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Swiss Court Confirms Applicability of Dominant Nationality Test to Fill Gap in Spain-Venezuela BIT

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In a recent case, the Swiss Federal Court upheld an arbitral award declining jurisdiction over a dual national's claim against Venezuela under the Spain-Venezuela BIT. It confirmed that the BIT is silent on whether dual nationals qualify for protection under the treaty, and that this gap could be filled by having recourse to customary international law on diplomatic protection and the principle of dominant and effective nationality. As the claimant's dominant nationality was Venezuelan, the arbitral tribunal correctly declined jurisdiction.

This post discusses (i) the background of the decision, (ii) the definition of "Investor" in the Spain-Venezuela BIT, (iii) the BIT's silence on the treatment of dual nationals, (iv) the applicability of the dominant nationality test to fill gaps in a treaty, and what the Swiss Federal Court's decision means (v).

Background

In January 2020, Raimundo J. Santamarta Devis commenced arbitration proceedings against Venezuela under the bilateral investment treaty between Spain and Venezuela, which entered into force in 1997 ("Treaty" or "BIT").

A three-member Arbitral Tribunal was appointed. The arbitration was conducted under the UNCITRAL Arbitration Rules (1976), administered by the Permanent Court of Arbitration, and seated in Geneva, Switzerland.

On 26 July 2023, the Arbitral Tribunal found it lacked jurisdiction *ratione personae*. The investor held both Spanish and Venezuelan nationalities, and the Treaty did not contain an express rule on how to treat claims by dual nationals. The Arbitral Tribunal found that the Treaty had a gap that could be filled with the customary international law principle of dominant and effective nationality. Applying this principle to the facts, the Arbitral Tribunal determined that the investor's dominant nationality was Venezuelan. As a Venezuelan national, he could not bring claims against Venezuela under the Treaty.

The investor challenged the award before the Swiss Federal Court ("Court"). On 6 February 2025, in a landmark ruling, the Court upheld the award and confirmed the applicability of the dominant

and effective nationality test (4A_466/2023).

Treaty's Definition of "Investor"

The issue before the Court was whether the Arbitral Tribunal had correctly determined that it lacked jurisdiction *ratione personae* – a question that hinged on the treatment of dual nationals under the Spain-Venezuela BIT.

The Court emphasized at the outset that it would not provide an abstract and definitive answer on how to treat claims by dual nationals in investor-state arbitration. The issue remains highly controversial among scholars, and the Court acknowledged that arbitral tribunals have reached divergent conclusions for different reasons (citing, in particular, *Serafín García Armas et Karina García Gruber v. Venezuela* (CPA n. 2013-3), Award on Jurisdiction, 15 December 2014; *Manuel García Armas et al. v. Venezuela* (CPA n. 2016-08), Award on Jurisdiction, 13 December 2019; and *Fernando Fraiz Trapote v. Venezuela* (CPA n. 2019-11), Final Award, 31 January 2022). The Court would focus on the specific case and the issues that were before it.

After these preliminary remarks, the Court turned to Article 31(1) of the Vienna Convention on the Law of Treaties ("VCLT"), which states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 31(3)(c) VCLT further requires that a treaty interpreter consider, "any relevant rules of international law applicable in the relations between the parties."

The Court agreed with the Arbitral Tribunal that the definition of "Investor" under the Treaty is inconclusive as to the treatment of dual nationals. It further noted that the Arbitral Tribunal had "convincingly demonstrated" that the status of dual nationals under international law may differ from that of individuals with a single nationality.

The Court confirmed the Arbitral Tribunal's interpretation of Article XI of the Treaty, that the investor may opt for *ad hoc* arbitration when ICSID is unavailable "for any reason". It thereby rejected the argument that the Treaty's reference to ICSID as the primary arbitral forum should be interpreted to mean that the ICSID Convention's exclusion of claims by dual nationals should apply also in *ad hoc* arbitration.

According to the Court, the object and purpose of the Treaty are of little help in interpreting the definition of "Investor", because these elements only confirm that the Treaty is silent on the treatment of dual nationals.

Lacuna in the Treaty and How to Fill It

The Court thus agreed with the Arbitral Tribunal that the Spain-Venezuela BIT has a gap. The existence of a gap was further supported by the Arbitral Tribunal's finding that, when the BIT was concluded, there was no widespread or emerging practice of granting full protection to dual nationals in the absence of an express exclusion. According to the Court, this constituted a finding of fact, by which it was bound.

