UAE’s primary challenge was based on the non-existence of Mr Soufraki’s Italian nationality, the UAE also argued that even if he was an Italian national at the relevant times, his dominant nationality was Canadian and, therefore, his Italian nationality was not effective.<sup>116</sup>

The parties agreed that Mr Soufraki could have regained Italian nationality if he had submitted an application (which he had not) or by taking up residence for at least a year (for which he provided evidence that was contested). The claimant also submitted five certificates of nationality issued by the Italian authorities, copies of his passports, and a letter from the Italian Ministry of Foreign Affairs confirming his right to resort to the ICSID forum on the basis of his Italian citizenship.<sup>117</sup> He asserted that the BIT defined an investor as a natural person holding the nationality of Italy according to its laws and so the possession of Italian nationality was a question of Italian law within the exclusive competence of the Italian state. The tribunal was, accordingly, not entitled to look beyond those certificates of nationality in the absence of fraud.<sup>118</sup>

However, the tribunal was careful to note that it was the judge of its own competence and where its jurisdiction turned on an issue of nationality, it was “empowered, indeed bound, to decide that issue.”<sup>119</sup> The certificates of nationality were “*prima facie*” evidence, but the tribunal could look at the substance behind them. Indeed, this echoed the Conciliation Commission in *Flegenheimer*, which referred to the “right of challenge” of an international tribunal to look behind a nationality certificate.<sup>120</sup> The *Soufraki* tribunal proceeded to do so and found no

<sup>114</sup> *Ibid.*, ¶ 26.

<sup>115</sup> *Ibid.*, ¶ 51. See also *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *Ad Hoc* Committee on the Application of Annulment of Mr Soufraki (June 5, 2007), ¶ 17.

<sup>116</sup> *Soufraki*, *supra* note 113, ¶ 42. Initially, the UAE’s key argument concerned the ineffectiveness of Mr Soufraki’s Italian nationality, but this changed when the date on which Mr Soufraki acquired Canadian nationality became known to the respondent, see *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *Ad Hoc* Committee on the Application of Annulment of Mr Soufraki (June 5, 2007), ¶ 10.

<sup>117</sup> *Soufraki*, *supra* note 113, ¶ 14.

<sup>118</sup> *Ibid.*, ¶¶ 36–7.

<sup>119</sup> *Ibid.*, ¶ 55.

<sup>120</sup> *Flegenheimer*, *supra* note 2 at 98: “in an international dispute, official declarations, testimonials or certificates do not have the same effect as in municipal law. . . . The right of challenge of the international court authorizing it to determine whether, behind the nationality certificate or the acts

evidence that the officials who issued those certificates had been aware of the full circumstances of Mr Soufraki's loss of Italian nationality or of whether it had been re-established by residence.<sup>121</sup> Indeed, Mr Soufraki admitted that he had not informed any Italian official of his loss of citizenship.<sup>122</sup> Although the Tribunal recognized that it was hard for an international businessman to reconstruct his actual residence, it dismissed the witness evidence submitted concerning Mr Soufraki's residence in Italy as not "disinterested and convincing" and concluded that the claimant had not demonstrated that he established his residence in Italy for a year, and so he was not an Italian national and did not fall within the scope of the Italy-UAE BIT.<sup>123</sup>

The claimant applied for the annulment of the award, but the *ad hoc* committee held that the tribunal had not exceeded its powers in stating that it had to verify the claimant's nationality to ascertain its jurisdiction.<sup>124</sup> A state does not have the last word on questions of interpretation of national law before an international tribunal, and the tribunal was not bound by national certificates of nationality or passports.<sup>125</sup> The majority of the committee referred to jurisprudence from ICSID and other fora where tribunals have asserted their power to verify the existence of a nationality.<sup>126</sup> The majority also stressed that it was not ruling on the general conclusiveness of official national documentation or a nation's interpretation of its own laws. Rather, it was dealing with a "very specific and limited situation" in which an international tribunal vested with the power to decide on its own jurisdiction must verify the reality of the claimed nationality of a natural person where its jurisdiction is dependent on that

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of naturalization produced, the right to citizenship was regularly acquired, is in conformity with the very broad rule of effectivity which dominates the Law of Nations . . ."

