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French Courts Keeping the Door Open for Dual Nationals' Claims?

Mangesh Krishna · Saturday, December 30th, 2023

Article 25 of the ICSID Convention imposes a condition on natural persons that they cannot bring a claim against the host State if they possess the nationality of both the contracting States of the invoked treaty (dual nationals). This is an added qualification to the requirements for a qualified investor mentioned in the treaty. Therefore, if the treaty does not bar dual nationals' claims and has a non-ICSID arbitration mechanism available, then the tribunal may have jurisdiction.

Dual nationals have taken this ambiguity to successfully bring claims before non-ICSID tribunals (*Bahgat v. Egypt*). However, there also have been instances where non-ICSID tribunals have refused jurisdiction over dual nationals' claims based on the principle of dominant and effective nationality or reference to ICSID arbitration in the treaty. These cases have been discussed previously on the blog here, here, and here, where the authors concluded that the doors for dual nationals' claims seem to be closing even for non-ICSID arbitrations.

However, a trail of judgments given by the French Courts this year seem to keep those doors open for dual nationals' claims.

Recent French Court Decisions on Dual Nationals

Recently, in *Maya Dangelas & Ors. v. Vietnam*, the Paris Court of Appeal ("Court of Appeal") dismissed Vietnam's application to annul a jurisdictional award, holding that US-Vietnam Trade Relations Agreement does not preclude dual national claims. The investor-Maya Dangelas was born in Vietnam and became a naturalised American citizen in 2014, which made the basis of *rationae personae* jurisdictional objection by Vietnam before the tribunal. The tribunal had rejected Vietnam's objection in its partial arbitral award, which came to be challenged by Vietnam before the Court of Appeal.

The Court of Appeal dismissed Vietnam's annulment application on the basis that the simple interpretation of the terms of the treaty does not exclude dual nationals from its application. The court observed that having recourse to suppletive procedures of interpretation of the Vienna Convention of Law of Treaties or assessing the dominant and effective nationality of the investor to exclude dual nationals' claims would be at the risk of adding a condition which has not been stipulated in the treaty's text. The court observed that the provisions of the treaty did not reserve a

particular fate for dual nationals, and thus, there is no need to add to the text a qualification that the contracting parties did not intend to include.

Further, Vietnam had relied on a 2023 diplomatic note issued by the economic department of the US Embassy for interpreting the treaty that said that for submitting the claims the dual nationals are treated as having the nationality of the investor's dominant and effective nationality. However, the court refused to take the diplomatic note into account stating that it is nothing more than an opinion and was irrelevant because it was not a contemporaneous document with the treaty.

Similarly, the Court of Appeal, in a decision given earlier this year in *Serafin Garcia & Anr. v. Venezuela*, upheld the jurisdictional award in favour of Spanish-Venezuelan nationals. This case is particularly interesting because of the number of times the French Courts have scrutinised the same jurisdictional award. This was the third time the Court of Appeal was dealing with the dual nationality objection by Venezuela under the Spain – Venezuela BIT.

The investors, i.e., Serafín García Armas and his daughter Karina García Gruber, had possessed only Venezuelan nationality at the time of making the investment but had acquired Spanish nationality before the contested measures happened. In 2014, the majority of the tribunal had upheld its jurisdiction. However, the Court of Appeal partially set aside the jurisdictional award was in 2017 on the dual nationality objection. Venezuela then appealed to the Court of Cassation that the Court of Appeal's finding should have led to the full annulment of the award for lack of jurisdiction. In 2019, the Court of Cassation agreed with Venezuela and remanded the annulment application to the Court of Appeal for re-consideration, observing that the court's conclusion did not follow its findings.

In June 2020, the Court of Appeal held that the underlying treaty only protected the investments made by the investors of the other contracting State. Since the investors did not possess Spanish nationality at the time of making the investment, the award had to be set aside. Upon appeal, in 2021, the Court of Cassation overturned the decision and remanded the case to the Court of Appeal while holding that the Court of Appeal had wrongly added the requirement that the investors must hold Spanish nationality at the time of the investment.

