

## Criteria for Determining the Affiliation of a Foreign Investor to a Particular State in an Investment Arbitration Dispute

*Implementing effective means of dispute resolution between a state and an investor represents significant achievement of the International Investment Law. Considering the abovementioned, In the Investment Law it is of crucial importance to determine which investor is eligible and has access to the international dispute resolution means. For the investor to gain access to the international dispute resolution means and to be the subject of the regulations of the ICSID convention or other bilateral or multilateral investment agreements, it is essential for the investor to meet the criteria of being foreign investor. Otherwise, in case of a dispute with a state, the investor will have to use internal dispute resolution means and national courts.*

*In this article the following is discussed: International standards of determining nationality of physical person investors, international standards of determining nationality of legal persons by place of registration, location of headquarters, nationality of governing persons and location of real economic activities. In the article method of determining investors' nationalities during partnerships is also discussed. Research of the aforementioned issues is significant both to ensure protection of investor's rights and to introduce dispute prevention mechanisms.*

**Key Words:** *Investor, partnership, foreign investment, investment agreement, investment contract, arbiter, arbitration tribunal.*

### 1. Introduction

Right to use international dispute resolution mechanisms is an important guarantee of protection for any foreign investor. Considering the fact, that the foreign investments plays key role in economic development of various countries, states are trying their best to attract foreign investors by creating liberal and investor-oriented legislation frameworks.<sup>1</sup> Usually, the investors prefer the countries with high reputation and express openness to international dispute resolution mechanisms.

In bilateral and multilateral investment agreements countries pay a lot of attention to defining criteria according to which nationality, affiliation to particular state, of the investor is determined. In examining admissibility of an arbitration claim, arbitration tribunals are primarily guided by the international investment agreements, because unified international rules, which determine types of investors and standards of their affiliations to particular states (nationality) do not exist. This approach is in both the so-called ad hoc<sup>2</sup> arbitrations and in institutional arbitration tribunals.

Even the 1965 Washington Convention on the Settlement of Investment Disputes Between States and Nationals of other States<sup>3</sup>, member of which is Georgia since September 6, 1992<sup>4</sup>, does not, in details, define criteria of determining affiliation of physical and legal persons to another state. Article 25 of the Convention generally establishes the inadmissibility of citizenship (nationality) of another state when initiating arbitration claims.

Arbitration tribunals established according to the Washington Convention have already considered several cases against Georgia and as of today there are several investment arbitration disputes cases Georgia in

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<sup>1</sup> Khvedelidze M., Impact of the Association Agreement on the investment related issues connected to Georgia, Journal "Justice and Law" №4(60)18, 66 (in Georgian).

<sup>2</sup> The use of ad hoc arbitrations in resolving disputes between the investor and the state is a well-proven practice. An example of this is Articles 8 and 9 of the Agreement between the Government of the Republic of Georgia and the Government of the People's Republic of China dated June 3, 1993 on mutual protection and promotion of investments.

<sup>3</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Washington, 18 March, 1965.

<sup>4</sup> <[https://icsid.worldbank.org/sites/default/files/2020\\_July\\_ICSID\\_8\\_ENG.pdf](https://icsid.worldbank.org/sites/default/files/2020_July_ICSID_8_ENG.pdf)> [20.01.2023].

ICSID arbitration tribunals.<sup>5</sup> Despite the relevance and direct relation to Georgia, criteria of affiliation of foreign investor to particular state is not sufficiently researched and analyzed in Georgian legal literature.