The Court also agrees with the Arbitral Tribunal, calling its reasoning "detailed and legally defensible", that it was justified to resort to customary international law on diplomatic protection and apply the rule of dominant and effective nationality to fill the gap in the Treaty. The Arbitral Tribunal "convincingly explained" that the *lex specialis* character of a BIT did not preclude the applicability of customary norms and principles in this area of public international law.

The Court emphasized that diplomatic protection and investment arbitration pursue "concordant objectives" and are based on a similar legal link, namely, the criterion of nationality. The only difference is that they use different means to enforce the host state's responsibility for the treatment of foreign nationals. This approach aligns with Article 17 of the Draft Articles on Diplomatic Protection (2006), as their application is excluded only if it is incompatible with special rules of international law. In the present case, the Court found no such incompatibility.

The Court also confirmed that, although some arbitral tribunals have decided otherwise, "it appears" to the Court that the principle of dominant and effective nationality is "capable of constituting" a relevant rule of international law applicable between the contracting parties, including in the context of investment protection. This view, the Court noted, was supported by several authors (citing, among others, McLachlan/Shore/Weiniger, International Investment Arbitration, 2017, para. 5.96; and Dugan/Wallace/Rubins/Sabahi, 2008, Investor-State Arbitration, 2008 p. 304).

Dominant and Effective Nationality

Finally, the Court addressed the investor's argument that the Arbitral Tribunal incorrectly applied the dominant and effective nationality test. The Court first noted that the application of this test is a question of law, not fact, and is therefore subject to full judicial review.

Agreeing with the Arbitral Tribunal, the Court noted that the most significant factor in determining dominant nationality in this case was the investor's center of economic interests when the measures, of which the investor complains, were adopted. The Court notes, however, that the investor did not seem to challenge this element of the Arbitral Tribunal's reasoning. The Court thus concurred with the Arbitral Tribunal's conclusion that the investor's dominant nationality was Venezuelan.

Comment

The present decision marks a significant contribution to the jurisprudence on treaty jurisdiction over dual nationals. The Court confirms that the Spain-Venezuela BIT is silent on the eligibility of dual nationals to bring *ad hoc* arbitral proceedings, and that this gap may be filled by applying the dominant and effective nationality test. This test, the Court held, is part of the customary international law rule on diplomatic protection. As such, it can be a rule of international law applicable to contracting parties within the meaning of Article 31(3) of the Vienna Convention on the Law of Treaties.

The Court's decision is important also for the arguments it rejects. The Court disagrees with the idea that the BIT's silence should be interpreted as allowing, or disallowing, claims by dual

nationals. It rejects the notion that a BIT, even when silent on a particular issue, is *lex specialis* and overrides general international law. Finally, the Court rejects the argument that the BIT's reference to ICSID should be interpreted as importing its dual nationality restriction to other forms of dispute resolution under the treaty.

The Court is well aware that the treatment of dual nationals has been the subject of inconsistent and controversial decisions by various international tribunals. It emphasizes, however, that it is not providing an abstract solution to the issue. Rather, it is resolving the particular case under a specific treaty and under what it calls "circonstances tout à fait singulières".

Finally, the decision illustrates the Swiss Federal Court's restrictive approach in reviewing arbitral awards. When reviewing an arbitral tribunal's jurisdiction, the Court examines *de novo* only questions of law; however, it does not review the Arbitral Tribunal's findings of fact, not even for manifest error or arbitrariness. Thus, the Court in this case reviewed the interpretation of the BIT and the application of the dominant and effective nationality test, but it was bound by the arbitrators' findings of fact to which the test applied.

The Swiss Federal Court's complete deference to the factual findings of arbitral tribunals is unique among major arbitration jurisdictions. For example, French courts, when reviewing arbitral jurisdiction, may consider "all elements of law or fact" (Paris Court of Appeal [Chamber 5-16], 3 June 2020, Case No. 19-03588, para. 45). Similarly, English courts are "not in any way bound or limited to the findings made in the award or to the evidence adduced before the arbitrator" (People's Ins. Co. of China, Hebei Branch v. Vysanthi Shipping Co. [2003] 2 Lloyd's Rep. 61, para. 25). It is thus essential for parties in Swiss-seated arbitration proceedings to thoroughly plead the facts already before the arbitral tribunal.

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