<sup>121</sup> *Soufraki*, *supra* note 113, ¶¶ 63–6.

<sup>122</sup> *Ibid.*, ¶ 67. In his separate opinion in the annulment proceedings, Omar Nabulsi argued that the tribunal had erroneously reversed the burden of proof by not requiring the respondent to submit proof undermining the authenticity of the certificates. The claimant had submitted *prima facie* evidence in the form of official papers, and so was released from his obligation to prove his nationality unless and until other evidence contradicted them. *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Separate Opinion and Statement of Dissent by Omar Nabulsi, member of the *Ad Hoc* Committee (May 27, 2007), ¶¶ 46–9.

<sup>123</sup> *Soufraki*, *supra* note 113, ¶¶ 78–84.

<sup>124</sup> *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *Ad Hoc* Committee on the Application of Annulment of Mr Soufraki (June 5, 2007), ¶¶ 50–56.

<sup>125</sup> *Ibid.*, ¶¶ 59–64. The dissenting committee member disagreed, however, on the application of the concept of "*prima facie*" evidence of nationality, and where the burden of proof lay, in this case. See *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Separate Opinion and Statement of Dissent by Omar Nabulsi, member of the *Ad Hoc* Committee (May 27, 2007), esp. ¶¶ 48–9.

<sup>126</sup> *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *Ad Hoc* Committee on the Application of Annulment of Mr Soufraki (June 5, 2007), ¶¶ 64–77.

nationality, and in which the issuance of certificates of nationality may have been affected by material error.<sup>127</sup>

In *Siag v. Egypt*, two natural persons brought claims under the Italy-Egypt BIT relating to the alleged expropriation of a tourism development. Egypt did not challenge the existence of the claimants' Italian nationality at the relevant times.<sup>128</sup> Rather, it alleged that, as Egyptian nationals at the relevant times, their claims were barred under Article 25 of the ICSID Convention. It also asserted that all of the claimants' connections were with Egypt, which was "another way of saying that the Claimants' links with Italy are ineffective to establish jurisdiction under the ICSID Convention as a matter of international law."<sup>129</sup>

Egypt produced official documents to prove the existence of the claimants' Egyptian nationality, but the tribunal (in line with *Soufraki*) found these constituted *prima facie* evidence only and the case turned on the effect of Egypt's nationality law.<sup>130</sup> Mr Siag was an Egyptian national who subsequently became Lebanese, and then acquired Italian nationality. Applying Egyptian nationality law, the tribunal found that, in order to maintain his Egyptian nationality, Mr Siag had to make a formal declaration to this effect within one year of obtaining permission to acquire Lebanese nationality. He had not done so, and thus had lost his Egyptian nationality a year after acquiring Lebanese nationality.<sup>131</sup> Ms Vecchi, Mr Siag's mother, was an Italian national who lost that nationality when she became Egyptian. Again applying Egyptian law, the tribunal held that she had lost her Egyptian nationality upon regaining her Italian nationality years later.<sup>132</sup> At all relevant times under the ICSID Convention, therefore, the claimants were not Egyptian nationals and held Italian nationality only.<sup>133</sup>

The tribunal concurred with the *Champion Trading* finding that the ICSID regime "does not leave room for a test of dominant and or effective nationality" and added that the avenue of diplomatic protection was specifically excluded under the Italy-Egypt BIT:

Developments in international law concerning nationality of individuals in the field of diplomatic protection . . . must give way to the specific regime under the ICSID Convention and the terms of the BIT.<sup>134</sup>

<sup>127</sup> *Ibid.*, ¶ 78.

<sup>128</sup> *Siag*, *supra* note 2, ¶ 142.

<sup>129</sup> *Ibid.*, ¶ 196.

