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THE CRITICAL DATE FOR THE ASSESSMENT OF THE INVESTOR'S NATIONALITY*

Abstract: *Several recent arbitral awards on jurisdiction in investment disputes have centred around the issue of the critical date for the assessment of the individual investor's nationality. While anonymously holding that an investor must be a foreign national at the time of the breach of the treaty and at the time of commencement of the arbitration, the tribunals were split on the relevance of the investor's nationality on the date of investment. Although it seems that the ordinary meaning of most BITs requires diversity of nationality at the time the investor makes his investments, the apparently clear wording seems to be open to different interpretations. The author examines the reasons and circumstances that have led the tribunals to reach different conclusions with regard to the date of investment as the potentially critical date for assessing individual investor's nationality under investment treaties.*

Keywords: *diversity of nationality, investment arbitration, relevant time, critical date.*

1. INTRODUCTION

International Investment Agreements (IIAs) and ICSID Convention are treaties which have as their purpose protection of foreign i.e., international investments. To ensure that the investments are foreign or international, the IIAs and the ICSID Convention adopt definitions of investors and investments which require

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diversity of nationality.¹ As a rule, IIA definitions do not deal expressly with the time factor and the possible changes of the relevant circumstances through time. The determination of the relevant moment is left to arbitral practice.

This article studies the effect of the change of circumstances through time which makes an investment foreign after it is made, after its inception. The author will study how arbitrators dealing with investment arbitration cases interpreted the terms found in the relevant treaties to decide on the relevance of such change to their jurisdiction *ratione personae*.

2. DEFINITIONS OF INVESTMENT

Definitions of investments and investors in the relevant investment treaties rarely use the adjective “foreign” to define them. For example, the *Bayview Irrigation District* tribunal notes this about NAFTA:

While NAFTA Article 1139 defines the term “investment” it does not define “foreign investment”. Similarly, NAFTA Chapter XI is named “Investment”, not “Foreign Investment”. However, this Tribunal considers that NAFTA Chapter XI in fact refers to “foreign investment” and that it regulates “foreign investors” and “investments of foreign investors of another Party”. The ordinary meaning of the text of the relevant provisions of Chapter Eleven is that they are concerned with foreign investment, not domestic investments.²

Instead, the definitions are based on contrasting between “one” and the “other” contracting state. For example, the founding treaty of the investment arbitration, the ICSID Convention, bears the title: Convention on the Settlement of Investment Disputes between *Contracting States* and *Nationals of Other States* (emphasis added). Besides putting the usual respondents before the usual claimants, this title is also misleading in the sense that it does not use the words “international” or “foreign” although this is exactly the type of disputes it wishes to encompass.³ The main subject matter of the Convention is undoubtedly the resolution of disputes arising from private *international* investment, as it is mentioned in the first two recitals of the Convention’s Preamble. Further in Clause (b) of Article

¹ In *Phoenix Action LTD*, the Czech Republic argued that the “diversity of nationality requirement” was not satisfied. *Phoenix Action LTD. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award 15 April 2009, § 35 (*Phoenix*). “The diversity of nationality requirement” is also mentioned *en passant* in Christoph H. Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair, *The ICSID Convention, A Commentary*, Second Edition, 2009, para. 25.760.

² *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/01, 19 June 2007, § 96 (*Bayview Irrigation District*).

³ C.H. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, § 25-760 and § 25-893.

25(2), which deals with juridical persons, the Convention provides that a juridical person which had the nationality of the State party to the dispute would be eligible to be a party to proceedings under the auspices of the Centre (i.e., the claimant) if that State (i.e. the respondent state) had agreed to treat it as a national of another Contracting State because of *foreign* control.⁴ This is the only provision in the Convention that mentions the word *foreign*, but there is no doubt that the forefathers of the Convention had foreign investments in mind when drafting it. If one goes through the Report of the Executive Directors of the Convention, one will learn that the Convention represents a “broad consensus” on establishing “procedures for the settlement of investment disputes which States and *foreign* investors wish to submit to conciliation or arbitration,” and that the object of the Convention is to “stimulate a larger flow of private international investment” made for the purpose of contributing to the economy of the host state:

“[t]he creation of an institution designated to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.”⁵

“... adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private *international investment* into its territories, which is *the primary purpose* of the Convention.”⁶

The reluctance to mention the words “foreign investment” is also a general feature of IIAs, which are usually titled in evasive terms.⁷

⁴ P. Đundić, Kriterijum kontrole i pravo pravnog lica da se javi kao tužilac u arbitraži pod okriljem IKSID, Zbornik radova Pravnog fakulteta u Novom Sadu, 2021, vo.. 55, br. 1, pp. 161-184.

⁵ International Bank for Reconstruction and Development, *Report of the Executive Directors on the ICSID Convention*, March 18, 1965, §§ 3 and 9.

⁶ *Ibidem*, § 12 cited in *Phoenix*, § 87 (emphases added).

⁷ For example : Accord entre le Gouvernement de la République française et le Gouvernement de l'Union des Républiques socialistes soviétiques sur l'encouragement et la protection réciproques des investissements (ensemble un échange de lettres interprétatif), fait a Paris le 4 juillet 1989 (in English : Agreement between the Government of the French Republic and the Government of the United Soviet Socialist Republics on the Reciprocal Promotion and Protection of Investments) ; Угода між Кабінетом Міністрів України і Урядом Російської Федерації про заохочення та взаємний захист інвестицій, вчинено в м. Москві 27 листопада 1998 (in English: Agreement Between the Cabinet Of Ministers of Ukraine and the Government of the Russian Federation on the Encouragement and Mutual Protection of Investments); Accord entre le Gouvernement de la République française et le Gouvernement de la République de Turquie sur l'encouragement et la protection réciproques des investissements (ensemble un échange de lettres interprétatif), fait a Paris le 4 juillet 1989 (in English: Agreement between the Government of the French Republic and the Government of the Republic of Turkey on the encouragement and mutual protection of investments); Acuerdo entre el Reino de España y la República de Venezuela para la Promocion Y Proteccion Reciproca d Inversiones (in English : Agreement between the Kingdom of Spain and the Republic of Venezuela for the Reciprocal Promotion and Protection of Investments).

As stated above, these IIAs furthermore meticulously avoid using determinators “foreign” and “international” in their definitions of investments and investors. ECT is a good example. The definition of investment in Article 26(1) turns on the use of the word “another”:

(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

This provision has been interpreted in the following way:

the Tribunal considers that the use of the word “another” is what essentially makes an Investor an international investor. Furthermore, the words “of the latter in the Area of the former” appears to place an emphasis on the Investor being imbued with a transnational quality – that is to say an Investor who is engaged in some form of cross-border transaction. The Tribunal believes that Article 26(1) implies a condition of transnationalism.⁸

Similarly, the French-USSR BIT defines the term investor in Article 1.2 without ever mentioning the word “foreign”:

2. Le terme « investisseur » désigne:⁹

a) Toute personne physique qui possède la nationalité de l'une des Parties contractantes et qui peut, conformément à la législation de cette Partie contractante, effectuer des investissements sur le territoire ou dans la zone maritime de l'autre Partie contractante ;

b) Toute personne morale constituée sur le territoire de l'une des Parties contractantes conformément à la législation de celle-ci et y possédant son siège social et qui peut, conformément à la législation de cette Partie contractante, effectuer des investissements sur le territoire ou dans la zone maritime de l'autre Partie contractante.

The diversity of nationality in those definitions stands on two legs: the nationality of the investor (which must be the nationality of “one contracting party” different from the “other contracting party”) and the territory of the host state

⁸ *Cem Cengiz Uzan v. The Republic of Turkey*, Arbitration V 2014/023, Award on Respondent's Preliminary Bifurcated Objection, 20 April 2016, § 146 (*Uzan*).

⁹ In English: “The term investments means: a) Any natural person who is a national of one of the Contracting Parties and who is permitted, in accordance with the laws of that Contracting Party, to make investments on the territory or in the maritime zone of the other Contracting Party. b) Any legal person established on the territory of one of the Contracting Parties in accordance with the laws of that Contracting Party which has its company seat in that Contracting Party and which is permitted, in accordance with the laws of that Contracting Party, to make investments on the territory or in the maritime zone of the other Contracting Party.”

(which must be the territory of “the other contracting party” different from the territory of the investor’s country of nationality).

3. CHANGES OF NATIONALITY

That an investor can change nationality is well known and hardly requires explanation. The case law on the effect of such changes is developed and can be divided into two distinct groups: cases where the investor is an individual, and cases where the investor is a legal entity. There is also a third group of cases where the nationality of host state changes. The approach of the arbitrators varies in these three groups of cases.

