The Challenges of Defining Investor in International Investment Law

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I. Introduction

Addressing the question who should be treated as an investor is a crucial issue under the international investment law to determine the rights and responsibilities of an investor. In earlier days, international investment law was highly concentrated on the protection of investor only. However, the trend has been changed and now it tries to make a balance between the investor and contracting State party as well in terms of protecting their interests. Nevertheless, confirming the nationality of investor is still a key issue for many reasons particularly it is essential to settle the jurisdiction of arbitration tribunal.

The investor's nationality determines from which treaties it may benefit. If the investor wishes to rely on a Bilateral Investment Treaty (BIT), it must show that it has the nationality of one of the two State parties of that BIT. Because if the host State's consent to jurisdiction is given through a treaty, it will only apply to a national of a State that is party to that treaty.[2] Often the State party is trying to establish that the party who is claiming himself/herself/itself as an investor before the tribunal is not an investor under the purview of their concerned BIT. Hence one is not eligible to claim protection before the arbitral tribunal. There are many complex issues relating to determination of who should be an investor under a treaty; including but not limited to the nationality of the investor, dual nationality, third country connection, effective control etc.

However, tribunals are settling the dispute arising out of the question of who should be an investor in international investment law from different perspective and upon considering specific treaty, facts and circumstances. Nevertheless, awards from the tribunal are also failed to make conformity in defining the term "investor" under international investment law. Here the definition of investor delineates who has standing to bring a claim in

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[2]R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP 2008) p 46

arbitration. And that is a critical issue for not only for the respondent State, but also for the claimant/investor. However, this article will primarily focus light on the complex questions relating to investor like nationality, dual nationality, registration of company, seat and management, control etc and subsequently evaluate the assessment of tribunals in defining the terminology. In addition, it will articulate author's suggestion to frame a shape of a precise definition of investor at the end.

II. Definition of Investor in International Investment Law

It is the contracting State parties who have exclusive authority to determine who would be investor under their agreed Bilateral Investment Treaty.[3] However, each party has some obligation under the BIT and usually investors take the benefits of investment treaty between two contracting parties. Hence an investor can bring legal action to the arbitration tribunal if any of the obligations is breached by the host State party and vis-a-vis. Although it is purely a treaty between two State parties, but the key player in the treaty is the investor.[4] The State makes an easier way on behalf of the individual or corporate entity to invest in an another country. On the contrary, the host State invites individual or organization from her desired country to invest in her territory.

Therefore, to be an investor, the person or entity who wants to invest must possess the nationality/citizenship/permanent residency of one contracting party to invest in the sovereign territory of other contracting party. Thus nationality and issues relating to nationality are very significant to determine whether the investor can seek protection under the BIT. The importance has many angles i.e. from the perspective of capital exporting country, capital exporting country and from the perspective of investor ultimately.[5]

Investor can be either individual person or juridical person. The International Centre for Settlement of Investment Dispute (ICSID) Convention restricts its jurisdiction to settle any dispute between national of

[3]*Symposium Co-organized by ICSID, OECD & UNCTAD on Making the Most of International Investment Agreements: A Common Agenda, paper presented by Barton Legum on Defining Investment and Investor: Who is Entitled to Claim? (12 December 2015) Paris.*

[4]R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP 2008) p 47

[5]See n 2, p 5

a contracting State with another State.[6] That mean it only allows national of a contracting party to bring legal action to it. Any person other than a national of any of the contracting party is not eligible to this forum. However, that person must be a national of that country either on the date of consent to arbitration or date of registration. Nevertheless, the ICSID Convention does not recognize dual nationality when one of the nationalities is the one of the contracting State.

On the contrary Art. 1(7) of the Energy Charter Treaty (ECT) defines investor as a natural person having the "Citizenship" or "Nationality of" or who is "Permanently Residing" in contracting party in accordance with its applicable law.[7] The definition of ECT is more liberal than the ICSID Convention. The ECT includes citizen and permanent resident as well apart from national. It elaborates the scope to be an investor by which a permanent resident may also become an investor under the treaty. The definition of ECT is more wider than the ICSID Convention while it considers permanent residency as well to be an investor. On the contrary, ICSID is too conventional in this regard and only permits citizen and national.

