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Americans at Heart, Colombians in Fact: How the Carrizosas Award Contributes to the Trend on Lack of Standing of Dual Nationals in Investment Arbitration

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The issue of dual nationals' access to investor-state dispute settlement ("ISDS") has once again taken the center stage through the recently issued *Carrizosa v. Colombia* award. Resolved under the auspices of the 2013 UNCITRAL Arbitration Rules, the PCA tribunal unanimously dismissed the entire case for lack of jurisdiction *ratione personae*, in accordance with the provisions of the Investment Chapter of the United States-Colombia Trade Promotion Agreement ("TPA").

In a previous post, one of the authors reviewed the *Ballantines* award, which also dealt with dual nationals' investment claims, concluding that doors for dual nationals' claims are being closed, in particular for non-ICSID cases. The author drew the readers' attention to then pending *Carrizosas* claim. As predicted at the time, in *Carrizosas* both the parties and the tribunal devoted much of their time to deal with the applicability of the *Ballantines* precedent to that dispute.

In a later post reviewing the *Heemsens* jurisdictional award, the same author reasserted the growing trend towards the restriction of dual nationals' recourse to ISDS. Showing their foreign passports was not enough for the *Heemsens* claimants, and unsurprisingly, was not enough for the *Carrizosas* claimants either. The Carrizosa brothers also relied heavily on their subjective feelings as Americans. Given the extrinsic evidence of their well-entrenched Colombian roots, the tribunal accorded no weight to those subjective feelings. They may be Americans at heart but are Colombians in fact.

The Carrizosa Brothers' Claims and Colombia's Jurisdictional Objections

The three claimants Alberto, Felipe, and Enrique are the sons of Astrida Benita Carrizosa, a naturalized US citizen, and the late Julio Carrizosa Mutis, a prominent Colombian businessman. They claimed to have invested in Granahorrar, a Colombian banking entity engaged in promoting private savings for the construction industry. Sometime in 1998, they acquired shares in Granahorrar.

Amid the Colombian economic crisis in the late 1990s, Granahorrar borrowed funds from two Colombian government entities—the Central Bank and the Fogafín (the Colombian *"Fondo de Garantías de Instituciones Financieras"*). Granahorrar defaulted on its payments. In October 1998,

Fogafín capitalized Granahorrar upon orders of the Colombian government's Superintendency invoking the Fogafín agreement enabling ownership takeover of Granahorrar's promissory notes in case of default.

From its acquisition of Granahorrar in 1998, the Fogafín implemented a "guarantee-restructuring program" to improve Granahorrar's financial situation that eventually led to its merger with a Spanish bank in 2005. The claimants challenged these measures before Colombian courts. Through a 14-year string of court cases, the Constitutional Court ultimately affirmed the Fogafín's and the Superintendency's measures. Aggrieved by their defeat, the Carrizosas initiated an investment claim against Colombia in 2018. Citing investment protections under the TPA, the claimants sought compensation in the amount of US$ 323 million.

Colombia resisted the claims. In its Answer on Jurisdiction, Colombia challenged every aspect of the tribunal's jurisdiction. With regard to the lack of jurisdiction *ratione personae*, it was an undisputed fact that the claimants were dual national citizens of the United States and of Colombia. All three claimants were born in Colombia, acquiring both Colombian nationality and, through their mother, US nationality at birth. The tribunal found that the Carrizosas' dominant and effective nationality is that of Colombia, not the US, and thus dismissed the claims for lack of jurisdiction *ratione personae*.

Carrizosas and *Ballantines* Compared

Customary international law dictates that a State cannot be subject to claims raised by its own dominant and effective nationals before an international forum (as reflected in article 7 of the ILC Draft Articles). The US-Colombia TPA embraces this principle by explicitly providing in Article 10.28 that a dual national claiming the status of a covered investor shall be deemed exclusively a national of the State of her or his dominant and effective nationality. As such, the sole issue that the *Carrizosas* tribunal had to resolve was which of the brothers' nationalities was the dominant and effective one.

Ballantines was resolved under DR-CAFTA, under which Article 10.28 also restricts a dual national's access to ISDS. It is not a sheer coincidence that both DR-CAFTA and the TPA contain the same restriction. The US government has had the very same clause in its 2004 and 2012 Model BITs, and it is a party to both the US-Colombia TPA and the DR-CAFTA. In fact, both in *Carrizosas* and in *Ballantines,* the US filed non-disputing party submissions reaffirming the importance of this principle in its treaties.

Further, in the *Carrizosas* award, the tribunal first ascertained who bears the burden of proof in establishing or defeating jurisdiction. Both *Carrizosas* and *Ballantines* placed the burden of proof on the claimants, following *Pac Rim*, which held that "all relevant facts supporting […] jurisdiction must be established by the Claimant at this jurisdictional stage and not merely assumed in the Claimant's favour." The *Carrizosas* award, however, went one step further. It rejected the claimants' assertion of "a presumption of legitimacy" in favor of claimants "that the non-host State represents [their] dominant and effective nationality."