As far as individuals are concerned an investor that was a national of the host state (“the other contracting party”) can obtain nationality of some other state that has an investment treaty with the host state, and thereby become a foreign national, a national of the “[first] contracting party”. At the same time, he can retain or renounce his former nationality, the nationality of the “other contracting party”, the host state. If he retains his former nationality, the question of the *ius standi* of dual-nationals arises. The issue of *ius standi* of dual nationals as claimants, in the situation when one of their nationalities is the nationality of the host state is an issue with which arbitrators in investment disputes are commonly faced. Their interpretations of the requirement of diversity of nationality in such cases will not be the subject of this article, although some of the awards analyzed for the purposes of timing of diversity have had the elements of this issue as well.

If the investor is a legal person, the change of the investor’s nationality may take place through change of the principal place of business or through corporate restructuring,¹⁰ so that the investor’s shareholder or an entity exercising control

¹⁰ Some of the cases discussing the restructuring of legal persons to gain access to treaty protection are: *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005; *Europe Cement Investment and Trade SA v. Turkey*, ICSID Case No. ARB[AF]/07/2, Award of 13 August 2009; *Cementownia “Nowa Huta” SA v. Turkey*, ICSID Case No. ARB[AF]/06/2, Award of 17 September 2009; *Mobil Corporation and others v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010; *Pac Rim Cayman LLC v. Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012; *Tidewater Investment SRL and Tidewater Caribe, CA v. Venezuela*, ICSID Case No ARB/10/5, Decision on Jurisdiction, 8 February 2013; *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v. Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013; *Lao Holdings NV v. Laos*, ICSID Case No ARB[AF]/12/6, Decision on Jurisdiction, 21 February 2014; *Cervin Investissements & Rhone Investissements v. Costa Rica*, ICSID Case No ARB/13/2, Decision on Jurisdiction, 15 December 2014; *Renée Rose Levy and Gremcitel SA v. Peru*, ICSID Case No. ARB/11/17, Award of 9 January 2015; *Philip Morris Asia Ltd. v. Australia*, PCA Case No 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015; *Transglobal Green Energy, LLC and Transglobal Green*

during the relevant time becomes a company incorporated under the laws of the “[first] contracting party”. Another way is to sell or assign the investment to an individual or company having the nationality of the [first] contracting party.¹¹

These changes are commonly directed to obtaining the nationality of the contracting party other than the host state, so that the claimant can initiate an action against the latter under the requisite nationality,¹² but they can also go in the other direction, if the investor loses the requisite nationality, so that he does not have it at the relevant time or acquires the nationality of the host state. The outlined facts are then invoked by the respondent, claiming that such loss or acquisition of nationality affects the tribunal’s jurisdiction.¹³ The topic of the changes of nationality of legal entities as investors is complex and requires a separate analysis,¹⁴ especially if such change is conducted through restructuring, because it usually carries elements of treaty shopping.¹⁵

The other leg on which the diversity of nationality stands, the “nationality” of the territory in which the investment is made (“the host state’s nationality”) can also change. This territory can undergo a political or territorial change through time which changes its identity. An example will clarify this statement. A domestic

Panama v. Panama, ICSID Case No. ARB/13/28, Award of 2 June 2016, etc. See, Stephen Jagush et al, Restructuring Investments to Achieve Investment Treaty Protection, in Meg Kinnear et al. [ed.], *Building International Investment Law*, 2016, p. 176. Yael Ribco Borman, Treaty Shopping Through Corporate Restructuring of Investments: Legitimate Corporate Planning or Abuse of Rights? *Hague Yearbook of International Law*, 2011 pp. 361 and 368; Julien Chaisse, The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration, *Hastings Business Law Journal* 2015/2 p. 304; Juan Garay, Abuse of process through corporate restructuring of assets: the legal standard for the multinational investor, *Boston University International Law Journal* 2017, p. 400; Roland Ziadé, Lorenzo Melchionda, Structuring and Restructuring of Investment in Investment Treaty Arbitration, in Arthur W. Rovine [ed.], *Contemporary Issues in International Arbitration and Mediation*, 2014, p. 371.

¹¹ Some of the cases discussing the effects of assignment upon the condition of nationality are: *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award 15 March 2002, §§ 24-25; *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, Award of the Tribunal, § 423; and *Phoenix*, §§ 89-92 and 100.

¹² If such a change is effectuated after the dispute has already arisen, it may be qualified as an abuse of the system of international investment arbitration, and jurisdiction may be denied, as was the case in *Phoenix*, § 144. Sanja Đjajić, 2020, Good Faith in International Investment Law and Policy, *Handbook of International Investment Law and Policy*, Julien Chaisse et al. (eds.), p. 9.

¹³ See, for example, *Loewen v. United States*, ICSID(AF), Award, 26 June 2003, § 220 (*Loewen*); *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, §§ 489-503 (*Siag and Vecchi*); Michel Ballantine and Lisa Ballantine v. The Dominican Republic, PCA Case No. 2016-17, Final Award, 3 September 2019 (*Ballantines*), etc.

¹⁴ The difference of issues is reflected in the ICSID Convention which provides different provisions on critical dates in Arts. 25(2)(a) and 25(2)(b) for natural persons and legal entities. C.H. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, § 25-758.

¹⁵ See in some detail: *Jorun Baumgarten*, Treaty Shopping in International Investment Law, 2017, p. 13, and 205 et seq.

investment is made jointly by two legal entities in their own country, Patria, which consists of six constituent provinces. The investors are incorporated in two different provinces of Patria, and their investments are made into a legal entity that is incorporated in another province of Patria. After several years, the first investor's province successfully succeeds from Patria. As a result, the nationality of the investor has changed but not through his own willful act. It was the actions of his province, now the sovereign state of Newlandia, that changed the investor's nationality, so that the investment is now foreign. Several years pass and the province in which the investment was made also successfully succeeds from Patria. Now the territory in which the investment is found is not any more the territory of Patria, but the territory of Sembria. The second investor remains the national of Patria, but his investment is now located in Sembria, a foreign country. He did not wish to make a foreign investment, but his investment became an investment in Sembria due to decision of that country's leadership to succeed from Patria.

When such changes of the defining circumstances happen through time, a classical private international law issue arises in the domain of investment arbitration: what is the relevant date for assessing the circumstances that determine the applicability of a legal norm, i.e. the treaty norms on the protection of foreign investments, including the procedural protection encapsulated in an arbitration clause.

The analysis in this article will be limited to the critical moment for assessing the nationality of the investor, while the analysis of the other leg of the definition, the territory of the other contracting party, will be left out. Furthermore, the issues of restructuring of legal entities will also be omitted. Therefore, in this article, only the problem of changes of nationality of individuals as investors will be in focus. This type of change seems to be especially painful for the respondent states because it concerns their own nationals who have changed "allegiance", who have turned "foreign" after making domestic investments, often retaining their nationality of birth, and using the BITs to internationalize their misunderstandings and disputes with their native country.¹⁶

4. THE ASSESSMENT OF RELEVANT TIME IS MADE AS A JURISDICTIONAL INQUIRY

One more point is of importance: in practice, the assessment of the relevant moment for the applicability of the treaty is usually made as a jurisdictional inquiry. If the treaty is not applicable because the investment is not foreign at the

¹⁶ In one ICSID case, the late professor Orrego Vicuña was troubled by the fact that the disputed Lebanese nationality which was initially used to avoid Egyptian military service "a goal which is bad enough", was subsequently used "in support of a multi-million-dollar claim" [by Mr. Siag, a former Egyptian national] against the Egyptian state. *Siag and Vecchi*, Award, Dissenting opinion, p. 4.

relevant time, the tribunal will not have subject matter jurisdiction because the arbitration clause in the treaty will not be operative. Or, if the claimant does not have the requisite nationality at the relevant time, personal jurisdiction will be lacking. Jurisdiction depends on the applicability of the treaty, and the applicability of the treaty depends on the “foreignness” or “internationality” of the investment or investor. For this reason, the assessment of the relevant time is made in the form of a preliminary jurisdictional inquiry.

If the treaty does not provide otherwise, the relevant date to determine a court or tribunal’s jurisdiction is the date of the institution of proceedings. This is an accepted principle of international law applied by the arbitral tribunals and the International Court of Justice.¹⁷ A sale of an investment or an assignment of a claim after the institution of the proceedings will generally not affect the claimant’s *ius standi*.¹⁸ The question is whether, when the foreign character of investment is concerned, the foreign element must be present before that date, and why should that be required. Perhaps the intertemporal rule in cases when jurisdiction is based on a BIT or another IIA differs with regard to the critical date(s)? This will largely depend on how the BIT provisions define its applicability to investments and investors and on the interpretation of these provisions by the tribunals. Therefore, the issue to be analyzed in this article is: when is the nationality of the investor assessed in disputes based on an IIA. This issue can also be framed in different terms: when is the character of the investment assessed for the purposes of application of a BIT. What is the relevant time for assessing foreign character of an investment?