III. Examining the question of Sovereignty

Although the customary international law prefers to determine nationality of the investor by the national law of the State whose nationality is claimed but the ECT introduces acceptance of permanent residency to be an investor. That mean to claim the protection of the BIT one must have nationality or citizenship or if any BIT permits permanent residency to claim protection under that BIT except the nationality or citizenship or permanent residency of the host State or third State who are not State party to that BIT. However, the issue of nationality, citizenship and permanent residency are purely dealt by each sovereign country. Each country set up their own rules to deal with the matter and in some cases, it put restriction to acquire dual nationality and forfeit citizenship or permanent residency in

[6]Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art 25(1)

[7]Entered into force in 1998

certain circumstances. However, the question is whether or to what extent State can refuse to recognize the nationality of a claimant.[8]

Although it is dealt by the long-established principle of international law but what will happen if any party calls into question it before the tribunal. However, the tribunal has jurisdiction to determine the matter. In fact, they are empowered and bound to decide in another sense if it is challenged albeit the concerned BIT relies on the same principle of international law.[9]

Nevertheless, a tribunal also has jurisdiction to take a decision in contrary with the content of a certificate of nationality issued by a country.[10] Tribunal is highly empowered in this regard though the claimant can argue that the certificate is issued by the concerned authority of one's claiming State. However, the tribunal can consider the document as a prima facie evidence but at the end they can reverse the nationality. Nonetheless, this position of arbitration tribunal limits the authority of a sovereign country. They even can disregard the certificate issued by a competent authority and an investor may be deprived from investing if the tribunal promulgate that the certificate of nationality is no longer valid to prove his/her nationality in the eye of the tribunal. It is evident from this position that the sovereignty of a country is being compromised when she come to international arena especially in investment treaty.

IV. The Dilemma of Dual Nationality

However, now-a-days many investors have dual or multi nationality due to many factors. It also raises some complex issues in settling who would be treated an investor under a BIT. Bilateral Investment Treaty is agreement between two specific States who want to limit the scope of treaty between them only.[11] Often investor from one State party has dual nationality and the other country is not a State party to that BIT. Even sometimes the investor has actual connection with his/her second country but want to take advantage of his/her dual nationality and invest to a State party of that BIT. When the host State opposes this stand of the investor and challenges

[8]*Survey prepared by Catherin Yannaca-Small on International Investment Law: Understanding Concepts and Tracking Innovations, Investment Division, OECD Directorates for Financial and Enterprise Affairs (2008)*

[9]*Hussein NuamanSoufraki v United Arab Emirates*, ICSID Case No ARB/02/7, Award (7 July 2014) para. 55

[10]ibid, para 63

[11]R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP 2008) p 4

his/her capability to take part under the BIT the tribunal only look into the effective nationality of the alleged person.

However, still one can invest if one has effective nationality with the contracting State party regardless of s/he maintains another nationality.[12] Consequently, the host State becomes lawfully bound to entertain the investor who is actually come from outside the treaty. The host State may not intend to invite that country and here by the intervention of the tribunal they lose their choice whom they invite to invest in their territory. Again, the question of sovereignty come into the spotlight but failed to maintain due the heavy influence of international law. Hence, there is every risk for capital importing country to lose their national interest and national security a well.

However, if an investor is being a national of both the contracting parties of a BIT then the question will come to light that what will happen if any conflict will arise between the investor and the host State. Will it be regarded as private matter between a State and its citizen? The answer to this question is clear from the Art. 25(2)(a) of the ICSID Convention. No investor is competent to take shelter of a BIT of which s/he is a citizen of other party as well. The decision was also upheld in *Champion Trading v Egypt*.[13]

However, a NAFTA Tribunal took another view while deciding a matter between *Feldman v Mexico*[14] where they focused that an investor holding citizenship of the another contracting State party is made one eligible to invest in host States and it does not matter whether one has permanent residency in that host country. From the above case laws, it is evident that there is no scope of being an investor in own country albeit it is possible in exceptional circumstance when the investor holds the nationality of another contacting party.

