ISSN : 1875-4120
Issue : (Provisional)
Published : April 2016

Transnational Dispute Management
www.transnational-dispute-management.com

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Dual Nationality in Investment Arbitration: the Case of Venezuela

*J. Eloy Anzola**[1]

Abstract

On December 2014 an UNCITRAL arbitral tribunal ruled that it had jurisdiction to hear the claim of two Spanish investors (Serafín García Armas and Karina García Grúber) who are seeking compensation from the Venezuelan Government for the expropriation (confiscation) of their investments in the South American country. The Garcías, father and daughter, in addition to being Spanish nationals are also Venezuelan citizens. The arbitral tribunal departed from commonly accepted international law where investors who are natural persons and who are seeking redress from a State in an international forum may not be nationals of that State, and, if they are, the nationality they invoke must be effective and predominate over the nationality of the respondent State. This article analyzes whether such ruling is in accordance with current investment arbitration law, and more specifically if it fits within the BIT signed between Venezuela and Spain and other similar BITs.

1. Introduction

On December 15, 2014, the investment arbitration tribunal in ***Serafín García Armas and Karina García Gruber v. República Bolivariana de Venezuela*** (henceforth, the ***García–Venezuela*** case)[2] issued a decision confirming its jurisdiction in the case. García Armas and García Gruber, Spanish investors with dual nationality in Venezuela, were seeking indemnification from the Venezuelan government for seizure of their property.

In accepting jurisdiction, the arbitration tribunal – established in accordance with the rules of the United Nations Commission on International Trade Law (UNCITRAL) – departed from commonly accepted international law dating back to the days when diplomatic protection was the only recourse for such claims. Traditionally in such cases, foreign investors who are natural persons seeking redress from a State in an international forum may not be nationals of that State, and, if they are, the nationality they invoke must be effective and predominate over the nationality of the State named in their claim.

These seemingly well-established rules have since been upended. As a result of the ***García–Venezuela*** decision, Venezuela's bilateral investment treaty with Spain (henceforth, the Venezuela–Spain BIT) may be understood as marking a departure from traditional public international law, creating a new system with new bases and its own rules.

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[2] *Serafin García Armas and Karina García Gruber v. La República Bolivariana de Venezuela*, CPA Case No. 2013-3, Decision on Jurisdiction, December 15, 2014. See: http://www.italaw.com/sites/default/files/case-documents/italaw4151.pdf

Since 1999, the Venezuelan government has nationalized or expropriated assets and property belonging to Venezuelan citizens and foreigners alike. Many of these seizures violate the country's own Constitution as well as investment promotion and protection bilateral agreements (singular, BIT; plural, BITs) with a number of countries requiring fair indemnification for private property seized for public or social use. In many cases, 21st-Century Socialism has dispossessed companies and natural persons of their property in exchange for paltry or zero compensation, as well as postponing the judicial expropriation process *sine die*.

Among the many affected by these policies are the two natural persons in the ***García–Venezuela*** case, Serafín García Armas and Karina García Gruber, a father and daughter with dual Spanish and Venezuelan nationality. Citing the BIT in existence between Venezuela and Spain, they sought international arbitration to demand the indemnification the Venezuelan government had denied them.

As could be expected, Venezuela's first line of defense was to argue that the arbitration tribunal lacked jurisdiction in the case because the Garcías, while Spanish nationals, were also Venezuelans. According to this argument, their Venezuelan nationality made the Garcías ineligible for arbitration before the tribunal. Venezuela also argued that the Garcías' Spanish nationality was a mere formality and was neither effective nor predominant.

As already noted, the arbitration tribunal, comprised of Costa Rican jurist Rodrigo Oreamuno and Argentine professor Guido Tawil, with Brazilian professor Eduardo Grebler presiding, confirmed its jurisdiction to hear and decide the case.

The García family's plight is by no means unique. For many decades, especially during the second half of the twentieth century, Venezuela opened its doors to immigration, and several of the new immigrants have faced or face similar situations. After moving to Venezuela and, in many cases, finding success and prosperity, these individuals often took Venezuelan citizenship but did not renounce their original nationality. Some recent cases involve the children or grandparents of immigrants - people who were born in Venezuela and are therefore Venezuelan by birth - but continue to enjoy dual nationality in the land of their forebears. Venezuela's 1999 constitution formally allows natural persons to hold dual nationality in Venezuela and another country.

In addition to Spaniards, other natural persons – Chileans, Portuguese and Germans among them – who hold dual nationality in Venezuela and have received little or no indemnification for confiscated property could also benefit from BITs their countries of origin maintain with Venezuela. In fact, Venezuela's BITs with Chile, Portugal and Germany contain language similar or virtually identical to that used in its treaty with Spain concerning nationality requirements for natural persons seeking their protection, as well as the resources available for pursuing claims against Venezuela in case their rights are violated.

Venezuela's BIT with Chile was signed on October 2, 1991 with an effective date of March 29, 1994[3]; with Portugal, was agreed to in Caracas on June 17, 1994, become effective in 1995[4]; with Spain, was signed in Caracas on November 2, 1995 and entering into effect on

[3] Published in Venezuela's Gaceta Oficial (GO) Nº 4830, special issue, December 29, 1994.
[4] Published in GO Nº 4846, special issue, January 26, 1995.

September 10, 1997[5]; and with Germany, signed on May 14, 1996 and in effect since October 16, 1998.[6]

Other Venezuelan BITs, in contrast, clearly exclude dual nationals. These include the country's treaties with Canada, signed on July 1, 1996 and effective since January 28, 1998,[7] and Iran, signed on March 11, 2005 and effective since 2006.[8] Venezuela's BIT with Italy also includes this prohibition, but this BIT signed on February 14, 2001 has never been ratified by Venezuela. As the provisions of these agreements make clear, claimants with dual nationality in Venezuela, on the one hand, and Canada or Iran, on the other hand, may not invoke protection for their investments under these treaties.

The question arises, however, whether a system created to promote and protect foreign investors can or should extend to claims formulated by a country's own nationals, even if they consider themselves nationals of another country.[9]

Before going on to analyze Venezuela's BITs with Chile, Spain, Portugal and Germany, it is important to familiarize ourselves with the diplomatic protection that was the traditional line of defense for foreigners dispossessed or prejudiced by illegitimate actions on the part of another State. These are cases in which the investors affected are natural persons with dual nationality, one of them in the State named in their claim. In the nineteenth and early twentieth centuries, as we shall see, Venezuela was the object of numerous such claims in which this issue was an important factor.

2. From diplomatic protection to direct action by investors

2.1. Government v. Government

Public International Law traditionally did not allow international investors, whether natural or legal persons, to take direct action against foreign governments for affecting their investments through unfair or unequal treatment, discrimination, or confiscation/expropriation without adequate compensation.

Normally in such cases, aggrieved investors would request diplomatic protection from their governments.[10] Under this international legal mechanism, the government of a country whose nationals have been mistreated in another country's territory demands indemnification or other reparations. The State, acting on behalf of and in defense of its own nationals, intervenes to demand that the offending country respect their rights. Examples of such claims include the destruction of property during foreign or civil wars, or confiscation or expropriation of property, without adequate compensation.

In those cases the investor's home government is called to seek satisfaction from the offending government. The injury of one of its nationals is considered an offense to the

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5 Published in GO Nº 36281, September 1, 1997.
6 Published in GO Nº 35383, January 28, 1998.
7 Published in GO Nº 5207, special issue, January 20, 1998.
8 Published in GO N° 38389, March 2, 2006.
9 We have not examined all BITs ratified by Venezuela to ascertain if dual nationals may invoke other BITs - in addition to those with Chile, Portugal, Spain and Germany – to file investment claims against Venezuela.
10 P. Daillier, M. Forteau, A. Pellet, *Droit International Public*, 8th edition, Paris, 2009, Nº 487; M. Diez de Velasco, *Instituciones de Derecho Internacional Público*, 16th edition, Madrid, 2008, p. 896 and following.

investor's home State. It is for this State to decide if it will resort to diplomatic protection, because the State is in no way obliged to take up its national's case if it considers this not to be in its own political or economic interests. Therefore, investor is in the hands of its own Government.

Diplomatic protection mayn include consular action, negotiations with the other State, political and economic pressure. If direct negotiations, or other means fail to produce an agreement, the governments may then turn to dispute resolution mechanisms. In addition to judicial proceedings, the States may agree to arbitrate the disputes by mixed commissions or arbitral tribunals whose job it is to uphold or deny the responsibility of the government accused of the offense. If the mixed commissions or arbitral tribunals determine that the investor has indeed been prejudiced by unfair treatment on the part of the government in question, it will set an amount for indemnification or other means of compensation for the petitioning State and, ultimately, the investor.

