

Nationality Requirements for Investors in ICSID Arbitration
The Award in *Soufraki v. The United Arab Emirates*

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A new ICSID award has been authorised for public release by the Respondent. The case of *Soufraki v. The United Arab Emirates* (ICSID Case No. ARB/02/07) (L.Y. Fortier, *President*; A. El Kholy, S.M. Schwebel, *Arbitrators*) is mostly interesting for its facts, but it is also notable as the first ICSID arbitration (of which I am aware) in which an individual investor has been denied jurisdiction to bring his or her claims on account of failure to satisfy the nationality requirements of Article 25(2)(a) of the ICSID Convention.

In 2000, Mr. Soufraki entered into a Concession Contract with the Dubai Department of Ports and Customs which purported to award to him in his personal capacity a concession for a period of 30 years to develop, maintain and operate the Port of Al Hamriya. The Award of 7 July 2004 does not describe or address the circumstances which led Mr. Soufraki to consider that he had cause for complaint either against The Dubai Department of Ports and Customs or the UAE, however in May 2002 he filed with ICSID a Request for Arbitration against the UAE in which he sought to invoke the protection afforded by the UAE to Italian citizens under the 1997 UAE-Italy bilateral investment treaty (the "BIT").

In support of his claim to be an Italian national Mr. Soufraki produced no less than two Italian passports, five Certificates of Italian nationality issued by Italian authorities and a letter from the Ministry of Foreign Affairs of Italy confirming his right to have recourse to the BIT on the basis of his Italian citizenship. The UAE, however, rejected Mr. Soufraki's claims to be an Italian national. It appears from the Award that UAE's principal objection was that in 1991 Mr. Soufraki had acquired Canadian nationality without taking the steps necessary under Italian law to preserve his Italian nationality, with the result that he lost his Italian nationality in 1991 and was not therefore a national of Italy at the relevant times necessary for ICSID to have jurisdiction under Article 25 of the ICSID Convention. In the alternative the UAE also argued, citing *inter alia* the *Nottebohm* decision, that if the Tribunal were satisfied that Mr. Soufraki was indeed a national of Italy on the relevant dates, the Tribunal still lacked jurisdiction because Mr. Soufraki lacked dominant or effective Italian nationality, which the UAE asserted was required in treaty arbitration as a matter of international law.

Mr. Soufraki responded that the fact that the Italian authorities were prepared to treat him as an Italian national must be sufficient for the BIT and ICSID Convention purposes and the Tribunal was not therefore obliged or permitted to investigate the matter further. However, Article 41(1) of the ICSID Convention provides that an ICSID tribunal is "the judge of its own competence" and the Tribunal accordingly held that it was not prevented from investigating matters to satisfy questions of its jurisdiction, the more so because for the purposes of an international tribunal's jurisdiction Certificates of Nationality do not constitute conclusive proof but merely *prima facie* evidence of nationality. Upon cross-examination of Mr. Soufraki it was established that the documents in question had been issued by Italian authorities without full knowledge of the relevant facts, particularly that Mr. Soufraki had lost his Italian nationality in 1991. Accordingly, such documents were therefore unreliable. It was admitted that Mr. Soufraki had in fact held Italian nationality for some time, and the Tribunal said it "accepts and respects the sincerity of Mr. Soufraki's conviction that he was and remains a national of Italy". However, after receiving expert evidence on the point, the Tribunal held that Mr. Soufraki had automatically lost his Italian nationality by operation of Article 8 paragraph 1 of Italian Law No. 555 of 1912 when in 1991 he spontaneously acquired Canadian citizenship and established his residence there.

It had been open to Mr. Soufraki under Italian law to reacquire his lost citizenship by timely submission of a relevant declaration, and he would have acquired it in any event one year after the date at which he re-established his residence in Italy provided this could be proved. However, Mr. Soufraki was an international business man who by and large preferred to reside in Monaco. He had never made an application to reacquire Italian citizenship and he was unable on the facts to show that he had re-established residence in Italy at any time after 1991.

Mr. Soufraki was unable to prove that he was an Italian national on the relevant dates and was not, therefore, within the class of investors with whom the UAE had consented to ICSID jurisdiction. The Tribunal therefore concluded that "the present dispute falls outside its jurisdiction under Article 25(1) and (2)(a) of the ICSID Convention and Article 1(3) of the BIT." The Tribunal did not need to consider the question raised by the UAE as to whether the principle of dominant and effective nationality as asserted by the UAE either existed or applied in the given circumstances.

In today's world there are many international businesspeople (like Mr. Soufraki) whose business interests span different countries, who travel widely, spend periods of time in different countries and who may possess the nationalities of more than one State. Therefore although the Tribunal was not called upon to rule on the question for the purposes of the Award (having found that Mr. Soufraki was not Italian and therefore not a dual national), the jurisprudence of ICSID and investment treaty arbitration would have been enriched if this esteemed Tribunal had also considered the UAE's alternative argument as to whether investment treaty arbitration encompasses a rule of effective nationality in the case of dual nationals, as summarised by the Tribunal:

"An alternative argument advanced by the Respondent was that, even if Mr. Soufraki should be found by the Tribunal to have been a national of Italy at the relevant dates, his dominant nationality was then not Italian but Canadian and hence his Italian nationality should not be treated as effectively Italian for purposes of an action under the Italy-UAE BIT."

A final interesting issue was raised in almost a postscript to the Award when the Tribunal remarked:

"had Mr. Soufraki contracted with the United Arab Emirates through a corporate vehicle incorporated in Italy, rather than contracting in his personal capacity, no problem of jurisdiction would now arise. But the Tribunal can only take the facts as they are and as it has found them to be."

This seemingly simple solution highlights the disparity between the jurisdictional requirements for individual investors and those applicable to corporations in investment treaty arbitration. One might ask whether the mischief aimed at in cases such as *Nottebohm* (which concerned a nationality acquired through naturalisation "in exceptional circumstances of speed and accommodation") is not broadly similar to the situation where an investor seizes upon a \$100 shelf company in a foreign jurisdiction to use as an investment vehicle so that it might attract investment treaty protection? This remark also brings to mind aspects of the eloquent Dissenting Opinion of 29 April 2004 in the case of *Tokios Tokelès v. Ukraine* (Case No. ARB/02/18) (P. Weil, *President*; P. Bernardini, D.M. Price *Arbitrators*) in which the President of the Tribunal declares himself unable to agree with the majority's Decision on Jurisdiction, which he believes departs from the object and purpose of the ICSID Convention.

Most investment treaties are of course designed to create a mechanism for direct recourse to arbitration against the host State Party, independent of any need for further intervention by the investor's home State – to the point where the bond of nationality seems to be diminished in significance to a mere formality. However, in entering into investment treaties States generally act upon a desire to create favourable conditions for greater economic cooperation between the States Parties in the mutual hope that this will increase their prosperity. These goals might suggest the need for a bond of some substance between an investor and the "home" State under whose investment treaty it seeks to gain protection.