Regarding the critical date for assessment of internationality, or the “defining moment” of foreign investment, there are in essence three possible interpretations of the treaty provisions that can be adopted: (1) foreign element must exist (investment must be foreign) at the time the investor makes the investment; (2) it is sufficient that the foreign element exists (investment is foreign) at the time of the breach of the treaty; 3) it suffices that the foreign element exists (investment is foreign) at the time of commencement of proceedings. There is also a fourth possibility that should not be lost out of sight and that is that the investment must remain foreign at all three moments.¹⁹

¹⁷ Ursula Kriebaum, Christoph Schreuer, Rudolf Dolzer, *Principles of International Investment Law* (3rd ed. 2022), p. 49 with further references.

¹⁸ *Ibidem*.

¹⁹ The fifth possibility, that investor must continuously have foreign nationality until the rendering of the award (the requirement of continuous nationality), initially espoused by the *Loewen* tribunal, was later discarded in the context of the ICSID Convention in *Siag and Vecchi*. See, *Loewen Award*, § 220; *Siag and Vecchi*, Decision on Jurisdiction, § 205; Award, §489-503; C.H. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, §§ 25.684 and 25.756.

5. INVESTMENT MUST BE FOREIGN AT INCEPTION

There are various reasons why the foreign character of the investment needs to exist from the outset.

First, it is the expectations of both parties. Investor's expectations when making the decision to invest matter. As a rule, the treaty protection is afforded only to those investors that made their investment in expectation that they would be protected by the relevant treaty. This is an important but not an absolute argument because occasionally the treaties extend protection retroactively, to investments that were made before the treaty's entry into force, when the investors could not cherish such expectations. The host state's expectations also matter. At the time of concluding the treaty and accepting the obligations arising from its provisions, the host state had information on the investments originating from the relevant country that were made in its territory and could assess its own exposure to liability.

Second, there is a high potential for abuse of the mechanism of investment arbitration if the change of nationality is accepted as a method to make the investment foreign: if the investor could change his nationality after making the investment, and obtain the status of a foreign investor, he could engage in treaty shopping contrary to good faith.²⁰

Third, there is the legality requirement: most treaties provide that the investment must be made in accordance with the host state's legislation. The legality requirement must be examined and fulfilled at the time of the inception of the investment, meaning that the investments which were not originally foreign can hardly pass the requirement of legality.

The most important reason, however, lies in the purpose of the investment treaties and investment treaty arbitration which is to encourage the cross-border flow of investments.

The view that investment must be foreign at the time it is being made was adopted in an award of the UNCITRAL tribunal sitting in Madrid in the investment dispute initiated by the dual French and Russian citizen Sergei Viktorovich Pugachev, against one of his home countries, the Russian Federation, on the basis of the above cited France-Russia BIT.²¹

²⁰ The need to assess the investor's nationality at the time of making the investment to avoid abuse of rights was emphasized by the dissenting arbitrator in, *Siag and Vecchi* in the context of the ICSID Convention: "[O]therwise there could be uncontrollable abuse arising from acquisition or loss of nationalities. *Siag and Vecchi*, Decision on Jurisdiction, 11 April 2007, Partial Dissenting Opinion, p. 63. However, the commentary of the ICSID Convention states that "There is no support in the text of the Convention for the critical date to be the acquisition or making of an investment, as suggested by the dissenting arbitrator in *Siag v. Egypt*. C.H. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, § 25.754.

²¹ Arbitrators were: Dr. Eduardo Zuleta Jaramillo (Presiding Arbitrator), Prof. Thomas Clay and Prof. Bernardo Cremades.

5.1. Pugachev v. the Russian Federation

Mr. Pugachev's claim was related to his five alleged investments, four of them made in the territory of the Russian Federation and the fifth, a group of investments made outside the Russian Federation.²² Mr. Pugachev obtained the French nationality in November 2009 and retained his Russian nationality in parallel. The Tribunal established that all investments were made before that date.

Although the tribunal unanimously held that the BIT does not prevent dual nationals from suing their own state,²³ the tribunal was divided over the issue whether the BIT required an investor to be French at the time he had made the investment in the Russian Federation. The majority determined that it did. The dissenting arbitrator, Professor Thomas Clay, pointed out that the decision was inconsistent with the established case law which, according to him, identified two relevant moments for assessing the nationality of the investor: the date of the alleged violations of the BIT and the date of the initiation of the arbitral proceedings.²⁴ Professor Clay claimed that:

“No arbitral tribunal, to my knowledge, has taken the condition of nationality back to the time of “making” the investment.”²⁵

Such “taking of the condition of nationality back to the time of making of the investment” was perhaps not explicit, but the grounds for doing it were outlined already in the award on jurisdiction in the famous case *Phoenix Action Ltd. against the Czech Republic*. There is a considerable resemblance between the factual matrix in these two cases, although the way of changing the investor's nationality was different in the case of the Israeli claimant. While Mr. Pugachev remained the owner of his investments in Russia after he fled the Russian Federation and acquired the foreign (French) nationality (“he was French and an investor”),²⁶ Mr. Beno, a Czech citizen, also a fugitive from justice, incorporated Phoenix Action Ltd., an Israeli company, which purchased the shares of the two companies in the Czech Republic that were formally owned by Mr. Beno's wife and daughter, after

²² *Sergei Viktorovich Pugachev v. The Russian Federation*, Award on Jurisdiction, 18 June 2020, § 2 (*Pugachev*).

²³ *Pugachev*, Award on Jurisdiction, §§ 368-388.

²⁴ Professor Clay cited four awards as the established case law to this effect: *Pac Rim v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdiction Objections, dated 1 June 2012, § 3.34., *Victor Pey Casado v. Republic of Chile*, ICSID Case No. ARB/98/2, Final Award, dated 8 May 2008, § 414, *Vladislav Kim v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Award on Jurisdiction, dated 9 March 2017, §§ 190-191 and the *Serafin Garcia* award, which will be discussed further on.

²⁵ *Pugachev*, Award on Jurisdiction, Dissenting opinion, § 74.

²⁶ *Pugachev*, Award on Jurisdiction, Dissenting opinion, § 50.

he fled to Israel from the Czech police.²⁷ There were also considerable differences in the way the requirement of diverse nationality and the effect of this requirement upon jurisdiction was treated in the two awards. The *Phoenix* award stands as a precedent for the requirement of good faith in international investment arbitration, and this aspect is missing from the *Pugachev* case. Nevertheless, there is a degree of commonality in the rationale of the two decisions. It may be said that the core idea of both decisions is that the investor must make a foreign investment if it is to be protected by the relevant BIT. As stated by the *Pugachev* tribunal, the foreignness of the investment is determined by the investor's nationality.²⁸ The implication to be drawn is that only foreign investments are protected by the BIT.

The majority in *Pugachev* anchored its interpretation of the critical moment for assessing the claimant's nationality in Article 1.2(a) of the BIT:

2. Le terme « investisseur » désigne:

a) Toute personne physique qui possède la nationalité de l'une des Parties contractantes et qui peut, conformément à la législation de cette Partie contractante, effectuer des investissements sur le territoire ou dans la zone maritime de l'autre Partie contractante;²⁹

This provision had a peculiar historical background because Soviet investors at the time of the conclusion of the France-USSR BIT (1989) needed to be allowed by Soviet law to invest outside the Soviet Union. Therefore, they had to be authorized under their national law to make the foreign investment before making it in France.³⁰ Relying on such background, the dissenting arbitrator pleaded for an evolutive interpretation of treaties that would disregard this obsolete provision, since at the time of introduction, in 1989, it was not designed for French nationals, and at the time of Mr. Pugachev's acquisition of assets, no impediments existed either in the French or Russian law for making foreign investments.

In contrast, in the historical reasons for the introduction of this provision the majority found a confirmation for its view that the relevant time for assessing the requirement of the investor's nationality was the time the investor made the investment. The relevant time for assessing this requirement must be determined according to the specific language of the particular treaty. The requirement itself could not be excluded as a matter of principle.³¹

²⁷ *Phoenix*, Award, §. 41.

²⁸ *Pugachev* Award on Jurisdiction, § 398.

²⁹ In English: The term investor means: "a national of one of the Contracting Parties and who is allowed, in accordance with the laws of that Contracting Party, to make investments on the territory [...] of the other Contracting Party".

³⁰ *Pugachev*, Award on Jurisdiction, § 429.

³¹ *Pugachev*, Award on Jurisdiction, § 436.

The Russian Federation as the respondent read this article as creating a temporal requirement, meaning that in order to qualify as an investor, a natural person had to be a national of the relevant state at the time of making the investment: “At the time a national makes the investment, he or she must be permitted to do so in accordance with the national law of the non-host State.”³² The respondent found support for this reading in the wording of other provisions of the BIT which repeatedly refer to investments “made” rather than “held”.³³ According to the respondent, the verb “make” connotes the creation of an investment.