2.2. Dual Nationality and Diplomatic Protection: The Case of Venezuela

Traditionally, a State cannot exercise diplomatic protection on behalf of natural or legal persons who are nationals of the State that is the object of the complaint. In effect, in cases of diplomatic protection it is an accepted principle that a State cannot protect a natural or legal person who holds dual nationality in the offending State.[11] International texts and decisions uphold this principle.

Venezuela was the object of numerous diplomatic complaints for destruction of property during the country's wars of independence in the first quarter of the nineteenth century and the civil wars that followed.

In the most extreme case, the German Empire, with the support of Great Britain and Italy, took military action against Venezuela following the breakdown of diplomatic talks in 1902. The Europeans seized Venezuelan ships and blockaded and bombed the country's ports.[12] For Germany, the motive was Venezuela's debt to the German bank *Berliner Disconto Gesellshaft*, while the other countries were seeking reparations for property confiscated and destroyed during Venezuela's late nineteenth-century civil wars.

Following the intercession of the United States, Venezuela and the European powers met in Washington, DC in February 1903 and signed Protocol for Venezuela to repay its debts by turning over a significant portion of its customs revenue – 30% of fees collected at the ports of La Guaira and Puerto Cabello – to its creditors.[13] Other countries with claims against Venezuela, among them Belgium, France, Spain, Mexico, the Netherlands and Sweden, signed similar agreements of their own. An arbitral ruling issued at The Hague on February 22, 1904[14] gave Germany, Great Britain and Italy preference over these other countries.

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[11] P. Daillier, M. Forteau, A. Pellet, op. cit., p. 905; M. Diez de Velasco, op. cit., p. 903.

[12] J. Eloy Anzola, *From Gunboats to Arbitration*, in Transnational Dispute Management, Vol. 5, issue 2, April 2008.

[13] J. Ralston y W.T. Sherman Doyle, *Venezuelan Arbitrations of 1903*, Government Printing Office, Washington, 1904, p. 511 and following. Available at: https://archive.org/stream/venezuelanarbit01doylgoog#page/n3/mode/2up

[14] Idem, p. 1057 and following.

Under these agreements, mixed arbitration commissions were given the task of assigning the amount of the claim in each case. The country filing the claim would have the right to name one member of this commission and Venezuela another. If the two proved unable to reach a consensus, the head of State of a third country would name a third member to serve as umpire and broker a final decision.[15] President Theodore Roosevelt, for example, was charged with naming an umpire in Venezuela's dispute with Germany.

Once the agreements had been signed, the Europeans lifted their embargo of Venezuela's ports. The mixed commissions heard the disputes and, in many cases, assigned Venezuela responsibility and set the amount of indemnification it had to pay. Ultimately, this amount was equivalent to a mere fraction of the original debt, but even so, it took Venezuela almost 30 years to pay it.

The countries with complaints, as was the practice at the time, presented the cases on behalf of their nationals, and Venezuela accepted or denied them based on the grounds, jurisdiction or amount of the claim, or some combination of these factors. In cases in which the two countries could not reach an agreement, the issue was submitted for arbitration by one of the mixed commissions.

The mixed commissions succeeded in resolving several cases in which European claimants, under the diplomatic protection of their governments, had dual nationality in Venezuela. In these cases, the foreign governments insisted on the validity of the claim because the claimant was a natural person with nationality in their country – whether by birth or through marriage to one of their citizens. Venezuela, for its part, argued that the commissions lacked jurisdiction because the agreements that created them were designed for foreign citizens, while the individuals involved were Venezuelan nationals. As Venezuelans, the Venezuelan government argued, these individuals were obliged to have their complaints heard in that country's courts. As one might imagine, the protection afforded under Venezuela's agreements with the Europeans was much more effective: the proceedings for determining indemnification were swift and payment guaranteed. Prospects were not as good in the Venezuelan courts.

In these cases, therefore, dual nationals' claims were dismissed. While they might seem like nothing more than a historical curiosity, it is illuminating to review the reasoning followed in these decisions, which are still being cited as precedents by legal experts and in arbitration forums more than 100 years later.

2.3. Mixed Commissions Decisions in Venezuelan Cases

One of such cases was ***Edward A. Mathison,***[16] who was born in Venezuela in 1858 to an English father and therefore a British national. The British-named arbitrator in the case argued that even though Mathison resided in Venezuela, he was a British citizen, meaning that the commission had jurisdiction to hear and resolve his claim. Venezuela's representative, Carlos Grisanti, countered that since 1830 – despite some modifications – successive Venezuelan constitutions accorded nationality to all individuals born free in Venezuela. Mathison was therefore Venezuelan, Grisanti argued, and the commission was not entitled to make a decision in the case. Since the two parties were unable to reach a

[15] Idem, Article IV of the agreement signed between Venezuela and Germany, p. 513.
[16] J. Ralston and W.T. Sherman Doyle, op. cit., p. 420 and following.

decision, an umpire was called in to be the tiebreaker. This person, a US citizen, inclined toward the Venezuelan point of view, on the basis that "There must be an end to the citizenship of the national when he is resident and domiciled in some other country."[17] The fact that Mathison lived in Venezuela was enough to make Venezuela's argument outweigh England's claim on his citizenship.

In another case posed by Great Britain, the heirs of ***J. P. K. Stevenson***[18] sued over damages he suffered while still alive. Stevenson had 13 heirs in all – his widow and 12 children – and each one was entitled to one-thirteenth of his inheritance. The widow was Venezuelan by birth but automatically obtained British nationality through her marriage to Stevenson under the laws of both Venezuela and Great Britain at the time. Venezuelan law maintained, however, that upon her husband's death she lost her British nationality and could claim only Venezuelan citizenship. Ten of the couple's children had been born and still lived in Venezuela, but the other two were born in Trinidad. They had lived in Venezuela for a time but moved back to Trinidad, which was then British territory. The umpire in the case took his cue from the Mathison ruling and decided that only the two children born and residing in Trinidad were British and had a right to indemnification. He explicity excluded the widow and the 10 Venezuelan-born children, arguing: "As this Umpire sees it, from the moment of [Stevenson's] death and throughout her widowhood Venezuela has considered the widow to be Venezuelan. Logically, [this Umpire] has reached the same conclusion about Stevenson's children who were born in Venezuela."[19]

Another case involving inheritance used similar criteria. ***Thomas Massiani***[20] was a French citizen who died in Venezuela in 1901, leaving behind a widow. Born in Carúpano, she was Venezuelan but acquired French nationality through her husband, as was the custom of the day. Upon his death, however, she reassumed her Venezuelan nationality – under Venezuelan law, at least, but not according to France. To complicate the matter, she and Massiani had children and grandchildren, all of them born in Carúpano and therefore Venezuelan, but also dual French nationals thanks to their father/grandfather. In his July 31, 1905 ruling, the umpire in the case concluded that even if the widow and her children were indeed French nationals, they lived in Venezuela and "the law of domicile prevails when there is a conflict." The commission therefore dismissed the claim on the grounds that it had no jurisdiction in the matter, while upholding the claimants' right to seek another forum. In the umpire's words:

> The widow was born in Venezuela, achieved French nationality by the laws of both countries when she married Thomas Massiani, but by the laws of Venezuela was restored to her quality of a Venezuelan citizen at his death. During their married life they remained in Venezuela; they were there domiciled when he died. It always has been her domicile. It is therefore her nationality, since such is the law of her domicile, which law prevails when there is a conflict ... The children of this marriage were all born in Venezuela. By the voluntary action of the father this was their birthplace. It has always been their domicile, first through the paternal selection and later through their own choice. Hence, governed by the laws of their domicile, they are Venezuelans.

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17 Idem, p. 438.
18 Idem, p. 438 and following.
19 Idem, p. 455.
20 *Reports of International Arbitral Awards, Mixed Claims Commission* (France-Venezuela), 1903-1905, VOLUME X, United Nations, 2006, p. 159 and following.

…

> This claim is to be therefore entered dismissed for want of jurisdiction, but clearly and distinctly without prejudice to the rights of the claimants elsewhere to whom is especially reserved every right which would have been theirs had this claim not been presented before this mixed commission.

The umpire ultimately upheld Venezuela's claim over that of France given the fact that the claimants' domicile was Venezuela.

The umpire in the case involving the widow of ***Sebastiano Brignone*** was even more categorical.[21] Brignone, an Italian by birth who lived in Venezuela, married a local woman who could therefore claim Italian nationality under both Italian and Venezuelan law. Like the widows cited above, she lost her dual nationality when her husband died, leading the umpire, American J.H. Ralston, to deny her right to file a claim against Venezuela as an Italian. Ralston ruled:

> The conclusion to be reached from the foregoing is that the claimant, Madame Brignone, is a citizen of Venezuela, and is without standing before this Commission.

