

Investment Protection and Government Contracts

Nationality requirements

LUIS GONZÁLEZ GARCÍA

Nationality requirements in state contracts: The Investor's identity

I.

Place of incorporation OK as long as:

- 1) the government is not misled about the corporate structure
- 2) No laws and regulations are violated
- 3) Is made clear in the preamble of the contract

Nationality requirements in state contracts

Tokios v Ukraine

A control test was not the appropriate test when determining the nationality of Tokios as the BIT did not require such a test.

Arguments that Tokios lacked substantial business activity in Lithuania were irrelevant as this was not a criteria for nationality under the BIT.

Nationality requirements in state contracts

II.

If the contract requires the incorporation of a special-purpose company in the host country:

- 1) ICSID arbitration clause in the contract will give presumption that is foreign controlled.
- 2) explicit wording that is controlled by nationals of X country

Nationality requirements in state contracts: some examples

“it is hereby agreed that (Company X) is a juridical person of (the host State) it is controlled by nationals of (Y Contracting State) and shall be treated as a national of Y for the purposes of the ICSID Convention”

Example in case of multiplicity of investors

“It is hereby stipulated by the Parties that CONTRACTOR parties are nationals of France (*Le Croix SA*), Germany (*Ukraine Offshore Limited*), UK (*Ultramar Limited*), it being understood and agreed that, for the purpose of Article 25(2)(b) of the ICSID Convention, *Ukraine Offshore Limited* shall, because of foreign control by nationals of Germany, be regarded as a national of Germany”

In case of restructuring

Does the host state needs to be informed about the restructuring?

- ◆ Mobil Corporation & Ors v Venezuela (Decision on Jurisdiction, 10 June 2010) says the host state does not need to be informed
- ◆ Millicom International v Senegal (Decision on Jurisdiction, 16 July 2010) says the host state needs to be informed of the restructuring

Nationality requirements in state contracts: In case of restructuring

Autopista v Venezuela:

Clause 64 of the Concession: ICSID arbitration if the majority of Aucoven's shareholders came to be nationals of a Contracting State to ICSID Convention, in which case Venezuela agreed to treat Aucoven as a 'National of another Contracting State' for purpose of Article 25(2)(b)

Clause 7: required Venezuela's permission for Aucoven's shares to be transferred.



Nationality requirements in state contracts: In case of restructuring

Venezuela argued:

- ◆ Aucoven was under the control of a Mexican national (ICA Holding), not a US national (Icatech).
- ◆ Icatech was merely a corporation of convenience and restructuring was an abuse of the system in order to gain access to arbitration



Nationality requirements

The Aucoven Tribunal held:

Given that the parties had defined “foreign control” by reference to shareholding, effective or ultimate control of Aucoven was not relevant

Nationality requirements: chain of nationality

Finally, in case there is a transfer of shares make sure the continuous chain of nationality is not broken during the relevant time.

Nationality requirements: The State's identity

The test is whether the Government showed its intent to be party to the contract.

If powers have been delegated to state entities a contractual ICSID tribunal is unlikely to assume jurisdiction over the Government.