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Utilizing Constitution Protocol and Law

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Abstract

The individual claimants argued that the tribunal should employ the international law test of real or effective nationality, which they contended would show that they have not effectively acquired Egyptian nationality. In the end, the tribunal did not wholly rule out the applicability of such a test in the ICSID context, where it would be manifestly absurd or unreasonable for a person to be classified as a dual national, perhaps where a third or fourth generation individual has no ties whatsoever with the country of its forefathers and where a test of real or effective nationality might be appropriate to use in ICSID.

Keywords: Nationality; Arbitration; Jurisdiction; Judicial person; Shareholders; Governments

Introduction

However, the tribunal was convinced that there could be little doubt that the claimants in this case had sufficient ties to Egypt and that that they were therefore clearly excluded from ICSID arbitration. It was relevant that their Egyptian nationality had been used for the registration of their business. After dismissing jurisdiction for the individual claims, the tribunal upheld jurisdiction for the claims brought by the two corporate entities observing that there was no bar to ICSID claims by companies whose shares were held by dual nationals of the two parties engaged in the arbitration. In the case Siag and Vecchi v. Egypt, Mr. Siag and his mother Ms. Vecchi, former Egyptian nationals submitted a claim under the Italy-Egypt BIT as Italian nationals [1]. Because the ICSID Convention does not allow persons to initiate arbitration against their own state, the tribunal examined extensively the Egyptian law in order to determine whether they had ceased to be Egyptian nationals. Although all three arbitrators held that Ms. Vecchi had lost her Egyptian nationality on the date she re-acquired her Italian nationality, one tribunal member, in a partial dissenting opinion disagreed that this was the case with Mr. Waguih Siag. Two of the three arbitrators held that Mr. Waguih Siag had lost his Egyptian nationality by virtue of his failure to take formal steps to retain it. The issues related to the nationality of legal persons can be even more complicated than for natural persons. Companies today operate in ways that can make it very difficult to determine nationality [2]. Layers of shareholders, both natural and legal persons themselves, operating from and in different countries make the traditional picture of a company established under the laws of a particular country and having its centre of operations in the same country, more of a rarity than a common situation. It is quite common that a company can be established under the laws of country A, have its centre of control in country B and do its main business in country C. Tribunals have usually refrained from engaging in substantive investigations of a company's control and they have usually adopted the test of incorporation or seat rather than control when determining the nationality of a juridical person. Accordingly, it is the general practice in investment treaties to specifically define the objective criteria which make a legal person a national, or investor, of a Party, for purposes of the agreements, rather than to simply rely on the term nationality and international law [3]. Since the objective criteria used may include investors to whom a Party would not wish to extend the treaty protection, some treaties themselves include denial of benefit clauses allowing exclusion of investors in certain categories. OECD governments are often confronted with requests by their investors to advocate on their behalf in their relations with the host state, before any arbitral claims are presented. It seems that in such situations government determinations on the nationality of an investor are not based exclusively on BITs provisions, but often use different, more flexible tests. The ICSID Convention which limits the jurisdiction of the Centre to disputes between one contracting state and a national of another contracting state, provides specific rules on the nationality of claims in its Article 25 and investment treaties specify any other or additional requirements that the contracting states wish to see apply to determine the standing of claimants [4]. A related issue is the question of the extent to which shareholders can bring claims for injury sustained by the corporation, an issue that has evolved significantly since the ICJ decision of Barcelona Traction. There is no single test used by all investment treaties to define the link required between a legal person seeking protection under the treaty and the contracting state under whose treaty the investor asks for protection. Bilateral investment treaties have essentially relied on the following tests for determining the nationality of legal persons, the place of constitution in accordance with the law in force in the country, the place of incorporation or where the registered office is, the country of the seat, i.e. where the place of administration is; and less frequently, the country of control. Most investment treaties use a combination of the tests for nationality of legal persons so that a company must satisfy two or more of them in order to be covered. The most common approach is a combination of the place of incorporation or constitution and seat, although the combination of incorporation or constitution and control and also of all three tests is also found. Place of constitution in accordance with the law. In order to determine the nationality of a legal person, some bilateral investment treaties have adopted the test of the place of constitution in accordance with the law in force in the country. By so doing, the contracting parties simply make reference to national law provisions of each contracting party in order to establish the legal persons entitled to protection. A legal person constituted in accordance with the laws of a contracting party will be considered an investor of that state [5]. Since states are free to choose the criteria for the attribution of nationality to legal persons, such criteria be they incorporation, seat or control, etc. may vary in accordance with the

