Isabela Aneas González
International Arbitration

Julia de Castro Velasco
International Arbitration and Litigation

Is the Door to Investment Arbitration Closed for Dual National Investors who Submit a Claim Against their Home State?

In today's interconnected world, individuals may invest anywhere, regardless of their nationality. Many countries also allow an individual to hold multiple nationalities. The issues that can arise in investment arbitrations from these specific circumstances are easy to predict. For instance, for the purposes of BIT protection, which nationality of a dual-national investor prevails? And what should dual

URÍA MENÉNDEZ

nationals reasonably expect when the applicable investment treaty is silent regarding their standing? Depending on the answers to these questions, not only will the legal protection vary, but also whether an individual can be identified as an investor and, therefore, be a claimant in arbitration proceedings against the corresponding state.

The truth is that, even at present, conventions and treaties applied in investment arbitrations mostly do not regulate situations involving multiple nationalities.[1] In fact, most international investment agreements are silent on this matter, while the remainder regulate it with rather imprecise wording. Nor has the international legal community been consistent in its support for the changing theories on the matter. This article aims to clarify, firstly, why the road arbitral tribunals have travelled has been bumpy and volatile and, secondly, the current general consensus -such that there is one.

Conventions and treaties applied in investment arbitrations mostly do not regulate situations involving multiple nationalities

Investment Arbitration Cases Involving Dual Nationals

One of the first approaches an arbitral tribunal took when interpreting a treaty that was silent on the standing of dual nationals was that the claim should be allowed. This was standard practice even if the claim had been brought by a dual national against one of the countries of which the claimant was a national.

In December 2014, an UNCITRAL tribunal put forward the following argument in connection with the Spain-Venezuela BIT[2] in *Serafín García Armas v Venezuela*.[3] When the underlying dispute arose,[4] Serafín García Armas and his daughter, both of whom were dual Spanish and Venezuelan nationals, initiated arbitration proceedings against Venezuela. The resulting award was the first decision in investment arbitration involving this prominent dual-national family, although it would not be the last. In fact, the *García Armas* cases have played a very important role in clarifying the standing of dual nationals.

The arbitral tribunal in *Serafín García Armas v Venezuela* rejected the application of public international law rules (such as the effective or dominant nationality derived from diplomatic-protection rules) to determine whether it had jurisdiction. The tribunal concluded that the language of the BIT was sufficiently clear[5] and that the treaty was not subject to customary international law. While Venezuela had made express reservations in this regard, and excluded protection for investors holding the nationality of the host state of the investment under several BITs (e.g. those

1 We say 'mostly' because some agreements include a clear and express provision in this regard. For instance, Art 25 of the ICSID Convention (entered into force on 14 October 1996); art I(h)(i) of the Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments (signed on 8 May 2009, entered into force on 23 November 2011) or Art 1(3)(a) of the Investment Promotion and Protection Agreement between Mauritius and Egypt (signed on 25 June 2014, entered into force on 17 October 2014).

2 Agreement between the Kingdom of Spain and the Bolivarian Republic of Venezuela (signed on 2 November 1995, entered into force on 10 September 1997) ('**Spain-Venezuela BIT**').

3 *Serafín García Armas and Karina García Gruber v Bolivarian Republic of Venezuela*, PCA Case No 2013-3, UNCITRAL, Decision on jurisdiction, 15 December 2014, and Award, 26 April 2019 ('***Serafín García Armas v Venezuela***').

4 The dispute related to shares that Mr Serafín and his daughter had acquired in various Venezuelan companies.

5 Spain-Venezuela BIT, Art 1.1.a) reads as follows (free translation):
"Investors" shall be understood to be: a) natural persons who are nationals of one of the Contracting Parties in accordance with its legislation and who have invested in the territory of the other Contracting Party.

entered into with Italy, Canada and Iran), it had made no such reservations in the Spain-Venezuela BIT. As a result, the García Armas investors obtained an award in their favour.

