

# **The Relevance of the 2006 Draft Articles on Diplomatic Protection in Determining the Nationality of Claims of Persons and Corporations (Natural Persons and Juridical/Corporate persons) in Investor-State Dispute Settlement**

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## ABSTRACT

*This article examines nationality as a condition governing the admissibility of international claims and the invocation of the international responsibility of States. Drawing on scholarly doctrine and international jurisprudence, it analyzes the relevance of the International Law Commission's 2006 Draft Articles on Diplomatic Protection for determining the nationality of claims brought by both natural and juridical persons in investor–State dispute settlements (ISDS). Although the Draft Articles were developed in the context of diplomatic protection and have not been explicitly applied in ISDS practice, this article argues that their nationality provisions remain highly relevant. In particular, they provide principled guidance for assessing the admissibility of claims and, by extension, jurisdiction *ratione personae* in investor–State disputes involving questions of claimant nationality.*

**Keywords:** International responsibility of States; nationality; admissibility of claims; jurisdiction *ratione personae*; diplomatic protection

I. ADMISSIBILITY OF CLAIMS AND THE IMPLEMENTATION OF  
THE INTERNATIONAL RESPONSIBILITY OF A STATE UNDER  
THE DRAFT ARTICLES ON DIPLOMATIC PROTECTION

The implementation of the international responsibility of a State for internationally wrongful acts generally occurs through international dispute settlement mechanisms, including investor-State dispute settlements (ISDS). In such international proceedings, respondent States may raise objections concerning the admissibility of claims, particularly regarding (i) the fulfillment of nationality requirements and (ii) the exhaustion of local remedies.<sup>1</sup> This article explores the applicability of the principles governing the nationality of claims, as articulated in the International Law Commission's (ILC) Draft Articles on Diplomatic Protection (2006), to ISDS proceedings, with particular emphasis on the nationality requirements.

While ISDS practice generally treats nationality requirements as a jurisdictional issue,<sup>2</sup> this article adopts a functional approach in which nationality is conceived primarily as an admissibility condition, with direct implications for jurisdiction *ratione personae*. In *Ioan Micula et al. v. Romania (Micula)*, the arbitral tribunal noted that “an objection to jurisdiction goes to the ability of a tribunal to hear a case, while an objection to admissibility aims at the claim itself”.<sup>3</sup> But realistically, the question of whether nationality is procedurally framed as a jurisdictional or an admissibility objection leads to an analogous outcome: dismissal of the claim without examination of the merits. In other words, where a tribunal lacks jurisdiction *ratione personae*, the claim cannot proceed to the merits and becomes ineffective. In this context, it is noteworthy that investment tribunals have rarely cited the Draft Articles on Diplomatic Protection expressly – *Micula* being a notable exception – although they offer a coherent framework for addressing nationality-related objections.

The Draft Articles on Diplomatic Protection represent a significant development in the codification and progressive development of international law concerning the “treatment of aliens.”<sup>4</sup> They seek to articulate the secondary rules of international law governing “the conditions that must be met for the bringing of a claim for diplomatic protection,” which, as the ILC explains, “means rules governing the admissibility of

<sup>1</sup> See Int'l L. Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 44, U.N. Doc. A/56/10 (2001) [<https://perma.cc/E58C-5BSE>] (reflecting the general law of State responsibility).

<sup>2</sup> *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, ¶ 63 (Sept. 24, 2008) [<https://perma.cc/29TR-8HJT>].

<sup>3</sup> *Id.*

<sup>4</sup> Int'l L. Comm'n, *Rep. on the Work of Its Fifty-Eighth Session*, at 22-23, U.N. Doc. A/61/10 (2006) [<https://perma.cc/6M34-7GTL>].

claims.”<sup>5</sup> As such, the Draft Articles are concerned with the thresholds that must be satisfied before a claim invoking international responsibility may be pursued.

This understanding is consistent with the general law of State responsibility. Article 44(a) of the ILC’s Articles on the Responsibility of States for Internationally Wrongful Acts (ASR)<sup>6</sup> provides that the admissibility of an international claim depends on compliance with applicable rules concerning the nationality of claims. Under these widely accepted principles, the international responsibility of a State may be invoked—and subsequently implemented—only if the claimant satisfies the relevant nationality requirements. Nationality thus emerges as one of the fundamental conditions for determining a claim’s admissibility under the general law of State responsibility and, more broadly, as a prerequisite for initiating an international claim.

The relevance of nationality as an admissibility condition became particularly pronounced in situations involving diplomatic protection. As Jan Klabbbers observes, admissibility conditions tend to assume importance primarily where States exercise diplomatic protection on behalf of their nationals. In such circumstances, nationality operates as a limiting principle: states may bring claims only on behalf of their own nationals, whether natural or juridical persons.<sup>7</sup> This restriction prevents “individuals or companies [from engaging] . . . in ‘State-shopping’ or possibly bring[ing] multiple cases” in multiple States.<sup>8</sup>

In this context, the Draft Articles on Diplomatic Protection play a crucial role. They articulate the legal principles governing the determination of nationality in claims brought by States on behalf of their nationals, as a prerequisite for the exercise of diplomatic protection.<sup>9</sup> As emphasized in the ILC commentaries, these principles largely concern the “admissibility of claims”<sup>10</sup> and operate as a *sine qua non* condition for invoking the international responsibility of a breaching State. By clarifying and constraining the nationality link, the Draft Articles also function as an important safeguard to prevent “State-shopping,”<sup>11</sup> ensuring that international claims are pursued only where a legally cognizable bond of nationality exists.

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<sup>5</sup> *Id.*

<sup>6</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *supra* note 1.

<sup>7</sup> JAN KLABBERS, *INTERNATIONAL LAW* 169 (3d ed. 2021).

<sup>8</sup> *Id.* at 172.

<sup>9</sup> *Rep. on the Work of Its Fifty-Eighth Session*, *supra* note 4, at 26.

<sup>10</sup> *Id.* at 23.

<sup>11</sup> *Id.* at 39 (The nationality principles address the issue of “fear that a person may deliberately change his or her nationality in order to acquire a State of nationality more willing and able to bring a diplomatic claim on his or her behalf”).

## II. AUTHORITY OF THE DRAFT ARTICLES ON DIPLOMATIC PROTECTION

Although the Draft Articles on Diplomatic Protection are *prima facie* non-binding and non-conventional in nature, they occupy a significant place in the codification and progressive development of international law<sup>12</sup> by governing diplomatic protection, nationality, and the admissibility of claims.<sup>13</sup> Elaborated by the ILC, the Draft Articles were adopted “taking into account the comments made by Governments either in the Sixth Committee or in writing, and the views expressed by members of the Commission in the plenary.”<sup>14</sup> Their formulation was further informed by relevant State practice and international jurisprudence, including practice arising in connection with treaties<sup>15</sup> and international disputes, including investment-related disputes, as discussed further below. As such, the Draft Articles reflect a careful assessment of the state of international law in this field.

While it may be argued that the Draft Articles do not, in all respects, codify existing customary international law on diplomatic protection or nationality. This is particularly where evidence of consistent State practice and *opinio juris* remains contested. Nevertheless, their legal significance should not be underestimated. Following Article 38(1)(d) of the Statute of the International Court of Justice, the work of the ILC constitutes a “subsidiary means for the determination of rules of law.”<sup>16</sup> The Draft Articles derive authority from the fact that they emanate from a collective body of “the most highly qualified publicists of the various nations” and represented a systematic and reasoned articulation of legal principles governing diplomatic protection and the admissibility of claims.<sup>17</sup> In this

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12 Charter of the U.N. art. 13, June 26, 1945, 1 U.N.T.S. 16 (entered into force Oct. 24, 1945) [<https://perma.cc/XN59-27AX>]; Statute of the International Court of Justice art. 1, 15, Oct. 24, 1945, 33 U.N.T.S. 993 (entered into force Apr. 18, 1946) [<https://perma.cc/L92P-S75C>].

13 See Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Preliminary Objections, 2007 I.C.J. Rep. 599, ¶ 39 (May 24) [<https://perma.cc/NVP8-KT7H>] (“The Court will recall that under customary international, as reflected in Article I of the draft Articles on Diplomatic Protection of the International Law Commission”).