## 2. International Standards for Determining Nationality of Physical Person Investor

International investor is physical or legal person, who export capital or other assets from one state to another and the transaction has nature of investment.<sup>6</sup> Nationality of physical person is determined according to the legislation of the state citizen of which the person is. Hard evidence of determining the citizenship is proof of citizenship.<sup>7</sup>

As a rule, bilateral and multilateral investment agreements determine criteria of nationality of investor belonging to one of the parties. Defining these criteria has clear aim. Protective rules of the investment law (including through international dispute resolution mechanisms) can be invoked only by the investor who is citizen of second state. When it comes to local investors, their affairs are governed by local legislation.<sup>8</sup>

Definition of the investor, given in bilateral agreements, must always be read together with the ICSID Convention, because, the tribunal determines nationality of the investor according to the Convention.<sup>9</sup> According to the article 25(2)(a) of the Convention, national of another contracting state means 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.<sup>10</sup> The Convention itself does not define criteria of citizenship. The goal of the authors of the Convention was to grant maximum flexibility to the member states of the convention in order to define criteria of citizenship themselves for more investors to have access to the protection standards established by the Convention.<sup>11</sup>

Investment Law provides specific rules to determine nationality of physical person, when it comes to citizen of two or more states. Citizenship of two or more states is present when an investor has one citizenship together with another citizenship, according to the legislation of the other state. Double citizenship may exist everywhere, where citizenship is granted through birthplace, while the person is being given citizenship of another state, if two or more states consider a person their citizen. Citizenship may also be obtained by naturalization<sup>12</sup>.

If the investor holds citizenship of two or more states, method of dominant, effective citizenship is used. One of the main precedents of invoking this notion is Nottebohm's case. Frederic Nottebohm was a German physical person, who lived and worked in Guatemala since 1905 and obtained citizenship of Lichtenstein in 1939. In the case International Court of Justice determined in 1955 that Nottebohm did not have real and effective affiliation to Lichtenstein.<sup>13</sup>

ICSID arbitration tribunal on the case Husein Nuaman Soufraki v The United Arab Emirates did not establish jurisdiction of the center, because the claimant did not meet the requirements of the article 25(2) of the convention. Investor appealed on having double citizenship of Italy and Canada. The investor intended to

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<sup>5</sup> Nasib Hasanov v. Georgia (ICSID Case No. ARB/20/44); Bob Meijer v. Georgia (ICSID Case No. ARB/20/28); Telcell Wireless, LLC and International Telcell Cellular, LLC v. Georgia (ICSID Case No. ARB/20/5); Gardabani Holdings B.V. and Silk Road Holdings B.V v. Georgia (ICSID Case No. ARB/17/29).

<sup>6</sup> *Salacuse, W. J.*, The Law of Investment Treaties, second edition, Oxford University Press 2015, 42.

<sup>7</sup> *Dolzer R., Schreuer, C.*, Principles of International Investment Law, Oxford University Press, 2012, 45.

<sup>8</sup> *Schlemmer E.C.*, Investment, Investor, Shareholders, International Investment Law, *Muchlinski P., Ortino F., Schreuer C.* (eds.), Oxford University Press, 2008, 71.

<sup>9</sup> *Ibid.*, 70-71.

<sup>10</sup> *Ibid.*, 70-71.

<sup>11</sup> *Reed L.F., Davis J.E.*, Who is a Protected Investor, International Investment Law, *Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y.-I.*, Baden-Baden, Hart Publishing, 2015, 617.

<sup>12</sup> *Schokkaert J., Heckscher Y.*, International Investment Protection, Comparative Law Analysis of Bilateral and Multilateral Interstate Conventions, Doctrinal Texts and Arbitral Jurisprudence concerning Foreign Investments, Bruylant Bruxelles 2009, 223-224.