Italian law did not automatically deprive the widow of her Italian nationality upon her husband's death, and in fact Italy still considered her to be a dual national, a fact Ralston did not mention in his decision.

The heirs of ***Michele Miliani***[22] experienced a similar situation. They filed a claim for the payment of debts and indemnification stemming from confiscations committed during the civil wars by both the Venezuelan government and insurgent forces. With Miliani deceased, his widow and children turned to the Venezuela–Italy Mixed Commission for arbitration. Miliani had been born in Italy but lived in Venezuela, and his widow was born in Venezuela but acquired Italian nationality upon her marriage to Miliani. In Venezuela's eyes, she could no longer claim Italian nationality now that her husband had died, and therefore neither she nor her Venezuelan-born children could invoke dual nationality to sue Venezuela in the mixed commission.[23] Ralston was the umpire in this case, too, and he concluded:

> … [W]hile the children of Miliani may with absolute legal propriety be recognized as Italians in Italy, or by Italy in any country other than Venezuela, in this country, and, as a consequence … before this [commission], they must be considered, for the purposes of this litigation, as Venezuelans.[24]

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21 *Reports of International Arbitral Awards, Mixed Claims Commission* (Italy-Venezuela), 13 February and 7 May 1903, VOLUME X, United Nations, 2006, p. 542 and following.

22 J. Ralston and W.T. Sherman Doyle, op. cit., p. 754 and following. See also *Reports of International Arbitral Awards, Mixed Claims Commission* (Italy-Venezuela), 13 February and 7 May 1903, VOLUME X, United Nations, 2006, p. 584 and following.

23 The same Venezuela –Italy Mixed Commission issued a similar decision in the *Brignone* case. See *Reports of International Arbitral Awards, Mixed Claims Commission* (Italy-Venezuela), 13 February and 7 May 1903, VOLUME X, United Nations, 2006, p. 542 and following.

24 *Reports of International Arbitral Awards, Mixed Claims Commission* (Italy-Venezuela), 13 February and 7 May 1903, VOLUME X, United Nations, 2006, p. 590.

In this case as well, therefore, the umpire ruled that the subject's widow and children could not claim dual nationality before the commission.

For further background, the following section examines prominent decisions in cases involving dual nationals of other countries.

2.4. Dual Nationality and Diplomatic Protection: The Canevaro Case

The ***Canevaro***[25] case is one of best-known examples, involving a dispute between Peru and Italy that was brought before the Permanent Court of Arbitration at The Hague in 1912. The facts in the case are similar to the Venezuelan examples cited above.

The case involved a claim submitted by Italy on behalf of the three Canevaro brothers against Peru. All three were the children of Italian parents and, therefore, Italian nationals themselves, but one brother, Raphael, had been born in Peru and claimed dual nationality: Italian, by virtue of his Italian parents, and Peruvian, because of his place of birth. The arbitrator in the case, however, concluded that Raphael behaved more like a Peruvian citizen, having run for Senate in Peru and served as the country's Consul General in Holland, an appointment approved by the Peruvian Senate. The court concluded that the Peruvian government had a right to consider Raphael a Peruvian citizen and to deny his status as an Italian claimant.[26]

Although it did not say so explicitly, the court clearly weighed the issue of Raphael's "effective" or "dominant" nationality. He had been born in Peru, exercised his political rights in Peru, and had a business in Peru. Taken together, all of these factors led the arbitrators in the case to conclude that his Peruvian identity took preeminence over this claims to Italian nationality. Increasingly, as we shall see below, the concept of effective or dominant nationality became the measure used in cases involving dual nationality.

2.5. Dual Nationality and Diplomatic Protection: The 1930 Hague Convention

Article 4 of the Hague Convention of 1930 on conflict of nationality laws confirmed that a State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.[27]

Even though Venezuela has never adopted this convention, it remains useful as a statement of principles of international law. As we shall see in the cases summarized below, it uses strict and limited criteria in delineating when a State may invoke diplomatic protection for dual nationals.

2.6. Dual Nationality and Diplomatic Protection: The Nottebohm and Mergé Cases

Two pivotal and much-referenced cases involving this issue were decided in 1955. The first, known as the ***Nottebohm*** case, did not actually involve dual nationality but is relevant

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[25] P. Daillier, M. Forteau, A. Pellet, op. cit., p. 905; M. Diez de Velasco, op. cit., p. 903.

[26] http://www.pcacases.com/web/sendAttach/516

[27] See: http://eudo-citizenship.eu/InternationalDB/docs/Convention%20on%20certain%20questions%20relating%20to%20the%20conflict%20of%20nationality%20laws%20FULL%20TEXT.pdf

nonetheless due to its emphasis on the limits of States in attributing nationality and exercising their diplomatic protection.

In the ***Nottebohm*** case, a German citizen residing in Guatemala sought to avoid confiscation of his property and extradition to the United States following Guatemala's declaration of war against Germany in World War II by becoming a national of the principality of Lichtenstein. Guatemala, refusing to recognize his new nationality, confiscated his property anyway and deported him to America. Once the war had ended, Lichtenstein exercised its diplomatic protection to demand indemnification from Guatemala, and when the two countries could not agree they turned to the International Court of Justice for arbitration. The court's ruling, issued April 6, 1955,[28] had this to say about dual nationals:

> International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. **They have given their preference to the real and effective nationality**, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.
>
> Similarly, the courts of third States, when they have before them an individual whom two other States hold to be their national, seek to resolve the conflict by having recourse to international criteria and **their prevailing tendency is to prefer the real and effective nationality.**
>
> The same tendency prevails in the writings of publicists and in practice...
>
> (Omissis)
>
> According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a **social fact of attachment, a genuine connection of existence, interests and sentiments**, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact **more closely connected** with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the **individual's connection with the State** which has made him its national.[29]

According to the court's ruling, a legal decision attributing an individual nationality in a given State is not enough. For that State to exercise diplomatic protection on the person's behalf, other States must also recognize the person's connection with the State. In other

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[28] See: http://www.icj-cij.org/docket/files/18/2674.pdf

[29] Idem, p. 23.

words, nationality must be real and effective, as determined by such considerations as habitual residence, center of interests, family connections, participation in public life, and other demonstrations of genuine interest and unity. Without these factors, a second State may reject the first's attempts at diplomatic protection. And in fact, the court in this case dismissed Lichtenstein's overtures by a vote of 11-3.

The second case we will look at in this section, ***Florence Strunsky–Mergé,*** was decided on June 10, 1955,[30] shortly after the ***Nottebohm*** case. Following the end of World War II, the dispute was sent to the Italian-United States Conciliation Commission, created to hear and decide complaints involving destruction of US property in Italy during the war. Italy was a member of the Axis powers, along with Germany and Japan, and capitulated to the Allies (led by the US, Soviet Union and Great Britain). The victors imposed certain penalties and obligations on the losing countries, including, as in this case, indemnification for damaged Allied property.

Mrs. Mergé filed her complaint, which involved the destruction of a grand piano and other property in the Italian city of Frascati, as a US citizen. Born in America, she married an Italian citizen in 1933 and lived with him in Italy, giving her the right to dual nationality in that country. Between 1937 and 1946, she accompanied her husband for a diplomatic post in Japan, living in Tokyo under her Italian passport. Once this posting ended, the couple moved back to Italy. Throughout this entire time, Ms. Mergé kept her US passport valid, registered with the US Consulate in all of the cities where she resided, and paid regular visits to her parents in the US. The Commission rejected her complaint, however, judging that her "effective nacionality" was Italian rather than American, and as such the United States could not present a complaint on her behalf. The third member of the Commission, a Spaniard named Yanguas Messia, concluded:

> [T]he Commission holds that Mrs. Mergé can in no way be considered to be **dominantly** a United States national within the meaning of Article 78 of the Treaty of Peace, because the family did not have its habitual residence in the United States and the interests and the permanent professional life of the head of the family were not established there. In fact, Mrs. Mergé has not lived in the United States since her marriage, she used an Italian passport in travelling to Japan from Italy in 1937, she stayed in Japan from 1937 until 1946 with her husband, an official of the Italian Embassy in Tokyo, and it does not appear that she was ever interned as a national of a country enemy to Japan.
>
> Inasmuch as Mrs. Mergé, for the foregoing reasons, cannot be considered to be **dominantly** a United States national within the meaning of Article 78 of the Treaty of Peace, the Commission is of the opinion that the Government of the United States of America is not entitled to present a claim against the Italian Government in her behalf.[31] (Emphasis added).