14 Martti Koskenniemi (International Law Commission’s Study Group Chair), *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (May 30, 2006) [<https://perma.cc/7SVV-AA4D>].

15 See e.g., Convention on Certain Questions Relating to the Conflict of Nationality Laws, Apr. 12, 1930, 179 L.N.T.S. 89 [<https://perma.cc/5G7E-WZRC>]; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [<https://perma.cc/RC4Y-AFDQ>]; American Convention on Human Rights “Pact of San José, Costa Rica”, Nov. 22, 1969, 1144 U.N.T.S. 123 [<https://perma.cc/4DNY-JT2L>].

16 *Statute of the International Court of Justice*, supra note 12, art. 38(1)(d).

17 *Id.*

sense, they serve as a highly authoritative reference point for determining the content and scope of nationality requirements under international law.<sup>18</sup>

The authority of the Draft Articles is further nuanced by the ILC's own distinction between codification and progressive development in its commentaries. The ILC has expressly acknowledged that certain provisions depart from existing law. For example, in its commentary to Draft Article 8 on stateless persons and refugees, the ILC acknowledges that this provision is "an exercise in progressive development of the law, [and] departs from the traditional rule".<sup>19</sup> Similarly, scholarly analysis and other ILC's commentaries suggest that Articles 5 and 15 of the Draft Articles, addressing continuous nationality of natural persons and the local remedies rule, respectively, also incorporate elements of progressive development.<sup>20</sup> These acknowledgements underscore the ILC's methodological transparency and reinforce the analytical value of the Draft Articles.

By contrast, aside from these expressly identified provisions, the remaining principles articulated in the Draft Articles may reasonably be regarded as reflecting customary international law. At the very least, they represent the prevailing understanding of applicable legal framework governing diplomatic protection and nationality. Even when individual provisions, such as Articles 5, 8, and 15, cannot be conclusively characterized as customary, the Draft Articles retain significant interpretive value. Collectively, they provide a coherent and authoritative framework for assessing questions of diplomatic protection, nationality-related issues, and admissibility in international claims. It is this characteristic that renders the Draft Articles particularly relevant for evaluating nationality objections in dispute settlement mechanisms, including ISDS, where nationality objections frequently arise.

### III. EMERGENCE OF NATURAL AND JURIDICAL PERSONS AS INTERNATIONAL ACTORS

Diplomatic protection developed historically in international law to protect foreigners' rights. In his 1758 treatise *The Law of Nations*, Emer de Vattel explained that "an injury to the property of a foreigner was an injury to the foreigner's home State which obtained the right to exercise protection over that property" – a mechanism now known as diplomatic protection.<sup>21</sup> Under traditional international law, "investors did not have direct access to

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18 For an insightful analysis on the authority of the work of the International Law Commission, see Fernando Luso Bordin, *Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law*, 63 INT'L & COMP. L.Q. 535, 537 (2014).

19 *Rep. on the Work of Its Fifty-Eighth Session*, *supra* note 4, at 48, ¶ 2.

20 Luso, *supra* note 18, at 556.

21 RUDOLF DOLZER, URSULA KRIEBAUM & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 2* (3d ed. 2022).

international remedies to pursue claims against foreign States for violations of their rights.”<sup>22</sup> Instead, they depended on diplomatic protection from their home States. As Dolzer, Kriebaum, and Schreuer observe, international practice on nationality issues has traditionally been “shaped to a large extent by cases involving the diplomatic protection of individuals and companies by their States of nationality.”<sup>23</sup>

But today, the situation has changed dramatically. Diplomatic protection disputes are infrequent and less relevant in international law; they have “largely fallen into disuse”<sup>24</sup> because of natural and juridical persons’ direct access to international remedies.<sup>25</sup> Natural and juridical persons have emerged as limited subjects of international law with *jus standi* before international tribunals that allow them to bring international claims against breaching sovereign States for internationally wrongful acts. Yet, direct standing does not eliminate admissibility constraints, particularly those relating to nationality and jurisdiction *ratione personae*. In the context in which investors have direct access to international mechanisms for the assertion of claims against sovereign States, nationality and admissibility requirements remain central.<sup>26</sup> This raises the question whether principles developed in the context of diplomatic protection continue to inform their assessment.

#### IV. APPLICABILITY OF THE DRAFT ARTICLES ON DIPLOMATIC PROTECTION IN INVESTOR-STATE DISPUTES

At the outset, the principles surrounding the nationality of claims and the 2006 Draft Articles on Diplomatic Protection were developed in the context of diplomatic protection. The question now is whether the 2006 Draft Articles are relevant in determining the nationality of claims of natural and juridical persons in ISDS? In other words: *Can the Draft Articles be applied as an authoritative reference for determining nationality of claims of natural and juridical persons in ISDS?*

Dolzer, Kriebaum, and Schreuer reflect that:

Whether the principles developed in that context [of diplomatic protection] can simply be transferred to situations where the investor has direct access to international arbitration is subject to doubt. Applicable treaties as well as arbitral practice on investor

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<sup>22</sup> *Id.* at 334.

<sup>23</sup> *Id.* at 59.

<sup>24</sup> Phoebe Okowa, *International Law*, in *INTERNATIONAL LAW* 465 (Malcolm D. Evans ed., 5th ed. 2018).

<sup>25</sup> *Rep. on the Work of Its Fifty-Eighth Session*, *supra* note 4, at 25 - 27; Francisco Orrego Vicuña, *Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement*, 15 *FOREIGN INV. L.J.* 1, 4 (2000).

<sup>26</sup> DOLZER, KRIEBAUM & SCHREUER, *supra* note 21, at 339 - 40.

protection have developed in a way that differs in several respects from the principles governing diplomatic protection.<sup>27</sup>

Legal scholar Moshe Hirsch, in referencing Brownlie's *The Relations of Nationality*, makes an interesting approach as to whether the principles developed in the context of diplomatic protection may be applied to ISDS. To him:

On the one hand, it may be argued that nationality does not merely create a legal link in a particular branch of international law, but it also determines a legal status from which rights and obligations in many areas are derived. Hence, it may be argued that the importance of the determination of nationality requires a uniform definition in all the spheres in which this definition has legal force, due to the need for uniformity and stability in the most fundamental terms of international law. On the other hand, it may be argued that a functional approach to a definition of nationality should be adopted, enabling nationality to be defined differently according to its function in a particular judicial area.

The latter approach, which allows for flexibility in the shaping of the term 'national' according to the substance of the issue, and according to the consequences attendant upon the determination of nationality, would seem preferable. The first approach, which requires a uniform definition, will indeed lead to simplicity and uniformity, but it is also liable to engender unforeseen situations (or logically intolerable [and inconsistent] ones). This, for example, might be so in cases in which rights are to be granted (or obligations imposed) *after* a uniform, binding definition.<sup>28</sup>

As noted, scholar Moshe Hirsch advocates for a functional approach to a definition of nationality, rather than a "uniform, binding definition".<sup>29</sup> This affords disputing parties a broad margin of appreciation to define nationality in a case-by-case basis, and allows regime-sensitive interpretation based on the specific treaty in a given case.<sup>30</sup> However, rather than framing the issue solely as a choice between a functional or uniform definition of nationality, a more balanced approach emerges by viewing nationality in terms of

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<sup>27</sup> *Id.* at 59.

<sup>28</sup> MOSHE HIRSCH, *THE ARBITRATION MECHANISM OF THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES* 76–77 (Martinus Nijhoff 1993).

<sup>29</sup> See Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 136 RECUEIL DES COURS 331, 359–60 (1972-II).

<sup>30</sup> In the specific case of ICSID, even though the drafters of the Convention decided not to insert any definition of nationality, practice on admissibility of claims has developed customary rules on nationality, reflected in the Draft Articles that provide grounds to determine a person's nationality for purposes of bringing international claims.

admissibility of claims and as a condition for invoking a State's international responsibility – the law of international claims. The principles governing the nationality of claims are common to both diplomatic protection and international investment claims, providing a coherent and consistent framework for determining the admissibility of international claims and jurisdiction across different fields. This approach is particularly relevant in cases where the parties to the dispute have not expressly agreed upon a concrete definition of nationality or where the nationality treaty provisions are not clear or exhaustive.