The claimant argued that this reading would carry a special meaning which is not evidenced by the wording of Article 1.2(a). According to the claimant, this provision sets out only two conditions that he had to fulfil in order to qualify as a protected investor: to be a national of France, and to be authorized under French law to make investments in Russia.³⁴ The verb *make* on which the respondent relied is formulated in the present tense. Therefore, a natural person would qualify as a protected investor if he “*is allowed to make*” (*peut effectuer*) investments in Russia at present (when the protection of the BIT is invoked), not if he was allowed in the past to make such investments. Also, the provision does not refer to the specific investment made by the investor but formulates the requirement in general terms: “is allowed to make investments”. The claimant argued that the principal aim of this requirement was to ensure the legality of the investment and not the timing [of foreign nationality].³⁵ The respondent agreed that this was the aim of the provision but disagreed with the claimant on the time when the requirement of legality had to be fulfilled. The parties disagreed whether this wording implies that the authorization should be ascertained before the making of the particular investment or later.³⁶

The majority of the tribunal sided with the respondent and found that the Treaty required the claimant to hold French citizenship at the time he had made his investments.³⁷ In justifying the reasons for its decision, the tribunal pointed out to the particular wording of Article 1.2(a) which requires an investor to have an authorization under his national law to make investments. The BITs tend to require that the investment is made in accordance with the laws of the host state. However, in case of the France-USSR BIT, there was an additional requirement³⁸ of compliance with the laws of the home state: a natural person of French nationality

³² *Pugachev*, Award on Jurisdiction, § 391.

³³ *Pugachev*, Award on Jurisdiction, § 392.

³⁴ *Pugachev*, Award on Jurisdiction, § 395.

³⁵ *Pugachev*, Award on Jurisdiction, § 396.

³⁶ *Pugachev*, Award on Jurisdiction, § 407.

³⁷ *Pugachev*, Award on Jurisdiction, § 397.

³⁸ The France-USSR BIT requires compliance with the law of the host state in the definition of the investment found in Article 1.1.

must be authorized by the laws of France to make investments in the territory of the Russian Federation.³⁹ The majority was not persuaded by the claimant's explanation that the reference to the law of the state of nationality was primarily concerned with the matter of legality and not with timing of the nationality requirement.⁴⁰ The parties' disagreement was not about the purpose of the provision, but rather about the question when the investor needed to have the requisite nationality. The majority also disagreed with the claimant's argument based on the redaction of the provision in the present tense and opined that the verb form used is neutral with respect to the timing and that it allows both interpretations.

The tribunal then turned to the debate on whether Article 1.2.(a) of the BIT which refers to investments made, could be interpreted to refer to investments held, as argued by the claimant. The issue was first distinguished from the debate related to indirect investments. It was pointed out that Article 1.1. of the BIT expressly allows indirect investments "made by investors of one of the Contracting Parties on the territory or in the maritime zone of the other Contracting Party through the intermediary of an investor of a third country". That provision would be relevant in case the parties were debating a corporate restructuring or which company in a chain of control should be considered as investor, while this case was about a direct investment made by an individual, a native Russian, who made investments in Russia, and who acquired the French nationality by naturalization, after making his investments. The majority then expressed its conclusion that

"Nothing in the BIT [...] would allow the Tribunal to conclude that the terms "made" (*"effectués"* or *"réalisé"*) and the term "held" (*"détenus"*) are synonymous or have the same meaning."⁴¹

The examination of context confirmed that the BIT consistently refers to investments "made" by the investor of one Contracting Party in the territory of the other Contracting Party, without ever referring to investments "held" by the investor.⁴²

This difference between the investments made and investments held was the key factor that influenced the majority's decision.⁴³ If holding or owning the investment were sufficient, the claimant would have satisfied the requirement, because in November 2009, when he became French, he already owned, i.e., held certain investments in the Russian Federation.⁴⁴ There are many BITs that define

³⁹ *Pugachev*, Award on Jurisdiction, § 407.

⁴⁰ *Pugachev*, Award on Jurisdiction, § 409.

⁴¹ *Pugachev*, Award on Jurisdiction, § 413.

⁴² *Pugachev*, Award on Jurisdiction, § 414.

⁴³ *Pugachev*, Award on Jurisdiction, § 423.

⁴⁴ *Pugachev* Award on Jurisdiction, Dissenting opinion, § 50.

the investment as the assets held or owned by the investor.⁴⁵ However, the France-USSR BIT did not use that particular formula.

The distinction between making and holding an investment resembles the distinction between an active and passive investor that was referred to already in the Phoenix award,⁴⁶ and in many awards thereafter.⁴⁷

The Phoenix tribunal stated that “significant economic activity [...] is the fundamental prerequisite of any investor’s protection. The Israeli-Czech BIT defined the term investment as any kind of asset invested in connection with economic activities by an investor.”⁴⁸ According to the tribunal, the Czech Republic agreed to be sued in ICSID arbitration only with respect to foreign investments that are connected with the investor’s economic activity in the host State.⁴⁹ If the transaction was undertaken without any intent to perform any economic activity in the host country (like the acquisition of shares in the Czech companies by Phoenix Action), such transaction cannot be considered as a protected investment.⁵⁰

The discussion on whether it is enough that assets are held, or the claimant must prove that he performed some activity goes to the core issue of investment law: what is the purpose of the rules such as those contained in the BITs and in other IIAs. Both the majority and the dissent in *Pugachev*, searched for the object and purpose of the particular BIT in its preamble. The dissenting arbitrator opined that the purpose of international investment law in general was to establish rules for the treatment and protection of *assets owned by foreigners as well as the rights they hold*.⁵¹ He found the protective purpose of the France-USSR BIT in the third paragraph of the preamble, which states that the contracting parties are persuaded that the encouragement and the reciprocal *protection* of investments are proper means “to stimulate the transfer of capital”. For the majority, the takeaway from the preamble was that the BIT aimed at the *promotion* of foreign investments, i.e. French investments in the USSR and Soviet investments in France and „the transfer of capital and the exchange of leading-edge technologies between the two

⁴⁵ For example, the US Model BIT 1994 contained the following definition of investment: “every kind of investment owned or controlled directly or indirectly by national or company...” This provision was incorporated into the US-Kazakhstan BIT. See, Emmanuelle Cabrol, Pren Nreka v. Czech Republic and The Notion of Investment Under Bilateral Investment Treaties: Does “Investment” Really Mean “Every Kind of Asset?”, in: Karl Sauvant, *Yearbook on International Investment Law and Policy*, 2009-2010, 226. The ECT defines “Investment” in Article 1.6. as “every kind of asset, owned or controlled directly or indirectly by an Investor.”

⁴⁶ *Phoenix*, Award § 38.

⁴⁷ Maja Stanivuković, Who Is The Active Investor?: Tribunals’ Search For A True Investor, *Indian Journal of Arbitration Law*, Vol. 11 issue 1, 2023, pp. 30-68.

⁴⁸ *Phoenix*, Award § 93.

⁴⁹ *Phoenix*, Award § 97.

⁵⁰ *Phoenix*, Award § 93.

⁵¹ *Pugachev* Award on Jurisdiction, Dissenting opinion, § 54.

States in the interest of their economic development.“ In the view of the majority, promotion of foreign investments from one state to the other could only be accomplished if the investor of one state party to the BIT makes – not simply holds – an investment in the territory of the other State party.⁵² A further conclusion that followed from such interpretation of the preamble was that the date of making an investment cannot be the date on which the investor seeks the protection under the BIT.

The majority determined when it should be considered that the investment was made:

„The investment is made, according to the BIT, when the investor acquires, in accordance with the law of the host State, any of the assets and rights listed in Article 1 of the BIT *and a transfer of capital takes place.*“⁵³

The claimant in *Pugachev* referred to the asset-based definition of investments under Article 1.1. of the BIT. He pointed out that the BIT protects investments such as movable and immovable assets, shares, copyrights and industrial property rights. According to the claimant in *Pugachev*, such assets and rights are properly speaking not made but rather held by the investor. The majority disagreed finding that the assets of this kind can also be made, and that they are made when an investor acquires them or when they are transferred to the investor.⁵⁴

The majority’s conclusion on when the particular investments were made by Mr. Pugachev was not accepted without criticism from the dissenting arbitrator. He noted that the act of investing, as understood in the France-USSR BIT, was not a single operation, an instantaneous transaction, such as acquisition of property, which could then be taken as a focal point for the assessment of the investor’s nationality, but rather a continuous activity.⁵⁵ He powerfully argued that an investment is „a complex transaction that is spread over time“⁵⁶, a „broad notion“ that cannot be reduced to operation of acquiring shares of a company.⁵⁷ In this case, according to the dissenting arbitrator, Mr. Pugachev, although he acquired all investments prior to November 2009, completed them after that date, investing millions of dollars in their development and creation of new value. For example, by November 2009, Mr. Pugachev had already acquired EPC, a company which owned a licence for the exploration of the Elegest Plateau of the Ulug Khemsky coal basin in Tuva, and for the development of a coal mine. However, after that date, he invested substantial capital to explore the resources of the Elegest Plateau,

⁵² *Pugachev* Award on Jurisdiction, § 416.