<sup>130</sup> *Ibid.*, ¶¶ 148–53, 192–3.

<sup>131</sup> *Ibid.*, ¶¶ 154–73.

<sup>132</sup> *Ibid.*, ¶¶ 174–94.

<sup>133</sup> *Ibid.*, ¶ 196.

<sup>134</sup> *Ibid.*, ¶ 198.

The tribunal found that there was no scope for international law principles to override Egyptian domestic law on nationality.<sup>135</sup> In any event, the case did not involve the determination of nationality between two states because the majority of the tribunal found that the claimants' Egyptian nationality had been lost and, moreover, Egypt had not demonstrated that the claimants had acquired Italian nationality simply to obtain standing to bring ICSID claims.<sup>136</sup>

*Olguín v. Paraguay* also involved domestic nationality rules. Mr Olguín, a dual Peruvian and US national resident in Florida,<sup>137</sup> brought a claim against Paraguay under the Peru-Paraguay BIT. The effectiveness of the claimant's Peruvian nationality was not disputed. However, Paraguay argued that the relevant nationality for the purposes of the claim was to be determined pursuant to Peruvian domestic law, according to which a person's specific rights were dependent on his or her registered address. Therefore, Mr Olguín was to be considered American, and thus he was not entitled to protection under the BIT.<sup>138</sup>

The tribunal dismissed this argument, considering that what was important to determine arbitral jurisdiction under the BIT was "only whether he has Peruvian nationality and if that nationality is effective."<sup>139</sup> On this, the tribunal had no doubts: Mr Olguín's Peruvian nationality was effective and that was "enough to determine that he cannot be excluded from the provisions for protection under the BIT."<sup>140</sup> His US nationality was also effective, but Peruvian requirements regarding the exercise of his specific political or civil rights were irrelevant.<sup>141</sup> The tribunal noted that, in the case of diplomatic protection, either of the states having conferred nationality on a dual national could assert diplomatic protection against a third state if the nationality was effective, regardless of those states' internal rules.<sup>142</sup> However, even if this were not the case, such internal rules could not, by analogy, be applied to the ICSID forum, which gave the individual a direct right of action, with no need for endorsement or other initiatives on the part of the home state.<sup>143</sup>

<sup>135</sup> *Ibid.*, ¶ 201.

<sup>136</sup> *Ibid.*, ¶¶ 199–200. Professor Orrego Vicuña issued a dissenting opinion in which he argued that the timing requirements relating to nationality in the ICSID Convention should be interpreted as requiring an investor not to have the nationality of the host state at the time both the investor and the host state expressed consent to arbitration. See *Waguil Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Partial Dissenting Opinion (April 11, 2007).

<sup>137</sup> *Eudoro Armando Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award (July 26, 2001), ¶ 1. However, it appears that Mr Olguín's dual nationality was not known to the tribunal or ICSID until some time after his request for arbitration was filed; see *ibid.*, ¶ 15.

<sup>138</sup> *Ibid.*, ¶ 60.

<sup>139</sup> *Ibid.*, ¶ 61.

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*, ¶ 62.

<sup>143</sup> *Ibid.*

## 2.4 BEYOND NATIONALITY

Where treaties incorporate a wider test for a qualifying investor than that of nationality, issues of dual identity can also arise. Under NAFTA, a “national” is defined as “a natural person who is a citizen or permanent resident of a Party.”<sup>144</sup> Thus, in *Feldman v. Mexico*, the respondent state argued that permanent residence was equivalent to nationality under NAFTA and that, since the claimant was a US national with permanent residency in Mexico, he was a dual national.

