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# The Passports' Game: Chronicle Of A Foretold Death For Dual Nationals' Claims

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In a previous post, which discussed the *Ballantines* award, the author concluded that doors for dual nationals' claims are being closed, including for non-ICSID cases where the relevant treaty does not have a provision dealing with the issue. The recent *Heemsen v. Venezuela* jurisdictional award confirms this approach. Unanimously, a PCA tribunal declined jurisdiction over the claims brought by Messrs. Enrique and Jorge Heemsen against Venezuela, not only because of lack of jurisdiction *ratione voluntatis*, since Venezuela did not consent the arbitration to be settled by an UNCITRAL tribunal, but most important – for the sake of this post – because of lack of jurisdiction *ratione personae*, since the Treaty between the Republic of Venezuela and the Federal Republic of Germany for the promotion and reciprocal protection of investments (the "Treaty") does not allow claims brought by nationals of both states.

The award makes clear that the lack of an express prohibition of dual nationals' claims in the relevant treaty is not enough to sustain that such types of claims were consented by the parties. Despite a treaty's silence on this issue, what matters are the principles of international law, including the *dominant and effective nationality* as the one that governs the issue. Showing their German passports and nationality certificates was not enough for the *Heemsens*. Their dominant and effective nationality was the Venezuelan one; therefore, they were not allowed to bring claims against their home state, Venezuela. Thus, it seems that the passports' game is reaching its end.

**Understanding the *Heemsen* award**

According to the jurisdictional award dated October 29, 2019 (PCA Case No. 2017-18), the company *Sucesión Heemsen, C.A.* ("SHCA") owned a land called "La Salina," in Carabobo, Venezuela. SHCA was ultimately controlled by Messrs. Enrique and Jorge Heemsen Sucre (¶¶ 63-71), both born in Venezuela but allegedly also German nationals due to *ius sanguinis*. Their father, Mr. Enrique Heemsen Velazco, was recognized and treated as a German national by the German authorities, despite also having been born in Venezuela (¶ 172).

In May 2011, after the Venezuelan port state-owned company "Bolivariana de Puertos S.A." informed Messrs. Heemsen of its intention to expand the state port, both parties began negotiations to transfer to the state a part of La Salina. Ultimately the parties could not agree on the price and on March 13, 2012, Venezuela issued the Expropriation Decree No. 8.838. The Decree ordered an

expropriation proceeding against La Salina due to public and social reasons (¶¶ 72-78). In December 2016, the *Heemsens* submitted the dispute to an *ad-hoc* arbitration proceeding under the UNCITRAL Rules alleging that the Decree violated its rights under the Treaty.

On the one hand, article 10.2 of the Treaty provides that any dispute under the Treaty shall be submitted to ICSID arbitration. Further, the Treaty's Protocol ad-article 10(a) states that "while the Republic of Venezuela does not become party to the ICSID Convention," the dispute shall be submitted to the ICSID Arbitration Additional Facility Rules before ICSID. Ad-article 10(b) points that "in case it is not possible to recourse to the arbitration proceeding according to the ICSID Arbitration Additional Facility Rules," the dispute shall be submitted to an *ad-hoc* proceeding under the UNCITRAL Rules. Based on these provisions, Venezuela submitted a *ratione voluntatis* jurisdictional objection arguing that it had not consented to an *ad-hoc* proceeding, which was available only during the time previous to Venezuela's becoming a party to the ICSID Convention. In any event, given that the ICSID Additional Facility Rules were still available, the *Heemsens* would not have been authorized to initiate a UNCITRAL proceeding (¶¶ 89-108).

On the other hand, the *Heemsens* are dual nationals, which is the base for Venezuela's *ratione personae* jurisdictional objection. Although the claimants hold German passports and nationality certificates, they are also Venezuelan citizens. According to Venezuela, the Treaty does not allow dual nationals' claims. Even if that were not the case, it argues that international principles of law should apply when interpreting the relevant treaty; thus, the principle of *dominant and effective nationality* controls the issue at hand. Therefore, since the *Heemsens* have stronger ties with Venezuela than with Germany, their *dominant and effective nationality* is the Venezuelan one, and therefore, they are not entitled to sue Venezuela (¶¶ 238-245).

Upholding the *ratione voluntatis* objection, the tribunal first concluded that the forums contemplated in ad-articles 10(a) and 10(b) of the Treaty's Protocol and in article 10.2 were not intended to be optional among each other. This is, any forum different from an ICSID arbitration, including an UNCITRAL proceeding, was available only while Venezuela had not become a party to the ICSID Convention; this is the so-called "pre-ICSID period," thus not extendible to the time after which Venezuela denounced such convention (¶¶ 352-388).

Nevertheless, even if the additional forums were extendible to that time, the *Heemsens* would not have been allowed to bring their claims to an UNCITRAL tribunal. They tried to initiate an arbitration under the ICSID Additional Facility Rules but the ICSID Secretary General rejected it *in-limine* since Messrs. Heemsens do not fit in the definition of "national of another state" set forth in article 1(6) of such Additional Facility Rules. The tribunal concluded by stating that a motivated rejection is not the same as the impossibility to apply the Additional Facility Rules mentioned in ad-article 10(b) (¶¶ 389-399).

