Kluwer Arbitration Blog

New Trends For Dual Nationals Claims. Is the Ballantines Award Relevant For Cases Where A Dual Nationals-Related Provision Is Not Incorporated In The Relevant Treaty?

Pablo Mori Bregante (GST LLP) · Wednesday, October 30th, 2019

It is said that states lose more times than investors in investment arbitration. Indeed, ICSID surveys reveal that while investors receive an award of costs in 41.4% of the cases, states receive a similar award of costs only in 23% of the cases, even when jurisdiction is fully declined. A case where a state prevails but has to bear the costs of a groundless claim is hardly a total victory. Despite that, there have recently been good news for some Latin American states. The latest is the case of the Dominican Republic, which in September prevailed in the first investment arbitration dealing with a treaty provision allowing dual nationals to sue one of their home states (*Lisa Ballantine and Michael Ballantine v. The Dominican Republic*), whose further implications for future disputes will be discussed below.

Before that, for the sake of fairness, it is worth mentioning that this decision follows on a series of recent positive cases for two other Latin American states. First, in May Venezuela beat Clorox Spain, when a PCA tribunal declined jurisdiction, requiring that "the owner of an asset in the territory of a Contracting Party is required to have been the active subject in the act of investing" (¶ 802). Second, in August, Colombia also beat Glencore when an ICSID tribunal awarded Glencore an actual compensation of approximately only 1.75% of the claim (considering both the restitution awarded less the legal expenses).

Understanding the *Ballantines* award

The dispute was decided by a PCA tribunal on a majority award declining jurisdiction dated September 3, 2019 (PCA Case No. 2016-17). The Ballantines are American citizens who accused the Dominican Republic of violating its obligations under the Dominican Republic – Central America – United States Free Trade Agreement (the "DR-CAFTA"), by rejecting in 2011 their authorization to keep expanding their luxury real estate project *Jamaca de Dios*, due to environmental reasons. In September 2014, the Ballantines submitted their dispute to arbitration, claiming that the Dominican Republic gave them less favorable treatment than its nationals and failed to give them fair and equitable treatment.

The Ballantines were also citizens of the Dominican Republic, *i.e.* dual nationals. The DR-CAFTA is one of the few treaties to allow claims by dual nationals against one of the countries of their

nationality (the host country) if and only if the claimant's "dominant and effective nationality" is that of the non-host country (article 10.28 of the DR-CAFTA).

For that reason, the Dominican Republic objected to the Tribunal's jurisdiction, contending that the Ballantines did not qualify as "claimants" under the treaty, since their *dominant and effective* nationality at the time when they submitted their claims to arbitration was the Dominican one. As for the Ballantines, although they acknowledged that they have to comply with the definition of "claimant" under the DR-CAFTA, they contended that the only relevant date was the time when they made their investment in the Dominican Republic and that, in any event, their *dominant and effective* nationality was always the one of the U.S.

Analyzing the Dominican Republic jurisdictional objection, the *Ballantines* tribunal first focused on when an individual should comply with the *nationality* requirement. The majority award concluded that according to both the terms of the specific treaty and the UNCITRAL Rules, the *nationality* requirement must be fulfilled, first, at the moment the notice of arbitration along with the statement of claim is received by the respondent and, second, at the date in which knowledge of the breach is or should have been acquired (¶¶ 522-523), which is when the alleged breach was committed.

Second, the Tribunal went on to analyze the legal standard under the treaty to determine the *dominant* and *effective* nationality of the claimants. Given the DR-CAFTA's silence on the matter, the majority tribunal pointed out that it is necessary to give effect to the customary rules of international law for which "customary international law cases are instructive" (¶ 533). As such, the Tribunal took reference from the ICJ decision in the famous *Nottebohm* case (¶ 545).

In a nutshell, following the *Ballantines* award, parties dealing with similar disputes from now on should consider four elements to determine the *effective* and *dominant* nationality: (i) the state of habitual residence; (ii) the circumstances in which the second nationality was acquired; (iii) the individual's personal attachment to a particular country; and (iv) the center of the person's economic, social and family life (¶ 552). The importance of those elements is such there will be no investor if there is no dominant and effective foreign national (¶ 553).

After concluding that the first three elements favored the Ballantines' Dominican Republic nationality, the Tribunal focused on the Ballantines' center of economic, social and family life. For that, the Tribunal considered very relevant not only the Dominican naturalization voluntarily acquired by the Ballantines on December 30, 2009 (¶ 578), but also the fact that the Ballantines moved to the Dominican Republic in 2006.