The tribunal dismissed Mexico’s argument on the basis of a contextual reading of NAFTA. A “national” may be a permanent resident, but the purpose of this definition is to complement Article 1139, which states that an “investor of a Party” means, among other things, “a national or an enterprise of such Party, that seeks to make, is making or has made an investment.”<sup>145</sup> In Article 1117(1), the words “investor of a Party” are used to refer to an investor of a state party other than the one in which the investment was made.<sup>146</sup> Thus, under NAFTA, permanent residents are to be treated like nationals of a given state party only if that state is different from the state where the investment is made.<sup>147</sup>

*Binder v. Czech Republic* concerned a claim under the Germany–Czechoslovakia BIT where a qualifying investor is defined as “a physical person whose permanent residence is . . . within the respective areas to which this Treaty applies and which is authorized to perform an investment.”<sup>148</sup> The Czech Republic argued that the tribunal did not have jurisdiction over the claimant as he had his permanent residence in the Czech Republic under Czech law (and he was also a Czech citizen).<sup>149</sup>

The tribunal considered the relevant criterion to be whether the claimant had his permanent residence in Germany, and that it was “in no way decisive whether the Claimant holds German, Czech or any other citizenship.”<sup>150</sup> The parties agreed that the BIT envisaged permanent residence in one state only, although the possibility of residence in both states could not be entirely excluded.<sup>151</sup>

This decision stands apart from the decisions on nationality that refer to national law, because here the tribunal applied permanent residence as a treaty

<sup>144</sup> NAFTA, Art. 201.

<sup>145</sup> NAFTA, Art. 1139.

<sup>146</sup> *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (December 6, 2000), ¶ 34.

<sup>147</sup> *Ibid.*

<sup>148</sup> Treaty between the Federal Republic of Germany and the Czech and Slovak Federative Republic regarding the Promotion and Mutual Protection of Investments (1990), Art. 1, as quoted in *Rupert Binder v. Czech Republic*, UNCITRAL *ad hoc* arbitration, Award on Jurisdiction (June 6, 2007), ¶ 1.

<sup>149</sup> *Binder*, *supra* note 148, ¶¶ 21–35.

<sup>150</sup> *Ibid.*, ¶¶ 68–9.

<sup>151</sup> *Ibid.*, ¶ 73.

concept with an autonomous meaning, and decided it was not appropriate to determine the question on the basis of national law.<sup>152</sup> The tribunal understood permanent residency as referring to “private and family life and not to professional or commercial activities” and, on that basis, there were strong reasons for considering that the claimant’s permanent residence remained in Germany.<sup>153</sup>

However, in a manner reminiscent of the IUSCT’s “caveat”<sup>154</sup> or the suggestions of other tribunals when discussing nationality, the *Binder* tribunal considered the possibility that the claimant could be estopped from relying on the BIT because of the measures he had taken to integrate into Czech society, and the benefits he obtained from Czech citizenship in his dealings with the Czech authorities.<sup>155</sup> On balance, the tribunal did not consider the measures taken by the claimant to be “sufficient to justify the conclusion that he has forfeited his right to protection under the Czech-German BIT” or that he had “acted in a manner inconsistent with his current contention that he has remained at all relevant times a permanent resident of Germany” within the meaning of the Czech-German BIT.<sup>156</sup>

## 2.5 “IT WOULD BE DIFFERENT IF YOU WERE A COMPANY”

The *Soufraki* tribunal found that the claimant was not an Italian national and thus his claim failed for want of jurisdiction *ratione personae*. However, the tribunal observed that if Mr Soufraki had invested in the UAE through an Italian corporate vehicle rather than in his personal capacity, “no problem of jurisdiction would now arise.”<sup>157</sup> This highlights the differing nationality requirements for natural persons in comparison with corporations. Yet, dual nationals may still encounter issues when investing through corporate vehicles incorporated in the host state. Article 25(2)(b) of the ICSID Convention allows corporate claimants with the nationality of the host state to bring claims if they are under foreign control and the parties agree that they should be treated as foreign investors. However, *Burimi v. Albania* and *National Gas v. Egypt* both suggest that the exclusion of individual dual nationals in Article 25(2)(a) of the ICSID Convention may, in certain circumstances, prevent claims brought by companies incorporated in the host state.