⁵³ *Pugachev* Award on Jurisdiction, § 418.

⁵⁴ *Pugachev* Award on Jurisdiction, § 428.

⁵⁵ *Pugachev* Award on Jurisdiction, Dissenting opinion, § 39.

⁵⁶ *Pugachev* Award on Jurisdiction, Dissenting opinion, § 40.

⁵⁷ *Pugachev* Award on Jurisdiction, Dissenting opinion, § 40.

made a discovery of a large deposit of coal, and entered into contracts for the construction and design of railways to transport coal to various regions of Russia.⁵⁸

It would have been consistent with the „investments made“ rather than „held“ theory for the majority to take into account this additional activity, these additional investments that were allegedly made by Mr. Pugachev after he had acquired the French nationality. Such additional investments would have distinguished his case from *Phoenix* where the Tribunal noted that „no activity was either launched or tried *after the alleged investment* was made“.⁵⁹

The reasons why these investments that were allegedly made after the acquisition of French citizenship did not count in Mr. Pugachev's case were twofold. First, he did not submit convincing evidence that a transfer of funds took place from France to Russia in order to make any of the investments for which he claimed protection while the majority, based on the wording of the BIT Preamble, considered that the transfer of capital was a condition *sine qua non* for the existence of an investment.⁶⁰ Second, the majority of the tribunal was convinced that the interpretation that nationality must be French at the time of the making of the investment was a “necessary consequence” of the use of the verb “made” rather than the verb “held” in the relevant provision of the BIT.⁶¹ The BIT required the investor to be allowed by his own national law to make the investment. This meant that the investment had to be made by a national of that Contracting Party, so the relevant time for assessing the nationality of the investor was the time the investment was made. The investment had to be transnational (cross-border) from inception.⁶²

The reasoning was again somehow connected to the *Phoenix* award, although no references were explicitly made. The *Phoenix* tribunal took the stand concerning the relevant moment for the analysis of the conformity of the investment with the *host* states laws. That was the moment of “the establishment of the investment”.⁶³ The requirement of the conformity with the *host* state's law is

⁵⁸ *Pugachev Award on Jurisdiction*, Dissenting opinion, § 40.

⁵⁹ *Phoenix*, Award, § 140 (emphasis in the original).

⁶⁰ The requirement of transfer of capital was found in the second paragraph of the BIT Preamble. *Pugachev Award on Jurisdiction*, §§ 417, 420 and 450.

⁶¹ *Pugachev Award on Jurisdiction*, § 418.

⁶² *Pugachev Award on Jurisdiction*, § 417.

⁶³ *Phoenix*, Award, § 103. See also: *Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, § 420, and *Border Timbers Limited, Border Timbers International (Private) Limited and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/20/25, Award, 28 July 2015, § 420: “for the purpose of the legality requirement, when determining whether an investment exists it is compliance with the laws at the time the investment is made that is pertinent”. Any subsequent alleged breach of law would not affect whether the investment qualifies for protection under the BIT. The relevant time for the determination is when the investment is made. *Gavrilovic and Gavrilović, d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, § 303: “The Parties agree that the relevant time at which legality is to be assessed for jurisdictional purposes is the time at which the alleged investment was made.”

important for the access to the substantive protections of the BIT.⁶⁴ Likewise, the conformity of the investment with the *home* state's law in *Pugachev*, had to be analyzed looking at the date of inception of the investment. That moment was necessarily the moment when the investor decided to take and took the initial step in the investment transaction. If the investment was a continuous activity, that was the moment when he began to make each particular investment, as remarked by the dissenting arbitrator, who disagreed with this conclusion.⁶⁵ The provisions on legality/lawfulness of the investment “operate a *renvoi* to the domestic law of a Contracting Party”,⁶⁶ which is the law that must provide the green light for the making of the investment. It would make no sense to assess the lawfulness of the investment at the time of the breach, when the investment had already been made, and lawfulness should have already been examined and confirmed. Otherwise, the laws of the host state could change and the investment which was lawful at the time of making could subsequently become unlawful.⁶⁷

The temporal dimension of the legality requirement and its determination by the verb employed was succinctly described in one of the more recent Permanent Court of Arbitration UNCITRAL cases:

Specifically, to fall within the host State's consent to arbitrate, an investment must be “made” in accordance with the law. The use of the word “made” indicates the point in time when the investment must comply with the law. In this respect, it is well-settled that the “jurisdictional significance” of a legality requirement found in the definition of an investment, like the one contained in Article 1(2) of the BIT, “is exhausted once the investment has been made”. Only an illegality that exists at the time of “entry”, “procurement”, “initiation” or “establishment” of the investment may preclude the existence of a protected investment. This is particularly clear in the present treaty from the use of the verb to “make”, which is synonymous to “establish”. In addition, the Treaty employs the past tense “made”, which confirms that the illegality test applies at the time of making of the investment.⁶⁸

⁶⁴ *Phoenix*, Award, § 104. Petar Đundić, Prigovor nezakonitosti ulaganja u investicionoj arbitraži – efikasan štit za držve prijema ulaganja (Objection of the investment's illegality in investment arbitration: Is it an effective shield for host states?) Zbornik radova Pravnog fakulteta, 2018, Vol. 52, No. 4, pp. 1663-1682.

⁶⁵ *Pugachev*, Award on Jurisdiction, Dissenting opinion, § 87.

⁶⁶ This expression, which was used in another context in *Uzan*, Award on Respondent's Preliminary Bifurcated Objection, § 156, describes well the interaction between the BIT rules and the rules of national law that takes place in cases when the BITs pose the condition of lawfulness of the investment.

⁶⁷ This was noted in *Phoenix* Award, § 103: “The State is not at liberty to modify the scope of its obligations under the international treaties on the protection of foreign investments, by simply modifying its legislation or the scope of what it qualifies as an investment that complies with its own laws.”

⁶⁸ *Muszynianka Spolka z Ograniczona Odpowiedzialnoscia v. Slovak Republic*, PCA Case No. 2017-08, Award, 7 October 2020, § 300 (references omitted).

In sum, the legality requirement necessarily has a temporal dimension which goes back to the beginning of the investment. Many arbitral tribunals have taken this view.⁶⁹ There is nothing exceptional about it, as there are other assessments that need to be made at the time the investment is made, such as assessments for the purposes of application of sunset clauses and stabilization clauses.

The importance of the investor's decision to invest in a foreign country and the connection of his decision to the applicable laws at the time this decision is made was underlined in a NAFTA case which concerned a claim of American investors who made an investment in their own country (in Texas), which was subsequently affected by measures taken by Mexican authorities in their own territory.

When an investment is made, such as the investments in farms and irrigation equipment, etc., in the present case, the investor makes its decision in the light of its appraisal of the law and of the authorities who are making, creating and applying the law to that investment. When the investment is made in the investor's State, it is made in the light of the investor's understanding of laws, institutions and procedures that are familiar to the investor. When the investment is made in a different country which has concluded an investment protection treaty covering that investment, the investor is entitled to rely upon the fact the States Parties to the treaty have decided to commit themselves to give a minimum level of legal protection to such foreign investments.⁷⁰

The dissenting view in *Pugachev* award, that it is sufficient that the investor is a foreign national at the time of the breach is challenged by the reasoning of the *Phoenix Action* case. If the Phoenix tribunal considered it was irrelevant that the investment was domestic at its inception, the abuse of the arbitral mechanism would not have come into play in that award. Although the claimant in that case initially complained of breaches that preceded its acquisition of the Czech companies, he later reformulated its claim to encompass only the alleged breaches of the BIT that took place after he acquired them. Thus, the claimant was an Israeli company at the time of the alleged breaches of the BIT by the Czech Republic, just as Mr. Pugachev was a French citizen at the time of the alleged breaches of

⁶⁹ *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/16, Decision on Jurisdiction, 8 March 2017, §§ 374-377 citing further awards: *Quiborax S.A. Non Metallic Minerals A.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on jurisdiction, 27 September 2012, § 266 and *Ghustav F W Hamster GmbH and Co. KG v. Republic of Ghana*, Award, 18 June 2010, § 127. See also: *David R. Aven and others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, final Award, 18 September 2018, § 342, where the Tribunal found that “the temporal scope of the legality requirement” concerns “the establishment of the investment” and “should not extend to the subsequent actions during the performance of the investment” and *Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/17/1 Award, 13 September 2021, § 299.

⁷⁰ *Bayview Irrigation District*, § 99.

the BIT by the Russian Federation. However, the *Phoenix* tribunal “looked back” to the time of inception of the investment and because the investment was domestic at its inception, and because no activities were undertaken by the Israeli company after the initial acquisition, concluded that the foreign investment that was made after the dispute arose, was not made *bona fide*.