The Ballantines made a significant investment creating the *Jamaca de Dios* project in the Dominican Republic in 2006, for which they even sold two of their homes and commercial real estate in the U.S. Although they maintained connections to the U.S., the Tribunal considered that from 2006 to the moment the claim was submitted, the Ballantines had moved or relocated their economic and family center to the Dominican Republic. That was independent of the fact that they often visited the U.S., that their children continued their education in the U.S., or that they kept social relations in the U.S. The Tribunal pointed out that the Ballantines both established their "main" business and reorganized their way of living in the Dominican Republic for several years around the investment. In consequence, the Tribunal concluded that the Dominican Republic was the center of their economic, family and social life, despite maintaining ties with the U.S. (¶ 576).

Given those findings, the Tribunal upheld the Dominican Republic objection and rejected jurisdiction dismissing the case without any further analysis of the merits.

Impact of the *Ballantines* award in other cases

The *Ballantines* case is the first publicly known investment arbitration that deals with a provision like this and will most likely be taken as a precedent for similar cases. For instance, the recent case of *Alberto Carrizosa Gelzis and others v. Colombia*, where the claimants just submitted their Memorial on Jurisdiction in May this year, deals with a claim presented by dual nationals under the BIT between the U.S. and Colombia, which contains a similar DR-CAFTA provision. The U.S.-Colombia BIT states that "a natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective nationality" (article 12.20). Most likely, both parties in the latter case will consider the findings on *Ballantines* in order to convince their tribunal whether the U.S. nationality is or not the claimants' *dominant* and *effective* nationality.

The question remains whether the *Ballantines* findings will also be relevant for cases brought by dual nationals whose relevant treaties do not have a similar provision. To the author's understanding, the answer is affirmative. This is not only because the *Ballantines* award has reinforced the concept that in absence of a provision in a treaty, "customary international law cases are instructive" (¶ 533), but also because, in at least one ongoing case without a similar provision (*Serafin García Armas v. Venezuela)*, the French courts recently upheld the need to determine the *effective* nationality.

Although in 2014 the *Serafin García Armas v. Venezuela* Tribunal (PCA Case No. 2013-3) allowed claims brought by dual Spanish-Venezuelan nationals against Venezuela due to a lack of an express prohibition for such claims in the Spain-Venezuela BIT (previously discussed in Kluwer Arbitration Blog), recently in February 2019, the French Court of Cassation determined that the Court of Appeals had previously violated the Spain-Venezuela BIT when it set aside the arbitral tribunal's jurisdictional decision only partially. As a consequence, the Court of Cassation annulled and remanded the lower court decision so that a different Court of Appeals could proceed according to the law (p.3), which can be understood as an order to fully set aside the jurisdictional tribunal decision.

Further, the Court of Cassation stated that "[even though the corresponding treaty does not have a provision like the DR-CAFTA], it was indeed necessary to decide whether the Spanish nationality of the claimants was their *effective* nationality" (p. 17). Thus, the concept of *effective* nationality developed in the *Ballantines* award will likely be considered if and when the arbitral jurisdictional decision is partially or fully set aside.

The importance of the *Ballantines* decision is therefore bigger than previously imagined. There are other pending cases with or without a provision allowing dual nationals to bring claims against one of their national states. The trends are yet to come and both investors and states have to remain aware of the new developments as they will either close or open the doors for new arbitration proceedings. For ICSID cases, the rule is simple, the doors are completely closed (ICSID Convention, Article 25(2)(a)). For non-ICSID cases, if tribunals follow the *Ballantines* reasoning, doors will most likely get closed too. It will not be enough for prospective claimants to have multiple passports to bring a claim against one of their home states, but rather they will also have

to demonstrate that their *effective* and *dominant* nationality is that of the non-host country.

Did the Dominican Republic really win?

On a final note, although the Dominican Republic totally prevailed in this case, the award reveals that the state spent approximately US$3.23 million in legal/expert fees and additional expenses (¶ 613), plus US$450,000 in arbitration costs (¶ 609). Each party was ordered to bear its own costs, with the common costs of arbitration split between them (¶ 637). This amounts to a loss for the Dominican Republic of approximately US$3.7 million, confirming the belief that even when states prevail they also lose. To be clear, this is not to say that such outcome is right or wrong, but rather a statement of fact to be considered when initiating or contesting an investment arbitration proceeding.

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