The arbitrators in the case, therefore, based their decision on the principle of effective nationality, citing all the reasons why Mrs. Mergé's Italian nationality outweighed her claim

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[30] *Reports of International Arbitral Awards*, *Mergé Case*–Decision No. 55, 10 June 1955, VOLUME XIV, United Nations, 2006, pp. 236–248.

[31] Idem, p. 248.

to US representation. The implication is that in cases of dual nationality, one of those nationalities may have predominance over the other.

2.7. Dual Nationality and Diplomatic Protection: The Iran-Us Claims Tribunal

The Iran-US Claims Tribunal reached similar conclusions. This Tribunal was created after the Shah of Iran was deposed in early 1979, and in November of that year the so-called Islamic Revolution, led by Ayatollah Ruhollah Khomeini, took power. Soon after, a group of Iranian students attacked and occupied the US Embassy in Tehran, holding the diplomats and employees inside hostage for more than a year.

As tensions flared, the Iranian regime confiscated American-owned property, while the American government froze Iranian deposits in US banks. Following complicated negotations, the two countries signed an agreement in Algiers on January 19, 1981, resulting in the hostages' release and the creation of a mixed commission known as the Iran-US Claims Tribunal.[32] It has nine members, with Iran and the US each appointing three and these six in turn naming another three. Claims are decided by one of three chambers or by the full tribunal. The tribunal hears and rules on complaints by companies and citizens of both countries seeking compensation for lost or seized property.

In its March 29, 1983 ruling in the case of ***Nasser Esphahanian v. Bank Tejarat,***[33] one of the tribunal's chambers cited the considerable bulk of laws, precedents and legal doctrine establishing that, in cases involving dual nationality, international law tends to favor the principle of "dominant and effective" nationality:

> [T]his Tribunal has jurisdiction (a) over claims against Iran by dual Iran-United States nationals when the dominant and effective nationality of the Claimant is that of the United States and (b) over claims against the United States by dual Iran-United States nationals when the dominant and effective nationality of the Claimant is that of Iran.[34]

Dissatisfied with this decision, Iran asked the full tribunal to take up the issue. It did so, and on April 6, 1984 confirmed that complaints against Iran could proceed when the claimant was able to demonstate dominant and effective US nationality.

> For the reasons stated above, the Tribunal holds that it has jurisdiction over claims against Iran by dual Iran-United States nationals when **the dominant and effective nationality** of the claimant during the relevant period from the date the claim arose until 19 January 1981 was that of the United States. **In determining the dominant and effective nationality**, the Tribunal will consider all relevant factors, including habitual **residence, center of interests, family ties, participation in public life and other evidence of attachment**. To this conclusion the Tribunal adds an important caveat. In cases where the Tribunal finds jurisdiction based upon a dominant and effective nationality of the claimant,

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[32] See http://www.iusct.net/Default.aspx

[33] Iran–US CTR. Cited by Mohsen Aghahosseini, *The Claims of Dual Nationals Before the Iran-United States Claims Tribunal: Some Reflections*, Leiden Journal of International Law / Volume 10 / Issue 01 / March 1997, pp. 21 – 47. See: http://journals.cambridge.org/abstract_S0922156597000034

[34] Mohsen Aghahosseini, op. cit. p. 24.

> the other nationality may remain relevant to the merits of the claim.[35] (Emphasis added)

As this decision makes clear, the tribunal inclined toward the criteria of the claimant's dominant and effective nationality, which, in the case of ***Nasser Esphahanian v. Bank Tejarat,*** it determined to be American.

2.8. Dual Nationality and Diplomatic Protection: The 2006 Draft Articles of the United Nations International Law Commission

Over time, the strict rules of the Hague Convention have been modified not only to reflect the concept of effective or dominant nationality expressed in some of the cases reviewed here, but also because of the Draft Articles on Diplomatic Protection prpraed by the United Nations International Law Commission, and published in 2006.

The Draft Articles maintain that a State may invoke the principle of diplomatic protection to present a claim on behalf of one of its nationals against a State in which that person can also claim nationality (in other words, dual nationals of the State presenting the claim and the State receiving the claim), as long as the person's **predominant nationality** is that of the State exercising the diplomatic protection, both at the moment the act that is the subject of the claim occurred and at the time the claim is presented. The text reads:

> Article 7. **Multiple nationality and claim against a State of nationality**. A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is **predominant**, both at the date of injury and at the date of the official presentation of the claim.[36] (Second emphasis added).

The Draft Articles have not been adopted as formal treaty, although they are frequently cited because of its well-reasoned stance grounded in the precedents reviewed in this paper.

Building on this modified approach to the notion of diplomatic protection in cases of dual nationality, the current trend is to permit such claims to a limited extent. To qualify for diplomatic protection in such disputes, the individual must be able to point to strong ties to the State pursuing the claim. This could include an established domicile or residency there, as well as property, personal and cultural ties, and academic affiliations. In any case, these ties must be stronger than those the person can be shown to have in the State that is the subject of the claim in order for the claimant's nationality to be judged effective according to the criteria for dominance or predominance, as required for a claim of diplomatic protection.[37]

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[35] Iran-United States Claims Tribunal: Decision in Case No. A/18. See: https://groups.google.com/forum/#!topic/misc.immigration.misc/oV4a9uLm-M0 . It's worth noting that the three Iranian members voted against this decision, casting a vehement dissenting vote.

[36] In "Draft Articles on Diplomatic Protection, with commentaries 2006," United Nations, 2006; see: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf

[37] It is interisting to note that Article 6.1 of the same Draft Articles allows a State to exercise diplomatic protection in respect of one of its nationals even when that person is a national of one or more other States (different from the respondent State. The Commentaries published together with the Draft Articles, add that this provision does not require a genuine or effective link between the national and the State exercising diplomatic protection. In addition, Article 6.2 provides that two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national and no objection may be raised by the

2.9. Evolution of remedies: Direct Actions by Investors

While diplomatic protection for foreign investors has not disappeared altogether, in the world of investment protection, it has largely been replaced by direct action initiated by investors against States they accuse of harming their interests. In effect, investment protection has evolved; in current practice, more and more investors – both natural and legal persons – are taking advantage of remedies available directly to them in the international arena to claim against offending governments and collect indemnification for unfair treatment. Many of the BITs signed between governments incorporate the right to direct action. It is also enshrined in a number of multilateral free trade and investment protection agreements, among them the North American Free Trade Agreement (NAFTA) and the Dominican Republic-Central America FTA (DR-CAFTA).

As long as this right is included in a BIT or multilateral agreement, investors no longer need to turn to their government for protection in investment cases involving another country. They can file direct suit against the government of that country and demand compensation for their losses. This was, without doubt, the biggest change in investment protection law in the second half of the twentieth century, and today it is the method most investors use to pursue such cases. The number of BITs has proliferated –currently, around 3,000 are in force around the world– among a large number of geographically and ideologically distinct governments. Venezuela alone is a signatory to around 29 such agreements.[38] At the same time, new forums for arbitration have been created to allow foreign investors to sue host countries, as we shall see in detail in the following section.

It is important to point out that many foreign investors, especially large multinationals, plan their investments carefully. When they invest in a country considered to pose risks for foreign capital, they often do so via a commercial entity in a country that has a BIT with the target country so as to be sure of an effective and expeditious claims process if they face discriminatory treatment or expropriation.

Foreign investors who suffer losses because of mistreatment in a given country can invoke a number of actions, defenses and resources within that country's jurisdiction. As far back as the nineteenth century, in fact, Argentine jurist Carlos Calvo recommended that foreign investors direct their demands, claims and complaints to the authorities and jurisdiction of the courts in the countries where the investment occurred rather than resorting to diplomatic pressure or other State-to-State interventions.

While Latin American countries welcomed the so-called Calvo doctrine, with some even incorporating it into their constitutions, they no longer accept it absolutely. In an effort to provide incentives for foreign investment, these States have acknowledged that foreigners can take their claims to international forums as well as to local authorities.

When dipolomatic protection prevails States will not initiate diplomatic efforts on behalf of an investor until that investor has exhausted all of the remedies available within the country where the investment was made. Before invoking State protection, therefore, and before the investor's home State will make claims to the host country, the investor must pursue all

State against which the claim is filed.

[38] Venezuela has withdrawn from some of these agreements and, most notably, declined to renew its BIT with the Netherlands.

possible local channels and actions. Not only that, the investor must wait for local courts and tribunals to issue their final decisions in the case unless a clear miscarriage of justice has occurred. The investor's home State cannot take action until the local courts have had their say. The investor may have to endure a seemingly endless and expensive series of lawsuits, legal appeals and delays to protest already manifestly unfair treatment.