However, in April 2017, before the final award was handed down, Venezuela challenged the jurisdictional decision before the French courts.[6] The Paris Court of Appeal partially annulled the decision stating that the arbitral tribunal should have considered the circumstances surrounding the claimants' nationalities and the manner in which they exercised them at the time. In other words, the Paris Court of Appeal ruled that the effective nationality of the claimants needed to be determined and consequently the arbitral tribunal had wrongly upheld its jurisdiction. The French Court of Cassation subsequently heard the case and reversed the decision of the Paris Court of Appeal because the latter had failed to reach the proper conclusion on the basis of its findings. The arbitration continued in parallel. In June 2020, once the final awards had been rendered, the International Chamber of the Paris Court of Appeal fully annulled its jurisdictional decision in *Serafin García Armas v Venezuela*.[7]

A second key case on the standing of dual nationals is *Ballantine v Dominican Republic*,[8] handed down in September 2019 under the CAFTA-DR. The claimants were also dual nationals of the countries involved (the US and the Dominican Republic). However, the outcome of this case differs from *Serafin García Armas v Venezuela* as Article 10.28 of the CAFTA-DR did regulate their standing as dual nationals.[9] Thus, the CAFTA-DR permits the submission of a claim against a state of which the claimants are nationals, provided that the state being sued is not the same as that corresponding to their 'dominant and effective nationality.'

The award in *Ballantine v Dominican Republic* favoured the respondent state. In its reasoning, the tribunal carefully analysed: (1) the 'dominance or effectiveness' of claimants' nationality; and (2) the moment when they exercised it.

On the one hand, to determine the claimants' 'dominant and effective nationality,' the arbitral tribunal based its analysis on the International Court of Justice ('ICJ') case *Liechtenstein v Guatemala* (commonly known as *Nottebohm*).[10] The tribunal referred to the ICJ's ruling in *Nottebohm* to determine

The elements that should be taken into consideration in order to define a nationality as being the 'dominant and effective nationality': (i) the claimant's habitual residence; (ii) the circumstances surrounding the acquired nationality; (iii) the personal attachments of the citizen(s) to the state in question; and (iv) the claimant's personal, economic and family ties

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On the other hand, the tribunal stated that the moment in time that an arbitral tribunal should take into consideration to examine the 'effective and dominant' nationality is both at the time the respondent receives the claim and at the time the breach is committed.

Shortly after this case, a third case was handed down in October 2019, issued under the investment agreement between the Federal Republic of Germany and the Bolivarian Republic of Venezuela.[12] In the same way as in *Serafín García Armas v Venezuela*, in *Heemsen v Venezuela*[13] the *ratione personae* jurisdiction was challenged because the BIT was silent on the standing of dual nationals. Nevertheless, the tribunal in *Heemsen v Venezuela* determined that the absence of an express prohibition could not be assumed to constitute authorisation. Moreover, the tribunal referred to principles of international law, particularly 'dominant and effective nationality,'[14] and thus the interpretation in *Serafín García*

6 The Paris Court of Appeal's decision was handed down on 25 April 2017 and the French Court of Cassation's decision was handed down on 13 February 2019 [Paris Court of Appeal (Chamber 1-1), 25 April 2017, No. 15-01040 para 6 and Cass. Civ. (Chamber 1), 13 February 2019, No. 17-25851, para 6.

7 Paris Court of Appeal (Chamber 5-16), Case No. 19-03588, 3 June 2020, para 1, 9.

8 *Michael Ballantine and Lisa Ballantine v The Dominican Republic*, PCA Case No 2016-17, UNCITRAL, Award, 3 September 2019 ('***Ballantine v Dominican Republic***').

9 The Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) (entered into force for the United States, El Salvador, Guatemala, Honduras, and Nicaragua in 2006, for the Dominican Republic in 2007, and for Costa Rica in 2009) establishes in Art. 10.28 ('Definitions') that 'provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.'

10 *Nottebohm Case (Liechtenstein v Guatemala)* (Second Phase Judgment) 1955 ICJ Rep. 131, pp 22-24.

11 See *Ballantine v Dominican Republic*, para 533, which states that: '[t]he Tribunal considers that the factors developed under customary international law cases are instructive, although such factors reflect an interpretation developed in a specific period of time and under different circumstances from the ones present in this case.'

12 Signed on 14 May 1996, entered into force on 16 October 1998.

13 *Enrique Heemsen and Jorge Heemsen v the Bolivarian Republic of Venezuela*, PCA Case No 2017-18, UNCITRAL, Decision on jurisdiction, 29 October 2019, ('***Heemsen v Venezuela***').

14 It is clear that the arbitral tribunal in *Heemsen v Venezuela* reinforced the idea of the dominant and effective nationality originating from the *Nottebohm* case (an approach previously taken into account by the arbitral tribunal in *Ballantine v Dominican Republic*). Thus, *Ballantine v Dominican Republic* and *Heemsen v Venezuela* are two precedents in which two separate arbitral tribunals adopted the same approach on the matter of dual nationals.