Another similarity between *Carrizosas* and *Ballantines* is that the parties in both cases agreed that the claimants did not acquire a second nationality through a form of treaty-shopping. Be that as it may, the *Ballantines* tribunal considered that "naturalization is also a key component to be

analyzed within the dominant and effective nationality test" and took it against the claimants that "the main reason for [them] to acquire a second nationality was the *investment directly related to this proceeding*." Meanwhile, the *Carrizosas* tribunal had no opportunity to include naturalization in its analysis because the claimants were dual nationals from birth. The Carrizosas, nonetheless, put emphasis on the lack of motive for treaty-shopping in the bringing of their claims to sway the tribunal's decision in their favor. Given that *Carrizosas* dismissed the claims despite the absence of evidence of treaty-shopping, it affirms the view that the prevention of treaty-shopping is not the sole object for restricting dual nationals' access to ISDS.

As to the test to determine the dominant and effective nationality, the *Carrizosas* tribunal assessed "the extent to which, together with other factors, the dual national has social, civic, family and other economic ties to the competing States". In *Ballantines*, the tribunal looked at "the State of habitual residence, the circumstances in which the second nationality was acquired, the individual's personal attachment for a particular country, and the center of the person's economic, social and family life". The convergence of these two awards as regards the applicable legal standard lies in the fact that both tribunals drew inspiration from *Nottebohm* and *Mergé*. Applying that standard, the *Carrizosas* tribunal found that Colombia was the claimants' habitual residence, economic center, and familial, social and political centers.

The tribunal analyzed the totality of facts that proved both the Carrizosas' strong roots in Colombia and the lack of their connections with the US. For instance, although they all traveled primarily with their US passport, the tribunal viewed this more as animated by pragmatism than patriotism due to the relative ease of movement with a US passport. Instead, the tribunal put weight on the fact that all three claimants were born and raised in Colombia, and each of them made Bogotá as his permanent home while maintaining only a vacation home in the US. All three brothers also spoke of returning to Colombia to run their family businesses at the behest of their father. All three were also employed in Bogotá and none held any position in a US company. The tribunal also explained how the claimants have made, raised, and educated their families in Colombia with no major attachment to the US. It was inarguable to the tribunal that Colombia was the focal point of the claimants' business activities and professional lives. In terms of commitment to public life, all three claimants voted in Colombian elections and even made political campaign contributions. Only Enrique voted by mail in the 2020 US election.

Without dwelling on all the other factors the tribunal examined, there was overwhelming evidence of the claimants' "long and deep-rooted connections with Colombia over many years" and they had little evidence to anchor their claims as American citizens.

Interestingly, the Carrizosas asked the tribunal to accord weight to their "subjective considerations", that is, their self-identification as Americans. They alleged that their preference has been to embrace their US heritage. In their Reply, they insisted that "how they see themselves with respect to citizenship and nationality" should be central to the tribunal's analysis. Alberto, for instance, testified that he "grew up in a family where traditions, customs and festivities were based on U.S. culture", while Enrique insisted that "[a]ll [his] life, U.S. culture has been the only culture [he] related to". They even went on to argue that "[t]he *only* kind of testimony" to refute their self-identification as Americans is "from a declarant having personal knowledge that […] Claimants when being raised in their household were not in fact exposed to U.S. culture as the predominant cultural influence."

The tribunal flatly rejected the claimants' argument. *First*, the test to determine dominant and

effective nationality requires the evaluation of “how an individual might hold himself out to the world on the basis of extrinsic evidence”, and *second*, in any case, it was “impossible to test” subjective feelings. The tribunal was emphatic that its task was to undertake an “objective factual enquiry”, which the claimants failed to satisfy. As the *Carrizosas* tribunal rightly held, “the [claimants’] lives behind their front doors may be the embodiment of modern American family life, but as to that, the Tribunal has only Claimants’ word and expression of subjective feeling.”

The Value of the *Carrizosas* Award

Carrizosas and *Ballantines* are similar in many respects, especially regarding the burden of proof and the factors considered in determining a claimant’s dominant and effective nationality. There is value in establishing uniform case law, more so for today’s ISDS system that faces heavy criticism for its fragmented and often inconsistent awards. Additionally, however, *Carrizosas*’ most significant contribution lies in its exclusion of investors’ untestable subjective feelings from the dominant and effective nationality calculus.

As seen, the ISDS doors have become much narrower for dual nationals. However, some dual national investors are still trying their luck, such as those in *Raimundo Santamarta v. Venezuela* and *Ernest Schütz v. Peru*. If at all, *Carrizosas* should serve as guidance for bi-national investors to be more conscientious in their choice of connections and the closeness of their national bonds so they can successfully access the ISDS mechanism. At the end of the day, a dual national investor’s attachment towards one country must be established as a matter of fact; subjective feelings, no matter how deep-seated, play no role in investment arbitration.

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