Consequently, this article does not suggest that the Draft Articles on Diplomatic Protection displace treaty-based nationality definitions or override institutional constraints governing investor–State arbitration, such as those contained in the ICSID Convention. Rather, it argues that the Draft Articles should be understood as an authoritative interpretive framework for nationality questions in ISDS, particularly where applicable treaties are silent, ambiguous, or incomplete. In such circumstances, tribunals may rely on the Draft Articles as evidence of customary international law, as a subsidiary means for determining rules of law pursuant to Article 38(1)(d) of the Statute of the International Court of Justice, and as a coherent body of principles designed to regulate admissibility and standing in international claims.

As Professor Francisco Orrego Vicuña analyzed, “the starting point of the discussion on the rules of nationality does not refer so much to nationality as such but to a more fundamental issue, namely the question of whose rights are asserted when bringing an international claim.”<sup>31</sup> In this sense, the Draft Articles do not deal with substantive rules on nationality as such, but rather with nationality rules of natural and juridical persons as a condition to bring an international claim and assert the proper nationality of the claimant. Therefore, these nationality rules are formulated, and applied, in the context of “bringing an international claim”<sup>32</sup> and providing jurisdiction *ratione personae*. As the ILC notes in its commentary to the Draft Articles, these Articles “are concerned only with the rules governing the circumstances in which diplomatic protection may be exercised and the conditions that must be met before it may be exercised,”<sup>33</sup> but not with the substantive rules of diplomatic protection or nationality *per se*.

Because nationality is a condition of admissibility for international claims, a claim for diplomatic protection is inadmissible unless the injured person, who by definition is an alien, shares the nationality of the claiming home State. A closely analogous logic applies in the field of ISDS: a claim

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31 Vicuña, *supra* note 25, at 1.

32 *Rep. on the Work of Its Fifty-Eighth Session*, *supra* note 4, at 24.

33 *Id.*

for international investment protection is inadmissible when the required nationality link between the injured person and their home State is not satisfied.<sup>34</sup> This nationality requirement refers to the State on whose international law the claimant derives its international investment right and its *jus standi*.<sup>35</sup> These rights are generally grounded in a Bilateral Investment Treaty (BIT), a Free Trade Agreement (FTA), or a multilateral convention ratified by the claimant's home State, such as ICSID Convention. The principle is analogous in both fields considering that, to exercise both diplomatic protection and foreign investor rights, the proper nationality of the claimant provides the basis for claim admissibility and the claimant's *jus standi* before an international tribunal and, therefore, makes the international claim viable. It is the link of nationality between the injured person and their home State (or State of nationality) that gives rise to the exercise of both diplomatic protection and ISDS.

Furthermore, in the context of a foreign investor, its nationality serves, on the one hand, to determine the substantive international laws that protect the investment, and, on the other, the jurisdictional basis that provides *jus standi* before an international tribunal to invoke the international responsibility of the host State for a breach. Notably, “the investor’s nationality determines the foreignness of the investment . . . [as well as the] treaties it may benefit. If the investor wishes to rely on a BIT, it must show that it has the nationality of one of the two States parties.”<sup>36</sup> In other words, “the investor’s nationality is relevant for two purposes. The substantive standards guaranteed in a treaty will only apply to the respective nationals. In addition, the jurisdiction of an international tribunal is determined, *inter alia*, by the claimant’s nationality. In particular, if the host State’s consent to jurisdiction is given through a treaty, it will apply only to nationals of a State that is party to the treaty.”<sup>37</sup>

On this basis, it is incomplete to state that “the investor has direct access to international arbitration”<sup>38</sup> Just as a State can raise admissibility and jurisdictional objections to a claim of diplomatic protection where the requisite nationality is not established, similar objections may be raised in the investment context. In ISDS, a respondent State may object to an investor’s investment claim when the applicable nationality requirement is not met. Access to international arbitration for foreign investors exists only when a given international convention or relevant treaty— such as BIT, FTA, or multilateral convention—grants that investor access to it, and when

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34 *Id.* at 30.

35 See Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 25, Mar. 18, 1965, 575 U.N.T.S. 159 [<https://perma.cc/T9FY-RFVD>]

36 DOLZER, KRIEBAUM & SCHREUER, *supra* note 21, at 59.

37 *Id.*

38 *Id.* at 59 - 60.

that investor holds the nationality of a State party to that instrument. Thus, the *sine qua non* element for bringing an international claim remains to be the proper nationality of the claimant in both diplomatic protection and ISDS. Accordingly, whether a claim is brought by a State exercising diplomatic protection on behalf of its national or by a foreign investor through investor-State dispute mechanisms, international claims must satisfy nationality rules.<sup>39</sup>

For instance, under the framework of International Centre for the Settlement of Investment Disputes (ICSID) and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, access to arbitration is limited to disputes between “a host State . . . [or its constituent subdivisions or agencies] stands a private foreign investor. Not every investor from a foreign State is entitled to participate in the arbitration proceedings of the Centre: only ‘a national of another Contracting State’ may do so. The Convention specifies that such a ‘national’ may be either a natural or a legal person (corporation).”<sup>40</sup> As Moshe Hirsch also commented, ICSID Convention “grants the nationals of contracting [S]tates the right of direct access to the arbitration mechanism of the Centre.”<sup>41</sup> Hence, the jurisdiction *ratione personae* in the context of an ICSID tribunal, and the admissibility of the international claim, has a strong nationality requirement. In other words, it is the person’s nationality that defines the *jus standi* or the jurisdiction *ratione personae*.

Following this same line of thought, in diplomatic protection disputes, the first objection that the respondent State may raise regarding the admissibility of the claim is that of the nationality of the claim, as in the International Court of Justice (ICJ) cases *Nottebohm*,<sup>42</sup> *Barcelona Traction*,<sup>43</sup> and *Ahmadou Sadio Diallo*.<sup>44</sup> Comparable objections arise in ISDS, where the respondent States may object claims on the admissibility grounds or for lack of jurisdiction *ratione personae* based on nationality-related issues. This issue has arisen in numerous investor-State dispute, including *Olguín v. Republic of Paraguay (Olguín)*,<sup>45</sup> *Feldman v. United*

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39 EDWIN MONTEFIORE BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS* (Banks Law 1916).

40 HIRSCH, *supra* note 28, at 73.

41 *Id.* at 75.

42 *Nottebohm* (Liech. v. Guat.), Judgment, 1955 I.C.J. 4 (Apr. 6) [<https://perma.cc/5VTT-AKMN>].

43 *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3 (Feb. 5) [<https://perma.cc/UEZ5-9KSZ>].

44 *Ahmadou Sadio Diallo*, *supra* note 13, at 582.

45 *Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award (July 26, 2001) [<https://perma.cc/4V6B-WX3N>] (The arbitral tribunal held that the individual claimant held two nationalities, both which were effective).

*Mexican States*,<sup>46</sup> *Soufraki v. The U.A.E. (Soufraki)*,<sup>47</sup> *Champion Trading et al. v. Arab Rep. of Egypt (Champion Trading)*,<sup>48</sup> *Siag v. Arab Rep. of Egypt (Siag)*,<sup>49</sup> *Fakes v. Rep. of Turk. (Fakes)*,<sup>50</sup> *Micula*,<sup>51</sup> *Aven, et al v. Costa Rica (Aven)*,<sup>52</sup> *Tokios Tokelés v. Ukraine (Tokios Tokelés)*,<sup>53</sup> *Saluka Investments B.V. v. Czech Republic (Saluka)*,<sup>54</sup> *Yaung Chi Oo Trading Pte. Ltd. v. Gov't*

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46 Feldman v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, ¶ 32 (Dec. 6, 2000) [<https://perma.cc/NAK3-Z5EP>] (While having one nationality, the individual claimant was a registered permanent resident in the respondent State, which under NAFTA amounted, *prima facie*, to nationality. The tribunal held that “citizenship must, as a matter of principle, prevail over permanent residence, as far as the issue of standing is concerned”).

