

07_Arbitration in Investment Disputes_GI[english]

The 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the Washington Convention") has established a mechanism of settling investment disputes which might arise between an investor and the State in which the investment was made. In accordance with the Washington Convention, the International Centre for Settlement of Investment Disputes has been established with its seat at the principal office of the International Bank for Reconstruction and Development to provide facilities for two types of proceedings: conciliation and arbitration proceedings.

The Washington Convention was ratified with a law enacted by the National Assembly and entered into force for Bulgaria on 13 May 2001. By the mere fact of the ratification, acceptance or approval of the Convention a Contracting State cannot be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration. The conclusion of bilateral and multilateral investment protection and promotion agreements tends to replace the conventional diplomatic mechanism for the State to provide protection to persons and legal entities that are investors in other States. Therefore the agreement on arbitration is typically included in a bilateral investment protection and promotion agreement between Contracting States to the Convention.

The explicit consent with the submission of any particular investment dispute to settlement in accordance with the Washington Convention is the first essential prerequisite for the applicability of proceedings. The consent to arbitration should be given clearly and unambiguous and the option for unilateral withdrawal is explicitly ruled out by the Convention.

The Arbitral Tribunal examines the existence or absence of consent to arbitration in the light of all existing international agreements or treaties between the State of which the claimant is a national and the State which is the respondent. In a bilateral investment protection agreement, the consent to arbitration is typically set out in a separate clause stating that all disputes arising out of or in relation to the investment which is the subject-matter of the agreement shall be submitted to arbitration. Some doubt as to whether the consent is clear and unambiguous could emerge in the cases in which arbitration is reached by means of

reference, i.e. where the bilateral agreement does not contain an arbitration clause, unlike the international agreement to which the State which is the respondent and the investor's State are parties. In its case law on jurisdiction, the Tribunal holds consistently that consent to arbitration on grounds of reference to a document containing an arbitration clause only where the document is given in writing and the reference makes this document an integral part of the agreement. The reference should make it clear that the parties express their unambiguous will to incorporate the arbitration clause in the agreement.

The Tribunal has rules also on the question whether the most-favoured-nation clause could be invoked to refer to existing agreements or treaties to which the State which is the respondent in the dispute and the investor's State are parties. The most-favoured-nation treatment builds on the principle of equal treatment of foreign investors under the domestic laws (there exist explicit clauses to this effect in the North American Free Trade Agreement (NAFTA) and the General Agreement on Trade in Services (GATS)).

Depending on the wording of the most-favoured nation clause, it could be decided to what extent it would be possible to infer an explicit consent to arbitration. For instance, a clause of equal treatment "in all respects" could not provide valid grounds for the existence of consent to arbitration. On the other hand, even a clear and specific most-favoured-nation clause in a bilateral agreement would not necessarily be incorporated into another one due to the specific nature of the relations which are the subject-matter of the different agreements. The Tribunal upholds that in negotiating dispute resolution clauses in a bilateral agreement, the parties do not give their consent to expanding the scope of such clauses through incorporating accords reached under other agreements. In relation to the incorporation of a most-favoured-nation clause from one agreement into another, the Tribunal has examined the question on the absence of an objective criterion to the assessment of which arrangement is more favourable. If a specific agreement envisages arbitration for all investment disputes, while another one provides for arbitration only in some particular cases (e.g. the amount of compensation in the event of expropriation), the answer is rather easy. It would be different if the two agreements provided for different types of arbitration (arbitration under the Washington Convention and ad hoc arbitration) and there was no existing legal mechanism for a State to be obligated to replace an arbitration clause, wholly

or in part, on grounds of a most-favoured-nation treatment clause, unless it had given its express consent to do so. A seminal decision of the Tribunal is that on objections to jurisdiction in the case of Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7. The Tribunal held that there was consent to refer the dispute to arbitration on the basis of the most-favoured-nation clause set out in the Spain-Chile Bilateral Investment Treaty (BIT), although the Argentine-Spain BIT provided that the dispute could be submitted to arbitration if the domestic court had not rendered a decision on the merits of the case within a period of eighteen months.

However, in the case of Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal (ICSID Case No. ARB/15/21), the Tribunal ruled that the complete absence of consent to arbitration could not be replaced. In that case, the Republic of Senegal had BITs with Denmark and the United Kingdom and therefore offered arbitration to the nationals of those countries. But Senegal did not have a BIT with Luxembourg and therefore did not offer any arbitration to the nationals of that country. Even if Senegal was in breach of its obligation to observe the principle of “most-favoured-nation” treatment under GATS, the Tribunal considered that the absence of express consent on part of Senegal ruled out the jurisdiction of the Tribunal in that dispute.