The *Phoenix* tribunal noted that the jurisdiction of the BIT tribunals would be virtually unlimited if the transfer of the investment from the “domestic arena” to the “international scene” would be automatically recognized as means to obtain the BIT protection. This idea was later reiterated and developed under other investment treaties. Thus, in *ST-AD v. Bulgaria*, the arbitrators analysed the timing of the investment and the timing of the claim and concluded that, like the *Phoenix* tribunal, they were dealing with a domestic investment disguised as international investment which the BIT did not protect.⁷¹ In *Cascade Investments v. Turkey*, the arbitrators considered themselves compelled to check whether a sudden acquisition of a pre-existing domestic investment by a foreign investor represented a *bona fide* foreign investment made for commercial reasons, with a real intention of engaging in economic activity in the host state.⁷²

It could be added on the basis of the *Pugachev* award, that the jurisdiction of the BIT tribunals would be virtually unlimited if the investor could obtain BIT protection simply by changing his own nationality, without taking the risk of making any foreign investment or engaging in any genuine cross-border activity thereafter. Since the breach of a BIT could be a continuous act, the dissatisfied investor could simply refer to violations that post-dated the change of his nationality, and thereby bring about the applicability of the BIT to his originally domestic investment.

The *Phoenix* award stood for the proposition that the act of investing by the particular investor who was the claimant determined the applicability of the BIT, not its breach. The applicability of the BIT started from the moment of the claimant’s own investment. That investment had to be by a national of the other contracting party. For the applicability of the BIT, and thus for its breach as well, there first had to be an investment by a national of the other contracting party. The obligations under the BIT could not be breached by the host state until there was such an investment of a national of the other contracting party.⁷³ In the case of Mr. Pugachev that meant that the applicability of the France-USSR BIT would be triggered only from his first investment as a national of the other contracting party. His acts, including the acts of investment, prior to becoming the national of France were simply irrelevant for the applicability of the BIT. The change of nationality alone,

⁷¹ *ST-AD, GmbH v. The Republic of Bulgaria*, UNCITRAL, Award on Jurisdiction, 18 July 2013, § 423, citing *Phoenix*, § 144.

⁷² *Cascade Investments NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Award, 20 September 2021, § 331, citing *Phoenix*, § 93.

⁷³ *Phoenix*, Award, § 68.

not accompanied by a fresh investment could not bring about the applicability of the BIT. In this case, all the investments were made while the claimant had only the Russian citizenship. When they were made, they were domestic investments.

Although not expressed in words, the *ratio decidendi* of *Pugachev* is that domestic investments were not meant to be protected by the BIT. This was already stated by the *Phoenix* tribunal:

“The BITs are not deemed to create a protection for rights ...not involving any significant flow of capital, resources or activity into the host State’s economy.”⁷⁴

and recapitulated in the *ST-AD v. Bulgaria*:

“ ... If it were accepted that the Tribunal has jurisdiction to decide *ST-AD*’s claim, then any pre-existing national dispute could be brought to an international arbitration tribunal by an “after the fact” transfer of the national economic interests to a foreign company in an attempt to seek protections under a BIT. Such transfer from the domestic arena to the international scene would *ipso facto* constitute a “protected investment” – and the jurisdiction of an international arbitral tribunal under a BIT would be virtually unlimited. ... It is indeed the Tribunal’s view that to accept jurisdiction in this case would go against the basic objectives underlying bilateral investment treaties. The Tribunal has to ensure that the BIT mechanism does not protect investments that it was not designed to protect, that is, domestic investments disguised as international investments or domestic disputes repackaged as international disputes for the sole purpose of gaining access, to international arbitration.”⁷⁵

So, although the claims in *Pugachev* were dismissed for the lack of jurisdiction *ratione personae*, they could have just as well been dismissed for the lack of jurisdiction *ratione materiae*.⁷⁶

This does not mean that originally domestic investments can never become investments protected by a BIT. They can become so protected if they are acquired by a *bona fide* foreign investor. Also, taking the case of Mr. *Pugachev* as a reference, the investor who was once a domestic investor can become a foreign protected investor if he makes new, fresh investments in the assets owned by him after he acquires the requisite foreign nationality. This was the whole point of examining whether Mr. *Pugachev* had held French nationality at the date of any of his alleged

⁷⁴ *Phoenix*, Award, § 97.

⁷⁵ *ST-AD, GmbH v. The Republic of Bulgaria*, UNCITRAL, Award on Jurisdiction, 18 July 2013, § 423. (emphasis added).

⁷⁶ In contrast, the majority in *Pugachev* asserted that the case concerned solely the issue of the nationality of the investor, but not of the character (status) of investments. *Pugachev*, Award on Jurisdiction, §§ 430 and 440. However, the author’s view is that the question of the nationality of investor is inextricably linked to and indivisible from the character of the investment.

investments.⁷⁷ However, the protection afforded by the French-USSR-BIT would have extended only to those newly made investments, which had been made as foreign investments.

As an extension of the discussion on the relevant moment for the assessment, the parties also discussed the effect of Article 10 of the BIT which regulates the *ratione temporis* applicability of the BIT and provides that it will apply to all investments made after 1 January 1950, i.e., before the France-USSR BIT was concluded and entered into force. The claimant saw in this provision justification for its view that requirements pertaining to the nationality of the investment are not to be assessed at the time of the investor's making the investment, because the BIT was not in force when certain investments were made, but they were nevertheless protected.⁷⁸ The majority lightly rejected this argument and reiterated that the investor must hold the requisite nationality at the time the investment is made notwithstanding whether it is made before or after the entry into force of the BIT.⁷⁹

5.2. Uzan v. Turkey

The moment for assessment of internationality was also deliberated upon in *Uzan v. Turkey*. Under Article 1(7) of the ECT which was the underlying treaty, the investor had to have a citizenship or nationality or to be permanently residing in a country to be considered an investor of that contracting party. The claimant alleged that he was permanently residing in the United Kingdom and then in France to initiate an investment claim and establish jurisdiction *ratione personae* against his country of nationality, Turkey. The Tribunal held that the claimant failed to establish jurisdiction *ratione personae* because he did not qualify as an investor within the meaning of the ECT.⁸⁰ According to the tribunal, a covered investor "must possess some cross-border characteristics", and the claimant lacked them.⁸¹

However, it was not entirely clear from the tribunal's reasoning when such cross-border characteristics needed to be present. The tribunal noted that the claimant was a national and resident of Turkey when he "first made his investment".⁸² Therefore, at that time he was a domestic investor and not a protected investor within the meaning of the ECT. The use of the words "first made his investment" implied that there could be "another time", that there could be a different assessment of when the claimant made his investment.

⁷⁷ *Pugachev*, Award on Jurisdiction, § 420, and §§ 442-470.

⁷⁸ *Pugachev*, Award on Jurisdiction, § 426.

⁷⁹ *Pugachev*, Award on Jurisdiction, § 427.

⁸⁰ *Uzan*, Award on Respondent's Preliminary Bifurcated Objection, § 128.

⁸¹ *Uzan*, Award on Respondent's Preliminary Bifurcated Objection, § 146.

⁸² *Uzan*, Award on Respondent's Preliminary Bifurcated Objection, § 147.

The claimant asserted that he subsequently became a permanent resident of the United Kingdom, and then France. According to the tribunal, this raised a question of the effect of the change of residence, i.e., whether such change would be capable of itself to transform claimant into a protected investor. The answer to this question provided by the tribunal seemed to direct to the date of investment as the defining moment for assessing the qualification of a protected investor:

In the view of the Tribunal, the mere fact of the Claimant's subsequent change of residence, as well as the reasons and the circumstances thereof, cannot as such operate to transform the legal characteristic of the person into an Investor, within the meaning of Article 26(1).⁸³

The new residence could become relevant for the claimant's status of an investor under the ECT only if he had made new energy investments after the change of residence, and he could enjoy the status of an investor only with respect to those new investments.⁸⁴

The Tribunal is not able to accept the argument that the Claimant can be considered an Investor under Article 26(1) merely by the fact of a change of residence, and nothing more.⁸⁵

The tribunal's inquiry could end there considering that the claimant in this case did not purport to have made any new investments after the change of residence.

However, the tribunal went on to examine whether the claimant was a resident of the UK during 2002 and 2003, and particularly on 11 June 2003, when the alleged expropriation happened⁸⁶ and whether he was a resident of France thereafter.⁸⁷

That the moment of expropriation, being the moment of the breach of the BIT is also relevant was announced by *Uzan* tribunal while it was examining the object and purpose of the ECT. Finding that the object and purpose of this treaty is to protect "the international flow of investments", the *Uzan* tribunal noted:

"The Claimant, no matter how he frames his arguments, is missing this essential transnational link, in relation both to the time his "investment" was made and when he alleges it was interfered with."⁸⁸

The reference was made to the moment when the investment was allegedly interfered with. This, together with the fact that the claimant's residence in the

⁸³ *Uzan*, Award on Respondent's Preliminary Bifurcated Objection, § 148.

⁸⁴ *Uzan*, Award on Respondent's Preliminary Bifurcated Objection, § 148.

