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A Never-ending Story? Dual Nationals in Investment Arbitration: A Commentary on Santamarta v Venezuela

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In the case of *Santamarta v Venezuela*, the dispute involved a dual national of Venezuela and Spain, who filed a claim against Venezuela for allegedly obstructing Santamarta's pharmaceutical business, including an unlawful confiscation of a manufacturing plant.

The arbitration proceedings were conducted in accordance with the UNCITRAL Arbitration Rules (1976) on the basis of the Bilateral Investment Treaty between Spain and Venezuela (the "BIT"), in force since 1997.

In the Award on Jurisdiction, rendered on 26 July 2023, the tribunal rejected jurisdiction over the dispute by adopting the doctrine of the *dominant and effective nationality*. In sum, it concluded that, although the claimant held the Spanish nationality, it was the Venezuelan nationality the claimant's effective nationality and, therefore, the claimant did not qualify as an investor under the BIT.

The *Santamarta's* tribunal joins a reduced group of cases where the doctrine of *dominant and effective nationality* has been applied to reject jurisdiction *ratione personae* in arbitral proceedings conducted under the UNCITRAL Arbitration Rules (see *Fernando Fraiz v Venezuela*, CPA No. 2019-11, Award dated 31 January 2022; *Manuel García Armas et al v Venezuela*, CPA 2016-08, Award on Jurisdiction dated 13 December 2019; *Enrique Heemsen v Venezuela*, CPA 2017-18, Award on Jurisdiction dated 29 October 2019).

Treatment of dual nationals under the BIT

The BIT contains a definition of "investor" that includes natural or legal persons who hold the nationality of any of the contracting parties (BIT, art. I.1(a)), including legal entities incorporated under the law of one of the parties or that are controlled by investors of the other contracting party (BIT, art. I.1(b)). The offer of arbitration contained in Article XI gives the investor a choice to submit the dispute to the local courts, ICSID arbitration or the Additional Facility, and if none of the former is available, arbitration under the UNCITRAL Arbitration Rules.

In this context, the lack of express provision in the BIT excluding dual nationals from the definition of "investor" should be enough for arbitral tribunals under UNCITRAL Arbitration Rules to uphold their jurisdiction, particularly when Venezuela has included express prohibition in

other treaties, such as the ones concluded with Canada (ratified by Venezuela on 20 January 1998), Iran (ratified by Venezuela on 24 February 2006), or more recently, Colombia (ratified by Venezuela on 10 March 2023).

The notion of "double nationality" in Venezuela and Spain

Nationality is "*…a fundamental human right that establishes the essential legal link between the individual and the State, by virtue of which a person is a member of the political community that a State constitutes according to domestic and international law*," which "*gives* [the individuals] *the right to enjoy the protection of the State and provides them with a legal basis for the exercise of various civil and political rights*." (see Lepoutre/Riva (1998): ***Nacionalidad y Apatridia, Rol del ACNUR***. Convención de 1954 sobre el Estatuto de los Apátridas, Convención de 1961 para reducir los casos de apatridia. ACNUR. Buenos Aires; free translation).

The repealed Venezuelan Constitution of 1961 improved the possibilities for Spanish nationals to obtain the Venezuelan nationality. The former Venezuelan Constitution did not allow its citizens to have double nationality. On the contrary, opting or obtaining another nationality was a ground for losing the Venezuelan nationality. This aspect was expressly modified in the current Venezuelan Constitution, which admits dual nationality.

In Spain, there has been a process of widening the possibility to obtain the Spanish nationality by citizens from particular countries. In particular, the Spanish Constitution refers to Ibero-American countries and "*those that have had or have a particular link with Spain*." (*see* Aguilar Benítez De Lugo M. (1996) ***Doble Nacionalidad***. Boletín de la Facultad de Derecho, núms. 10-11, 1996, page 222; –free translation). Venezuela, as an Ibero-American country clearly fits into that category. In addition, the Spanish Constitution also determines that *"Spaniards may be naturalized without losing their nationality of origin."*

It is clear that the Spanish and Venezuelan constitutions currently in force allow their citizens to hold more than one nationality.

The reasoning of the Tribunal

As a result of an analysis of the relevant provisions of the BIT, the tribunal made several critical determinations:

1. The treaty does not establish a hierarchy of forums that would apply jurisdictional requirements of the ICSID Convention system to arbitration under the UNCITRAL Arbitration Rules.
2. The BIT's purpose do not inherently exclude the protection of dual nationals.
3. The BIT is silent on the treatment of dual nationals, resulting in a varied spectrum of decisions in prior cases. As such, the tribunal could not conclusively determine whether the treaty contains specific rules regarding dual nationality and had to rely on other rules of international law.