In the case of Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon (ICSID Case No. ARB/15/18), the Tribunal interpreted the clause in the bilateral investment promotion treaty in connection with the consent to arbitration. Having established that the parties had agreed for the upcoming investments to be made under the laws of Cameroon and, at the same time, to submit all investment disputes to arbitration under the Washington Convention, the Tribunal ruled that the consent to arbitration referred only to the investments made under the laws of Cameroon rather than those in contravention to those laws (as was the case). The Tribunal invoked the general rule of the Vienna Convention on the Law of Treaties in accordance with which an arbitral tribunal had no right to add criteria other than those that the parties had included in their agreement. It ruled that if it was established that the claimant had violated the laws of Cameroon, that would lead to absence of substantive jurisdiction to settle the dispute and therefore declined jurisdiction.

Another prerequisite for the applicability of arbitration under the Washington Convention is

that the dispute has to be an investment dispute. Bilateral investment promotion and protection agreements almost always contain a definition of the concept but it could also be derived from the scope of the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID or “the Centre”) as set out in the Washington Convention. The jurisdiction of the Centre extends to any legal dispute arising directly out of an investment, between a Contracting State and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

The case law of the Tribunal reveals that the question whether a party (a person or an entity) can be qualified as “a national of another Contracting State” becomes crucial before the case is heard on its merits.

In its award in the case of Hussein Nuaman Soufraki v. United Arab Emirates (ICSID Case No. ARB/02/7), the Tribunal held that the claimant Mr. Soufraki did not meet the nationality requirement since he failed to submit convincing proof that he was an Italian national. The Tribunal disused the facts, i.e. the claimant was an Italian national in the past, then he lost that nationality by applying for Canadian nationality, after which he again resided in Italy but failed to prove that he met the requirement of residence in Italy for a period of no less than one year prior to the time relevant to the dispute, and therefore the Tribunal declined jurisdiction.

With regard to the nationality criterion, the Tribunal makes a detailed discussion of facts in order to give an answer to the question whether the nationality is effective. The case of Eudoro A. Olguín v. Republic of Paraguay (ICSID Case No. ARB/98/5) was brought by Mr. Olguín who held both Peruvian and United States nationalities and alleged that Paraguay had violated its obligations under the Convention between Peru and Paraguay on the Reciprocal Promotion and Protection of Investments. In its decision on jurisdiction, the Tribunal came to the reasoned conclusion that the claimant had dual nationality and that both nationalities were effective. The award makes the point that what mother countries understand regarding, for example, the person’s exercise of political or civil rights, the responsibility for his diplomatic protection and the importance of his registered address for determining any such rights has no bearing on the effectiveness of the nationality. The Tribunal held that the effectiveness of the claimant’s Peruvian nationality provided sufficient grounds to determine

his capacity of an investor enjoying the rights set out in the Peru-Paraguay bilateral agreement.

Different agreements contain different criteria for a company to qualify as an investor in terms of its nationality. Some agreements contain restrictions in view of the company's ownership or control. Thus in the case of *Société Ouest Africaine des Bétons Industriels v. Republic of Senegal* (ICSID Case No. ARB/82/1) the Tribunal discussed the equity and control of the company which was the claimant to justify the decision on jurisdiction. A Panamanian company held shares of the claimant company and Panama was not a Contracting State to the Washington Convention. The majority shareholder was a Belgian company and Belgium was a party to the Convention. Therefore the Tribunal accepted jurisdiction to rule on the merits of the case.

In each case, the Tribunal makes a decision on jurisdiction, taking into account these criteria, i.e. consent to arbitration, nationality and nature of the dispute. The arbitral award of the Tribunal on the dispute between the investor and the State is final and enforceable.

The Republic of Bulgaria has been the respondent in a total of seven cases brought to arbitration under the Washington Convention. Three of the proceedings were completed: *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24) ended with an award rejecting the claims; *Accession Eastern Europe Capital AB and Mezzanine Management Sweden AB v. Republic of Bulgaria* (ICSID Case No. ARB/11/3) ended with an order taking note of the discontinuance of the proceeding; and *Novera AD, Novera Properties B.V. and Novera Properties N.V. v. Republic of Bulgaria* (ICSID Case No. ARB/12/16) was discontinued. The other four proceedings are pending.