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東北大学大学院法学研究科
猪瀬　貴道

投資条約仲裁手続における重国籍者・資料

日本＝ペルーＢＩＴ

第 2 条

1. この協定は、一方の締約国が採用し、又は維持する措置であって、次のものに関するものについて適用する。

(a) 他方の締約国の投資家

(b) 当該一方の締約国の区域内にある他方の締約国の投資家の投資財産であって、この協定の効力発生の日に存在しているもの及びその後に設立され、取得され、又は拡張されるもの

(c) 第六条及び第二十六条の規定の適用の対象となるすべての投資財産であって、当該一方の締約国の区域内にあるもの

2. この協定は、この協定の効力発生の前に生じた事態に起因する請求又はこの協定の効力発生の前に既に解決されている請求については、適用しない。

注釈

この協定のいかなる規定も、この協定の効力発生の前に生じた損害について、この協定に基づく請求権を投資家に与えることを意図するものではない。

3. 各中央政府は、この協定に基づく各締約国の義務を履行するに当たり、自国の区域内の地域の又は地方の政府によるこの協定の遵守を確保するため、利用し得る妥当な措置をとる。

スイス・モデルＢＩＴ

Article 2　Scope of application

The present Agreement shall apply to investments in the territory of one Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party, whether prior to or after the entry into force of the Agreement.

米国モデル BIT（2004 年）

第 1 条

“**investor of a Party**” means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.

イスラエル＝クロアチア BIT

第 1 条

3. The term "investor" shall comprise:

(a) natural persons who are nationals or permanent residents of the Contracting Party concerned who are not also nationals of the other Contracting Party;

イスラエル＝ドイツ BIT

第 1 条

(3) The term 'nationals' shall mean

(a) in respect of the Federal Republic of Germany: Germany within the meaning of the Basic Law for the Federal Republic of Germany;

(b) in respect of the State of Israel: Israeli nationals being permanent residents of the State of Israel

デンマーク＝キューバ BIT

第 1 条

(5) “Investor” means:

(a) with regard to the Republic of Cuba:

Natural persons having the citizenship of, and who are permanently residing in Cuba in accordance with its laws.
with regard to the Kingdom of Denmark:
Natural persons having the citizenship of, or who are permanently residing in Denmark in accordance with its laws.

デンマーク＝インドネシア BIT
第 1 条
a) nationals of the other Contracting Party, provided they are dorniciled in the territory of their nationality,

アルゼンチン＝オーストラリア BIT
第 2 条
3. In respect of Australia, this Agreement shall not apply to a natural person who is a permanent resident but not a citizen of Australia where:
(a) the provisions of an investment protection agreement between the Argentine Republic and the country of which the person is a citizen have already been invoked in respect of the same matter; or
(b) the person is a citizen of the Argentine Republic.
4. In respect of the Argentine Republic, this Agreement shall not apply to the investments made by citizens of Australia if such persons have, at the time of making the investment, been domiciled in the Argentine Republic for more than two years unless that investor can prove that the investment was admitted into its territory from abroad.

ICSID 条約 CHAPTER II [Jurisdiction of the Centre]
Article 25
(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 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

国籍法の抵触についてのある種の問題に関する条約
第三条
この条約の規定を留保し、二個以上の国籍を有する個人は、保持する国籍の各所属国が自国の国民と認めることができる。
Article 3
Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses.

第四条
国は、自国民がひとしく国民として所属している他の国に対抗して、当該自国民のために外交的保護を加えることができない。
Article 4
A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.

第五条
第三国では、二以上の国籍を有する者は、一の国籍のみを有する者として取り扱われる。第三国は、身分に関する自国の法令および現行の条約の適用を害することなく、その領域内では、その者が有する国籍のうちその者が通常かつ主に居住する国の国籍または、状況に応じてその者が事実上最も密接な関係を有すると思われる国の国籍のみを認める。
Article 5
Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, 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.

外交的保護条文
第六条
１　重国籍者のいずれの国籍国も、自国民について、その者が国民ではない国に対して外交的保護を行使することができる。
２　二又はそれ以上の国籍国は、重国籍者について共同で外交的保護を行使することができる。
Article 6
1. 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.
2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

第七条
国籍国は、重国籍者について、自らの国籍が損害の日及び請求の公式提出の日のいずれにおいても優越的なものでない限り、その者の他の国籍国に対して外交的保護を行使することができない。
Article 7
A 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 date of injury and at the date of the official presentation of the claim.

Champion Trading Company and others v. Arab Republic of Egypt (Case No. ARB/02/9)
Pag 11:
The Arbitral Tribunal therefore comes to the conclusion that at the time the three individual Claimants were born, their father still possessed his Egyptian nationality and that therefore under Egyptian law the three individual Claimants upon birth automatically acquired the Egyptian nationality (see Affidavit Professor Sadek of May 28, 2003, page 3, paragraph 3).