Although the tribunal could have stopped there, "*ex abundati cautela,*" it went further and stated its position on the feasibility of dual nationals bringing claims against one of their own states (¶ 411). First, the tribunal concluded that the lack of an explicit prohibition in the relevant treaty is not an authorization for such kind of claims. While the treaty does not exclude protection to dual nationals, it does not include them explicitly either (¶ 414).

Moreover, it found that article 10.2 states that had the dispute not been amicably settled, it shall be submitted, at the "national" request, to an arbitration proceeding under the ICSID Convention. Since the latter does not allow dual nationals' claims (article 25(2)(a) of the ICSID Convention)

the concept of "national" in the treaty must be interpreted as a national holding the nationality of one state but without having at the same time the nationality of the other one. Arguing otherwise would mean that the treaty protects dual nationals, but they cannot use the dispute resolution clause. The fact that theoretically the investor and the state could apply rules different from those of ICSID is not a compelling excuse to change the conclusion above (¶¶ 417-419).

Finally, the tribunal concluded that regardless of the treaty's silence on the issue, principles of international law apply, and therefore – applying by analogy the international law of diplomatic protection (¶ 433) – the principle of *dominant and effective nationality* is to govern the matter (¶ 440). Applying the *Nottebohm case*, the tribunal concluded that the Heemsens' *dominant and effective nationality* was the Venezuelan one as they were born and have their domicile in Venezuela, their children were also born in Venezuela, they incorporated companies and behaved on them as Venezuelan citizens, and finally they did not register their shares in La Salina or themselves as an international investment or as foreign investors respectively before the Superintendence of Foreign Investments.

Given those findings, the tribunal rejected jurisdiction ordering the *Heemsens* to pay Venezuela's counsel reasonable fees.

**There is no such a thing as an affirmative silence for dual nationals' claims**

The importance of the *Heemsen* award is even bigger than that of the *Ballatines* decision. Unlike the *Ballantines* decision, which dealt with a treaty that had a specific provision about dual nationals' standing, the *Heemsen* decision deals with the same issue but where the applicable treaty keeps silent on the matter. This issue had been previously dealt with by other tribunals in a totally opposite direction. Particularly the PCA, *Serafin García Armas* tribunal (discussed here) allowed claims brought by dual Spanish-Venezuelan nationals against Venezuela mostly due to a lack of an express prohibition for such claims in the Spain-Venezuela BIT (*Serafin García Armas* award, ¶ 200). The *Heemsen* award has shifted such an interpretation, concluding that an affirmative silence for dual nationals' claims does not exist in investment arbitration.

Most recently, a new PCA tribunal confirmed this trend, dealing what could be seen as the final blow to the passports' game. Analyzing the Spain-Venezuela BIT, the *Manuel García Armas v. Venezuela* jurisdiction award dated December 13, 2019 (PCA Case No. 2016-08), found that silence in a treaty about dual nationals' standing cannot amount to a consent. The tribunal looked at the context of the BIT's conclusion. During the negotiations of the ICSID Convention both Spain and Venezuela explicitly opposed dual nationals' claims. Particularly, Spain's representative stated that "with regard to the problem of dual nationality, he felt that, where one of the two nationalities involved was that of the host State, that State would not agree to being brought before an international forum by a person whom it claimed as its national." Further, the same representative added that "on the question of dual nationality he could not agree that a State would under any circumstance consider foreign an investment made by one of its nationals even if they had concurrently the nationality of another State." (¶ 667). The tribunal concluded that this revealed what both states considered as the international law applicable not only to the ICSID Convention negotiation, but also to their negotiated investment treaties, including the BIT (¶ 669).

Contrary to the *Serafin García Armas* award, which stated that the international law of diplomatic

protection was not applicable to the interpretation of investment treaties (¶¶ 172-173), both the *Heemsen* and the *Manuel García Armas* awards state that diplomatic protection principles are indeed important in this field, including therefore the principle of *dominant and effective* nationality. As a consequence, from now on, if tribunals follow the *Heemsen* and the *Manuel García Armas* approaches, any dual national will have to show that their dominant and effective nationality is the one of the non-host country state; otherwise, their claims will be dismissed based on lack of *ratione personae* jurisdiction.

**The back door is not an option anymore either**

Of same – or maybe even more – importance than the application of international law principles is the fact that the alternative to submit a dispute to a non-ICSID arbitration, like an UNCITRAL one, is no longer an option. Same as *Serafin García Armas*, the *Heemsens*, and *Manuel García Armas*, other investors have tried to use the back door of an UNCITRAL arbitration, instead of an ICSID one, in order to secure jurisdiction. Since the ICSID Convention clearly forbids dual nationals to sue either of their own states, investors have argued that because the treaty also allows them to initiate an UNCITRAL proceeding, this would also create standing for dual nationals. Both the *Heemsen* and the *Manuel García Armas* awards seem to put an end to that possibility, too. If parties agreed to ICSID arbitration, the parties also agreed on the prohibition of dual nationals suing any of their own states. What cannot be obtained through the main door (ICSID) cannot be obtained through the back door (UNCITRAL) either.

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