Non-regulation of dual nationals' claims in investment treaties should not be interpreted as 'affirmative silence'

Armas v Venezuela completely shifted. Therefore, the decision in *Heemsen v Venezuela* became the second within a year in which an arbitral tribunal rejected its jurisdiction based on the claimants being 'effective and dominant' nationals of the respondent state. This tribunal concluded that non-regulation of dual nationals' claims in investment treaties should not be interpreted as 'affirmative silence.'

In December 2019, the García Armas family was once again involved in a similar dispute. This time, the dispute was between Domingo García Armas, Manuel García Armas, Pedro García Armas and others and Venezuela.[15] While the Spain-Venezuela BIT also applied in this dispute, the family was less successful than in the first case.

The arbitral tribunal in *Manuel García Armas v Venezuela* carried out its jurisdictional analysis based on international law. Not only had both parties agreed on the application of the Vienna Convention on the Law of Treaties (the 'Vienna Convention')[16] – even though Venezuela was not a party to the Vienna Convention– but Article XI(4)(b) of the Spain-Venezuela BIT also established that a potential arbitration should be based on rules and principles of international law. Therefore, when interpreting the definition of 'investor' the arbitral tribunal understood that it also had to bear in mind Article 31(3)(c) of the Vienna Convention.[17]

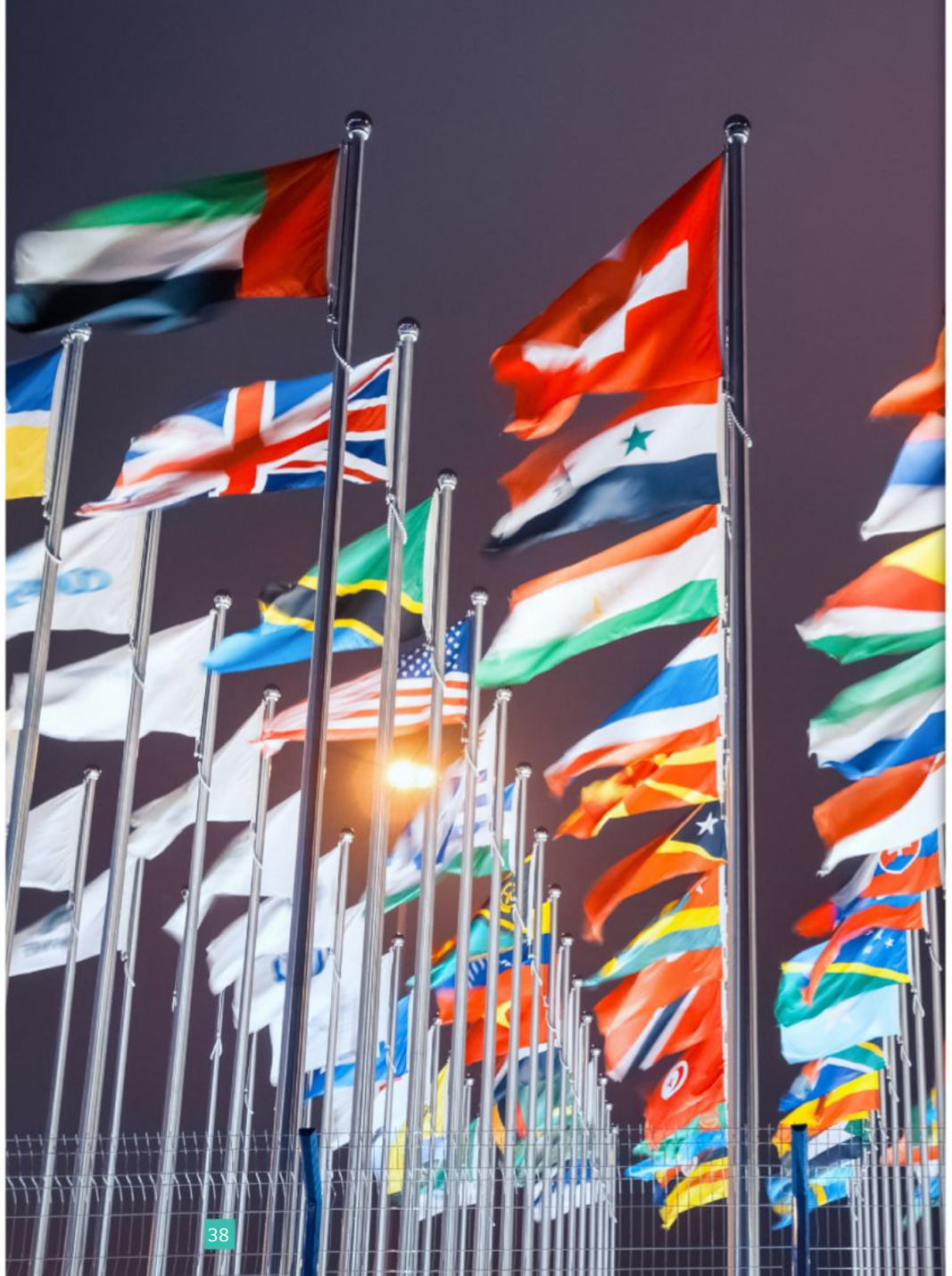
The tribunal in *Manuel García Armas v Venezuela* considered that the dispute resolution clause established in the Spain-Venezuela BIT sets out a hierarchy of forums. In this structure, the first and main option is to resort to ICSID arbitration[18] under the ICSID Convention or the ICSID Additional Facility Rules (neither of which permit dual national claims). This reveals Spain's and Venezuela's intentions in the context of dual national claims under the Spain-Venezuela BIT: both states clearly oppose the possibility of a dual