Pag 16-17:
The Nottebohm and A/18 decisions, in the opinion of the Tribunal, find no application in the present case. The Convention in Article 25 (2)(a) contains a clear and specific rule regarding dual nationals. The Tribunal notes that the above cited A/18 decision contained an important reservation that the real and effective nationality was indeed relevant “unless an exception is clearly stated”. The Tribunal is faced here with such a clear exception.

According to Article 31 of the Vienna Convention of 23 May 1969, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaties in their context and in the light of their object and purpose.

According to the ordinary meaning of the terms of the Convention (Article 25 (2)(a)) dual nationals are excluded from invoking the protection under the Convention against the host country of the investment of which they are also a national. This Tribunal does not rule out that situations might arise where the exclusion of dual nationals could lead to a result which was manifestly absurd or unreasonable (Vienna Convention, Article (32)(b)). 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.

In the present case this situation does not arise and the question need not be answered.
[...]
This question need not be addressed by this Tribunal. What is relevant for this Tribunal is that the three individual Claimants, in the documents setting up the vehicle of their investment, used their Egyptian nationality without any mention of their US nationality. According to the documents, Dr. Mahmoud Wahba acted in this connection as the legal guardian of his then still minor three children. The mere fact that this investment in Egypt by the three individual Claimants was done by using, for whatever reason and purpose, exclusively their Egyptian nationality clearly qualifies them as dual nationals within the meaning of the Convention and thereby based on Article 25 (2)(a) excludes them from invoking the Convention. The Tribunal therefore holds that it does not have jurisdiction over the claims of the three individual Claimants.

Marvin Roy Feldman Karpa v. United Mexican States (ICSID Case No. ARB(AF)/99/1)

Paragraph 30 (6 December 2000):

‘Given the legal and the factual background of this case, the Tribunal deems it appropriate to recall that, under general international law, citizenship rather than residence or any other geographic affiliation is the main connecting factor between a state and an individual. Residence, even permanent or otherwise authorized or officially certified residence, only fulfills a subsidiary function which, as a matter of principle, does not amount to, or compete with, citizenship. In particular, in matters of standing in international adjudication or arbitration or other form of diplomatic protection, citizenship rather than residence is considered to deliver, subject to specific rules, the relevant connection.’

Paragraph 34 (6 December 2000):

‘[…] Thus, the definition of “national” as “a natural person who is a citizen or permanent resident of a Party” is needed in this context to complement the definition in Article 1139 of the “investor of a Party” which, in the scope of application of Article 1117 (1), refers to an investor of a Party other than the one in which the investment is made. Such contextual interpretation of an equal treatment of nationals and permanent residents leads to the result that permanent residents are treated like nationals in a given State Party only if that State is different from the State where the investment is made.’

Paragraphs 35-36 (6 December 2000):

‘[…] Thus, e.g., an investor of a Party, entitled to seek arbitration under Chapter Eleven can be not only a U.S. citizen but a French citizen as well, provided he is a permanent resident of the United States. This is, in the opinion of the Tribunal, the proper meaning and function of the definition of “national[s]” in NAFTA Article 201.

Under the interpretation elaborated above (paras. 33-35), which concurs with general principles of international law (see supra, paras. 30-32), the Claimant in this case, being a citizen of the United States and of the United States only, and despite his permanent residence (inmigrado status) in Mexico, has standing to sue in the present arbitration under Chapter Eleven of NAFTA. Indeed, the Claimant as a citizen of the United States should not be barred from the protection provided by Chapter Eleven just because he is also a permanent resident of Mexico.’

Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt (Case No. ARB/05/15)

Paragraph 153 (Award, 28 May 2007)

The Tribunal must determine the nationality of the Claimants. Application of international law principles requires an application of the Egyptian nationality laws with reference to international law as may be appropriate in the circumstances. Both Egyptian law and the practice of international tribunals is that the documents referred to by the Respondent evidencing the nationality of the Claimants are prima facie evidence only.

Paragraph 157 (Award, 28 May 2007)

The Tribunal finds that it is unnecessary for the purpose of this ruling on jurisdiction to determine whether Mr Siag acquired his Lebanese nationality voluntarily or involuntarily. The Tribunal accepts the evidence of Professor Riad that the Nationality Law does not differentiate between involuntary and voluntary acquisition of a foreign nationality in the application of Article 10

Paragraph 196 (Award, 28 May 2007)

The Respondent has asserted that all of the Claimants’ connections are with Egypt. This is 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. The links of the Claimants with Egypt are not disputed. However, as noted above the Tribunal’s findings are that through the operation of the Nationality Law both Claimants have lost their Egyptian nationality and only held Italian nationality at the relevant times for the purposes of the Convention. Thus, this is not a situation where the Claimants are dual-nationals.