<sup>13</sup> *Reed L.F., Davis J.E.*, Who is a Protected Investor, International Investment Law, *Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y.-I.*, Baden-Baden, Hart Publishing, 2015, 625.

file arbitration claim on the grounds of investment agreement concluded between Italy and UAE. Through the review it was determined, that the investor lost Italian citizenship immediately after they obtained Canadian Citizenship and established their dwelling place abroad. The tribunal concluded, that the Investors lawsuit did not meet the criteria of citizenship. One of the arguments was also the fact that, even if the double citizenship was determined, tribunal would pay attention to citizenship of which state was dominant and effective.<sup>14</sup>

On the case *Olguin v Paraguay*, arbitration claimant relied on the investment agreement concluded between Paraguay and Peru. The defendant, Paraguay stated, that together with the citizenship of Peru, the claimant also held citizenship of the USA and he was raised in the USA. True, the arbitration tribunal determined that the investor held double citizenship, however, the arbitration noted, that both citizenship was effective, thus, being citizen of Peru was enough for him to apply for arbitration.<sup>15</sup>

Ethnic, cultural, or linguistic connections are not sufficient enough to determine affiliation of a person to a state. Tribunal did not consider position of an arbitration defendant Turkey on the case *Fakes v Turkey*. The investor held double citizenship of Jordan and The Netherlands and claimed, that the norms of bilateral investment treaty between Turkey and The Netherlands applied to him. According to the tribunal, Turkey's indication to the lack of effectiveness of citizenship of the Netherlands, because according to the rules of "genuine link"<sup>16</sup> the investor was more connected to Jordan was not sufficient argument.

Regarding the double citizenship, ICSID tribunal has determined, that according to the convention, Investor can not apply to the arbitration, if one of the citizenship state is beneficiary of the investment. This definition was made by the tribunal on a case *Champion Trading v Egypt*, where the arbitration claimant was citizen of Egypt and the USA. Tribunal did not share argument regarding lack of effectiveness of the citizenship of Egypt and noted, that the rules of the convention clearly defines, that the jurisdiction of the center does not apply on the cases where the investor is a citizen of the investment beneficiary state.<sup>17</sup>

Regarding the citizenship of an investor, the Tribunal also heard a case, where the arbitration claimant was *Bidzina Ivanishvili*, and the defendant – Georgia. The investor based the dispute on the BIT concluded between Georgia and France. At the moment when the claim was made to the arbitration, *Bidzina Ivanishvili* was not citizen of Georgia. After obtaining citizenship of Georgia, the claimant filed a motion asking for termination of the dispute. In reality, after the investor obtained citizenship of Georgia, it turned out that the investor was in dispute with the state of his citizenship.<sup>18</sup>

When it comes to the North American Free Trade Agreement, NAFTA tribunal, on the case *Feldamn v Mexico*, determined, that it had jurisdiction on the claim made by an investor with citizenship of the USA, despite of the later having permanent residence in Mexico. Tribunal explained that, in general, according to the international law, to establish connection between a state and an individual, citizenship is more superior criteria than the place of residence or other geographical features.<sup>19</sup>

Regarding the determination of investor's citizenship, it is important, that the following question is answered, as to in which time frame does the investor have to hold citizenship of a relevant state for him to be eligible to apply to ICSID arbitration. According to the article 25 of the Convention, an investor must hold citizenship of the state on the day when the agreement on ICSID tribunal was made, or on the day, when the arbitration claim was registered. The convention does not demand the investor to permanently hold same citizenship between the day when the arbitration agreement was made to the day of filing arbitration claim.<sup>20</sup>

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<sup>14</sup> *Schlemmer E.C.*, Investment, Investor, Shareholders, International Investment Law, *Muchlinski P., Ortino F., Schreuer C. (eds.)*, Oxford University Press, 2008, 71.

<sup>15</sup> *Dolzer R., Schreuer, C.*, Principles of International Investment Law, Oxford University Press 2012, 46.

<sup>16</sup> In international public law, "genuine link" means connection with the state, according to cultural, linguistic, social and other similar features, <<https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/genuine-link-doctrine-and-flags-of-convenience/CB0A537F85CBC8716A03BD55F3998FBC>> [16.01.2023].

<sup>17</sup> *Dolzer R., Schreuer, C.*, Principles of International Investment Law, Oxford University Press 2012, 46-47.