15 *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v the Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, UNCITRAL, Decision on jurisdiction, 13 December 2019 ('***Manuel García Armas v Venezuela***').

16 The Vienna Convention on the Law of Treaties, signed on 23 May 1969 and entered into force on 27 January 1980).

17 See Vienna Convention, Art 31(3): 'There shall be taken into account, together with the context: [...] (c) Any relevant rules of international law applicable in the relations between the parties.'

18 Spain-Venezuela BIT, Art XI (2) a and b.



national suing any state of which they are a national.

In addition, the tribunal in *Manuel García Armas v Venezuela* concluded that dual national claims were permitted under the Spain-Venezuela BIT provided that the claim was against the state of the claimant's non-dominant or non-effective nationality. However, the García Armas family failed to prove that their effective and dominant nationality was not Venezuelan. Moreover, the arbitral tribunal based its analysis on the international law aspects they considered applicable at the time the treaty obligations were adopted (as opposed to the time the alleged breach was committed). Therefore, they agreed with the arbitral tribunals in *Ballantine* and *Heemsen* in relation to the application of international law. However, they differed on the exact moment in time when the dominance and effectiveness of the claimants' nationality should be analysed.

The award favoured Venezuela and the *Manuel García Armas v Venezuela* case was dismissed due to the lack of *ratione personae* jurisdiction.

In January 2021, the García Armas family attempted to revive their claim before the Hague Court of Appeal and sought to set aside the award.[19] However, in February 2021 the Dutch Court dismissed all of the García Armas' arguments.

19 Decision of the Hague Court of Appeal, 19 January 2021 (ECLI:NL:GHDHA:2021:14).

The current interpretations of arbitral awards on this matter tend to assert the principle of 'dominant and effective nationality' as the determining factor

In line with *Heemsen v Venezuela* and the *Ballantine v Dominican Republic*, the arbitral tribunal in *Manuel García Armas v Venezuela* did not interpret the non-regulation of claims by dual nationals in the applicable BIT as affirmative silence. At the time the Spain-Venezuela BIT was signed, the Venezuelan Constitution did not even permit dual nationality. Thus, an express provision in the Spain-Venezuela BIT (whether prohibiting or allowing claims by dual nationals against Spain or Venezuela) would have been interpreted as contravening Venezuelan law.

Nonetheless, there is a García Armas case that has finally passed the jurisdictional phase: *Luis García Armas v Venezuela*.[20] In this case, the claimant challenged Venezuela on the basis of similar facts as those of the previous García Armas case (*Manuel García Armas v Venezuela*, initiated only one year earlier).[21] However, this case is different in that (i) it is the first time that only one member of the García Armas family has challenged Venezuela, (ii) the claimant opted for the ICSID Additional Facility Rules, and (iii) the case is being heard by the same tribunal that heard the previous García Armas case.

Venezuela objected to the tribunal's jurisdiction on the grounds that Luis García Armas is a dual national. Venezuela's main argument was that Luis García's credentials as a 'national investor' (granted in accordance with Venezuelan laws) were sufficient for him to be considered a Venezuelan national. However, Venezuela failed to convince the tribunal of Luis Garcia's dual nationality, resulting in the tribunal considering him to be a Spanish national only.[22] Therefore, the tribunal found no jurisdictional grounds to dismiss the case and confirmed its own jurisdiction. The decision on the merits is still pending.

