YAI TALKS #DC: Treaty Claims by Dual Nationals and Collection of Treaty-Based Awards

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YAI TALKS#, a new conversation series launched by the ITA Young Arbitrators Initiative (YAI) under the leadership of YAI chair Montserrat Manzano (Von Wobeser y Sierra, Mexico City) and vice chair Silvia Marchili (King & Spalding, Houston), kicked off on May 12 in Washington, D.C., with a debate on claims by dual nationals against countries of their own nationality, and a panel discussion on issues pertaining to collection in the context of treaty-based arbitral awards. The first YAI TALK was hosted by Manzano and Marchili, at the office of co-sponsor Quinn Emanuel Urquhart & Sullivan, LLP.

David Orta of Quinn Emanuel opened the first panel with an overview of Serafín García Armas v. Venezuela, an UNCITRAL case holding that a father and daughter with dual Venezuelan-Spanish nationality are able to sue Venezuela under the Spain-Venezuela BIT. Framing the debate, Orta highlighted Venezuela's main jurisdictional objections; mainly, that applicable rules of international law impede the admission of claims by dual nationals against their own states, especially if the nationality of the respondent state is the predominant or effective nationality of the claimant.

Orta raised a series of critical questions: Should states have the burden to show that dual nationals are excluded from the protection of the treaty? Do we really think that states intended to be sued by their own nationals when they signed BITs? Should tribunals look beyond the text of the treaty to discern the intention of the parties from other instruments? Panelists Michelle Grando (White & Case), Catherine Kettlewell (Arnold & Porter), and Patrick Childress (Sidley Austin) were asked to argue opposing sides of these issues (without necessarily expressing their views or the views of their law firms or clients).

Adopting a pro-claimant position, Grando argued that the text of the Spanish-Venezuela BIT does not exclude dual nationals, such as the Garcías, from its scope of protection. She asserted that BITs are *lex specialis* vis-à-vis customary international law, and that there is no room to apply the customary test of dominant or effective nationality when the BIT expressly defines "investor" by reference to domestic legislation. Grando also pointed to Venezuela's treaty practice to argue that, when Venezuela has sought to exclude dual nationals, it has done so expressly in the treaty.

Adopting a pro-respondent stance, Childress responded that there is no evidence that contracting states to the Spain-Venezuela BIT made a purposeful choice to protect dual nationals, and that Venezuela's treaty practice does not suggest otherwise. Childress suggested that extending protection to dual nationals only as investors of the state of 'effective' or 'dominant' nationality may strike the proper balance. Responding to a question by a member of the audience on what is the legal basis to apply customary rules of nationality in the BIT context, Childress further suggested that when a BIT is silent on the question of dual nationality, international customary rules of diplomatic protection may play a gap-filling role.

Catherine Kettlewell discussed the differences between the ICSID Convention and Additional Facility Rules —expressly excluding dual nationals— and the UNCITRAL regime —which is silent on the question of dual nationality— and highlighted the asymmetry that may arise in the resolution of questions of standing of dual nationals by tribunals constituted under the different sets of rules.

The persuasiveness of the *García Armas* holding has not been tested yet but, as the heated panel discussion revealed, it will likely be highly debated in future BIT jurisdictional rulings involving dual nationals.

The second panel focused on collection by winning claimants of amounts awarded by treaty-based tribunals in the ICSID and non-ICSID context. Michael Nolan (Milbank) moderated the panel of Sara McBrearty (King & Spalding), Isaiah Soval-Levine (Derains & Gharavi) and Hugh Carlson (Three Crowns).

McBrearty discussed the geopolitical implications of global efforts by the Yukos majority shareholders to enforce a US$ 50 billion award against Russia. Although the Yukos award has been set aside by the District Court of the Hague, McBrearty noted that the global enforcement fight is far from over, as Article V(1)(e) of the New York Convention grants enforcing courts discretion to enforce an award that has been annulled by the courts of the seat of the arbitration (and the Yukos majority shareholders have announced their intent to appeal the district court judgment).

Next, Isaiah Soval-Levine contrasted the approach adopted by the U.S. District Court for the District of Columbia —holding that ICSID awards can only be enforced through a plenary action— and the approach followed by U.S. District Court for the Southern District of New York in Mobil Cerro Negro Ltd. v. Venezuela —allowing enforcement of ICSID awards in expedited *ex parte* proceedings. Soval-Levine also highlighted the recent filing by the U.S. of an amicus curiae brief in the *Mobil Cerro Negro* case (on appeal before the Second Circuit), arguing that award creditors must file a plenary action under the Foreign Sovereign Immunities Act (FSIA) to enforce an ICSID award.

Closing, Hugh Carlson discussed a recent "micro-trend" in ICSID annulment proceedings to lift the automatic stay of enforcement of awards or to require the posting of security. As evidence of this rising trend, Carlson highlighted two recent cases involving Venezuela: Flughafen v. Venezuela, where the annulment committee declined to lift the stay of enforcement but required Venezuela to post security in favor of the claimants for the full amount of the award; and OI European Group v. Venezuela, where the *ad hoc* committee rejected Venezuela's request to continue the stay of enforcement, placing the burden on Venezuela to show that existing circumstances justified its continuation. An interesting discussion followed when Carlson's conclusion that "the automatic stay of ICSID awards is no longer automatic" was challenged by a member of the audience who argued that *ad hoc* committees have generally declined to lift the automatic stay.

Although sovereign debtors rarely resist recognition and enforcement of treaty-

based arbitral awards, the panelists underscored the importance of enforcement due diligence in anticipation of an award, and collection speed once the award is rendered.