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specific provisions of the applicable laws of each contracting party. Investment treaties concluded by Greece have often followed this pattern in order for legal persons to qualify as investors under investment agreements. Article 1 of the Greece-Cuba BIT defines as investors, with regard to either Contracting Party, legal persons constituted in accordance with the laws of that Contracting Parties. The US-Uruguay BIT32 for instance provides that, Enterprise of a Party means an enterprise constituted or organised under the law of a Party and a branch located in the territory of a Party and carrying out business activities there [6]. The most recent definitions section of the Canada Model FIPA34 reads enterprise means Any entity constituted or organised under applicable law, whether or not for profit, whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association. The Energy Charter Treaty (ECT) in its article 1 (7) (a) (ii) defines investor with respect to a contracting Party to include a "company or other organisation organised in accordance with the law applicable in that Contracting Party. This broad definition is somewhat qualified by Article 17 of the ECT which calls for an inquiry into a company's substantive connection with the state in which it is incorporated [7]. The draft MAI defined as investor, A legal person or any other entity constituted or organised under the applicable law of a Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, joint venture, association or organisation [8]. Place of incorporation. In other treaties the place of constitution in accordance with the laws is often found in combination with the incorporation test. Because of its potential opening for treaty shopping, it may be accompanied by a denial of benefits clause which allows the state party concerned to deny treaty protection to a company, under certain circumstances, which is controlled by nationals of a non-party. The UK is one of the countries which, in the majority of their BITs, use the place of incorporation or constitution as the sole test. The UK-El Salvador and the UK-Yugoslavia BIT37 for instance, define an investor as, in respect of the United Kingdom, corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended [9]. The two cases that follow show how arguments related to the economic reality have not succeeded in preventing tribunals from applying the test that the contracting parties have agreed upon and included in their treaties. In Tokios Tokelés v. Ukraine, the Tribunal held that a company incorporated in Lithuania was entitled to bring a claim against the Ukraine under the Lithuania-Ukraine BIT although it was controlled and 99 per cent owned by Ukrainian nationals [10].

Conclusion

Tokios Tokelés, the claimant company, was qualified as a Lithuanian investor under the Lithuania-Ukraine BIT that defined corporate nationality by incorporation, according to the ordinary meaning of the terms of the Treaty, the Claimant is an investor of Lithuania if it is a thing of real legal existence that was founded on a secure basis in the territory of Lithuania in conformity with its laws and regulations. The Treaty contains no additional requirements for an entity to qualify as an investor of Lithuania.

Acknowledgement

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Conflict of Interest

None

References

1. Shehabuddin E (2008) Reshaping the holy: Democracy, development, and Muslim women in Bangladesh. CUP NY: 1-304.
2. Hossain K (2003) In Search of Equality: Marriage Related Laws for Muslim Women in Bangladesh.J Int Women's Stud MA 5:1-38.
3. Elias T (2015) Gaps and Challenges in the Enforcement Framework for Consumer Protection in Ethiopia. Miz L Rev EA 9:1-25.
4. Levitus S, John I, Wang J, Thomas L, Keith W, et al. (2001) Anthropogenic Warming of Earth's Climate System. USA 292:267-270.
5. Roger A, Jimmy A, Thomas N, Curtis H, Matsui T, et al. (2007) A new paradigm for assessing the role of agriculture in the climate system and in climate change. Agric For Meteorol EU 142:234-254.
6. Yoram J, Didier T, Olivier B (2002) A satellite view of aerosols in the climate system. Nature UK 419:215-223
7. Ramanathan P, Crutzen, J, Rosenfeld D (2001) Aerosols, climate, and the hydrological cycle. Nature UK 294:2119-24.
8. Hassan A, Qadri MA, Saleem M (2021) The Muslim Family Law Ordinance 1961: Pioneer of Women Empowerment in Pakistan. JRSP PAK 58:1-8.
9. Abdullah R, Monsoor T, Johari F (2015) Financial support for women under Islamic family law in Bangladesh and Malaysia. Taylor and Francis UK 21:363-383.
10. Shahid TN (2013) Islam and women in the constitution of Bangladesh: The impact on family laws for Muslim women. FLJS UK 1-11.