⁸⁵ *Uzan*, Award on Respondent's Preliminary Bifurcated Objection, § 149.

⁸⁶ *Uzan*, Award on Respondent's Preliminary Bifurcated Objection, §§ 157-172.

⁸⁷ *Uzan*, Award on Respondent's Preliminary Bifurcated Objection, §§ 173-187.

⁸⁸ *Uzan*, Award on Respondent's Preliminary Bifurcated Objection, § 152.

United Kingdom (allegedly established after the investment had been made and before the breach had happened) was thoroughly examined by the tribunal, suggests that the moment of breach alone could possibly be considered as the defining moment. Given that the Tribunal found that the claimant did not have permanent residence in the UK at the time of expropriation, this hypothesis was not confirmed in *Uzan*. This is more so, since the quoted sentence in which the moment of breach (interference) was mentioned, was followed by several sentences in which the tribunal reverted to the “time when the investment was made” as the relevant moment for assessing whether the claimant is entitled to the ECT protection. The tribunal also repeated that a change of residence could not transform the claimant into a protected investor in relation to the domestic investments that had already been made.⁸⁹ Another statement found in the above quoted paragraph additionally blurred the conclusion about the relevant moment. The tribunal stated that Mr. Uzan could not be considered a covered investor

*“because on the date he made his investment, and at all times until the alleged interference occurred, he was an investor of the Republic of Turkey.”*⁹⁰

The requirement as formulated in this sentence was that the claimant had to have permanent residence in another country on the date he made the investment and on the date of the breach. Perhaps the purpose of this sentence was simply to reinforce the conclusion already reached that there was no jurisdiction. After checking the existence of foreign residence at the time of breach the tribunal realized that it was lacking, so it thought there was no harm in mentioning it, too.

It is also hard to explain why the tribunal, after finding that the claimant was not permanently residing in the United Kingdom on the date of the breach, went on to examine whether he was permanently residing in France.⁹¹ Professor Sands as arbitrator appointed by Turkey, submitted a declaration stating his opinion that it was not necessary to decide whether the Claimant had permanent residence in France.⁹² A plausible explanation could be that the tribunal examined the claimant’s residence in France because it thought that the date of commencement of the arbitration was also relevant. The declaration of professor Sands points to this conclusion because he was of the view that the relevant times are the time of making the investment and the time when the alleged interference was said to have occurred or commenced, while the time the claimant filed the claim was of no consequence.⁹³ Be it as it may, the finding that the claimant indeed had been

⁸⁹ *Uzan*, Award on Respondent’s Preliminary Bifurcated Objection, § 152.

⁹⁰ *Uzan*, Award on Respondent’s Preliminary Bifurcated Objection, § 152 (emphasis added).

⁹¹ *Uzan*, Award on Respondent’s Preliminary Bifurcated Objection, §§ 173-187.

⁹² *Uzan*, Award on Respondent’s Preliminary Bifurcated Objection, Sands declaration, § 3.

⁹³ *Uzan*, Award on Respondent’s Preliminary Bifurcated Objection, Sands declaration, §§ 1 and 3.

permanently residing in France for six years did not assist the claimant, because he could not prove that he was an Investor “of another Contracting Party” at the time he made the investment.

This puts *Uzan* into category of cases, such as *Pugachev* and *Ballantines*,⁹⁴ requiring diversity of nationalities to exist at all three critical dates, the date of making the investment, the date of interference with the investment, and the date of commencing the arbitration. In *Ballantines* (another case initiated by dual nationals), it was not sufficient that the diversity existed at the time the investment was made, but it had to exist also at both other dates. At least this was the opinion of the majority, since the dissenting arbitrator, Marney Cheek, voiced her opinion that the diversity needed to exist only at the two later dates.⁹⁵

6. INVESTMENT DOES NOT HAVE TO BE FOREIGN AT INCEPTION

The IIAs are often drafted loosely, using broad language and without specifying the critical date for assessment of the investor's nationality. When the existence of the temporal requirement is not specific enough and certain, the tribunals are reluctant to read it in, based on the context of the treaty. Several cases are illustrative of such approach when the nationality of individual investors is concerned.

6.1. *Serafin Garcia and Karina Garcia Gruber v Venezuela*

While *Phoenix* was not mentioned, another case was discussed at some length in the *Pugachev* arbitration. That was the decision in the case *Serafin Garcia and Karina Garcia Gruber v Venezuela*⁹⁶ where the question of the date of assessing the nationality of the investor also arose. The Spain-Venezuela BIT defines “investors” inter alia as “any physical person who possesses nationality of one Contracting Party pursuant to its legislation and makes investments in the territory of the other Contracting Party”. Investments are defined as “any kind of assets invested by investors of one Contracting Party in the territory of the other Contracting Party”.⁹⁷

The case involved domestic, Venezuelan investors who, after making their investments in Venezuela, also acquired the nationality of Spain. The majority of

⁹⁴ Michel Ballantine and Lisa Ballantine v. The Dominical Republic, PCA Case No. 2016-17, Final Award, 3 September 2019.

⁹⁵ Michel Ballantine and Lisa Ballantine v. The Dominical Republic, PCA Case No. 2016-17, Partial Dissent of Arbitrator Cheek on Jurisdiction, para 3.

⁹⁶ *Serafin Garcia and Karina Garcia Gruber v Bolivarian Republic of Venezuela*, PCA Case No. 2013-3, Award on Jurisdiction, dated 15 December 2014 (*Serafin Garcia*). The tribunal was chaired by Eduardo Grebler and members were Guido Santiago Tawil and Rodrigo Oreamuno.

⁹⁷ Translation to English from *Pugachev*, Award on Jurisdiction, § 421.

the tribunal that rendered the jurisdictional award in that case considered that it was irrelevant whether the investors were nationals of Spain at the time they made their investment in Venezuela. It was sufficient that they had Spanish nationality at the time of the breach. The dissenting arbitrator (Professor Oreamuno), in contrast, considered that:

“There is no doubt that, in order for a person to be deemed an investor and consequently, for his or her investment to be protected [under the BIT], that person must possess the nationality of one of the Contracting Parties when making such investment in the territory of the other.”⁹⁸

Nevertheless, Professor Oreamuno agreed with the majority that the tribunal had jurisdiction because both claimants have made some investments after they had acquired the nationality of Spain.⁹⁹

When this award was challenged at the place of arbitration, before the Paris Court of Appeal, the Court partially set it aside to the extent that it decided that the assets in question were protected investments without considering whether the investors had the nationality of Spain at the date of the investment. The foundation for the ruling of the Paris Court of Appeals was grounded in the difference between assets held and assets invested:

“Considering that according to the ordinary meaning to be given to these terms, the investment is *not an asset simply “held”* by an investor of the other contracting Party – which would exclude any reference to the date of acquisition – but an asset “invested” by an investor of the other contracting Party – which necessarily refers to a condition of nationality of the investor at the date of the investment.”¹⁰⁰

The holding of the Paris Court of Appeal and the dissenting opinion of professor Oreamuno were qualified by the dissenting arbitrator in *Pugachev* as “crystallizing” the investor’s nationality at the time of the investment, and “crystallizing” the investment as French or Russian. Pleading for the recognition of relevance of the change of investor’s nationality, the dissenting arbitrator referred to Article 1 of the BIT which provides that “[a]ny change in the form of investment of assets

⁹⁸ *Serafin Garcia* Decision on Jurisdiction, Dissenting Opinion of Professor Rodrigo Oreamuno, § 9. (originally in Spanish. Translation to English from *Pugachev*, Award on Jurisdiction, § 421).

⁹⁹ Clovis Trevino, Luke Eric Peterson, UNCITRAL tribunal allows dual-national to sue Venezuela; surprise development highlights unintended consequence of recent ICSID denunciation, IAREporter, 8 February 2015.

¹⁰⁰ Court of Appeal of Paris, dated 25 April 2017, in *Bolivarian Republic of Venezuela v Serafin Garcia Armas and Karina Garcia Gruber*, page 8. <https://www.italaw.com/cases/2869>

shall not affect their qualification as an investment within the meaning of this Agreement, provided that this change is not contrary to the laws of the Contracting Party on whose territory or in whose maritime zone the investment is made.”¹⁰¹ It is questionable whether the “change in form of investment of assets” that is regulated in the cited provision should be understood to include *inter alia* the change of the investor’s nationality. Nevertheless, the tribunal, presumably acting on the assumption that it could be so understood, responded that the subsequent nationality change would not be irrelevant because the investor would have to hold French nationality not just at the moment he made his investment, but also at the date of the alleged breach of the BIT and on the date of the commencement of the proceedings,¹⁰² meaning that the loss of French nationality if it had existed at the time of inception would affect the qualification of investments as investments within the meaning of the BIT. They would lose such qualification. The opposite was not true. If the investments could not be qualified as investments within the meaning of the BIT at their inception, then they were presumably not protected, and any further change relating to those investments would be irrelevant for the application of that particular provision regulating the effect of change in form upon a qualifying investment.