Paragraph 198-199-200 (Award, 28 May 2007)

The Tribunal concurs with the finding of the ICSID Tribunal in the Champion Trading case that the regime established under Article 25 of the ICSID Tribunal does not leave room for a test of dominant or effective nationality. [...]

This is not a situation where a claimant is seeking to assert a particular nationality in order to bring a claim and that nationality is claimed to be ineffective. Nor is it a case where the consequence of a determination of the nationality of an individual by one state as against other states falls to be determined. This case concerns a state, through operation of its domestic law, ceasing to regard individuals as its nationals. In this case the Claimants contend that they lost their Egyptian nationality through operation of Egyptian domestic law so that they were not dual-nationals at all. [...]

The Tribunal finds that the Respondent has not demonstrated that the Claimants acquired Italian nationality as a mere expedient in order to bring these claims before ICSID. [...] The Tribunal finds that the Claimants possess genuine links to Italy.

Micula and others v Romania, Decision on Jurisdiction and Admissibility (ICSID Case No ARB/05/20)

95. In these conditions, the Tribunal would only be inclined to disregard the decision of the Swedish authorities if there was convincing and decisive evidence that Viorel Micula's acquisition of Swedish nationality was fraudulent or at least resulted from a material error. It is for Respondent to make such a showing. For this purpose, casting doubt is not sufficient. The fact is that Respondent has presented only limited evidence, none of which is sufficient to make the necessary showing. Respondent has pointed to Mr. Viorel Micula's hesitations and inaccuracies under cross-examination by counsel for Respondent. Some of his answers may have left the feeling that his memory was selectively failing him, but they are not a basis to question the validity of the Swedish authorities' decision to naturalize him or even to question the convincing evidentiary value of the certificate that the Swedish Migration Board issued to Respondent. The record does not include any elements which should lead the Tribunal to investigate facts that are not before it. Nor do Respondent's allegations of facts lead to the need for opening a fact-finding procedure. Given the factual evidence presented by Respondent, the Tribunal, in its letter of 11 July 2008, directed Respondent how to proceed in the event that Respondent believed that it needed additional supplemental documentary production — an option that Respondent chose not to pursue.

96. For these reasons, the Tribunal considers that, contrary to the situation in the Soufraki case, Respondent has not met the burden of proof to establish grounds for the Tribunal to question Mr. Viorel Micula's nationality, and that, rather, Mr. Viorel Micula has established a strong and convincing case that he has been a national of Sweden during the period relevant to this dispute. The burden thus shifted to Respondent to establish that the Swedish decision was unfounded on the basis of the existing facts. Romania has not done so and the Tribunal sees no good reason to open an investigation.

99. The Tribunal notes that the role of a genuine or effective link with the state of nationality is disputable in public international law, and is indeed disputed, particularly in the case of a single nationality. It seems clear that, as put by the Special Rapporteur of the ILC on Diplomatic Protection in his first report, “the Nottebohm requirement of a ‘genuine link’ should be confined to peculiar facts of the case and not seen as a general principle applicable to all cases of diplomatic protection”. He added “[t]he suggestion that the Nottebohm principle of an effective and genuine link be seen as a rule of customary international law in cases not involving dual or plural nationality enjoys little support”. Indeed, the International Law Commission considered incorporating such a requirement in the Draft Articles on Diplomatic Protection, but ultimately decided against it and did not include such a requirement in Article 4 of the Draft Articles, which covers cases where there is only one nationality. The fact that the genuine link test was omitted in the context of diplomatic protection is especially noteworthy because it is in the context of diplomatic protection that States may have a particular vested interest in relying on or disregarding a nationality that lacks foundation in reality. There is thus a clear reluctance in public international law to apply the genuine link test where only a single nationality is at issue, such as the case at hand.

100. The Tribunal must nonetheless examine whether there is any room for the Nottebohm requirement of a “genuine link” in this proceeding. There is little support for the proposition that the genuine link test has any role to play in the context of ICSID proceedings. The ICSID Convention requires only that a claimant demonstrate that it is a nationalof a “Contracting State”. In fact, Article 25(2)(a) of the ICSID Convention does not require that a claimant hold solely one nationality, so long as its second nationality is not that of the State party to the dispute. The Tribunal agrees with the conclusion of the tribunal in Siag that the regime established under Article 25 of the ICSID Convention does not leave room for a test of dominant or effective nationality. No previous ICSID tribunal appears to have ever ruled to the contrary and Respondent has not supplied any convincing evidence to the contrary. In fact, Respondent has not convinced the Tribunal to hold otherwise.