Finally, this year, the Court of Appeal dismissed the application to set aside the award, observing that the treaty did not impose the Spanish nationality requirement at the time of making an investment. The court held that the ordinary meaning of the terms of the treaty did not prohibit claims by dual nationals, and recourse to supplementary means of treaty interpretation was unnecessary when these terms were clear. The court further disagreed with Venezuela's contention that reference to ICSID arbitration in the treaty would lead to dual nationals' claims being disqualified under UNCITRAL arbitration. It reasoned that a cumulative application of all the conditions stipulated by different settlement mechanisms would lead to disregarding and distorting the terms of the treaty, which the treaty did not provide for.

Another award with a dual nationality objection met with a similar conclusion before the Court of Cassation earlier this year. In *Ibrahim Aboukhalil v Senegal*, the Court of Cassation refused to set aside the judgment in which the Court of Appeal had dismissed Senegal's annulment application against an award that had dismissed Senegal's dual nationality objection. The investor- Ibrahim Aboukhalil possessed Senegalese, French and Lebanese nationality. The Court of Appeal observed that the France-Senegal BIT made no distinction for dual nationals and there was no need to make one when the treaty does not. Further, the Court of Appeal was unpersuaded by Senegal's

argument that the requirements of the ICSID convention would apply to exclude dual nationals' claims when the investor had chosen to initiate UNICTRAL proceedings.

Takeaway

The dual national objection stems from customary international law entailing two principles in the context of diplomatic protection – (i) principle of non-responsibility and (ii) principle of dominant and effective nationality. The principle of non-responsibility provides that a State may not exercise protection on behalf of its nationals against a State which regards the individual as its own national (*Reparation for Injuries Suffered in the Service of the United Nations*). The principle of dominant and effective nationality is taken aide of in determining which State a dual national is more closely linked with to establish the individual's effective nationality (*Nottebohm*). Therefore, a dual national should be prohibited from making an international claim against the State to which it is most closely attached.

This stands in contrast to treaty arrangements agreed between parties which creates a legal framework considered as *lex specialis*, specifically delineating the rights and obligations of the parties, that do not yield to the principles of international law unless expressly provided (*Bahgat v. Egypt*, para. 231).

Thus, absent any express exclusion of dual national claims, tribunals are at a crossroads on whether to consider the silence as inclusion or apply the customary principles of international law for determining jurisdiction.

Conclusion

Consequently, on the one hand, tribunals have taken the principle of dominant and effective nationality or the fact that the treaty provided for ICSID arbitration, or the host State is an ICSID member to deny jurisdiction over dual nationals' claims. On the other hand, there are tribunals and courts which have adopted the line of reasoning that dual nationals' claims are admissible in the absence of express exclusion in the treaty and find it unnecessary to refer to suppletive methods of interpretation to add an exclusion when the treaty's text is clear. These divergent approaches adopted by courts and tribunals have led to a precarious situation, leaving the fate of dual nationals' claims uncertain.

An effective possible measure to harmonise the practice and achieve the objective of avoiding dual national claims is for the treaties to incorporate this exclusion expressly. This is reinforced by the fact that the treaties signed in recent years incorporate such express restrictions on dual national claims and require an assessment of the effective nationality of the person to determine if it qualifies as an investor for protection. (Article 1(3) Slovak Republic– Iran BIT, Article 2(5) Colombia-Spain BIT, Articles 2(b)(i) and (f)(i), Venezuela-Colombia BIT (previously discussed here))

However, treaty modification is a long-drawn process, and until then, the question of dual national claims will remain open. Meanwhile, it will be interesting to see how these judicial pronouncements would impact the tribunal practice when dealing with dual national claims. After

all, the tribunals would want to avoid the risk of awards being set aside on this ground.

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