47 Soufraki v. The U.A.E., ICSID Case No. ARB/02/7, Award (July 7, 2004) [<https://perma.cc/45XP-JULG>]. The Respondent challenged the Claimant’s nationality under international law, claiming that it was not effective for the purposes of invoking the BIT. *Id.* ¶ 9. The arbitral tribunal established that “[i]t is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality”. *Id.* ¶ 55. It finally found that the claimant lost the proper nationality under the applicable national law. *Id.* ¶ 84.

48 Champion Trading et al. v. Arab Rep. of Egypt, ICSID Case No. ARB/02/9, Decision on Jurisdiction, § 3.4.2 (Oct. 21, 2003) [<https://perma.cc/B3PL-U5C3>]. The three individual claimants had dual nationality (including respondent’s nationality) and therefore could not invoke ICSID Convention. The tribunal disregarded the effective nationality link argument and determined that the claimants did possess the respondent’s nationality at the relevant time. Regarding the corporate claimants, it was argued that the shareholders had dual nationalities, including respondent State’s nationality. The tribunal held that neither the treaty nor the ICSID Convention contain “any exclusion of dual nationals as shareholders of companies of the other Contracting State”. *Id.* at 18.

49 Siag v. Arab Rep. of Egypt, ICSID Case No ARB/05/15, Decision on Jurisdiction (Apr. 11, 2007) [<https://perma.cc/Y8AP-YF2P>]. It was argued that the individual claimants had the respondent’s nationality at the relevant times. The tribunal held that even though under respondent’s domestic nationality law they lost this nationality and, therefore, did not have the respondent’s nationality at the relevant times, in any event the claimants possessed genuine links to Italy. *Id.* ¶ 196.

50 Fakes v. Rep. of Turk., ICSID Case No ARB/07/20, Award (July 14, 2010) [<https://perma.cc/RU2P-HWHB>]. The individual claimant held two nationalities, allegedly lacking effective Dutch nationality. The arbitral tribunal established that the wording of both the ICSID Convention and the applicable BIT do not include an effective nationality test. *Id.* ¶ 59 *et seq.* Therefore, the effective nationality test was not applicable. *Id.* ¶ 79.

51 *Ioan Micula*, *supra* note 2. It was challenged that the individual claimants did not possess effective nationality under international law to invoke the ICSID Convention and the BIT. The tribunal held that the respondent did not meet the burden of proof to establish grounds to question the nationality at issue under the invoked domestic law and that being just one nationality involved, the genuine link test should not apply. *Id.* ¶¶ 96, 99. Regarding the corporate claimants, the Tribunal held that since the majority of the shareholders were nationals of another Contracting State (not the respondent State), the objection to jurisdiction cannot be sustained. *Id.* ¶ 115.

52 Aven, et al v. Costa Rica, ICSID Case No UNCT/15/3, Final Award (Sep. 18, 2018) [<https://perma.cc/6URU-WT3S>]. One of the individual claimants, Mr. Aven, held two nationalities. Under the applicable treaty, DR-CAFTA, “jurisdiction *ratione personae* is dependent upon the investor’s ‘dominant and effective nationality’”. *Id.* ¶ 202. The tribunal held that the test of dominant and effective nationality becomes relevant in the context of DR-CAFTA when one of the nationalities at issue is that from the host/respondent State. *Id.* ¶¶ 215, 238.

53 Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr. 29, 2004) [<https://perma.cc/7J8M-F42K>]. The respondent argued that the corporate claimant was not “a genuine entity of Lithuania first because it is owned and controlled predominantly by Ukrainian nationals” and that it has no substantial business activities in Lithuania. *Id.* ¶ 21. The tribunal held that the wording of the applicable BIT is clear and did not intend to use those methods to deny the benefits of the BIT. *Id.* ¶¶ 30, 38. The State of incorporation prevailed.

54 Saluka Investments B.V. v. Czech Republic, P.C.A. Case No. 2001-04, Partial Award (Mar. 17, 2006),

of the Union of Myanmar (*Yaung Chi*),<sup>55</sup> and *Mobile Corp. Venezuela Holdings v. Bolivarian Republic of Venezuela*<sup>56</sup> Across these cases, the ICSID Tribunals applied the nationality criteria for both natural and juridical persons that closely mirrors those developed in diplomatic protection jurisprudence. These cases demonstrate that, in both diplomatic protection and ISDS, a respondent State's primary objection will be related to the nationality of the claimants. The cases further reveal that both fields adopt a broadly similar approach to nationality, reflecting a common doctrinal ground for assessing jurisdiction and claim admissibility.

Consistent with this overlap, the ILC considered the practice of States arising out of or in connection with both diplomatic protection and investment disputes when formulating the Draft Articles on Diplomatic Protection. As the Commentaries to the Draft Articles make clear, the ILC considered diplomatic protection practice and arbitral jurisprudence in formulating the Draft Articles. This included investment-related disputes such as *Loewen Grp., Inc. v. United States of America (Loewen)*,<sup>57</sup> *Dallal v. Iran (Dallal)*,<sup>58</sup> *Orinoco Steamship Company*,<sup>59</sup> *Kunhardt & Co.*,<sup>60</sup> *Delagoa*

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[www.italaw.com/sites/default/files/case-documents/ita0740.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0740.pdf) [<https://perma.cc/6D9V-QTDY>]. The respondent argued that the claimant had no links to The Netherlands and, therefore, could not invoke the applicable BIT. *Id.* ¶ 239. While the tribunal acknowledged that, in certain cases, a “mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty[.]” it found no treaty provision imposing any additional requirement beyond incorporation under the laws of the State party. *Id.* ¶ 240. In the case before it, therefore, the relevant requirement was satisfied by incorporation under the laws of the Netherlands. *Id.* ¶ 241.

55 *Yaung Chi Oo Trading Pte. Ltd. v. Gov't of the Union of Myanmar, ASEAN I.D. Case No. ARB/01/1, Award (Mar. 31, 2003)* [<https://perma.cc/XE87-XAJX>]. The place of effective management of the corporate claimant was challenged. *Id.* ¶ 46. The tribunal indicated that the applicable treaty required “both local incorporation and effective management” at the time the investment was made and throughout the investment period. *Id.* ¶ 49. The tribunal concluded that the effective management requirement was satisfied. *Id.* ¶ 52.

56 *Mobile Corp. Venezuela Holdings v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction (June 10, 2010)* [<https://perma.cc/XFV3-6CJ2>]. The respondent argued that the corporate claimant was a “corporation of convenience” and “did not exercise control on its subsidiaries”. *Id.* ¶¶ 58, 144. The tribunal concluded that the share capital in the subsidiaries “makes it possible for it to exercise control on them”. *Id.* ¶ 160.

57 *Loewen Grp., Inc. v. United States of America, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003)* [<https://perma.cc/8G9Y-28VB>].

58 *Mark Dallal v. Republic of Iran, 53 Iran-U.S. Cl. Trib. Rep. 149 (1983)* [<https://perma.cc/6R2L-BNYF>].

*Société Générale de Surveillance S.A. v. Republic of the Phil., ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶ 154 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005).*

59 *Orinoco Steamship Co. Case (U.S. v. Venez.)*, 11 R.I.A.A. 227 (Perm. Ct. Arb. 1910) [<https://perma.cc/4D7Z-RLBR>].

60 *Kunhardt & Co. Case (U.S. v. Venez.)*, 9 R.I.A.A. 171 (Perm. Ct. Arb. 1903) [<https://perma.cc/DJS9-Z5JZ>].

*Bay Railway Co.*,<sup>61</sup> *Salvador Commercial Company*,<sup>62</sup> and *The Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers*<sup>63</sup>

This dual relevance is unsurprising, as both diplomatic protection and ISDS involve claims brought on behalf of an injured person – a person injured by an internationally wrongful act attributable to a State – who may be a natural person or a juridical person (corporation). Through this shared structure, the Draft Articles treat both categories separately when required: Articles 4 through 8 govern nationality principles regarding natural persons, while Articles 9 through 13 address principles applied to juridical persons.

