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ICSID Tribunal declines personal jurisdiction over dual national under Egypt-UAE BIT

Gordon Blanke (Blanke Arbitration LLC) · Monday, December 1st, 2014

In an Award on Jurisdiction rendered earlier this year under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") in ICSID Case No. ARB/11/7 – *National Gas S.A.E. v. Arab Republic of Egypt* (a copy of which is electronically available on the official Investment Treaty Arbitration website at https://www.italaw.com/cases/2494), a tribunal composed of Mr. V.V. Veeder QC as President, The Honorable L. Yves Fortier QC and Prof. Brigitte Stern declined jurisdiction *ratione personae* over an Egyptian corporate claimant, National Gas S.A.E., a private joint stock company incorporated under the laws of the Arab Republic of Egypt (the "Claimant") purportedly controlled by an Egyptian-Canadian dual national. The Respondent was the Arab Republic of Egypt ("Egypt") and the dispute concerned the purported expropriation through denial of justice and abuse of process of (i) the Claimant's right to arbitrate and (ii) an award rendered under the rules of the Cairo Regional Centre for International Commercial Arbitration ("CRCICA") in relation to a contractual dispute between the Claimant and the Egyptian Petroleum Corporation ("EGPC") arising from a Concession Agreement concluded between the Claimant and EGPC on 6 January 1999.

By way of background, the Claimant submitted its claim on the basis of the ICSID Convention and the Treaty between Egypt and the United Arab Emirates ("UAE") on the Encouragement, Protection and Guarantee of Investments of 11 May 1997, which entered into force on 11 January 1999 (the "Egypt-UAE BIT"). For the avoidance of doubt, both Egypt and the UAE also have been Contracting States of the ICSID Convention since 1972 and 1982 respectively. Pursuant to Article 10(3) of the Egypt-UAE BIT,*"[i]n the event that it becomes difficult to reach a satisfactory resolution through local courts, each Contracting State agrees to the submission of the dispute which arises between it and an investor from the other Contracting State to the International Centre for Settlement of Investment Disputes (referred to hereinafter as the "Centre") to be settled through conciliation or arbitration by virtue of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which was presented in Washington on 18 March 1965 to be signed (referred to hereinafter as the "Convention"),* […]." (translation as per the text of the Award on Jurisdiction) Further, pursuant to Article 10(4) of the Egypt-UAE BIT, *"[i]n case of the existence of a juridical person that has been registered or established in accordance with the law in force in a region [territory] ["iqlim" in Arabic, meaning a province or like territory] following a Contracting State ["tabai" in Arabic, meaning linked to or subject to a Contracting State], and an investor from the other Contracting State owns the majority of the shares of that juridical person before the dispute arises, then such a juridical person shall, for the*

purposes of the Convention, be treated as an investor of the other Contracting State, in accordance with Article 25(2)(B) of the Convention." (translation and square-bracketed additions as per the text of the Award on Jurisdiction) Article 25 of the ICSID Convention provides in pertinent part:

> "(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 [for conciliation or arbitration] was registered[…], but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

Since 2006, ninety percent of all shares in the Claimant have been owned by CTIP Oil & Gas International Limited ("CTIP"), a legal person incorporated under UAE law in the Jebel Ali free zone of the Emirate of Dubai, UAE. CTIP, in turn, has, at all material times, been wholly owned by another legal person, equally incorporated under UAE law in the Jebel Ali free zone, REGI, which in turn has been wholly owned by a certain Mr. Ginenea, a dual national of both Egypt and Canada.