Nevertheless, if anybody loses his/her nationality from any contracting State then they will no longer be regarded investor under that BIT

[12]*Eudoro Armando Olguin v Republic of Paraguay,* ICSID Case No ARB/98/5, Award (26 July 2001) para 61

[13]*Champion Trading Company, Ameritrade International, Inc. v Arab Republic of Egypt,* ICSID Case No ARB/02/9, Award (27 October 2006)

[14]*Marvin Roy Feldman Karpa v United Mexican States,* ICSID Case No ARB(AF)/99/1, Award (11 January 2005)

regardless of their previous strong connection with any of the contracting States.[15]

V. Nationality of Legal Person

Legal or juridical person denotes legally incorporated entity and usually every legal entity need to be incorporated in contracting State to get involve with a BIT. Although there are some exceptions to this rule i.e. Argentina-Germany BIT allows any commercial association or a company whether legally registered or not to invest in their land. Hence it is the treaty makers who set up the rules to be an investor according to their agreement.

However, the issue of nationality is more complex in case of artificial person rather than natural person. Diversity in business and multinational operation gives the matter a different shape from a natural person. Determining nationality of a company is not always easy due to multi-layer shareholders come from both natural and juridical person, location of control in one country and registration in another places etc. However, the previous views of tribunals were normally looked into test of registration and seat instead of doing substantive investigation to determine control of the company.[16]

Nevertheless, nationality of juridical person is crucial in determining the rights and obligation under a BIT. Most widely accepted procedure to determine the nationality is the place of registration.[17] That mean in which territory the company is being registered to operate their business is holding the nationality of that country. According to the Energy Charter Treaty (ECT), investor includes a company or other organization organized in

[15]*WaguihElie George Siag and ClorindaVecchi v The Arab Republic of Egypt,* ICSID Case No ARB/05/15, Awar (1 January 2009) paras 156-159, 172

[16]*Survey prepared by Catherin Yannaca-Small on International Investment Law: Understanding Concepts and Tracking Innovations, Investment Division, OECD Directorates for Financial and Enterprise Affairs* (2008) p 18

[17]M Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Dispute (*M. Nijhoff 1993)

accordance with the law applicable in that contracting party.[18] It is the BIT which will ultimately fix the process of determining nationality.[19]

Many UK and USA bilateral treaties recognized the concept of place of registration. In those cases, the tribunals were reluctant to pierce the incorporation veil.[20] However, the company may be registered in one country and the majority of shareholders may come from another country. The tribunals' view in that type of case is whether the BIT focuses on the place of incorporation. If the case is that then the nationality of majority of shareholders will be disregarded and the place of registration will be counted to continue their investment as an investor to another contracting party of the BIT.

The *TokiosTokeles v Ukraine* is the best example of application of this rule where the Tribunal emphasized on the place of registration and compliance of the rules enumerated in the BIT instead of nationality of investors.[21] However, if any BIT covers the issue also then the Tribunal will has to follow the intention of the parties described in their agreement like the Ukraine-United States BIT empowered the parties to exclude a company controlled by the nationals of a third country from the purview of their BIT.

However, *Sedelmayer v Russia* is the first case in which an arbitral Tribunal has interpreted the notion of investor in a way that allowed the protection of an investment made by the intermediary of a company incorporated in a third State.[22] The Tribunal held that SGC international was a simple vehicle by which Mr. Sedelmayer has transferred his capital to Russia and that he was a *de facto* investor. Although the language of the treaty did not mention the element of control but only the elements of incorporation and siège social, the Tribunal accepted jurisdiction.

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[18]The Energy Charter Treaty (Signed in December 1994, entered into force April 1998), (ECT), art 1(7)(a)(ii)

[19]*TokiosTokeles V Ukraine*, ICSID Case No ARB/02/18, Award (29 April 2004) para 32

[20]Suzy H. Nikiema, *Best Practices: Definition of Investor (*The International Institute for Sustainable Development 2012)

[21]*TokiosTokeles V Ukraine*, ICSID Case No ARB/02/18, Award (29 April 2004)

[22]Mr. Franz *Sedelmayer v The Russia Federation*, Judgment of the City Court of Stockholm, Award (18 December 2002)

The ECT also has similar provisions to protect the interest of two contracting parties only.[23] However, if the contracting State parties do not insert any such obligation in their treaty then the tribunal does not have authority to go beyond the intention of the parties and refrain someone from taking part in that treaty. In *TokiosTokeles v Ukraine* the Tribunal opined that in absence of any such provision in the text of the BIT, the Tribunal cannot impose any such restriction upon any third State controlled company.[24] They also declared that it is evident from the BIT that the State parties are deliberately chose not to exclude any such company and a Tribunal cannot go beyond the text of the BIT.