#### V. NATIONALITY PRINCIPLES REGARDING NATURAL PERSONS

Draft Article 4 sets out a general principle well established in both diplomatic protection and ISDS: a natural person’s State of nationality is determined by the acquisition of nationality “in accordance with the law of that State, . . . [provided that such acquisition is] not inconsistent with international law.”<sup>64</sup> Nationality may be acquired by birth, descent, naturalization, succession of States or in any other manner.<sup>65</sup>

One of the first cases addressing the nationality of claims in the context of diplomatic protection of individual persons is *Nottebohm*, where the Principality of Liechtenstein exercised diplomatic protection on behalf of its national, Mr. Friedrich Nottebohm, against the Republic of Guatemala before the ICJ.<sup>66</sup> Liechtenstein brought a claim of “restitution and compensation . . . on the grounds that . . . [Guatemala] had acted towards Friedrich Nottebohm, a citizen of Liechtenstein, in a manner contrary to international law.”<sup>67</sup> Although Guatemala objected to the Court’s jurisdiction, the Court overruled this objection in its first judgment. In its second judgment, however, the Court held that “Liechtenstein’s claim was inadmissible on grounds relating to Mr. Nottebohm’s nationality.”<sup>68</sup> Following this judgment, the Court clarified that “the real issue . . . is the admissibility of the claim of Liechtenstein in respect of Nottebohm.”<sup>69</sup> It further explained that “[i]n order to decide upon the admissibility of the

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61 *Delagoa Bay Ry. Co. Case* (Gr. Brit. v. Port.), 28 R.I.A.A. 186 (Perm. Ct. Arb. 1900) [<https://perma.cc/PCE7-KX69>].

62 *Salvador Commercial Co. (‘El Triunfo Co.’) Case* (U.S. v. El Sal.), 15 R.I.A.A. 467 (Perm. Ct. Arb. 1902) [<https://perma.cc/G3ZG-LBPP>].

63 *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers Case* (Gr. Brit. v. Ger.), 2 R.I.A.A. 777 (Perm. Ct. Arb. 1926) [<https://perma.cc/AJQ8-QSQF>].

64 *Rep. on the Work of Its Fifty-Eighth Session*, *supra* note 4, at 31, art. 4.

65 *Id.*

66 *Nottebohm (Liech. v. Guat.): Case Overview*, ICJ, <https://www.icj-cij.org/case/18> [<https://perma.cc/A26U-FVBN>].

67 *Id.*

68 *Id.*

69 *Nottebohm*, *supra* note 42, at 16.

Application, the Court must ascertain whether the nationality conferred on Nottebohm by Liechtenstein by means of a naturalization which took place in the circumstances which have been described, can be validly invoked as against Guatemala”.<sup>70</sup>

The ICJ concluded in *Nottebohm* that “nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments together with the existence of reciprocal rights and duties”.<sup>71</sup> On that basis, it dismissed Liechtenstein’s claim, finding that Liechtenstein had failed to establish a genuine link with Mr. Nottebohm.<sup>72</sup> Nevertheless, in the Draft Articles commentaries, ILC considered that the ICJ “did not intend to expound a general rule”.<sup>73</sup> It further distinguished the genuine link requirement in the context of diplomatic protection from the rules governing nationality for purposes of admissibility of claims, and confirmed that the latter does not require a genuine link. ILC’s conclusion in Draft Article 4 is consistent with post-*Nottebohm* State practice in both diplomatic protection and ISDS. For example, in *Micula*, the ICSID Tribunal stated that “*Nottebohm* cannot be read to allow or require that a State disregard an individual’s single nationality on the basis of the fact that this individual has not resided in the country of his nationality for a period of time.”<sup>74</sup> The tribunal further held that “once naturalized, Messrs. Micula had no need to entertain closer links to Sweden (beyond those links resulting from their Swedish nationality itself) than any other national of Sweden.”<sup>75</sup>

The arbitral tribunal in *Micula*, being the only ICSID arbitral tribunal that expressly applied the Draft Articles, in fact relied on Draft Article 4 to indicate:

The fact that the genuine test was omitted in the context of diplomatic protection is especially noteworthy because it is in the context of diplomatic protection that States may have a particular vested interest in relying on or disregarding a nationality that lacks foundation in reality. There is thus a clear reluctance in public international law to apply the genuine link test where only a single nationality is at issue.<sup>76</sup>

In a similar approach, the ICSID tribunal in *Champion Trading* found no application of the *Nottebohm* standard. Here, the tribunal took into account the ICSID Convention’s Article 25 (2)(a) clear rule regarding dual

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<sup>70</sup> *Id.* at 16-17.

<sup>71</sup> *Id.* at 23.

<sup>72</sup> *Id.* at 26.

<sup>73</sup> *Rep. on the Work of Its Fifty-Eighth Session, supra* note 4, at 33.

<sup>74</sup> *Ioan Micula, supra* note 2, ¶ 103.

<sup>75</sup> *Id.* ¶ 102.

<sup>76</sup> *Id.* ¶ 99.

nationals stating that if the individual claimants had two nationalities – one of them being the nationality of the respondent State – the genuine link contained in *Nottebohm* did not apply.<sup>77</sup> Moreover, in *Fakes*, the ICSID tribunal held that the neither the ICSID Convention nor the applicable BIT included an effective nationality test.<sup>78</sup> As a consequence, the tribunal found that the “effective nationality test” or “genuine link” requirement established in *Nottebohm* was not applicable, a conclusion consistent with the criteria set out in Draft Article 4.<sup>79</sup>

In *Soufraki*, another ISDS case, the ICSID tribunal followed the same principle articulated in Draft Article 4 and established that “[i]t is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality.”<sup>80</sup> In *Siag*, the arbitral tribunal also recognized that “[t]he domestic laws of each Contracting State determine nationality. This has been accepted in ICSID practice.”<sup>81</sup>

The final phrase in Draft Article 4 acknowledges that although a person acquires nationality according to the law of the State, such acquisition should be in a manner not inconsistent with international law. This means that the acquisition must be “consistent with international conventions, international custom and the principles of law generally recognized”.<sup>82</sup> *Micula* similarly acknowledged that Draft Article 4 codifies the well-established principles that a person acquires nationality according to the State law and that the acquisition of nationality must not be inconsistent with international law.<sup>83</sup> The arbitral tribunal also considered that if a nationality was acquired by fraud or material error it would render the acquisition inconsistent with international law.<sup>84</sup> Furthermore, it considered that human rights considerations should be taken into account.<sup>85</sup>

Draft Article 5 formulates the rule regarding the continuous nationality of a natural person. It upholds that: “[a] State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.”<sup>86</sup> The ILC further considered that:

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77 *Champion Trading*, *supra* note 48, at 16 - 18, ¶¶ 34 - 46.

78 *Fakes*, *supra* note 50, ¶ 79.

79 *Fakes*, *supra* note 50, ¶ 59 *et seq.*

80 *Soufraki*, *supra* note 47, ¶ 55.

81 *Siag*, *supra* note 49, ¶ 143.

82 *Rep. on the Work of Its Fifty-Eighth Session*, *supra* note 4, at 33.

83 *Ioan Micula*, *supra* note 2, ¶¶ 86 - 87.

84 *Id.* ¶¶ 91, 95.

85 *Id.* ¶ 88.

86 *Rep. on the Work of Its Fifty-Eighth Session*, *supra* note 4, at 35, ¶ 1.

In 2003 in *Loewen*, an ICSID arbitral tribunal held that ‘there must be continuous material identity from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through to the date of the resolution of the claim, which date is known as the *dies ad quem*.<sup>87</sup>

The *Loewen* case dealt with an investor invoking protection who changed nationality after the presentation of the claim and adopted the nationality of the respondent State. After considering the case and the arbitral tribunal’s decision, the ILC concluded that requiring a natural person to maintain the same nationality until the date of the resolution “could be contrary to the interests of the individual”.<sup>88</sup> This is because many years may pass between the submission of a claim and its final determination, and it may be unfair to penalize the individual for changing nationality during that period.<sup>89</sup> Although the ILC departed slightly from the ICSID Tribunal’s approach requiring the maintenance of nationality until the final resolution of the claim, it nevertheless drew on the ISDS practice in formulating its principles on nationality. This is particularly evident in its treatment of claim admissibility and the protection of the injured person’s rights.