In light of the foregoing, the Tribunal held that it did not have proper personal jurisdiction over the Claimant. It based its finding on the Claimant's failure to establish that the Respondent had properly consented to arbitral jurisdiction in the presently prevailing circumstances, in particular taking account of the restrictive wording of Article 10(4) of the Egypt-UAE BIT read together with Article 25(2)(b) of the ICSID Convention (see paras 116 et seq., Award on Jurisdiction). In the Tribunal's view, the limitation to *"a national of another Contracting State"* in the terms of Article 25 of the ICSID Convention included within its scope *"dual nationals of the respondent Contracting State and of another State"* (see paras 122 and 123, Award on Jurisdiction). According to the Tribunal,

> "there is a significant difference under Article 25(2)(b) between (i) control exercised by a national of the Contracting State against which the Claimant asserts its claim and (ii) control by a national of another Contracting State. The latter situation violates no principle of international law and is consistent with the text of the ICSID

> Convention. On the other hand, the former situation violates the general limitation in Article 25(1) and the first part of Article 25(2)(b) of the ICSID Convention in regard to both Contracting States and nationals (including dual nationals). In other words, the latter is consistent with the object and purpose of the ICSID Convention; but the former is inconsistent: it would permit the use of the ICSID Convention for a purpose for which it was clearly not intended and it would breach its outer limits. As already noted above, Article 25(2)(b) operates only as a qualified exception to the general limitation to ICSID jurisdiction in Article 25: a sardine cannot swallow a whale." (see para. 136, Award on Jurisdiction)

More specifically, taking account of established arbitral case law on the subject-matter, including in particular the decisions on jurisdiction taken in *Vacuum Salt* (see ICSID Case No. ARB/92/1 – *Vacuum Salt Products Ltd. V. Republic of Ghana*, Award dated 16 February 1994) and *Autopista* (see ICSID Case No. ARB/00/5 – *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction dated 27 September 2001), the Tribunal considered the application of two complementary tests to the question of jurisdiction under the Egypt-UAE BIT and the ICSID Convention, one subjective and the other one objective:

> "The subjective test is raised by the words 'the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention'. In the Tribunal's view, this subjective test is met by Article 10(4) of the [Egypt-UAE BIT] by treating the Claimant as a national of the UAE, the latter being a Contracting State to the ICSID Convention. Article 10(4) refers expressly to Article 25(2)(b) of the Convention; the Claimant is a juridical person registered or established in accordance with the laws of Egypt; and CTIP owns a majority of the Claimant's shares.
>
> The objective test is raised by the words 'because of foreign control'; and it is not met simply by meeting the subjective test: these two tests are not the same. As was decided in *Vacuum Salt*, '[…] the parties' agreement to treat Claimant as a foreign national "because of foreign control" does not *ipso jure* confer jurisdiction. The reference in Article 25(2)(b) to "foreign control" necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke same no matter how devoutly they may have desired to do so […]'. As was likewise decided in *Autopista*: '[…] locally incorporated companies may agree to ICSID arbitration subject to two requirements: "[t]he parties have agreed to treat the said company as a national of another Contracting State for the purposes of this Convention; and [t]he said company is subject to foreign control'. Accordingly, the Tribunal decides that this objective test is not satisfied by mere agreement of the Parties in this case: 'foreign control' must be established objectively." (see paras 132 and 133, Award on Jurisdiction, original footnotes omitted; italics in the original)

Applied to the facts at hand, the Tribunal concluded:

> "The Tribunal decides that the factual evidence shows unequivocally that CTIP is a

> shell company of UAE nationality wholly owned by REGI, which is also a shell company of UAE nationality wholly owned by Mr. Reda Ginena, an Egyptian national (who is also a Canadian national). Share ownership is not, of course, conclusive proof of control; but, in this case, it is clear that in fact the controller of both CTIP and REGI is Mr. Ginena, with these two UAE companies acting as holding companies for Mr. Ginena's 90% indirect interest in the Claimant, which have to be added to the 5% direct interest of Mr. Ginena, which were not held through these companies. Indeed, the Claimant agrees that Mr. Ginena controls CTIP and that CTIP controls the Claimant […]. Each of these two UAE companies exists independently from Mr. Ginena in juridical theory, but not in practice. Indeed, REGI is clearly named after Mr. Reda Ginena. In commercial reality, as a fact, Mr. Ginena controls the Claimant." (see para. 142, Award on Jurisdiction; italics in the original)