<sup>18</sup> *Bidzina Ivanishvili v. Georgia*, ICSID Case No. ARB/12/27

<sup>19</sup> *Dolzer R., Schreuer, C.*, Principles of International Investment Law, Oxford University Press 2012, 47.

<sup>20</sup> *Reed L.F., Davis J.E.*, Who is a Protected Investor, International Investment Law, *Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y.-I.*, Baden-Baden, Hart Publishing, 2015, 625.

### 3 International Standards for Determining Nationality of Legal Entity Investors

Along with physical persons, investment treaties also protect legal entities as investors.<sup>21</sup> Affiliating a legal entity to a state is much more complicated matter, than in the case of physical persons. It is common that different states have different definitions and forms of legal entities. In international practice, there are several widely used method for determining affiliation of legal entities. They are the following: Place of registration, place of business, place of governing bodies/persons.<sup>22</sup>

#### 3.1. Place of Registration

Place of registration of legal entity is widely considered as one of the most common criteria for determining belonging of the company to one of the states. Example of this is the investment treaty concluded between the Netherlands and India, according to which, the Dutch company means a company registered according to the Dutch Laws.<sup>23</sup> Along with the place of registration, the place of business as a determining criterion is defined in a treaty between Spain and Albania.<sup>24</sup>

Place of registration as the only criterion of determination caused large discussion. The issue was that in order to obtain investment protection guarantees, companies used to formally register in another state, so that the investor did not have another connection to the state, other than the place of registration.<sup>25</sup> To better understand the issue, it is recommended to review several judgements.

On the case *Saluka v Czech Republic*, arbitration claimant was the legal entity registered according to the Dutch Laws. The defendant stated, that the company was owned and controlled by Japanese shareholders, therefore, the legal entity must not have been considered as a Dutch company. The tribunal determined that, in general, it is possible for the belonging of the legal entity to be determined according to the nationality of the governing persons, however, because under the investment treaty between Czechia and the Netherlands place of registration according to the Laws of either state was sufficient to determine affiliation of the company, the tribunal did not share the opinion of the defendant and the arbitration claimant was considered as the Dutch company.<sup>26</sup>

On the case *Tokios Tokeles v Ukraine* arbitration claimant was the company registered according to the Lithuanian Law, however 99% of the shares were owned by citizens of Ukraine. Ukraine believed that the company in reality was Ukrainian, because the shares were controlled by the Ukrainians and the place of registration was only formally in Lithuania. Despite the shares being owned by the citizens of Ukraine, the majority of the tribunal determined that the arbitration claimant was Lithuanian. The tribunal relied on the writing in investment agreement between Lithuania and Ukraine, according to which, for the Lithuanian party, Lithuanian company means a company registered in the territory of Lithuania according to the Lithuanian Laws.<sup>27</sup>

The Tribunal invoked only criterion of place of registration on the case *Romp petrol N.V. v Romania*. The tribunal relied on the investment agreement concluded between Romania and the Netherlands, where the place of registration was determined as an only criterion for establishing nationality. Tribunal itself confirmed, that the arbitration claimant was in fact controlled and owned by the Romanian citizens, however, the arbitration

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<sup>21</sup> *Perkams M.*, Protection for Legal Persons, International Investment Law, *Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y.-I. (eds.)*, Baden-Baden, Hart Publishing, 2015, 638.

<sup>22</sup> *Dolzer R., Schreuer, C.*, Principles of International Investment Law, Oxford Uniceristy Press 2012, 47.

<sup>23</sup> *Perkams M.*, Protection for Legal Persons, International Investment Law, *Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y.-I. (eds.)*, Baden-Baden, Hart Publishing, 2015, 641.

<sup>24</sup> *Ibid.*, 641.

<sup>25</sup> *Ibid.*, 641.

<sup>26</sup> *Dolzer R., Schreuer, C.*, Principles of International Investment Law, Oxford Uniceristy Press 2012, 48.