As per the definition of investor, the interpretation of the BIT by the tribunal was given under article 31 of the Vienna Convention: in good faith, based on the ordinary meaning of the terms, its context, object and purpose and the international law applicable between the State parties to the

treaty.

A literal interpretation led the tribunal to conclude that the BIT is silent about the dual nationals. As per the context of the BIT, the tribunal referred to (i) the preamble and other provisions of the treaty, concluding, again, that they were silent about dual nationals, (ii) to other treaties between Spain and Venezuela, which the tribunal considered out of the context of the BIT, and (iii) to the dispute resolution clause (Article IX), already described above.

The tribunal concluded that there was no hierarchy among the different available *fora* allowing the application of ICSID jurisdiction requirements to arbitration under UNCITRAL Arbitration Rules, therefore, there is no exclusion of double nationals. Analyzing the object and purpose of the BIT only served for the tribunal to ratify that there is no total exclusion or inclusion of dual nationals from the scope of the treaty, which confirmed that the treaty is silent about this issue.

Facing the silence of the BIT, the tribunal pointed that "[g]*iven this varied spectrum of decisions on the same point, the Tribunal simply cannot conclude that the Treaty contains a specific special rule with respect to the treatment of double nationals that would allow the question to be decided without looking at other rules of international law in accordance with Article 31.3.c) of the VCLT*" (See para. 443). Accordingly, three principles were studied by the tribunal: (i) sovereign equality, (ii) no responsibility, and (iii) dominant and effective nationality.

The principle of sovereign equality implies that a double national cannot attack one of the states of which he is a national. However, the tribunal highlighted that the incorporation of this principle in the Hague Convention is not opposed to the principle of effective nationality and that it was not aimed to exclude diplomatic protection of double nationals.

The principle of no responsibility, based on the Hague Convention concerning Certain Questions relating to the Conflict of Nationality Laws, which inspired the relevant provisions of the ICSID Convention, provides that a state cannot grant diplomatic protection to one of its nationals against a state in which the claimant is also a national. The tribunal considered this principle irrelevant to determine if the double nationals are protected by the BIT, which is *lex specialis.*

On the basis of Article 31.3.c) of the Vienna Convention on the Law of Treaties, the tribunal concluded that the principle of dominant and effective nationality is a principle of customary international law, developed within the framework of diplomatic protection, which is also applicable to arbitration under BITs, while, as the *lex specialis*, the BIT is not a self-contained regime. A person with the nationality of both contracting countries of an investment treaty can initiate an arbitration against the State of which he is a national if that nationality is not dominant and effective.

The tribunal then considered various factors to determine the claimant's dominant and effective nationality. The tribunal concluded that the claimant's dominant nationality was the Venezuelan one on the basis that the claimant's main economic interests were in Venezuela. The tribunal disregarded the fact that the claimant was a dual national living in a third country, where it had his family and personal/social life (as expressly recognized by the tribunal). These are also elements to be considered when determining the dominant and effective nationality. For the dual-national claimant in this case, it was precisely having his investment in the territory of one of the states of his nationalities the main element that determined what was his dominant and effective nationality and excluded him from the protection of the BIT.

Conclusion

Cases such as the one of *Santamarta* stress the need to consider the adoption of principles of interpretation that are required to reach balance in the relationship between states and foreign investors, considering that the states are the ones that historically have shaped international law, they are also the ones that negotiate BITs and enact legislation regulating foreign investment. Therefore, under international investment agreements, all the possible sources of jurisdiction are in control of the states, not the investors.

In contract law, when a provision is not clear, the *contra proferentem rule* would apply. Similarly, in administrative law, in civil law jurisdictions, there are principles that could serve as examples to follow when regulating the relationship between private individuals or entities and the state. Just to name two that may be relevant for the discussion, there is the principle *in dubio pro cive*, leading to construe any obscure legal provision in favor of the citizen, and finally, the principle of *in dubio pro actione*, applicable to claims against governments, where any doubt representing a procedural obstacle must be resolved in the benefit of the possibility of judicial review of administrative actions. Under the same rationale a similar principle of *in dubio pro investor* could have a place in international investment law, given that the foreign investor does not participate in the negotiations of BITs, or the drafting of foreign investment legislation.

Although among a minority of precedents, the *Santamarta* case highlights the complexities surrounding dual nationality in the context of international investment treaties. The tribunal's determination, grounded in the principle of dominant and effective nationality, underscores the importance of considering a variety of factors to ascertain the nationality of a claimant and their eligibility for protection under a specific treaty.

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