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Rights Defined with Investment International Law among States

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Abstract

The right to grant and withdraw nationality of natural persons remains part of the sovereign domain. The question before tribunals has been whether and to what extent a state can refuse to recognise the nationality of a claimant. International law practice on questions of nationality has developed primarily in the context of diplomatic protection.

Keywords: Legislation; Juridicial terms; Globalisation; Diplomatic protection; American nationality; Effective nationality

Introduction

In the Nottebohm case, 2 the ICJ held that even though a state may decide on its own accord and in terms of its own legislation whether to grant nationality to a specific person, there must be a real connection between the state and the national. The Court made the following statement; 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 [1]. 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. However, in today's circumstances of the modern world it would be very difficult to demonstrate effective nationality following the Nottebohm considerations, i.e. the person's attachment to the state through tradition, interests, activities or family ties. The International Law Commission's Report on Diplomatic protection recognised the limitations presented by the Nottebohm ruling in the context of modern economic relations, it is necessary to be mindful of the fact that if the genuine link requirement proposed by Nottebohm was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today's world of economic globalisation and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection. However, the Nottebohm principles are still useful in cases of dual or multiple nationalities when the nationality of the claimant in order to be accepted has to be predominant [2]. In the case of dual nationality, Article 7 of the ILC Draft Articles on Diplomatic Protection states, State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and the date of the official presentation of the claim.

Discussion

Under customary international law, a state may exercise diplomatic protection on behalf of one of its nationals with respect to a claim against another state, even if its national also possessed the nationality of the other state, provided that the dominant and effective nationality of the person was that of the state exercising diplomatic protection. In this respect, customary law has evolved from the earlier rule of non-responsibility under which diplomatic protection could not be exercised in those circumstances. The Iran-United States Claims Tribunal 7 had recourse to the test of dominant and effective nationality in that it had to determine whether a claimant with dual US-Iranian nationality was to be regarded as predominantly American or Iranian for purposes of bringing a claim before the Tribunal [3]. In Esphahanian v. Bank Tejarat, Chamber Two found that the claimant could claim before the Tribunal because his dominant and effective nationality at all relevant times that of the United States and the funds at issue in the present case related primarily to his American nationality, not his Iranian nationality. Nevertheless, the Chamber distinguished the case as one in which the dual national, rather than the state, brought his own claim before the international tribunal against one of the states whose nationality he possessed. Some Bilateral Investment Treaties include a single definition of national which applies to both parties. Other BITs offer two definitions, one relating to one Contracting Party and the other to the second Contracting Party [4]. For example the Finland-Egypt BIT9 provides that the term national means, In respect of Finland, an individual who is a citizen of Finland according to Finnish law. In respect of Egypt, an individual who is a citizen of Egypt according to Egyptian Law. The US-Uruguay BIT10 defines national to mean, For the United States, a natural person who is a national of the United States as defined in Title III of the Immigration and Nationality Act. For Uruguay, a natural person possessing the citizenship of Uruguay, in accordance with its laws. Some investment agreements require some link beyond nationality. For example, the Germany-Israel BIT11 provides in its Article (1) (3)(b), that the term nationals means with respect to Israel, Israeli nationals being permanent residents of the State of Israel. The criterion of permanent residence is sometimes used as an alternative to citizenship or nationality. For instance in the Canada-Argentina BIT12 the term investor means any natural person possessing the citizenship of or permanently residing in a Contracting Party in accordance with its laws [5]. Natural persons that are covered by the Energy Charter Treaty are similarly defined by reference to each state's domestic laws determining citizenship or nationality but also extends coverage to permanent residents, Investor means, with respect to a Contracting Party, a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party

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in accordance with its applicable law. Article 201 of NAFTA equally provides in part that, National means a natural person who is a citizen or permanent resident of a Party. The new Canada Model FIPA which replaces the 2004 Model FIPA covers citizens as well as permanent residents of Canada, but it expressly provides that a natural person who is a national of both contracting parties shall be deemed to be exclusively a national of the party of his or her dominant or effective nationality. Not many investment agreements address the issue of dual nationality. Nevertheless Dolzer and Stevens say that in the absence of treaty regulation, general principles of international law would apply, according to which the effective nationality of the individual would govern. Article 25(1) of the ICSID Convention provides that, the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State and a national of another Contracting State [6]. With respect to natural persons, Article 25(2) of the Convention defines National of another Contracting State to mean, 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 d ate 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 Contacting State party to the dispute. The ICSID Convention requires claimants to establish that they had the nationality of a Contracting State on two different dates: the date at which the parties consented to ICSID's jurisdiction and the date of the registration of the request for arbitration. An extension of treaty rights to permanent residents cannot extend ICSID's jurisdiction beyond nationals of Contracting States to the ICSID Convention. With respect to dual nationality, the ICSID Convention excludes dual nationals, if one of the nationalities is that of the host state. In practice, investment treaty jurisprudence under the ICSID Convention as to the nationality of natural persons is limited to four cases brought by dual nationals. The first case is Eudoro A. Olguín v. Republic of Paraguay. Mr. Olguín, a dual national of Peru and the United States, brought a claim against the Republic of Paraguay under the Peru-Paraguay BIT, for the treatment allegedly received from the Paraguayan authorities, in relation to his investment in a company for the manufacture and distribution of food products in Paraguay [7]. The arbitral tribunal rejected Paraguay's objection to jurisdiction based on the claimant's dual nationality by relying on the fact that Mr.Olguín's Peruvian nationality was effective, which was deemed enough for purposes of the ICSID Convention and the BIT. In Soufraki v. United Arab Emirates, the claim was related to a port concession in Dubai. When a dispute arose, Mr. Soufraki, a dual Italian and Canadian national, invoked the Italy-United Arab Emirates BIT to bring a claim based on his Italian nationality. The Tribunal investigated his claim of Italian nationality and found that he had lost it when he acquired Canadian citizenship. The fact that he could present certificates of nationality only provided prima facie evidence of his Italian nationality. The tribunal therefore held that he was not entitled to bring a claim under the Italy-U.A.E. BIT as an Italian national [8]. The Tribunal recognised the difference between the ease with which an investor may incorporate an investment in a favourable jurisdiction in order to have the most advantageous BIT coverage and the many difficulties faced by Mr. Soufraki as a natural person in proving that he had Italian nationality, when he had previously lost it, had Mr. Soufraki contracted with the United Arab Emirates through a corporate vehicle incorporated in Italy, rather than contracting in his personal capacity, no problem of jurisdiction would now arise. But the Tribunal can only take the facts as they are and as it has found them to be. On 4 November 2004, Mr. Soufraki submitted a request for annulment of the Arbitral Award issued on 7 July 2004 because of a manifest excess of power by the Tribunal and its failure to state reasons [9]. The core issue was whether the Tribunal could make an independent determination of the nationality of the claimant or whether it was bound by the determination made by the Italian authorities relying on passports and certificates of nationality issued to the claimant. The ad hoc Committee found that the arbitral tribunal correctly stated that certificates issued by consular authorities are not binding on the tribunal's determination of the claimant's nationality in order to ascertain its own jurisdiction. The presumption in favour of the existence of the Italian nationality was not corroborated by further evidence showing that Mr. Soufraki had reacquired his lost Italian nationality [10].

Conclusion

In the case Champion Trading v. Egypt, US nationals who were also found to be Egyptian nationals were denied the right to bring a claim against Egypt because of the rule in Article 25(2) (a) excluding nationals having the nationality of the Contracting State Party to the dispute.

Acknowledgement

None

Conflict of Interest

None

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