<sup>27</sup> *Schlemmer E.C.*, Investment, Investor, Shareholders, Inernational Investmemt Law, *Muchlinski P., Ortino F., Schreuer C. (eds.)*, Oxford University Press, 2008, 79-80.

claimant was determined to be the Dutch company. The argumentation on the case was also the fact, that Romania and the Netherlands themselves agreed on the said criterion for determining person's nationality.<sup>28</sup>

Despite of difference in opinions, the place of registration remains most widely shared criterion for determining one's affiliation to a state. In order for the concluding states to avoid practice of formally registering companies, along with the criterion of the place of registration, additional criteria must be present. One of such criteria could also be place of business.

### 3.2. Place of Headquarters

Next criterion, which might determine belonging of a legal entity to a state is place of the company (Seat Theory). This criterion might as well be the only one determining factor, as well as one of the other provided criteria.<sup>29</sup>

In the international practice, the investment treaty between Germany and India is referred to as an example of determining belonging of a company through place of headquarters, where it is stated, that a German investor is a legal entity, who is located in Germany.<sup>30</sup> The same provision is provided in an investment treaty between Argentina and Germany, where, it is stated, that an investor is deemed to be a legal entity, who is located in either of the contracting states.<sup>31</sup>

2004 BIT concluded between Italy and Nicaragua states, that a legal entity of the concluding party is a company, that has headquarters in the second state, whether it is a corporation, fund, association or public agency and whether they have limited liability or not.<sup>32</sup>

In the investment treaty concluded between Germany and China in 2005, it is determined, that for the Federal Republic of Germany, notion of legal entity means any kind of legal entity, commercial or not, also associations, that are located in Germany, whether the entities are profit oriented or not.<sup>33</sup>

### 3.3. Control Standard

Control theory is based on a principle, that an affiliation of a company to a state is based on the citizenships of the persons who control the company.<sup>34</sup>

In 2003, ASEAN arbitration tribunal on the case *Yaung Chi Oo Trading Pte.Ltd. v. Government of the Union of Myanmar* determined not only the fact that the claimant, which was based in Singapore, but also whether the company was controlled from Singapore. This obligation was stipulated from the 1987 ASEAN treaty itself, which, in article I(2) states, that an investor is a company, business association of the contracting state, which is registered according to the states law and is also managed from the same state.<sup>35</sup>

ICSID tribunal on the case *TSA Spectrum de Argentina SA v Argentina*, determined, that the provisions of the investment treaty concluded between the Netherlands and Argentina did not provide bases for tribunal's jurisdiction. Tribunal relied on the fact, that the arbitration claimant which was incorporated in Argentina was not being controlled by the holding registered in the Netherlands and in reality was owned by a German-Argentinian businessman.<sup>36</sup> On the contrary, on the case *Aguas del Tunari SA V Bolivia*, the tribunal stated, that there were grounds for referring to the arbitration according to the existing investment treaty between

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<sup>28</sup> *Perkams M.*, Protection for Legal Persons, International Investment Law, *Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y.-I. (eds.)*, Baden-Baden, Hart Publishing, 2015, 642-643.

<sup>29</sup> *Ibid.*, 644.

<sup>30</sup> *Ibid.*, 644.

<sup>31</sup> *Dolzer R., Schreuer, C.*, Principles of International Investment Law, Oxford Uniceristy Press 2012, 49.

<sup>32</sup> *Schokkaert J., Heckscher Y.*, International Investment Protection, Comparative Law Analysis of Bilateral and Multilateral inerstate Conventions, Doctrinal Texts and Arbitral Jurispudence concerning Foreign Investments, Bruylant Bruxelles 2009, 246.

<sup>33</sup> *Ibid.*, 246.

<sup>34</sup> *Ibid.*, 248.

<sup>35</sup> *Dolzer R., Schreuer, C.*, Principles of International Investment Law, Oxford Uniceristy Press 2012, 49.