As stated above, the Paris Court of Appeals partially set aside the *Serafin Garcia* award on jurisdiction in 2017. Thereupon, the claimants had withdrawn all their claims based on investments that had been made before they became nationals of Spain. The tribunal continued the proceedings on the merits and rendered the final award in favor of claimants for approximately 214 million US dollars in 2019.¹⁰³ In the meantime, the set aside proceedings before the French courts have also continued. The decision of the Paris Court of Appeals was overturned by the Cour de cassation, and the case was remanded to the same court for a new ruling. In June 2020, the *Serafim* jurisdictional award was set aside again by the Paris Court of Appeals, this time in full, on grounds that, according to the ordinary meaning of the Spain-Venezuela BIT, a protected investment was an asset invested by an investor of another contracting party, so that the investment for which the tribunal had jurisdiction *ratione materie* was an investment made by an investor who held the nationality of Spain pursuant to its legislation on the date of making of that investment in the territory of Venezuela. By not verifying whether the condition of nationality of investors was fulfilled at the date when the

¹⁰¹ *Pugachev*, Award on Jurisdiction, Dissenting opinion, § 47.

¹⁰² Both Parties in *Pugachev* agreed that the date of the alleged breach of the BIT and the date of the commencement of the proceedings were relevant for the assessment of nationality. The disagreement existed only on the third date: the date of making the investment as a potential relevant date, so the tribunal dealt only with this issue. *Pugachev*, Award on Jurisdiction, § 389.

¹⁰³ Lisa Bohmer, French Cour de Cassation sees no indication that BIT’s nationality requirement must be met at the time when the investment was made, IAREporter, 1 December 2021.

investments were made in 2001, the tribunal wrongly declared it had jurisdiction for all claims of the spouses Garcia.¹⁰⁴

The judicial battle is not over yet. In the end of 2021, the Cour de cassation annulled the 2020 judgment of the Paris Court of Appeals because „the Court of Appeals violated [article 1520 of the French Code of Civil Procedure] by adding to the treaty a condition that it does not envisage.” This referred to the Court of Appeals reasoning on the critical date for assessment of the investor’s nationality. The case was remanded to the Court of Appeals again for a new decision.

Although the decision of this court is pending, it may already be concluded with some certainty that the *Serafin Garcia* jurisdictional award will be upheld. Although that particular holding was adopted by majority, the award at first sight stands for the proposition that the investor does not have to have nationality of a foreign country and the investment does not have to be foreign at inception. The principal reason seems to be that looking at the ordinary meaning, the wording of the particular BIT does not pose this requirement. However, the French courts were split on this issue, just as the arbitrators in the *Serafin Garcia* tribunal. It should also be remembered that the tribunal unanimously held it had jurisdiction because some new fresh investments were made after the acquisition of foreign nationality. It may be that the difference with *Pugachev* and *Uzan* lies only in this circumstance because there were no new fresh investments there. A further difference with *Uzan* that may be noted is that the effect of new fresh investments was assessed differently. The tribunal in *Uzan* would have awarded compensation only for the new investments made after the change of nationality, whereas the *Serafin Garcia* tribunal would have awarded compensation both for the initial and for the new investments, if it was not for the claimants renouncing their claims based on initial investments that were made while they were still not nationals of Spain.

6.2. Other cases

In contrast to the *Serafin Garcia* award which seemed relevant because the arbitrators in *Pugachev* were in disagreement precisely about the relevant time for assessment of the claimants’ nationality, several other awards that were relied on by the claimant were held by the *Pugachev* tribunal to lack relevance. These were the cases *Pac Rim v. Salvador*, *Aguas del Tunari v. Bolivia*, *Vladislav Kim v. Uzbekistan*, and *Pey Casado v. Chile*. The claimant in *Pugachev* invoked them, because the tribunals in those cases purportedly assessed the claimants’ standing with reference to only two dates: the date of the breach of the BIT and the date of the commencement of the proceedings. The *Pugachev* tribunal distinguished those cases on two grounds: on the one hand, they did not analyze the issue whether the

¹⁰⁴ Judgment of Paris Court of Appeal, 3 June 2020 in *Bolivarian Republic of Venezuela v Serafin Garcia Armas and Karina Garcia Gruber*, § 51. <https://www.italaw.com/cases/2869>

relevant treaty also required the investor to have the nationality of the contracting party at the moment of making the investment; on the other hand, none of the treaties in question contained a provision similar to the one contained in the France-USSR BIT, requiring the investor to be permitted by the law of the contracting party of his nationality to make the investments in the territory of the other contracting party.¹⁰⁵

The majority also rejected the idea that the issue in this case was whether the investment itself should be considered French or Russian and insisted on the proposition that the issue was limited to the investor's nationality at all three relevant dates. In that vein, the tribunal refused to discuss the Crimean cases initiated against the Russian Federation because they did not seem to be comparable. According to the majority, the issue in those cases was not the nationality of the investor, but the status of the investments.¹⁰⁶

Another case where the tribunal held that the time of breach of the BITs and the date of consent to arbitration are relevant is *Bahgat v. Egypt*.¹⁰⁷ The holding was confirmed by the Hague District Court.¹⁰⁸ However, despite some opinions to the contrary,¹⁰⁹ the case cannot be treated as good authority on whether the time of making the investment may also be relevant because (a) the parties were in agreement on the relevant dates for establishing the Tribunal's jurisdiction *ratione personae*¹¹⁰ and (b) the claimant was a Finnish national according to Finish law at the time he made the investment in question. The claimant also held Egyptian nationality at the time he made his investments, but his dual nationality was no impediment to jurisdiction, according to the tribunal.¹¹¹

7. CONCLUSION

Pugachev, Uzan and *Serafin Garcia* have in common that the diversity between the investor and the host state existed at the date of initiating the action, but not at the date of making the investment. In *Uzan*, there was no suggestion of treaty shopping involved,¹¹² so the tribunal could not reject jurisdiction *ratione*

¹⁰⁵ *Pugachev*, Award on Jurisdiction, §§ 433-434.

¹⁰⁶ *Pugachev*, Award on Jurisdiction, § 440.

¹⁰⁷ Mohamed Abdel Raouf Bahgat v The Arab Republic of Egypt, Decision on Jurisdiction, (Baghat)

¹⁰⁸ Judgment of the Hague District Court rendered on 8 July 2020 (accessible only in Dutch: at <https://www.italaw.com/cases/8322>)

¹⁰⁹ L. Bohmer, French Cour de Cassation sees no indication that BIT's nationality requirement must be met at the time when the investment was made, p. 4.

¹¹⁰ *Bahgat v The Arab Republic of Egypt*, Decision on Jurisdiction, § 138 (*Baghat*).

¹¹¹ *Baghat*, Decision on Jurisdiction, § 227.

¹¹² In *Uzan*, para. 153 the tribunal expressly stated that the claimant did not engage in treaty shopping.

personae on grounds of lack of good faith. In *Pugachev* the claims of abuse of process were made by the respondent but were ultimately not examined.¹¹³ In *Serafin* some additional investments were made after the claimants acquired foreign nationality which persuaded the tribunal that the lack of foreign nationality at the inception of investment was irrelevant. In all three cases the tribunals decided to grapple directly with the issue of the effect of change of the investor's nationality or residence after the date the investment was made. The answers they have provided are not unison. In all three of them, the date of making the investment was in some way relevant for assessing the requisite diversity. For obtaining protection under the relevant treaties for the investment already made, it was insufficient that the investor acquires the required foreign nationality after making the investment. He had to make some new fresh investments after the date of acquisition of foreign nationality. Also, all three awards confirm that the investor must have the required foreign nationality at all three dates: the date of making the investment (or at least the date of making a new fresh investment), the date of the breach of the relevant treaty and the date of commencement of the arbitration.

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¹¹³ *Pugachev*, Award on Jurisdiction, §§ 478-479.

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Релевантни датум за оцену припадности улагача у инвестиционим споразумима

Сажетак: У више новијих арбитражних одлука о надлежности у инвестиционим споразумима спорно је било ишњање релевантног датума за оцену припадности одређеног улагача. Арбитражи су били једнодушни у оцени да улагач мора имати страну припадност у тренутку када је дошло до повреде међународног уговора и у време покретања арбитраже, а били су подељени у односу на ишњање да ли је година припадности улагача у тренутку улагања. Мада се чини да уобичајени смисао формулација употребљених у већини БИТ-ова подразумева да мора да постоји страна припадност улагача у време када он улаже средства, ове наизглед јасне формулације су изгледа погодне за различита тумачења. Аутор се у овом раду бави разлозима и околностима које су навеле арбитраже да усвоје различите ставове у односу на датум улагања као објективно релевантан датум за оцену припадности улагача на основу инвестиционих уговора.

Кључне речи: инвестициони споразуми, инвестициона арбитража, релевантни датум, припадност улагача.

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