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Treaty Claims by Dual Nationals: A New Frontier?

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For natural persons, possession of the nationality of the host state is an absolute bar to becoming a party to ICSID proceedings against that state. Article 25 of the ICSID Convention delimits the scope of arbitral jurisdiction to investment disputes between a 'Contracting State' and a 'national of another Contracting State', defined as 'any natural person who had the nationality of a Contracting State other than the State party to the dispute' on the relevant dates, that is, the *date of consent* to arbitration and the *date of registration* of the request.

Some bilateral investments treaties incorporate a similar rule. For instance, the Canada-Venezuela BIT expressly excludes dual nationals from its scope of protection by stipulating that an investor cannot possess the citizenship of the host state of the investment. Similarly, the Italy-Venezuela BIT excludes from its protection '[n]ationals of both Parties who reside or are domiciled in the Territory of one of said Parties' *at the time the investment is made* (free translation)

The following questions arise: Where an investment treaty is silent on the question of standing of dual nationals, should dual nationals get protection as 'investors' of both treaty parties, protection only as 'investors' of the state of 'effective' or 'dominant' nationality, or no treaty protection at all? And what are the critical dates for testing nationality under the BIT and under the ICSID Convention?

Some of these questions have recently been tested.

In a case of first impression, an UNCITRAL tribunal of Eduardo Grebler, Guido Tawil and Rodrigo Oreamuno held that dual Venezuelan-Spanish nationals Serafín García Armas and his daughter, Karina García Gruber, had standing to sue Venezuela under the Spain-Venezuela BIT over the alleged expropriation of their food retail and distribution business in the country. The tribunal rejected the application of customary rules of nationality in the BIT sphere, and declined to inquire into the claimants' effective or dominant nationality.

In the *García Armas* case, Venezuela relied on the customary international law principle of 'effective and dominant' nationality to argue that the claimants could not invoke their Spanish nationality against Venezuela because it was merely formalistic, in contrast with their deeper actual ties to Venezuela (Mr. García Armas was born in Spain in 1944, moved to Venezuela in 1961, acquired Venezuela nationality in 1972, and allegedly lost his Spanish nationality between 1978 and 2004; Ms. García Gruber was born in Venezuela in 1980 and obtained Spanish nationality in 2003).

The claimants countered that nationality (and other) rules developed within the diplomatic protection framework cannot be applied to the detriment of relevant provisions in the BIT. As a preliminary matter, the tribunal rejected the application of customary nationality rules in the BIT context, which application it deemed necessary only when the text of the treaty was not sufficiently clear for its interpretation. In support of this conclusion, the arbitrators also cited to Article 17 of the Draft Articles on Diplomatic Protection, providing that '[t]he present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments'.

Having found that BITs constitute '*lex specialis*' between the contracting parties and are not 'subject to the application of customary international law', the tribunal deemed unnecessary to inquire into the claimants' effective or dominant nationality.

The *García Gruber* tribunal next turned to the text of the BIT to determine whether the dual national claimants had standing to sue Venezuela under the treaty. Venezuela had argued that, on its face, the BIT's definition of investor ? 'a physical person having the nationality of one of the Contracting Parties' who invests in 'the other Contracting Party' ? excluded physical persons with the nationality of both contracting parties. (free translation). Venezuela added that allowing dual nationals to sue their own state would go against the object and purpose of the treaty.

The claimants rejected Venezuela's contention, noting that the expressions 'one' and 'other' in the definition of 'investor' only sought to establish that an investor must have at least one nationality different from the home state of the investment, and that the exclusion of dual nationals cannot be implied from these phrases. Moreover, the claimants pointed to Venezuela's treaty practice to argue that, when treaty parties have sought to exclude dual nationals, they have done so expressly, as is the case of other BITs entered into by Venezuela with, for example, Italy, Canada, and Iran.

The tribunal sided with the claimants, holding that if the treaty did not impose any express limitation on dual nationals, it was 'not possible to devoid of effect the nationality granted freely by a State and accepted as valid by the other'.

Venezuela had also argued the inclusion of ICSID as the primary method of dispute resolution in the treaty confirmed the treaty parties' intent to exclude the possibility of being sued by their own nationals in an international arbitral forum (the Spain-Venezuela BIT provided for UNCITRAL arbitration if arbitration under the ICSID Convention and under the Additional Facility Rules were unavailable, or if the parties otherwise agreed on UNCITRAL arbitration).

In turn, the claimants pointed to the express exclusion of dual nationals under ICSID Article 25 in support of their argument that the ICSID exclusion cannot be generalized to *other* forms of arbitration that might be available under the BIT. The tribunal sided with the claimants, declining to extend the restrictions on claims by dual nationals under the ICSID Convention to a different arbitral regime.

The *García Armas* tribunal had no need to address whether ICSID's dual nationality rule — to be tested on the date on which the parties consent to ICSID arbitration and the date of registration of the request for arbitration — incorporates an implicit requirement that the host state's nationality must not be held at the time of the breach of the obligation in question. The possibility remains open that an investor with dual nationality *at the time of the breach* may pursue the ICSID route if he no longer holds the nationality of the state party to the dispute *at the time of consent* (unless the

same dual nationality rule is stipulated in the applicable BIT).

García Armas v. Venezuela highlights the asymmetry that may arise in the resolution of the question of standing of dual nationals by tribunals constituted under the ICSID Convention and under the UNCITRAL Arbitration Rules (or other arbitral rules that are silent on the question of dual nationality). It may be too soon to tell whether this case will open the floodgates of claims by dual nationals. But domestic investors seeking to 'internationalize' their investment would be well-advised to get a second (or third) passport.

This entry was posted on Thursday, October 8th, 2015 at 11:00 pm and is filed under Canada, ICSID Arbitration, ICSID Convention, Italy, Nationality requirement in arbitration clauses, UNCITRAL, Venezuela
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