Pey Casado and Presidente Allende Foundation v Chile (ICSID Case No. ARB/98/2)

321. Le passage suivant du même auteur est particulièrement significatif ou pertinent. Il démontre que les rédacteurs de la Convention CIRDI ont été conscients du risque qu'un Etat d’accueil utilise son droit interne de la nationalité de manière intéressée ou abusive :

> « The host State may not impose its nationality on a foreign investor for the purpose of withdrawing its consent. During the Convention's drafting the problem of compulsory granting of nationality was discussed and the opinion was expressed that this would not be a permissible way for a State to evade its obligation to submit a dispute to the Centre (History, vol. II, page 658, 705, 876). But it was decided that this question could be left to the decision of the Conciliation Commission or Arbitral Tribunal. »

322. Il revient donc au Tribunal arbitral d’apprécier le contenu et les effets du droit chilien sur la nationalité et de l’appliquer au cas d’espèce. Ce faisant, le Tribunal est conduit à conclure de ce qui précède la validité d'une renonciation volontaire à la nationalité chilienne lorsque la partie renonçant est double nationale, renonciation dont la réalité a été prouvée par la première partie demanderesse.

323. Aussi pour les raisons indiquées ci-dessus, le Tribunal arbitral estime n'être pas en mesure d'admettre l'exception

d'incompétence fondée sur　l'allégation selon laquelle la première partie demanderesse possèderait, à la date pertinente, la nationalité chilienne.

Eudoro Armando Olguin v. Republic of Paraguay (ICSID Case No. ARB/98/5)
Paragraph 61 (26 July 2001):
What is important in this case in order to determine whether the Claimant has access to the arbitral jurisdiction based on the BIT, is only whether he has Peruvian nationality and if that nationality is effective. There is no doubt on this point. There was no dispute regarding the fact that Mr. Olguín has dual nationality, and that both are effective. What one, or the other, or even both of his mother countries understand regarding, for example, the person's exercise of political rights, civil rights, the responsibility for his diplomatic protection and the importance of his registered address for determining any such rights has no bearing on the legitimate legal fact that Mr. Olguín effectively has dual nationality. To this Tribunal, the effectiveness of his Peruvian nationality is enough to determine that he cannot be excluded from the provisions for protection under the BIT.

Hussein Nauman Soufraki v. United Arab Emirates (ICSID Case No. ARB/02/7)
Paragarph 23:
Article 1(3) of the BIT defines an "investor of the other Contracting State" as a "natural person holding the nationality of that State [Italy] in accordance with its law".

Paragraph 53:
The first contentious question to be decided is whether, as Claimant maintains, the Certificates of Nationality issued by Italian authorities characterizing Mr. Soufraki as an Italian national,2 and his Italian passports, identity cards and the letter of the Italian Ministry of Foreign Affairs so stating, constitute conclusive proof that Mr. Soufraki reacquired his Italian nationality after 1992 and that he was an Italian national on the date on which the parties to this dispute consented to submit it to arbitration as well as on the date on which the request to ICSID was registered by it.

Paragraph 55:
It is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality. Article 1(3) of the BIT reflects this rule. But it is no less accepted that when, in international arbitral or judicial proceedings, the nationality of a person is challenged, the international tribunal is competent to pass upon that challenge. It will accord great weight to the nationality law of the State in question and to the interpretation and application of that law by its authorities. But it will in the end decide for itself whether, on the facts and law before it, the person whose nationality is at issue was or was not a national of the State in question and when, and what follows from that finding. Where, as in the instant case, the jurisdiction of an international tribunal turns on an issue of nationality, the international tribunal is empowered, indeed bound, to decide that issue.

Paragraphs 66 and 68:
As to the four Certificates of Nationality issued after 1992, there is no evidence in the record that any Italian official who issued to Mr. Soufraki any of these Certificates undertook any inquiry in order to determine whether he had lost his Italian citizenship prior to 1992 and whether he had established his residence in Italy for one year after enactment of the Law of 1992 and thus reacquired his Italian citizenship.

The Tribunal accordingly holds that the Claimant cannot rely on any of the pleaded Certificates of Nationality to establish conclusively that he was a national of Italy on the dates of the Request for Arbitration and its registration. Nor can it treat the letter from the Ministry of Foreign Affairs as conclusively establishing Mr. Soufraki's Italian nationality and his entitlement to invoke Italy's BIT with the UAE, essentially for the same reason, namely, that it is not shown that the Ministry knew when it wrote its letter that Mr. Soufraki had lost his Italian nationality and that hence the question was whether he had reacquired it.

Paragraph 84:
Since, as found by the Tribunal, Claimant was not an Italian national under the laws of Italy at the two relevant times, namely on 16 May 2002 (the date of the parties' consent to ICSID arbitration) and on 18 June 2002 (the date the Claimant's Request for Arbitration was registered with ICSID), this Tribunal does not have jurisdiction to hear this dispute.