A few BITs block the investor from taking direct action against the host country in any other forum, including international arbitration, until all local processes have run their course. Others, albeit a small minority, maintain that investors who accept local jurisdiction for their complaints lose the right to appeal to any other forum. This is known as the "fork in the road" option, because the investor must choose between the local authorities and international mechanisms for resolving the dispute. Once the choice is made there is no going back: The investor must await a decision in that jurisdiction, which marks the end of the road for the complaint.

3. Jurisdiction in investment arbitration

3.1. International Center for the Settlement of Investment Disputes (ICSID)

As indicated, most BITs and multilateral agreements favor international arbitration to resolve investment disputes involving foreign nationals. Most accord investors in such cases the right to initiate arbitration directly if they have been unable to reach a friendly agreement with the host country.

Many of these BITs set a time frame (often six months) for the parties to reach an amicable solution. If after the specified time since the investor first notified the host country of the complaint - usually by means of a written communication - such a solution has not been possible, the dispute then becomes eligible for the dispute resolution mechanisms established in the applicable BIT.

In general, BITs indicate which arbitration center the parties to the agreement should use. The one chosen most frequently in recent years is the International Center for the Settlement of Investment Disputes (ICSID), established in 1965 under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (known as the ICSID Convention).[39]

For a case to be eligible for ICSID arbitration, both the investor's home country and the host country must be signatories to and current members of the ICSID Convention.

For cases in which those requirements are not met, the center has created the Additional Facility. The Additional Facility is not ICSID; it is a separate entity with its own rules for arbitration. It can resolve investment disputes when either the investor's home country or the country of the investment are not signatories to the ICSID Convention or have withdrawn their membership, if so stated in the BIT between the two countries or if the two parties agree to this mechanism to address the dispute.

[39] https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf

Under the terms of other BITs, disputes must be resolved by arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL).[40]

Article 11 of the Venezuela–Spain BIT,[41] which is identical to Article 11 of the Venezuela–Germany BIT (and very similar to the corresponding provisions of the BITs signed by Venezuela with Chile and Portugal), states:

> 2.- If the dispute cannot be resolved in this way [amicably] **in the space of six months** from the date written notification is received, as detailed in Paragraph 1, **the investor may choose to submit it:**
>
> a.- To the competent courts in the territory where the investment occurred, or
>
> b.- **To the International Center for the Settlement of Investment Disputes (I.C.S.I.D.),** created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, open for signature in Washington on March 18, 1965, when it was signed by each State belonging to the present Agreement. In case **one of the contracting parties has not adhered** to the above-mentioned Convention, the case will be heard by the **Additional Facility** for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes;
>
> 3.- If for any reason the arbitration mechanisms cited in Item 2.b. of this Article **are not available,** or if both parties so **agree**, the dispute will be submitted to an ***ad hoc*** **arbitration tribunal** established under the **Arbitration Rules of the United Nations Commission on International Trade Law** (Emphasis added, English translation from the Spanish version).

An aggrieved investor has two options, therefore: appearing beffore the courts in the country of the investment, or resorting to international arbitration. If the investor choses the second option, the next step is determining the appropriate arbitration forum.

Under the Venezuela–Spain and Venezuela-Germany BITs, the first option is ICSID.

3.2. ICSID Jurisdiction

The ICSID Convention establishes the requirements for ICSID jurisdiction in cases involving a natural person and a Contracting State:

> Jurisdiction of the Centre
>
> Article 25
>
> (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (…) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to

[40] http://www.uncitral.org/pdf/spanish/texts/arbitration/arb-rules-revised/arb-rules-revised-s.pdf
[41] GO Nº 36281, September 1, 1997; Boletín Oficial del Estado (BOE), Spain, Nº 245, October 13, 1997.

> the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
>
> (2) "National of another Contracting State" means:
>
> (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered (…) **but does not include any person who on either date also had the nationality of the Contracting State party to the dispute (**…) [Emphasis added].

To be eligible for ICSID arbitration, therefore, the case must involve a juridical disagreement over an investment dispute, the State and the investor must hav given its consent for arbitration, and the dispute must be between a national of a Contracting State other than the State party to the dispute.

Most relevant for our purposes is the exclusion of persons who **also had the nationality of the Contracting State party to the dispute** on the date on which the parties consented to submit the dispute to arbitration or on the date on which the request was registered.

In other words, ICSID jurisdiction clearly excludes persons with dual nationality when one of those nationalities is that of the State party to the dispute.

Curiously, this provision does not appear in early versions of the ICSID Convention rules.[42] And yet, the exclusion became absolute, allowing for no exceptions or possibility for a waiver from the interested parties. In a report accompanying the ICSID Convention, the executive directors of the World Bank stated:

> 29. It should be noted that under clause (a) of Article 25 (2), a natural person who was a national of the State party to the dispute would not be eligible to be a party in proceedings under the auspices of the Centre, even if at the same time he had the nactonality of another State. **This ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent.**[43] (Emphasis added)

Individuals with dual nationality, therefore, are automatically excluded from ICSID arbitration if one of their nationalities is that of the State party to the dispute. This exclusion is absolute; there is no way to override it, not even by the States that signed a BIT, and not even by an explicit agreement between the investor and the State involved. This means that if an investor with dual nationality in Venezuela and some other country, such as Germany or Spain, brings a claim against Venezuela before ICSID, the center's General Secretary is obliged to dismiss it. Even if the General Secretery does accept it, the arbitration tribunal itself cannot accept jurisdiction. ICSID tribunals do not and can never have jurisdiction to hear such disputes.

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[42] C.H. Schreuer, *The ICSID Convention, A Commentary*, Cambridge, 2001, p. 271.

[43] https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB.htm

3.3. Venezuela Is No Longer Part of the ICSID Convention

Venezuela signed the ICSID Convention on August 18, 1993, submitted its ratification on May 2, 1995, and became an effective party to ICSID on June 1, 1995. On January 24, 2012, the custodian of the ICSID Convention (the World Bank) received written notification of Venezuela's withdrawal from the agreement. In accordance with Article 71 of the Convention, Venezuela's withdrawal took effect six months from that date, on July 25, 2012. Since then, Venezuela has not been a contracting party of the ICSID Convention.

Because Venezuela stopped being a party to the ICSID Convention as of that date, arbitration proceedings initiatated against it since then cannot be heard by ICSID but must instead be submitted to the arbitration tribunals designated in the corresponding BIT. These may incude the Additional Facility or an *ad hoc* tribunal constituted in accordance with UNCITRAL rules of arbitration.

3.4. ICSID's Additional Facility

The Additional Facility, whose full name is "Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes," was created by ICSID's Administrative Council and not by the ICSID Convention. Its proceedings are governed neither by the ICSID Convention nor the rules applicable to ICSID arbitration proceedings.

Under the the Additional Facility Rules, which are separate and distinct from those governing ICSID, the Administrative Council authorizes ICSID's Secretariat to administer certain types of proceedings between parties when one of them is not an ICSID member State or a national of an ICSID member State. Cases involving Venezuela fall into this category.

In accordance with Article 2 of its regulations, the Additional Facility may hear the following types of proceedings between a State (or an entity or a constituent subdivision of that State) and a national of another State:

> (a) conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State;
>
> (b) conciliation and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State; and
>
> (c) fact-finding proceedings.

Specific rules have been put in place to regulate these proceedings, including Fact-finding, Conciliation and Arbitration Rules.

An examination of the rules of the Additional Facility (which govern its organization and general procedures) should allow us to determine whether a Chilean, Spanish, Portuguese or German national who holds dual nationality in Venezuela may submit a claim against

Venezuela, have it accepted by the Secretary General, and registered to be heard and decided by an Additional Facility arbitration tribunal.

Article 3 of the rules goes on to state that the norms of the ICSID Convention are not applicable to proceedings before the Additional Facility. It is explicit on this point:

> Article 3
> Convention not Applicable
>
> Since the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre, none of the provisions of the Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein.

One would therefore assume that the inadmissibility established in Article 25 of the ICSID Convention for natural persons who pursue claims against a State whose nationality they possess does not apply to the Additional Facility, which may accept and decide such claims. This is not in fact the case, however; despite the Additional Facility's clear separation from the ICSID Convention, its very next article, Article 4, makes two references to the text of the Convention that reverse the provisions of Article 3.

These references are of supreme importance because they determine nothing less than the jurisdiction of the Additional Facility in the cases we have been examining. The first one directly relevant to the issue we are discussing is Article 4, (2), referring to Article 25 of the ICSID Convention and its specific exclusion and inadmissibility of claims submitted by nationals of the State named in the claim:

> (2) In the case of an application based on Article 2(a), the Secretary-General shall give his approval only if (a) he is satisfied that the requirements of that provision are fulfilled at the time, and (b) both parties give their consent to the jurisdiction of the Centre under Article 25 of the Convention (in lieu of the Additional Facility**) in the event that the jurisdictional requirements *ratione personae* of that Article shall have been met at the time when proceedings are instituted**. (Emphasis added).