The latest decision on this issue has come from a claim by Alberto Carrizosa Gelzis, Felipe Carrizosa Gelzis and Enrique Carrizosa Gelzis. They are all dual nationals of the US and Colombia who commenced arbitration proceedings against the Republic of Colombia under the United States-Colombia Trade Promotion Agreement on the basis of their status as US nationals.[23] This is a PCA case under UNCITRAL rules and pertains to the expropriation of the Granahorrar bank, which occurred in 1998.

The United States-Colombia Trade Promotion Agreement clearly establishes that if the investor of a Party is a dual national he or she shall only be considered to be a national of the state of his or her dominant and effective nationality.[24] Although the treaty itself does not provide guidance as to how a tribunal should interpret the concept of 'dominant and effective nationality', the tribunal hearing the case understood that the rules of international law had to be applied.[25] Therefore, relying on *Nottebohm*, *Ballantine v Dominican Republic* and *Manuel García Armas v Venezuela*, the tribunal concluded that, although the three Carrizosa Gelzis brothers acquired both Colombian and US nationality at birth, their dominant and effective nationality was that of the Republic of Colombia and the tribunal therefore lacked *rationae personae* jurisdiction.

A case that is currently underway is Raimundo Santamarta's recently submitted claim against the Bolivarian

20 *Luis García Armas v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/16/1, to which the Spain-Venezuela BIT also applies ('***Luis García Armas v Venezuela***'). The decision on jurisdiction of 24 July 2020 is of import.

21 Although it relates to different assets to those at issue in *Manuel García Armas v Venezuela*, the facts of the case are similar. As regards the commencement date, *Manuel García Armas v Venezuela* was initiated on 1 June 2015 and *Luis García Armas v Venezuela* on 5 May 2016.

22 The tribunal found that these credentials did not lead to Luis Garcia acquiring Venezuelan nationality, nor did they lead to the loss of his Spanish nationality by origin.

23 *Alberto Carrizosa Gelzis, Felipe Carrizosa Gelzis and Enrique Carrizosa Gelzis v Republic of Colombia*, PCA ad hoc case No. 2018-56, UNCITRAL, Award, 7 May 2021 ('***Carrizosa v Colombia***').

24 United States-Colombia Trade Promotion Agreement, Art 10.28.

25 *Carrizosa v Colombia*, para 176, and United States-Colombia Trade Promotion Agreement, Art 10.22.

Republic of Venezuela.[26] Raimundo is a Spanish-Venezuelan dual national who has filed an investment treaty claim against Venezuela under the Spain-Venezuela BIT.[27] This is also a PCA case under the UNCITRAL rules, involving the expropriation of SM Pharma, a Venezuelan producer and distributor of pharmaceutical products owned by the Santamarta family. The facts of this arbitration are public, but the details in relation to the arbitral tribunal's jurisdiction are not. What seems to be clear is that Raimundo Santamarta will most likely have to deal with jurisdictional challenges, as a dual national investor who has taken legal action against one of the states of which he is a national.

In line with the aforementioned decisions, the tribunal's jurisdictional decision in *Santamarta v Venezuela* will probably depend on what Mr Santamarta is able to prove with regard to exercising both nationalities on the critical dates (as described above).

Conclusion

In view of the cited cases, public international law and particularly diplomatic-protection principles are gaining importance in the field of investment arbitration. The current interpretations of arbitral awards on this matter tend to assert the principle of 'dominant and effective nationality' as the determining factor. As such, the trend in relation to dual nationals in investment arbitrations has undoubtedly evolved.

Should investment arbitration tribunals continue to follow this approach, dual nationals who make an investment can reasonably expect to be considered an investor protected by their applicable investment treaty, provided they can prove that their dominant and effective nationality is that of the home state (and not that of the host state). Otherwise, their claims will probably be dismissed owing to a lack of *ratione personae* jurisdiction.

However, this journey has not finished yet, as there are still pending cases that may deviate from the emerging trend. Dual nationals should definitely stay tuned.

26 Submitted on 17 January 2020 (information available at https://jusmundi.com/en/document/decision/en-raimundo-santamarta-devis-v-bolivarian-republic-of-venezuela-constitution-of-the-tribunal-friday-1st-january-2021).

27 *Raimundo Santamarta Devis v Bolivarian Republic of Venezuela*, PCA ad hoc case, UNCITRAL rules, filed in January 2020 ('***Santamarta v Venezuela***').