In *Micula*, the arbitral tribunal analyzed whether the claimants “were Swedish nationals at the time of their consent to arbitration . . . at the date of the Request, as well as on the date of the registration of the Request by the Centre (the so-called positive requirement).”<sup>90</sup> The tribunal also had to determine that they did not hold the respondent’s nationality on either of these dates (the so-called negative requirement).<sup>91</sup>

Moreover, the ILC included exceptions to the rule in paragraph 2 of Draft Article 5. It indicates that:

Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of the injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.<sup>92</sup>

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87 *Id.* at 37, ¶ 5.

88 *Id.* at 38.

89 *Id.*

90 *Ioan Micula, supra* note 2, ¶ 85.

91 *Id.*

92 *Rep. on the Work of Its Fifty-Eighth Session, supra* note 4, at 35, ¶ 2.

ICSID tribunals have emphasized the importance of analyzing the acquisition of nationality in the context of whether it was acquired for a reason unrelated to the bringing of the claim. For instance, in *Siag*, the arbitral tribunal concluded that “[t]here was no evidence that the Claimants willfully manipulated their nationality”<sup>93</sup> and their “acquisition of Italian nationality was unrelated to these [arbitral] proceedings.”<sup>94</sup> In *Fakes*, the arbitral tribunal concluded that the claimant’s “nationality is not one of convenience, obtained for the purposes of bringing his claim against the Respondent.”<sup>95</sup>

Draft Article 6 deals with the issue of multiple nationalities and a claim against a third State. It establishes that: “[a]ny State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national.”<sup>96</sup> The genuine link when a natural person holds two or more nationalities, as outlined in Draft Article 6, is also not required according to State practice reflected “in both arbitral decision and codification endeavors.”<sup>97</sup> Arbitral decisions as in *Dallal* by the Iran-United States Claim Tribunal, and *Egypt v. United States of America* in the *Salem* case support that when a person has dual nationality the respondent State “is not entitled to contest the claim of one of the two other powers [States] whose national is interested in the case by referring to the nationality of the other power [State].”<sup>98</sup> The ILC stated that “there is no conflict over nationality where one State of nationality seeks to protect a dual national against a third State.”<sup>99</sup> To further support this principle in *Olguín*, the respondent State (Paraguay) objected that the claimant, relying on a BIT between Paraguay and Peru, had Peruvian and United States nationalities, and resided in the United States.<sup>100</sup> The ICSID “Tribunal found that the claimant held dual nationality and that both nationalities were effective. The fact that the claimant had Peruvian nationality was enough, in the Tribunal’s view, to afford [him] the protection of the BIT.”<sup>101</sup>

In *Fakes*, the ICSID tribunal, “rejected the respondent’s argument concerning the lack of effectiveness of the Netherlands nationality” when the claimant relied on the BIT between the Netherlands and Turkey because of his dual nationality.<sup>102</sup> In *Aven*, the ICSID Tribunal applied Article 10.28

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93 *Siag*, *supra* note 49, ¶ 101.

94 *Id.*

95 *Fakes*, *supra* note 50, ¶ 78.

96 *Rep. on the Work of its Fifty-Eighth Session*, *supra* note 4, at 41.

97 *Id.* at 42.

98 *Salem* (Egypt v. U.S.), 2 R.I.A.A. 1161, 1188 (1932) [<https://perma.cc/SFB9-9FEY>].

99 *Rep. on the Work of Its Fifty-Eighth Session*, *supra* note 4, at 43, art. 6, cmt. ¶ 3.

100 *Olguín*, *supra* note 45, ¶ 60.

101 DOLZER, KRIEBAUM & SCHREUER, *supra* note 21, at 61.

102 *Id.*; *Fakes*, *supra* note 50, ¶ 81.

DR-CAFTA specifying that it applied “to cases where nationalities of two parties to the Treaty are at stake.”<sup>103</sup> Therefore rejected the defendant’s argument that the effective and dominant nationality of the claimant was Italian and not the United States. In so holding, the tribunal recognized that the possession of dual nationalities, such as Italian and United States, does not preclude a claimant from invoking either nationality in bringing an international claim. The reasoning is consistent with the approach reflected in Draft Article 6. In this respect, the Draft Articles are consistent with general ISDS practice regarding the nationality of individuals. Both confirm that the genuine and effective nationality link requirement articulated in *Nottebohm* does not constitute a general rule governing the admissibility of international claims.

The analysis differs, however, where a claimant possesses multiple nationalities, and brings a claim against the State of which the claimant is also a national. Draft Article 7 establishes that: “a State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.”<sup>104</sup> According to this Draft Article, the genuine or effective link might come into place only when the claim is against a State of nationality of the injured person, when the person has multiple nationalities. This rule of the “predominant nationality” is supported in cases like *Mergé* by the Italian-United States Conciliation Commission as well as some of the Iran-United States Claims Tribunal decisions.<sup>105</sup>

The principle is also similar to ICSID Convention Article 25(2)(a) which establishes that “the jurisdiction of the Centre shall not extend to investors who ‘also had the nationality’ of the host State.”<sup>106</sup> In *Champion Trading*, the ICSID Tribunal applied ICSID Convention Article 25(2)(a), disregarding the argument that the claimant’s host State nationality (Egyptian) was ineffective.<sup>107</sup> In that case, the ICSID Tribunal followed a criteria analogous to the Draft Article’s principle that approached the nationality genuine link as an admissibility condition, as well as the criteria contained in Draft Article 7 regarding multiple nationalities and a claim against a State of nationality. It is important to note that:

<sup>103</sup> DOLZER, KRIEBAUM & SCHREUER, *supra* note 21, at 62.

<sup>104</sup> See *Rep. on the Work of Its Fifty-Eighth Session*, *supra* note 4, at 18, art. 7.

<sup>105</sup> According to the ILC, the Iran-United States Claims Tribunal applied Draft Article 7 principle in several cases, in particular: *Nasser Esphahanian v. Bank Tejarat*, 2 Iran–U.S. Cl. Trib. Rep. 157, ¶ 17 (1983) [<https://perma.cc/F3B9-NT7K>]; *Ataollah Golpira v. Gov’t of the Islamic Republic of Iran*, 2 Iran–U.S. Cl. Trib. Rep. 171, ¶ 14 (1983) [<https://perma.cc/4G6M-NSE2>]. *Merge Case*, 14 R.I.A.A. 236 (It.-U.S. Conciliation Comm’n 1955) [<https://perma.cc/PQS8-3R5M>].

<sup>106</sup> HIRSCH, *supra* note 28, at 78; *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, *supra* note 35, art. 25(2)(a).

<sup>107</sup> DOLZER, KRIEBAUM & SCHREUER, *supra* note 21, at 61-62.

Draft Article 7 is framed in negative language . . . [which] show that the circumstances envisaged by draft article 7 are to be regarded as exceptional. This also makes it clear that the burden of proof is on the claimant State to prove that its nationality is predominant.<sup>108</sup>

A similar analysis was followed by the arbitral tribunal *Aven*, establishing that, even if the claimant had two nationalities, neither of them was the nationality of the respondent State. Consequently, the tribunal held that the test of dominant and effective nationality becomes relevant in the context of DR-CAFTA when one of the nationalities at issue is from the host/respondent State.<sup>109</sup> Although Article 25(2)(a) of the ICSID Convention precludes the possibility for bringing a claim against a State of which the injured person is also a national, Draft Article 7 recognizes such claims as an exception, imposes a particular burden on the claimant to prove predominant nationality.<sup>110</sup> This divergence reflects differing policy choices rather than a conceptual inconsistency in the treatment of nationality as a gatekeeping requirement.

Draft Article 8, although not the most frequent situation in ISDS, deals with the possibility of bringing claims on behalf of stateless persons and refugees. It states that “[a] State may exercise diplomatic protection in respect of a stateless person who, at the date of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.”<sup>111</sup> Although ILC recognized this Article to be “an exercise in progressive development of the law”,<sup>112</sup> it is possible to envisage such a situation in ISDS. This Draft Article may be applicable to cases where the specific treaty is unclear or silent with respect to stateless persons and refugees.

