INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

MARKO MIHALJEVIĆ

Claimant

and

REPUBLIC OF CROATIA

Respondent

ICSID Case No. ARB/19/35

CONCURRING OPINION OF MS. MARIA VICIEN-MILBURN

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19 May 2023

1. I concur entirely with the Tribunal's decision and with all aspects of the reasoning set forth in the Award. That said, I write separately to briefly address the question of abuse of process, to which the Parties (and the Respondent's legal expert, Prof. Dr. Christoph Schreuer)[1] devoted significant attention. As noted at paragraph 137 of the Award, "the facts strongly suggest that the sole reason for the Claimant's application to relinquish his citizenship was so that he could pursue arbitration against the Respondent." In my view, it follows that, even if the Tribunal had accepted the Claimant's position that he was no longer a national of Croatia at the relevant time under Article 25 of the ICSID Convention, his institution of this arbitration would still have amounted to an abuse of process rendering his claims inadmissible.

2. As far as I am aware, no other investor-State tribunal has been called upon to decide whether it constitutes an abuse of process for a claimant to *renounce* nationality in order to gain access to international arbitration,[2] with most of the prior cases on the record concerning situations in which a claimant had *acquired* nationality through a corporate restructuring. However, I am of the view that, in the context of the doctrine of abuse of process, this is a distinction without a difference. As explained by the tribunal in *Orascom v. Algeria*, the doctrine is not limited exclusively to the corporate restructuring context: "[A]s a 'general principle applicable in international law as well as in municipal law', the prohibition of abuse of rights may equally apply in contexts other

[1] Schreuer Legal Opinion.

[2] I am aware of the awards in *Pey Casado v. Chile* (Ex. RL-052, *Victor Pey Casado and Foundation "Presidente Allende" v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008 (excerpt) ("***Pey Casado v. Chile***")) and *Littop Enterprises v. Ukraine* (Ex. RL-077, *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine*, SCC Case No. V 2015/092, Final Award, 4 February 2021 ("***Littop Enterprises v. Ukraine***")). While the tribunal in *Pey Casado* dealt with a situation in which the claimant renounced his nationality, the renunciation was held to have been validly effected under Chilean law, before the institution of ICSID proceedings and the tribunal assumed jurisdiction (Cf. Ex. RL-052, *Pey Casado v. Chile*, paras. 322-323). Furthermore, the award was rendered before the development of the doctrine of abuse of process in the context of corporate restructuring (Cf. Ex. RL-018, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 ("***Phoenix v. Czech Republic***")).

In *Littop Enterprises v. Ukraine*, two claimants who were nationals of Ukraine and Israel acquired Cypriot citizenship in order to shield themselves from the application of Article 17(1) of the Energy Charter Treaty ("**ECT**") which permits the denial of benefits to a legal entity owned or controlled by nationals of a third state. In that case, the tribunal declined jurisdiction holding, *inter alia*, that "a problem arises when such nationality has been acquired only for the purpose of gaining access to the benefits of the said treaty [the ECT]" (Ex. RL- 077, *Littop Enterprises v. Ukraine*, paras. 608-609). In his report, Professor Schreuer posits that "…in *Littop*, a tribunal has confirmed that the same principle [that applies to corporate restructuring] applies to the nationality of individuals." Schreuer Legal Opinion, para. 128.

than the one just mentioned."[3] What matters, as held by the tribunal in *Phoenix v. Czech Republic*, is that "[t]he Tribunal has to prevent an abuse of the system of international investment protection under the ICSID Convention."[4] That tribunal went further in stating: "It is the duty of the Tribunal not to protect such an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs."[5]

3. Such abuse may, in my view, arise equally in the case of acquisition or renunciation of nationality, since both entail an alteration of form designed to obtain a right that would not otherwise exist. What matters is the timing of the *change* in nationality of the claimant, not whether such nationality is shed or acquired, or whether the claimant is a physical or legal person. In this sense, the central holding of the tribunal in *Philip Morris v. Australia* applies equally in the case at hand: "[T]he initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has ***changed*** its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable"[6] (emphasis added). The only necessary adjustment to this well-known holding is to replace the words "corporate structure" with "nationality." Yet even this adjustment does not represent a departure from the reasoning in a long line of cases, since in each instance the change in corporate structure entailed a change in the corporate nationality (*i.e.*, place of incorporation) of the entity holding the investment.

4. As explained by Prof. Dr. Schreuer in his testimony, the *travaux* of the ICSID Convention reveal that the negative nationality requirement of Article 25 was the subject of intense discussion that "evolved more and more towards a strong prohibition

[3] Ex. RL-116, *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Award, 31 May 2017, para. 541.

[4] Ex. RL-018, *Phoenix v. Czech Republic*, para. 113.

[5] Ex. RL-018, *Phoenix v. Czech Republic*, para. 144.

[6] Ex. RL-075, *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, para. 554.

of Host State nationality".[7] This prohibition was even described as "absolute."[8] This is unsurprising, since it coincides with the fundamental *raison d'être* of the ICSID Convention, which, as indicated in its title, is to provide a forum for "the Settlement of Investment Disputes between States and Nationals *of Other States,*" not between States and their own nationals.

5. It follows that Claimant's position that he acted to "remove a procedural obstacle through renunciation"[9] is a significant understatement. The negative nationality requirement of the ICSID Convention is not a "procedural obstacle" to be removed, but an absolute and explicit requirement linked to the Convention's object and purpose. For an individual to renounce his or her nationality in order to gain the protection of the ICSID Convention could therefore, in my view, constitute an abuse of process. Evidently, it stands to reason that as an emanation of the principle of good faith, the application of the doctrine of abuse of process is highly fact dependent, and its application requires careful consideration of all relevant facts and circumstances in any given case.

Ms. Maria Vicien-Milburn
Arbitrator

[7] Tr. Day 2, 356:20–357:3.

[8] Tr. Day 2, 357:4. *See also* Ex. RL-051, International Bank for Reconstruction and Development, "Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States" dated 18 March 1965, reprinted in 1 ICSID Reports 23 (1993), p. 44.

[9] Claimant's Rejoinder, para. 49.