ICSID Secretary General may approve the start of arbitration proceedings in the Additional Facility only if the following three conditions are cumulatively met:

> a) The dispute involves legal differences stemming directly from an investment and outside of the ICSID Center's jurisdiction, based on the fact that the State that is a party to the dispute or whose national is a party to the dispute is not a contracting State under the ICSID Convention.
> b) Both parties have given their consent for ICSID Center jurisdiction in accordance with Article 25 of the ICSID Convention. In addition to a specific agreement between the parties to initiate arbitration, States give consent by signing the respective BIT, and the natural person making the claim gives his when he decides to pursue the open offer for arbitration consented to by the State named in the claim.
> c) The *rationae personae* requirements mentioned in Article 25 of the ICSID Convention are fulfilled. This completely excludes from the Additional Facility's jurisdiction natural persons with the nationality of the State named in the claim.

Therefore, the prohibition or inadmissibility envisaged in Article 25(1)(2)(a) of the ICSID Convention CIADI that excludes dual nationals from initiating arbitration against a State of which they are also nationals applies to cases submitted to the Additional Facility as well. As a result, the Secretary General cannot accept cases presented by Chilean, Spanish, Portuguese or German nationals who have dual Venezuelan nationality for arbitration by the Additional Facility when their claim is against Venezuela. If they are admitted, then the arbitration tribunal directed to hear such cases must declare itself lacking in jurisdiction, if Venezuela so demands.

Chilean, Spanish, Portuguese or German investors who are dual Venezuelan nationals will find their way to the Additional Facility blocked. The question then is, without the possibility of arbitration by the ICSID Center, since Venezuela is no longer a member of the Convention, or the Additional Facility, which excludes claimants who are nationals of the State they are suing, can these investors still hope for *ad hoc* arbitration under UNCITRAL rules? The next section addresses this question.

3.5. Arbitration under UNCITRAL Rules

Article 11 of Venezuela's BITs with both Spain and Germany, as noted in Section 3.1, states: "(…) if for any reason the arbitration forums listed [ICSID or the Additional Facility] are not available, or if both parties so agree, the dispute will be submitted to an *ad hoc* arbitration tribunal established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law." Venezuela's BITs with Chile and Portugal contain similar provisions, making arbitration under UNCITRAL rules the only remaining option.

As noted earlier, UNCITRAL arbitration is conditional on ICSID and the Additional Facility being **unavailable**. What exactly does **unavailable** mean? Not much has been written about the topic (or at least, not much that we've been able to find), but a UNCITRAL case, ***Nova Scotia Power Incorporated (Canada) vs. República Bolivariana de Venezuela***[44] contains some relevant elements. In the decision, issued on April 22, 2010, the arbitration tribunal[45] examined the provisions of the Venezuela-Canada bilateral investment treaty on this point, are similar to those included in Venezuela's BITs with Chile, Spain, Portugal and Germany.[46]

As the quotes below illustrate, the tribunal unanimously concluded that these BITs give investors the right to access one of three arbitration processes as part of their goal of ensuring they are entitled to international arbitration. The tribunal reasoned that the Additional Facility can be said to be unavailable if there is no reasonable chance that the Secretary General will approve a given case for arbitration. ICSID's Secretary General, as we have seen, cannot accept, much less register, a request for arbitration if a claimant is a national of the State named in the claim.

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[44] http://www.jfarmesto.com/UserFiles/2010-04-22-AwardonJurisdiction.pdf

[45] Juan Fernández Armesto presided, with co-arbitrators John Beechey and Philippe Sands.

[46] Victorino Tejera Pérez, in his well documented and exhaustive work, *Arbitraje de Inversiones en Venezuela*, Caracas, 2012, p. 177, points out that this issue receives similar – essentially identical – treatment in Venezuela's BITs with Barbados, Canada, Denmark, Ecuador, Lithuania, Peru, the United Kingdom, the Czech Republic and Uruguay. This is true also of its BITs with Luxemburg, Switzerland and Cuba, except that they do not include the Additional Facility, leaving UNCITRAL arbitration as the only option.

Nova Scotia Power Incorporated vs. Venezuela did not involve an issue of dual nationality. The dispute arose from Venezuela's cancelation of a coal contract. At the time, Canada was not a member of ICSID and so, under the terms of the Venezuela–Canada BIT, was obliged to submit its claim to the Additional Facility and, if it was unavailable, to an arbitration tribunal constituted under UNCITRAL rules. The tribunal in question argued that the Additional Facility was in fact available as a forum to hear the case, based on careful examination of the Venezuela–Canada BIT's provisions for such circumstances (which, as we have noted, are similar in Venezuela's agreements with Chile, Spain, Portugal and Germany). The arbitral tribunal reasoned as follows:

> 79. The preliminary Issue for the Tribunal is discrete and specific: whether on the date on which Claimant initiated these arbitration proceedings and alternative procedure was "available" under the ICSID Additional Facility, within the meaning of the Treaty.
>
> ….
>
> 81. The Claimant disagrees and contends that neither ICSID nor the Additional Facility were "available" within the meaning of Article XII (4) of the Treaty because they were not "ready for immediate use" or they did not have a reasonable prospect of success."
>
> ….
>
> 84.There is no dispute between the Parties that the interpretation of this provision is subject to the rules set forth in the Vienna Convention and, in particular, to Articles 31 to 33 thereof concerning treaty interpretation. Article 31(1) provides the starting point:
>
> > 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 light of its object and purpose.
>
> 87. … [T]he investor is granted the right to submit the dispute to arbitration under three alternative scenarios:
>
> - ICSID, provided in this case that both Venezuela and Canada are parties to the 1965 Washington Convention;
> - the ICSID Additional Facility Rules, provided that either Venezuela or Canada is party to the Washington Convention; and
> - in case neither of these procedures is "available," UNCITRAL arbitration.
>
> 88. The purpose of Article XII(4) is to afford an investor who meets the requirements of the Treaty the right to bring international arbitration proceedings to resolve an investment dispute.
>
> 89. The ordinary meaning of Article XII(4) does not indicate that the three procedures provided by the Treaty are to be treated as alternatives. Rather, the ordinary meaning of Article XII(4) is to establish a hierarchy of procedures. Article XII(4) defines access to ICSID (either under ordinary Rules or under the

Additional Facility) as the primary possibility: depending on whether only one Contracting Party or both have ratified the Washington Convention, the investor is *ipso iure* entitled to submit the dispute to the Centre under one set of rules or under the other.

90. The possibility of filing an UNCITRAL arbitration, however, is subject to an additional requirement: UNCITRAL arbitration is only open to an investor "[i]n case neither of the [other] procedures mentioned … is available." The wording of Article XII(4) admits of no ambiguity or doubt. It indicates that the drafters of the Treaty intended that it be first necessary to consider whether the dispute resolution mechanisms of ICSID or its Additional Facility were available. Only if both were not "available" was an investor entitled to have recourse to UNCITRAL arbitration.

….

96. In the present case, therefore, the crucial issue is whether arbitration under ICSID or the Additional Facility Rules was available as at October 1, 2008. What does "available" mean?

….

98. In order to clarify this issue, the Tribunal finds that it is appropriate to consider not only the English language version of the Treaty, but also the Spanish and French texts, since each of these texts is equally authentic. The Spanish version of Article XII(4) closely follows the English text, stating as follows:

En caso de que ninguno de los procedimientos mencionados anteriormente estédisponible, el inversor podrá someter la disputa [a arbitraje CNUDMI].

99. The French text, however, adopts a slightly different approach:

Lorsque aucun des recours susmentionnés ne peut être exercé, l'investisseur peut soumettre le différend à [l'arbitrage CNUDCI].

100. Comparing these three texts of Article XII(4), the Tribunal notes that the French text might be considered to be more precise, in the sense that it explicitly identifies three considerations, aspects of which may only be implicitly articulated in the Spanish and English versions:

- availability relates to the "exercise," i.e., the ability to implement or to avail oneself of ("*peut être exercé*") the ICSID or ICSID Additional Facility procedures;
- a relevant qualifying factor is the possibility of the "exercise" of the action ("*peut être exercé*"), not the actual success; and
- that it is the investor who must be unable to "exercise" ICSID arbitration, since it is the investor who, in the absence of access to ICSID, has the option to submit the dispute to UNCITRAL arbitration.