## VI. NATIONALITY PRINCIPLES REGARDING JURIDICAL PERSONS

In the context of diplomatic protection of corporations or juridical persons, Draft Article 9 establishes that:

[T]he State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the

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108 *Rep. on the Work of Its Fifty-Eighth Session, supra* note 4, at 47, ¶ 6.

109 *Aven, supra* note 52, ¶¶ 215, 238.

110 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States, supra* note 35, art. 25(2)(a); *Rep. on the Work of Its Fifty-Eighth Session, supra* note 4, at 43, art. 7; at 44-45, cmt. ¶ 3.

111 *Rep. on the Work of Its Fifty-Eighth Session, supra* note 4, at 47, art. 8, ¶ 1.

112 *Id.* at 48.

seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.<sup>113</sup>

*Barcelona Traction* is an emblematic case where the ICJ addressed the issue of nationality of corporations in the context of bringing an international claim. Belgium filed a claim against Spain for diplomatic protection for an injury caused by Spain to Barcelona Traction, Light and Power Company, Ltd., a corporation created under the laws of Canada but with its shareholders of almost exclusively Belgian nationality.<sup>114</sup> The International Court of Justice's overview relayed that, "Belgium sought compensation for the damage claimed to have been caused to its nationals, shareholders in Barcelona Traction, Light and Power Company, Ltd. as the result of acts contrary to international law said to have been committed by organs of the Spanish State."<sup>115</sup> Spain raised four preliminary objections. After review, "[t]he Court rejected the first two preliminary objections . . . The third was to the effect that the claim is inadmissible because the Belgian Government lacks any *jus standi* to intervene or make a judicial claim on behalf of Belgian interests in a Canadian company"<sup>116</sup> The subject-matter in this third objection, which was joined by the Court to the merits, was, according to the Court: "namely the question of the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company which is a juridical entity incorporated in Canada, the measures complained of having been taken in relation not to any Belgian national but to the company itself."<sup>117</sup>

The ICJ established that "international law 'attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office.'"<sup>118</sup> Draft Article 9 follows this principle of accepting the "basic premise of *Barcelona Traction* that it is incorporation that confers nationality on a corporation for the purposes of diplomatic protection."<sup>119</sup> An analogous principle has been adopted in ISDS, where international law and arbitral practice generally treat the place of incorporation (*siège social*) as the primary criterion for determining a corporation's nationality. This position has been recognized in several ICSID Tribunals including

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113 *Id.* at 52, art. 9.

114 *Barcelona Traction, Light & Power Co., Ltd. (Belg v. Spain): Case Overview*, I.C.J., <https://www.icj-cij.org/case/50> [<https://perma.cc/59RP-7X6R>].

115 *Id.*

116 *Barcelona Traction*, *supra* note 43, at 6, ¶ 3.

117 *Id.* at 32, ¶ 32.

118 *Rep. on the Work of Its Fifty-Eighth Session*, *supra* note 4, at 53 (citing the ICJ Judgment regarding *Barcelona Traction*).

119 *Id.* at 54, cmt. ¶ 4.

*Autopista v. Venezuela (Autopista)*,<sup>120</sup> *Société Ouest Africaine des Bétons Industriels v. Senegal (SOABI)*,<sup>121</sup> *Tokios Tokelés*,<sup>122</sup> *Saluka*,<sup>123</sup> *inter alia*.

In *SOABI*, the ICSID Tribunal found that “as a general rule, States apply either the head office or the place of incorporation criteria in order to determine nationality. By contrast, neither the nationality of the company’s shareholders nor foreign control, other than over capital, normally govern the nationality of a company, although a legislature may invoke these criteria in exceptional cases.”<sup>124</sup>

Draft Article 9, however, formulates an exception consistent with international practice where a corporation is controlled by nationals of another State, has no business activities in the State of incorporation, and the seat of management and financial control is located in that other State. This exception was recognized by ICSID Tribunal in *Autopista* when the tribunal noted that although the most widely used criterion for determining a juridical person’s nationality is the place of incorporation or registered office, “alternatively, the place of central administration or effective seat may also be taken into consideration.”<sup>125</sup>

In *Yaung Chi*, for example, the arbitral tribunal established that the applicable treaty required both local incorporation and effective management at the time the investment was made and throughout the investment period.<sup>126</sup> Thus, the effective management test was incorporated into the analysis, consistent with Draft Article 9.

As in the case of natural persons, the Draft Articles also address the continuous nationality of a corporation in Draft Article 10, which reflects the same general requirements of continuity of nationality.<sup>127</sup> This was illustrated in *Orinoco Steamship Company*, a case administered by the Permanent Court of Arbitration, in which a claim against the Government of Venezuela was permitted to proceed after a United Kingdom corporation transferred its claim to a successor corporation incorporated under the laws of the United States.<sup>128</sup>

With respect to the protection of shareholders, Draft Article 11 incorporates the general rule that a State of nationality of shareholders is not

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120 *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Rep. of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, at 41 (Sep. 27, 2001) [<https://perma.cc/3SCX-V4DQ>].

121 *Société Ouest Africaine des Bétons Industriels (SOABI) v. State of Senegal*, ICSID Case No. ARB/82/1, Decision on Jurisdiction (Aug. 1, 1984), 2 ICSID Rep. 165, 181 (1984) [<https://perma.cc/HBP6-J9VX>].

122 *Tokios Tokelés*, *supra* note 53.

123 *Saluka*, *supra* note 54.

124 *SOABI*, *supra* note 121.

125 *Autopista Concesionada de Venezuela*, *supra* note 120.

126 *Yaung Chi*, *supra* note 55, ¶ 49.

127 *Rep. on the Work of Its Fifty-Eighth Session*, *supra* note 4, at 55, art. 10.

128 *Orinoco Steamship Co. Case*, *supra* note 59.

entitled to exercise diplomatic protection with respects to claims arising from injury to the corporation.<sup>129</sup> This rule reflects the foundational principle of international law that a corporation possess a legal personality separate from that of its shareholders. As the ICJ observed in *Barcelona Traction*, granting every State of nationality of a corporation's shareholder *jus standi* to bring claims would create practical difficulties where a corporation has shareholders of several nationalities, potentially triggering a multiplicity of claims.

Draft Article 11 nevertheless recognizes two defined exceptions to this rule: (a) where the corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury, and (b) where the corporation had, at the date of the injury, the nationality of the breaching-respondent-State, and incorporation in that State was a precondition for doing business there.<sup>130</sup>

The latter exception reflects situations in which the injured corporation lacks an effective avenue of diplomatic protection, thereby justifying recourse by the shareholder's State of nationality. As the ILC explains in its commentary to Draft Article 11, this exception is supported by State practice, arbitral awards, and doctrine,<sup>131</sup> including cases such as *Delagoa Bay Railway*, *Mexican Eagle*, and *Salvador Commercial Company*, as well as references made to this principle in *Barcelona Traction*.<sup>132</sup>

It should be acknowledged that the specific treaty regimes may address the standing (*jus standi*) of shareholders differently, particularly given that shareholders are frequently treated as investors in their own right under bilateral and multilateral investment treaties. In this respect, ISDS departs from the traditional framework of diplomatic protection. Nevertheless, the principle embodied in Draft Article 11 remains relevant as an expression of the general rule of corporate separateness and as a background norm against which a shareholder claim must be assessed. Even in ISDS, the distinction between corporate injuries and direct shareholder injuries continues to inform questions of admissibility, standing, and the proper scope of international claims.

Draft Article 12 establishes that the State of nationality of a shareholder may bring an international claim and exercise diplomatic protection on behalf of that shareholder to the extent that an internationally wrongful act causes direct injury to the rights of the shareholder as such, distinct from the corporation itself.<sup>133</sup> This principle does not derogate from the principle of corporate separateness; rather, it recognizes that shareholders may possess

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129 *Rep. on the Work of Its Fifty-Eighth Session*, *supra* note 4, at 58, art. 11.