*Burimi v. Albania* involved a request for arbitration submitted by Mr Ilir Burimi, Burimi SRL, and Eagle Games SH.A. (“Eagle Games”) pursuant to the

<sup>152</sup> *Ibid.*, ¶ 74.

<sup>153</sup> *Ibid.*, ¶ 78.

<sup>154</sup> *Esphahanian*, *supra* note 2 at 166.

<sup>155</sup> *Binder*, *supra* note 148, ¶ 79.

<sup>156</sup> *Ibid.*, ¶ 80.

<sup>157</sup> *Soufraki*, *supra* note 113, ¶ 83.

Italy-Albania BIT and the Albanian Foreign Investment Law. Mr Burimi was required to withdraw his request because he was a dual national of both Italy and Albania, rendering his claim “manifestly outside ICSID’s jurisdiction”<sup>158</sup> under Article 25(2)(a). While noting the absolute nature of the bar imposed by Article 25(2)(a) of the ICSID Convention, the tribunal went further by assessing the impact of this bar on Article 25(2)(b).

The claimants contended that Eagle Games, which was registered in Albania, would qualify as having Italian nationality under Article 25(2)(b) of the ICSID Convention if it were owned by an Italian national.<sup>159</sup> Rejecting the claimants’ case, the tribunal found that Mr Burimi was the majority shareholder<sup>160</sup> and that, although there were no relevant precedents on the point, it would be “anomalous” if the rule against the use of dual nationality did not transfer to Article 25(2)(b), which allows corporate claimants with the nationality of the host state to bring claims if they are under foreign control and the parties agree that they should be treated as a foreign investor. The tribunal held that:

Otherwise, any dual national who is a national of the Contracting State to a dispute could circumvent the bar on claims in Article 25(2)(a) by establishing a company in that state and asserting foreign control of that company by virtue of his second (foreign) nationality.<sup>161</sup>

On that basis, the tribunal concluded that Mr Burimi could not invoke his Italian nationality to establish “foreign control” of Eagle Games and so it lacked jurisdiction with respect to that corporate claimant.<sup>162</sup>

The *National Gas v. Egypt* tribunal followed similar reasoning. The parties in that case agreed that National Gas S.A.E was an Egyptian company, but the claimant asserted that the tribunal had jurisdiction under Article 25(2)(b) as it was controlled by a UAE company. Ultimately, the tribunal decided that it did not have jurisdiction because the claimant was under the control of Mr Ginena, an Egyptian national. Further, this conclusion was “not modified” by the fact that Mr Ginena was also a Canadian national.<sup>163</sup> The tribunal’s reasoning on this issue is important because it differentiated between questions of foreign “control” and questions of foreign nationality. It distinguished the case from those concerned with the

<sup>158</sup> *Burimi SRL and Eagle Games SH. A v. Republic of Albania*, ICSID Case No. ARB/11/18, Award (May 29, 2013), ¶ 46, quoting from a letter from ICSID dated July 1, 2011. See also *ibid.*, ¶ 120.

<sup>159</sup> *Ibid.*, ¶ 115.

<sup>160</sup> *Ibid.*, ¶ 116–8.

<sup>161</sup> *Ibid.*, ¶ 121.

<sup>162</sup> *Ibid.*, ¶¶ 121–2.

<sup>163</sup> *National Gas*, *supra* note 48, ¶¶ 137, 147–8.



claimant's foreign nationality,<sup>164</sup> because an examination of jurisdiction on the basis of control presupposes a search for the "true controllers."<sup>165</sup>

A key point made in the decision is that Article 25(2)(b) is concerned with *control* as opposed to incorporation or some other test. Where tribunals are considering whether a corporate entity is under foreign control, as opposed to looking at a test such as incorporation, they will generally search for the controller on a factual and objective basis and may accordingly pierce the corporate veil.<sup>166</sup>

### 3 CONCLUSIONS

The investment treaty cases concerning dual nationals to date, many of which involved states in the Middle East, have tended to address issues of nationality by laying particular emphasis on investment treaty language.