However, in *Saluka v Czech Republic* the Tribunal echoed the same notion although this time the Tribunal was sympathetic to the Respondent but cannot construe the text of BIT beyond the wish of the State parties.[25] In the mentioned case, the court recognized that the Claimant is merely a shell company which has its full control to a third country registered company but as it has its registration in Netherland and the BIT is not open any scope to the tribunal to add other requirements to refrain the company hence it upheld the claim of the Claimant regarding the question of nationality.[26]

Nevertheless, this method is no longer valid to determine the nationality because now-a-days companies are holding their central administration or control or main seat in a different country and even can operate business in an another country. Consequently, the texts of modern BITs broaden the scope of the nationality of juridical entity and include all these issues. Subsequently, tribunals are also considering all these relevant issues to settle the question of nationality. Hence the draftsmen are more conscious to deal with the new challenges now. Present treaties have imposed condition that the company must have incorporation under the law having force in the contracting State and effective control and seat must also be situated in the same territory simultaneously.

The principle is subsequently upheld by the tribunal in *Yaung Chi Oo v Myanmar* while the Tribunal closely looked into the effective management

[23]The Energy Charter Treaty, Annex 1 to the Final Act of European Energy Charter Conference at Art. 17(1), Dec 16-17, 1994, Lisbon, Portugal, available at www.encharter.org/upload/1/TreatyBook-en.pdf
[24]*TokiosTokeles V Ukraine*, ICSID Case No ARB/02/18, Award (29 April 2004)
[25]*Saluka Investments B.V. v The Czech Republic* (partly awarded in 2006)
[26]Saluka (n 23)

of the company from Singapore where it was also registered to operate business.[27] This new condition to the BITs limits the scope of the companies to take advantage of mere registration to be a part of a BIT without effective management there.

However, albeit tribunals are overcoming the challenges gradually but still there is no precise definition what does control of company mean? The *Draft 4th Edition of the OECD Benchmark Definition of Foreign Investment* consider the percentage of ownership or voting power in a company as themeasure of control, constituting the quantitative approach.[28]

The Tribunal in the NAFTA case *Thunderbird* v *Mexico* gave the following interpretation of what might constitute control[29]:

> Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise and, under certain circumstances, control can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, knowhow and authoritative reputation.[30]

However, in *Aguas Del Tunari v Bolivia* the Respondent argued that although the Claimant has a registration in one of the BIT country, but it is effectively controlled by an another country which is not a State party to the BIT.[31] The Tribunal found that the Claimant were more than just a corporate shell set up to obtain jurisdiction before the Tribunal and thus the Tribunal deem that the company fulfilled the BIT's nationality requirement.

The *Generation Ukraine* v *Ukraine* case also upheld the same principle while the Tribunal dealt with the question of jurisdiction whether the claimant is a national of the home State.[32] Although the Claimant established a subsidiary in Ukraine which was actually a company

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[27]*Yaung Chi Oo Trading Pte. Ltd. v Government of the Union of Myanmar,* ASEAN I.D. Case No ARB/01/1, Award (31 march 2003)

[28]*OECD Benchmark Definition of Foreign Investment* (Draft) – 4th Edition, DAF/INV/STAT(2006)2/REV. 3, 2007.

[29]*International Thunderbird Gaming Corporation v The United Mexican States,* UNCITRAL, Award (19 November 2004)

[30]Ibid, para. 180.

[31]*Aguas Del Tunari v Bolivia v Republic of Bolivia,* ICSID Case No ARB/02/3, Award (29 August 2002)

[32]*Generation Ukraine Inc.* v *Ukraine,* ICSID Case No ARB/00/9, Award (16 September 2003)

registered in the US. Ukraine wanted to take shelter of a clause of the BIT to refuse the Claimant the benefits of that BIT.[33] According to the BIT, the investor must have substantial business in the home State and they argued that the Claimant is essentially managed and controlled by Canadians and had no genuine business in the US.[34] Subsequently, the Tribunal promulgated that it had jurisdiction under Part V to determine the justifiability of the arisen claims by the Claimant as these were arisen before the time the investment was notified of the denial of benefits and under Article 17(1) of the BIT the home State can only deny the Part III investment Protection benefits prospectively.[35] As this was not happen in this case hence the Tribunal delivered its award in favour of Generation Ukraine.