In the Tribunal's further estimation,

> "[a]t the relevant time, when the Claimant submitted its Request for Arbitration to ICSID, Canada was not a Contracting State to the ICSID Convention; and Mr. Ginena was and is not a party to this arbitration. Moreover, a bilateral treaty between two States, even if that treaty is incorporated into their national laws, cannot modify the text of a multilateral treaty, such as the ICSID Convention. Hence, Mr. Ginena's deemed Canadian nationality cannot be a factor under Article 25(2)(b) the ICSID Convention; and for that purpose, he was and remains a dual national of Egypt and Canada. In any event, Mr. Ginena is not the Claimant (nor Mr. Rasikh); the Claimant advances its claim under the Treaty between Egypt and the UAE (not the Egypt–Canada BIT); and the Tribunal cannot therefore derive any part of its jurisdiction in the present case from the Egypt–Canada BIT. However, the Tribunal refrains from expressing any view as to whether Mr. Ginena could advance any claim against Egypt under the Egypt–Canada BIT." (see para. 148, Award on Jurisdiction)

By way of conclusion, the Tribunal's interpretation of Article 25(2)(b) of the ICSID Convention and its application to dual nationals has to be endorsed: It adequately takes account of relevant precedent and the generally understood prohibition of dual nationals to qualify as "nationals of another Contracting State" within the meaning of that Article.

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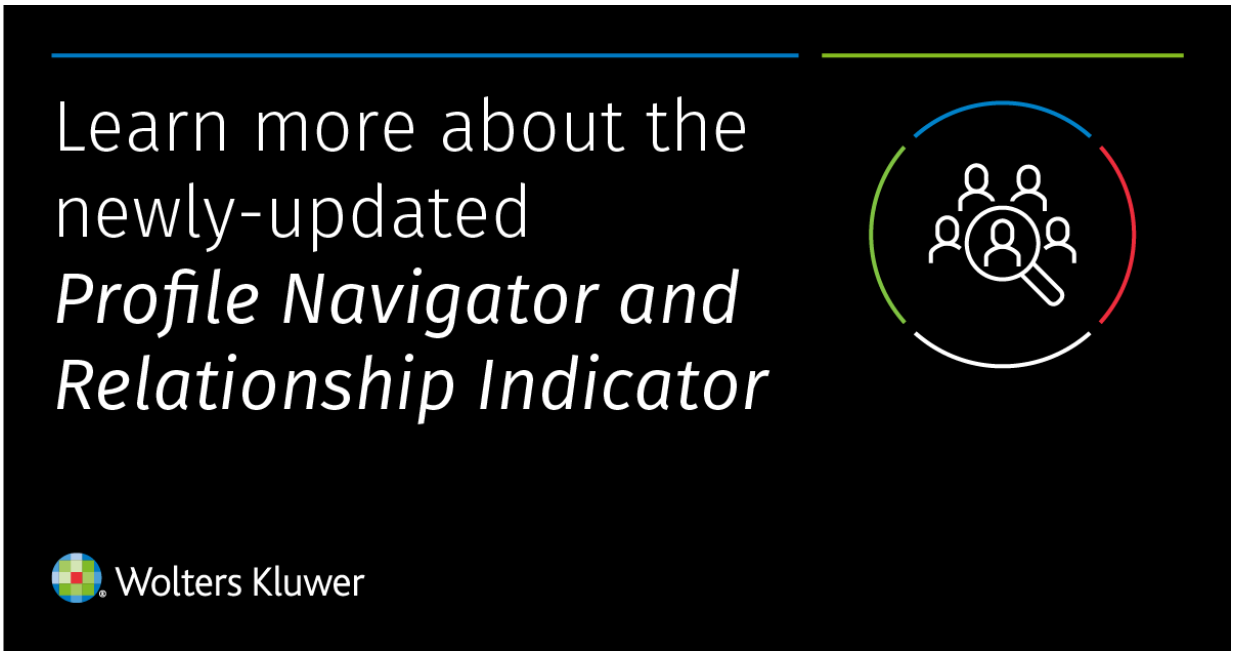

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