A question frequently raised is the potential for abuse of nationality through "passport shopping." Equally, there is scope for concern over expansive nationality laws being abused by host states.<sup>167</sup> Natural persons who attempt to acquire a second nationality after a dispute has arisen in order to take advantage of a treaty will presumably be subject to the same exclusions as corporate investors that are restructured belatedly for the same purpose.

More generally, tribunals have responded cautiously to arguments that additional controls need to be imposed through the doctrines of dominant and effective nationality and/or the existence of a genuine link between an investor and a contracting state where these conditions are not included in the relevant investment treaty. However, tribunals have on occasion suggested that there could be situations or exceptional circumstances in which these concepts may be applicable. For instance, the *Champion Trading* tribunal considered this to be the case in the presence of a "clinging" nationality across multiple generations,<sup>168</sup> and the *Fakes* tribunal envisaged "several instances" where an effective nationality test could be "justified in light of the particular circumstances of a case."<sup>169</sup> Explicit

<sup>164</sup> *Ibid.*, ¶ 141.

<sup>165</sup> *Ibid.*, ¶ 135, citing Christoph Schreuer et al., *The ICSID Convention: A Commentary*, 2nd ed. (CUP) at 323, fn. 32. The tribunal analyzed Art. 25(2)(b) in terms of both an objective and subjective requirement for consent, but the claimant did not pass the objective test based on who actually controlled the claimant. See *National Gas*, *supra* note 48, ¶¶ 131–49.

<sup>166</sup> See e.g. *TSA Spectrum, de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award (December 19, 2008), ¶¶ 139–62; *Guardian Fiduciary Trust Ltd f/k/a Capital Conservator Savings & Loan Ltd v. Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/12/31, Award (September 22, 2015), ¶¶ 125–40.

<sup>167</sup> Robert D. Sloane, *supra* note 17 at 39–42.

<sup>168</sup> *Champion Trading*, *supra* note 57, ¶ 3.4.1.33.

<sup>169</sup> *Fakes*, *supra* note 73, ¶ 77.

references to the question of dual nationals or the application of a test of effectiveness may become more common in investment treaties.

The cases on dual nationals also raise questions about the interaction between national and international law. As Mr Soufraki discovered, an investment arbitration tribunal will apply national law to individuals to determine who they really are, and there can be times when a tribunal's position on who someone really is under national law appears to differ from that of the state itself. An international tribunal has power to decide on its own competence and, where questions are raised, will come to its own conclusions based on the evidence and arguments before it.

Several of the cases and issues relating to dual nationals raise wider questions on conceptualizations of international investment law. Assertions about the relevance of concepts derived from diplomatic protection and customary international law are often linked to a particular understanding of the nature of the system of international investment treaty arbitration. Does it reflect a direct model where individual investors present their own claims against host states, or is it a derivative model whereby the home state has simply delegated its procedural right to present a claim against the host state?<sup>170</sup> Should the law concerning diplomatic protection be automatically applied on the basis that investment treaty arbitration somehow mirrors state-state claims relating to the protection of nationals? Or is a claim by an individual under an investment treaty governed by a *lex specialis*? There is no telling whether future jurisprudence on dual nationals in investment treaty arbitration will amplify or resolve this dialectic.<sup>171</sup>

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<sup>170</sup> See e.g. Zachary Douglas, "The Hybrid Foundations of Investment Treaty Arbitration" (2004) 74:1 *British Yearbook of International Law* 151 at 167–84; August Reisch, "Investors" in Math Noortmann et al. (eds) *Non-State Actors in International Law* (Hart, 2015) at 253–71, 260–2.

<sup>171</sup> See e.g. *Yosef Maiman, Merhav (MNF), Merhav-Ampal Group, Merhav-Ampal Energy Holdings v. Arab Republic of Egypt*, UNCITRAL, PCA Case No. 2012-26 and *Dawood Rawat v. The Republic of Mauritius*, UNCITRAL, PCA Case No. 2016-20.