Nevertheless, often host State like that investment be made through locally incorporated company. The problem to this choice of host State is that no locally incorporated entity is not entitled to take shelter if ICSID. However, Art. 25(2)(b) of the ICSID Convention confers right to come under the shadow of ICSID of a local company if that is actually controlled by the nationals of other countries provided that country is a State party to ICSID Convention.

However, in *Vacuum Salt v Ghana* the Tribunal found that the parties have an agreement between themselves that the investor will be treated as foreign nationals.[36] The Tribunal in this case held that the existence of foreign control is a separate requirement under Art. 25(2)(b) which cannot be settled by mere paper agreement by the parties; there must be real existence of foreign control and as the party to this dispute is lacking that hence the Tribunal refused jurisdiction.

Whether investment is being effected directly or indirectly via a company which has effective control in a third-party State is not distinguished by the

[33]*Survey prepared by Catherin Yannaca-Small on International Investment Law: Understanding Concepts and Tracking Innovations, Investment Division, OECD Directorates for Financial and Enterprise Affairs* (2008) p 32
[34]Article 1(2) of the *US-Ukraine BIT*
[35]*Generation Ukraine Inc.* v *Ukraine*, ICSID Case No ARB/00/9, Award (16 September 2003) para 15.7, 15.9
[36]*Vacuum Salt Products ltd. v Republic of Ghana,* ICSID Case No ARB/92/1, Award (14 January 1993)

ICSID Convention.[37] Hence, the Tribunal delivered award based on this non distinction of ICSID Convention in the *Tza Yap Shum v. Peru* case and declared that when a company starts a claim against a State, the Tribunal shall only look into whether the company that is making the investment in the host country and has suffered injury regardless of its direct or indirect control or ownership whit the company which bring the claim before the Tribunal.[38]

In the *SOABI v Senegal* case, a question had been arisen whether the national of Panama have access to the arbitration centre as the claimant was incorporated in Panama and purely controlled by Belgian shareholders whereas Panama was not a signatory to the ICSID Convention.[39] Despite that, the Tribunal accepted jurisdiction and determine the case as the Claimant company was controlled indirectly by shareholders of a signatory State of the ICSID Convention.[40] Hence, in this case the Tribunal also recognized the notion of indirect control of shareholders to a company.

However, investment may take place in various ways which may call in question again about the nationality of investor. A company may be acquired by a group of shareholders who hold nationality of a different country. In that case a question may arise whether a shareholder pursue claim for damages do to the company. Nevertheless, I that circumstance the shareholder can proceed on the basis of its own nationality even if the company does not meet the nationality requirement under that treaty.[41] The International Court of Justice (ICJ) view on this is the exclusion of shareholders' rights against a host State inflicting damage on a company would not necessarily apply if the company in question is incorporated in the host State.[42]

VI. Conclusion

[37]Suzy H. Nikiema, *Best Practices: Definition of Investor (*The International Institute for Sustainable Development 2012) p 19

[38]*Senor Tza Yap Shum v. IaRepublica Del Peru,* ICSID Case No ARB/07/6, Award (7 July 2011) para. 96

[39]*SOABI v Senegal,*AIU3/82/1

[40]Suzy H. Nikiema, *Best Practices: Definition of Investor (*The International Institute for Sustainable Development 2012) p 19

[41]S A Alexandrov, 'The "Baby Boom" of Treat-Based Arbitrations and the Jurisdiction of the ICSID Tribunals: Shareholders as "Investor" under Investment Treaties' *(*2006) TDM 5

[42]*Barcelona Tracticon, Light and Power Co., Ltd. (Belgium v Spain)* [1970] ICJ Reports 1970 4

It is evident from the above discussion that although the tribunals give full effect to broad the definition of investor in BITs but it also highly concentrated on the language of BITs and intention of the parties. However, the tribunals are also reluctant to uplift the corporate veil whether the investor has nationality from home State or not except BITs insert automatic denial of benefit clause. Therefore, the State parties must pay closer attention while drafting BIT whether they welcome third country nation to them or not. In addition, with regard to natural person the BIT must put emphasize on dominant nationality to handle the issue of dual nationality to refrain someone from a third nation. With regard to artificial person, both the State parties may choice single criteria to define a company instead of define it separately. Moreover, a special focus on both registration and substantial business activity at the same country can refrain a State party from compromising sovereignty.