101.The French text suggests that Article XII(4) is properly to be interpreted as indicating that the burden is on the Claimant to establish that, at the time when it filed its Request for Arbitration, no possibility existed for it to exercise a right to bring an arbitration, either under the ICSID Rules proper or under the Additional Facility Rules:

(i) Possibility: Article XII(4) cannot be interpreted as requiring a prospective claimant to bring proceedings under ICSID or the Additional Facility Rules, if the prospects of approval (if necessary) and registration are non-existent or unlikely, or will require an unreasonable effort.

(ii) To exercise: When is an investor able "to exercise" an ICSID arbitration procedure? Access to ICSID arbitration requires, as a preliminary step, that certain administrative hurdles be overcome. In the case of arbitration under ordinary ICSID rules, the request must be drafted and communicated to the Secretary-General of ICSID, who will then decide whether or not to register it. In the case of ICSID Additional Facility Rules, the Secretary-General must decide on whether to give his or her approval to an agreement to arbitrate, and then decide on whether to register the request. Until these requirements have been met, an ICSID or ICSID Additional Facility tribunal cannot be constituted and will have no capacity to decide on possible jurisdictional objections and on the merits of the dispute.

102.In sum, the Tribunal proceeds on the basis that for the purposes of Article XII(4) of the Treaty, arbitration under the Additional Facility Rules will not be "available" if there is no reasonable prospect that the Secretary-General would approve the arbitration agreement and then register a request for arbitration, and would do so in a timely manner.

Obviously, there is no French version of the texts of Venezuela BITs with Chile, Spain, Portugal or Germany, but the reasoning in the Canadian case should be applicable to them as well. According to this line of thinking, the definition "available" used in these BITs means that the Additional Facility is not available when a claim is certain to be rejected by ICSID's Secretary General because the claimant, in addition to being a national of Chile, Spain, Portugal or Germany, holds dual nationality in Venezuela. The only arbitration forum open to such claimants is a tribunal governed by UNCITRAL rules.

4. Investors with dual nationality

We will now go on to examine whether a natural person who holds Venezuelan nationality and the nationality of a State that has ratified a BIT with Venezuela – such as Chile Portugal, Spain and Germany - should be admitted to invoke the protections and remedies included in the BIT and file a claim against Venezuela in case of expropriation, or other violations of the BIT

4.1. BITs and Natural Persons

Article I of the Venezuela–Spain and Venezuela–Germany BITs contains the definitions used in these agreements to refer to protected investors who are natural persons, as follows:

> Article I Definitions
>
> For the purposes of this Agreement;
>
> 1.- The term "investors" is understood to mean:
>
> a) **Physical persons who are nationals of one of the Contracting States** in accordance with their legislation who make Investments in the territory of the other Contracting State. (Emphasis added).

Article I.1.a) of the Venezuela–Portugal BIT says essentially the same thing, although the wording is slightly different:

> a) **Natural persons** who, in accordance with the **legislation** of the respective Contracting State, are **nationals** of that Contracting State. (Emphasis aded).

These BITs, like the overwhelming majority of those to which Venezuela is a signatory, clearly state that to be covered under the treaty an investor must be a national of one of the contracting States as defined by the laws of that country. The BITs with Chile, Portugal, Spain and Germany do not explicity address the case of natural persons who hold dual nationality in both of the contracting States. Do these BITs protect dual nationals?

There is nothing illegitimate about having more than one nationality.[47] Under international law, every State has the right to set its own rules with regard to nationality. Some States have opted for *jus sanguinis*, extending nationality to descendants of their citizens even if they are born in a different country. Others abide by *jus soli*, the right of anyone born in their territory to nationality or citizenship. Many countries, Venezuela among them, follow both principles, granting nationality to those born in their territory as well as to the children of a parent who can claim nationality.[48] In addition, of course, most countries, including Venezuela, have a naturalization process by which people can gain citizenship by meeting residency and other requirements. [49] In many cases, again including Venezuela, immigrants can become naturalized citizens without renouncing their citizenship in their country of origin.[50]

Holding more than one nationality offers certain advantages, among them the ability to use different passports when convenient and to reside in another country without having to worry about visas or residency requirements. It can also have some disadvantages, however, including having to pay taxes in more than one jurisdiction or even being drafted into a country's armed forces during times of war.

The protections afforded by these Venezuelan BITs – signed with Chile, Portugal, Spain and Germany - are granted to investors who are physical persons or individuals, and who are nationals of one of the contracting States. These BITs do no add any other requirment as to nationality, such as domicile, residence, or effectiveness/predominance. At the same time, they do not exclude those physical persons who hold dual nationality. As we will see below other Venezuelan BITs, such as those signed with Canada and Iran, specifically exclude from

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47 The preamble to the current Venezuelan Constitution states: "(…) following contemporary constitutional guidelines, dual nationality is permissable (…)". (GO, March 24, 2000, Nº 5.453 Extr.).

48 Venezuelan Constitution: Article 32.

49 Idem, Article 33.

50 Idem, Article 34.

protection those investors who being physical persons hold the nationality of the two States parties to thos BITs.

4.3. Dual Nationality in Some ICSID Cases

Despite the provisions of Article 25 of the ICSID Convention that discussed in the preceding sections, which exclude dual nationals, the issue of dual nationality has arisen in some ICSID cases. Below, we will analyze why and what sorts of decisions the have been adopted in these cases.

In the first such case, ***Eudoro A. Olguín v. Republic of Paraguay***,[51] the claimant, who held dual nationality in the United States and Peru, invoked his Peruvian nationality in order to take advantage of the bilateral investment treatment in existance between Peru and Paraguay to pursue a claim against the latter country. Paraguay, however, argued that the claimant could not invoke the BIT's protection because he was also a US national. On July 26, 2001, the arbitration tribunal ruled that Mr. Olguín could prove effective nationality in Peru and was therefore entitled to protection under both the Peru-Paraguay BIT and the ICSID Convention.

The tribunal reasoned as follows:

> The most important consideration in this case for determining whether the Claimant has access to the BIT's jurisdiction is whether or not he has Peruvian nationality and if that nationality is effective. There can be no doubt as to this point. There has been no disagreement about whether Mr. Olguín has **two nationalities, both of which are effective**. Whatever the understanding of one or both of those States with regard to, for example, the exercise of his political or civil rights, their responsibility to provide him with diplomatic protection, or the importance of domicile for determining these rights, it pales in importance before the legitimate juridical fact that Mr. Olguín **effectively holds both nationalities**. The fact that he has **effective Peruvian nationality** is enough for this Tribunal to conclude that he cannot be excluded from BIT protection.[52] (Emphasis added).

Another relevant case ***Soufraki v. United Arab Emirates.***[53] A dual Canadian and Italian national, Soufraki invoked the bilateral investment treaty between Italy and the United Arab Emirates to help resolve an investment dispute. Despite official documents certifying his Italian nationality, the tribunal, after extensive and detailed deliberation, concluded that he had relinquished his Italian nationality upon taking Canadian citizenship. In a decision dated July 7, 2004, the tribunal declared that it lacked jurisdiction in the case:

> 55. It is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality. Article 1(3) of the BIT reflects this rule. But it is no less accepted that when, in international arbitral or judicial proceedings, the nationality of a person is challenged, **the international tribunal**

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51 ICSID Case No. ARB/98/5. The July 26, 2001 decision is available at: http://www.italaw.com/cases/documents/778

52 Idem, Paragraph Nº 61.

53 *Hussein Nuaman Soufraki* v. *United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004. See: http://www.italaw.com/cases/1041.

> **is competent to pass upon that challenge**. It will accord great weight to the nationality law of the State in question and to the interpretation and application of that law by its authorities. But it will in the end **decide for itself** whether, on the facts and law before it, the person whose nationality is at issue was or was not a national of the State in question and when, and what follows from that finding. Where, as in the instant case, the jurisdiction of an international tribunal turns on an issue of nationality**, the international tribunal is empowered, indeed bound, to decide that issue**.
>
> (…)
>
> 84. Since, as found by the Tribunal, Claimant **was not an Italian national** under the laws of Italy at the two relevant times, namely on 16 May 2002 (the date of the parties' consent to ICSID arbitration) and on 18 June 2002 (the date the Claimant's Request for Arbitration was registered with ICSID), this Tribunal does not have jurisdiction to hear this dispute. (Emphasis added).

Soufraki challenged this decision, but in vain.[54]

The salient part of this case is that the arbitration tribunal decided it had the power to determine the nationality of a natural person, regardless of the official documentation available to certify this status. These documents may constitute *prima facie* evidence, but the arbitration tribunal has the authority to decide whether or not to accept them.

The next case, ***Champion Trading v. Egypt,***[55] involved a US-based corporation and several natural persons with dual US and Egyptian nationality. The issue here is the natural persons' request that the arbitration tribunal recognize only their US nationality as "real and effective." The tribunal rejected this petition, saying that it had no jurisdiction to hear the case because of the claimants' dual US-Egyptian nationality.