130 *Id.*

131 *Rep. on the Work of Its Fifty-Eighth Session*, *supra* note 4, at 58.

132 *Id.* at 62.

133 *Id.* at 66, art. 12.

individual rights under international law whose violation gives rise to an independent claim.

The operation of Draft Article 12 is illustrated by the ICJ's decision in *Ahmadou Sadio Diallo*. In this case, the Republic of Guinea brought a diplomatic protection claim against the Democratic Republic of the Congo (DRC) for violations of international law allegedly committed by DRC against Mr. Diallo, a Guinean national who was a shareholder or *associé* in two companies incorporated under Congolese law: Africom-Zaire and Africontainers-Zaire.<sup>134</sup> The DRC raised preliminary objections, arguing *inter alia*, that Guinea lacked personal jurisdiction or *jus standi* because "the rights which it seeks to protect belong to Africom-Zaire and Africontainers-Zaire, Congolese companies, not to Mr. Diallo."<sup>135</sup>

In its judgment on preliminary objections, the Court held the claims "admissible: 'in so far as it concerns protection of Mr. Diallo's rights as an individual' and 'in so far as it concerns protection of [his] direct rights as *associé* in Africom-Zaire and Africontainers-Zaire'."<sup>136</sup> The Court emphasized that the independent legal personality of the corporation separates it from the shareholders.<sup>137</sup> However, "the exercise by a State of diplomatic protection on behalf of a natural or legal person, who is *associé* or shareholder, having its nationality, seeks to engage the responsibility of another State for an injury caused to that person by an internationally wrongful act committed by that State."<sup>138</sup> In other words, the ICJ underscored that that bringing of an international claim on behalf of a shareholder seeks to engage the responsibility of a State for injuries caused by internationally wrongful acts that affect the shareholder.

The Court further concluded that:

Guinea does indeed have standing in this case in so far as its action involves a person of its nationality, Mr. Diallo, and is directed against the allegedly unlawful acts of the DRC which are said to have infringed his rights, particularly his direct rights as *associé* of the two companies".<sup>139</sup>

This reasoning reflects the principle codified in Draft Article 12 and confirms that diplomatic protection may extend to direct shareholders injuries without undermining the separate personality of the corporation.

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<sup>134</sup> *Ahmadou Sadio Diallo*, *supra* note 13, at 582.

<sup>135</sup> *Id.* at 596.

<sup>136</sup> *Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo): Case Overview*, I.C.J., <https://www.icj-cij.org/case/103> [<https://perma.cc/Z3X9-JZCC>].

<sup>137</sup> *Ahmadou Sadio Diallo*, *supra* note 13, at 605.

<sup>138</sup> *Id.* at 606.

<sup>139</sup> *Id.*

The principle is also consistent with ISDS practice, where shareholders may themselves qualify as investors and enjoy direct standing to bring international claims against a breaching State, when the applicable treaty so provides. In both contexts, the admissibility of the claim turns on whether the alleged wrongful act caused a direct injury to the shareholder's own rights, thereby reinforcing the relevance of Draft Article 12 to ISDS. For example, in *CMS Gas Transmission*, the ICSID tribunal determined that there is "no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if the shareholders are minority or non-controlling shareholders."<sup>140</sup> The tribunal further concluded that the ICSID Convention allows shareholders to bring international claims of their own.<sup>141</sup>

## VII. CONCLUSION

Nationality is a basic condition to provide *jus standi* to bring international claims when invoking the international responsibility of a State for an internationally wrongful act. Given this fact, international tribunals often face the challenge of determining the nationality of both natural and juridical persons. The challenge can arise in any claim of international responsibility, which could be brought by a State on behalf of its nationals (through the exercise of diplomatic protection) or by individuals and juridical persons themselves, as international actors with *jus standi*.

The Draft Articles on Diplomatic Protection, formulated by the International Law Commission, address the general rules of international law for the determination of nationality of both natural and juridical persons. Even though the Draft Articles were developed within the framework of diplomatic protection, they were specially crafted in the context of admissibility of claims as a jurisdictional issue. Therefore, the principles they articulate remain relevant for determining the admissibility of investor claims and providing jurisdiction *ratione personae*.

Diplomatic protection and ISDS practice have evolved along similar lines with respect to the determination of nationality of both natural and juridical persons. For natural persons, consistent with Draft Article 4, the general principle establishes that it is domestic law that defines the nationality of a person, so long as it is not inconsistent with international law.<sup>142</sup> In the case of juridical persons, it has been widely accepted in both

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<sup>140</sup> *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, ¶ 47 (July 17, 2003), 42 I.L.M. 788 (2003) [<https://perma.cc/NHU6-576P>].

<sup>141</sup> *Id.* at ¶ 56.

<sup>142</sup> See *Rep. on the Work of Its Fifty-Eighth Session*, *supra* note 4, at 31, art. 4.

diplomatic protection practice and ISDS that it is the place of incorporation or *siège social* that determines a corporation's nationality. An exception applies where effective control and management in another State, and the corporation has no substantial business activities in its place of incorporation, as reflected in Draft Article 9.<sup>143</sup> Building upon these core principles, the Draft Articles also address the requirements of continuous nationality, situations involving multiple nationalities, and the issue of shareholders in the context of juridical persons.<sup>144</sup> Although the Draft Articles have not been explicitly applied in ISDS proceedings, arbitral tribunals have reached conclusions that align closely with the principles they set forth. Cases, including *Olguin*, *Micula*, *Champion Trading*, *Aven*, *Autopista*, and *SOABI*, illustrate these parallels in the application of nationality rules in both diplomatic protection and ISDS contexts. Accordingly, the Draft Articles on Diplomatic Protection provide a coherent framework for nationality rules across international dispute settlement mechanisms, and particularly the admissibility of claims.

While international law affords States' "the widest possible latitude to agree on the meaning of nationality"<sup>145</sup>, and investments treaties almost always incorporate nationality prescriptions, the absence of such provisions in the context of an international claim calls for the application of general principles of international law. In this regard, the Draft Articles on Diplomatic Protection offer a coherent and consistent framework that should guide the determination of nationality for the purposes of admissibility and jurisdiction. In other words, the existence or absence of particular agreed-upon provisions between parties to a conflict does not preclude recourse to customary international law and the principles reflected in the Draft Articles on Diplomatic Protection. This approach is consistent with the general rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties, Article 31.<sup>146</sup>

As the ICSID Tribunal in *Micula* observed, "it is in the context of diplomatic protection that States may have a particular vested interest in relying on or disregarding a nationality".<sup>147</sup> Therefore, the principles developed in the context of diplomatic protection for the determination of nationality are legally authoritative and remain relevant for assessing the nationality of natural and juridical persons in ISDS.

Similarly, the ASR have been extensively cited in Investor-State disputes, notwithstanding the fact that they were formulated in the broader

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143 *See id.* at 52, art. 9.

144 *See id.* at 55, art. 10.

145 *Autopista Concesionada de Venezuela*, *supra* note 120, at 41.

146 Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 [<https://perma.cc/9VQE-NLLK>].

147 *Ioan Micula*, *supra* note 2, ¶ 99.

context of general international responsibility rather than international investment law. There is therefore no principled reason to prevent the application of the Draft Articles on Diplomatic Protection to nationality issues. As the ICSID tribunal said in *LSG v. Romania* (2022) affirmed, the ILC's ASR "apply to inter-State international responsibility but can be applied by analogy and transposed to relations between a State and a foreign investor insofar as it concerns the objective of reparation."<sup>148</sup> The same reasoning applies to the rules of nationality contained in the Draft Articles on Diplomatic Protection to ISDS.

Applying these Draft Articles in this context will help to reduce the inherent uncertainty of customary rules of international law and promote a more systematic and consistent approach to the application of international legal rules. In doing so, it would also mitigate the fragmentation that arises from the profusion of international tribunals interpreting international law independently.

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148 *LSG Bldg. Sols. GmbH v. Romania*, ICSID Case No. ARB/18/19, Final Award, ¶ 1309 (Feb. 20, 2024) [<https://perma.cc/U3G6-2FXE>].