<sup>36</sup> *Perkams M.*, Protection for Legal Persons, International Investment Law, *Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y.-I. (eds.)*, Baden-Baden, Hart Publishing, 2015, 648-649.

Bolivia and the Netherlands. On this case, an opinion according to which the control might be different in nature and a company incorporated in Bolivia, that was indirectly was controlled by two Dutch companies, as the major partners, was enough criterion to determine “Control”. However, the fact, that the Dutch company itself was controlled by Italian and American investors, was not decisive.<sup>37</sup>

Existence of the element of control is also provided by the ICSID convention, according to the article 25 of the convention, for the goals of the convention, person of another state means any legal entities, 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>38</sup>

### 3.4. Standard of Real Economic Activity

Sometimes, in investment agreements real economic activity is used as a criterion of legal entity’s belonging to a state. As a rule, this standard is an additional criterion to the registration or residence standards.<sup>39</sup> Method of real economic activity is provided in an investment agreement concluded between Switzerland and Croatia. According to the article 1(1)(b) of the agreement, it is required for the investor to be registered in one of the contracting states, which in addition carries out real economic activities in the state.<sup>40</sup> What exactly suffices to be real economic activity, shall individually be determined in each specific case, according to the circumstances of the case.

### 4. Establishing Affiliation of a Partnership

In the developing countries it is usual for a foreign investor to carry out an investment together with the beneficiary state or other local entities. It must be noted, that with Partnership, involving parties may be physical persons as well as legal entities or both of them simultaneously. In the meantime, if the rights of the investor are violated, both the partnership itself and the foreign investor participating in this partnership have the right to initiate a dispute against the beneficiary state.<sup>41</sup>

The main thing is that the investor meets the nationality criteria. Such a partnership, as a claimant, is only entitled to use the rights granted to a foreign investor and international dispute resolution mechanisms if all members of that partnership are subjects of the other state and not the beneficiary subject state. If the members of the partnership are also subjects of the beneficiary state, It is not the partnership, but individual foreign investors that are authorized to initiate a dispute. The basis for this is that international dispute resolution mechanisms are only for foreign investors, while domestic entities defend their rights through domestic courts.<sup>42</sup>

### 5. Conclusion

In the recent decades, investors’ appeals to the international arbitrations have increased significantly. Through the investment treaties, the states most commonly agree to a dispute resolution center established

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<sup>37</sup> Ibid, 648.

<sup>38</sup> *Schlemmer E.C.*, Investment, Investor, Shareholders, International Investment Law, *Muchlinski P., Ortino F., Schreuer C. (eds.)*, Oxford University Press, 2008, 75.

<sup>39</sup> *Perkams M.*, Protection for Legal Persons, International Investment Law, *Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y.-I. (eds.)*, Baden-Baden, Hart Publishing, 2015, 648.

<sup>40</sup> *ibid*, 649.

<sup>41</sup> *Rubins N.N., Kinsella S.*, International Investment Political Risk and Dispute Resolution, A Practitioner’s Guide, Oxford, Oceana Publications Inc., 2005, 139.

<sup>42</sup> *Ibid*, 139-140.

under the 1965 Washington Convention. Right to initiate arbitration claim is an important leverage for the foreign investors to protect themselves from an unscrupulous beneficiary state.

Establishment of effective dispute resolution mechanisms between an investor and a state represents a significant achievement of the international investment law. Considering the abovementioned, in the investment law it is of great importance to determine which investor is entitled and has access to the international dispute resolution mechanisms.

In the international arbitration practice, there are still some questions as to in which cases investors or partnerships are the appropriate physical and legal persons authorized to apply for arbitration. In order for arbitral tribunals to accept investor claims without hindrance, it is important that investment agreements and investment contracts contain direct and unambiguous wording regarding the jurisdiction of arbitral tribunals.

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