Nevertheless, the tribunal agreed on the possibility of dismissing the second nationality on the grounds that it would be absurd to attribute dual nationality to a person who is the third- or fourth-generation descendant of a national of a country to which he currently has no ties. On February 21, 2003 the tribunal ruled:

> This Tribunal does not rule out that situations might arise where the exclusion of dual nationals could lead to a result which was manifestly absurd or unreasonable (Vienna Convention, Article (32)(b)). One could envisage a situation where a country continues to apply the *jus sanguinis* over many generations. It might for instance be **questionable if the third or fourth foreign born generation**, which has no ties whatsoever with the country of its forefathers, could still be considered to have, for the purpose of the Convention, the nationality of this State. In the present case this situation does not arise and the question need not be answered.[56] (Emphasis added)

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[54] Idem.

[55] *Champion Trading Company Ameritrade International Inc., James T. Wahba, John B. Wahba, Timothy T. Wahba* v. *Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction 21 February 2003. See: http://www.italaw.com/cases/245

[56] Idem, p. 16.

The same line of reasoning – in other words, the possiblity of losing one's nationality in a given State and then filing a claim against that State – came out in ***Siag and Vecchi v. Egypt.***[57] Mr. Siag and his mother, Ms. Vechi, both Italian nationals, filed a claim against Egypt based on that country's bilateral investment treaty with Italy. Both natural persons maintained that they had been Egyptian nationals but lost this standing when they accepted Italian nationality. After extensive analysis, the three arbitrators agreed that Ms. Vechi, an Italian by birth who became an Egyptian national by virtue of marriage, had lost her Egyptian nationality when her husband died and she took no steps to ensure her continued status in that country.

The arbitrators could not reach a consensus about Mr. Siag's situation, however. Two of them, the majority, argued that he had lost his Egyptian nationality because he never attempted to recover it after becoming a Lebanese citizen (while remaning an Italian national). By invoking his Italian nationality, they declared, he could legitimately pursue a claim against Egypt. The third arbitrator – the distinguished Chilean professor Francisco Orrego Vicuña – dissented, questioning the justification for the loss of Mr. Siag's Egyptian nationality. He went further and emphasized the importance of demonstrating the claimant's effective nationality agreeing with the majority on this specific point. He cited the precedent established in the Nottebohm case:

> As the ICSID Convention does not define nationality, the principles of international law governing this matter come into play instantly. Cardinal among such principles is that of **effectiveness**. Ever since the Nottebohm case, this has been the accepted premise in international law and the recent work on the diplomatic protection of persons and property of both the International Law Commission and the International Law Association so confirms. There is no difference of opinion on this question with my learned colleagues.[58] (Emphasis added).

4.4. Dual Nationality in Pey Casado v. Republic of Chile

An especially relevant case for our topic of this paper is ***Pey Casado v. Republic of Chile***,[59] heard and decided by an ICSID arbitration tribunal. The claimants were the Fundación Presidente Allende, based in Spain, and Mr. Pey Casado, a dual Spanish-Chilean national, under the auspices of the bilateral investment treaty between Spain and Chile.

Pey Casado, a newspaper publisher and supporter of President Salvador Allende, maintained that the military regime led by Augusto Pinochet had seized his property without any compensation following the coup that brought him to power in September 1973. In fear for his life, Pey Casado had sought shelter in the Venezuelan Embassy until he was finally able to leave Chile.

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[57] *Waguih Elie George Siag and Clorinda Vecchi* v. *The Arab Republic of Egypt*, ICSID case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007. See: http://italaw.com/documents/WaguihElieGeorgeSiag-AwardandDissentingOpinion_001.pdf

[58] Idem, p. 62 and following.

[59] Victor Pey Casado and Fundación Presidente Allende v. The Republic of Chile, ICSID case No. ARB/98/2, Final Award, 8 May 2008. See: www.italaw.com/sites/default/files/case-documents/ita0639.pdf

Chile objected ICSID's jurisdiction in the case, among other reasons because of Mr. Pey Casado's dual nationality. Pey Casado argued that he had renounced his Chilean citizenship before giving his consent to the arbitration and presenting the claim before the tribunal. After careful consideration of the facts, the arbitrators concluded that Pey Casado had legitimately renounced his Chilean nationality and that Chile's objections to the tribunal's jurisdiction were therefore groundless:

> 322. It therefore corresponds to the aribitration Tribunal to evaluate the content and effects of Chilean law with regard to nationality and to apply it in the present case. In so doing, the Tribunal must conclude from the preceding that a **voluntary renunciation of Chilean** nationality is valid when the party that renounces it has dual nationality, a renunciation whose truth the claimant has in fact demonstrated.
>
> 323. For the reasons mentioned above, the arbitration Tribunal judges that it is **cannot uphold the plea of lack of competence** based on the argument that the claimant held Chilean nationality on the pertinent date. (Emphasis added).

It should be underscored that in this case the arbitration tribunal accepted as valid the idea that a natural person could abandon or renounce the nationality of the aggressor State in order to submit a claim for ICSID arbitration in a case involving that State.

In the **Pey Casado** case, the arbitration tribunal stressed the difference between the ICSID Convention and the bilateral investment treaty between Spain and Chile by referring to natural persons with the nationality of both contracting States. It was perhaps the first arbitration tribunal to address the issue in such a direct manner and to adopt the position that natural persons are not exluded from BIT protection merely because they hold dual nationality in the States in question. The tribunal also ruled that BIT protection isn't dependent on the ability to prove effective and dominant nationality, and that the parties may not add requirements or criteria not explcitly Stated in the BIT:

> Second, under the [BIT] dual nationals are treated **differently** than under the ICSID Convention CIADI with regard to applicability and content. To meet the criteria for nationality in accordance with the [BIT], it is enough for the claimant to demonstrate that he **has** the nationality of the other contracting State. Contrary to what the Respondent maintains, the fact that the claimant **possesses dual nationality**, inculding the nationality of the Respondent, **does not exclude the case from the scope of the [BIT]**. In the opinion of the arbitration Tribunal, in this context **the concept of "effective and dominant" nationality for dual nationals does not exist**. A dual national is not excluded from the scope of the [BIT] even if his "effective and dominant" nationality is that of the State where he made the investment (contrary to what Profesor Dolzer maintains in his expert report, presented by the Respondent). On the contrary, the [BIT's} goal and its wording **exclude** the idea of a requirement of effective and dominant nationality. As Profesor Dolzer himself notes, the [BIT] extends protection to "investors from the other Party" or "a contracting party in the other party's terrotory" (…) The [BIT] does not explicitly address the issue of whether dual Spanish-Chilean nationals are included or not within its scope. In the opinion of the arbitration Tribunal, **the Tribunal would not be justified (basing itself on customary**

> **international law) in adding an requirement that does follows neither the letter nor the spirit of the law**.[60] (Enphasis added)

As the quote shows, the arbitration tribunal concluded that since the BIT does not expressly exclude natural persons with nationality in both contracting States, proven nationality in one of the contracting States is enough to be covered under the treaty. In other words, since the BIT has no provision explicity excluding dual nationals, they can legitimately take action against an aggressor State even if they are nationals of that State.

In addition, as already noted, the arbitration tribunal ruled that nationality requirements not explicitly stated in a BIT cannot be added as a result of different interpretations of the treaty's text. Of course, this point is only applicable in cases not brought before ICSID, including *ad hoc* arbitration conducted under the UNCITRAL rules.

It is important to note, however, that the arbitration tribunal made these comments *obiter dicta.* The point that tipped the balance in favor of Pey Casado was not these last and interesting considerations, but rather the tribunal's acceptance of his renunciation of Chilean nationality. Validating this renunciation meant that the tribunal allowed Pey Casado to invoke his now sole Spanish nationality to present his claim.

4.5. Dual Nationality in Micula v. Romania and Oostergertel v. The Slovak Republic

In the first of these cases, the claimants, Ioan Micula and Viorel Micula, twin brothers born in Romania and holding Romanian nationality, emigrated to Sweden in 1987. After meeting the conditions required by Sweden and renouncing their Romanian nationality, Ioan Micula acquired Swedish nationality in 1994, followed a year later by Viorel Micula. As of that date, the brothers held sole Swedish nationality.

In 2005, the Miculas, along with three Romanian-based companies in which they were majority shareholders, requested ICSID arbitration for their claim demanding large amounts of indemnification for Romania's reversal of incentives and fiscal stimuli it had instituted to encourage investment in economically depressed areas of the country. The Miculas had made significant investments in Romania to take advantage of these benefits, but when Romania gained membership in the European Union it had to eliminate such measures to comply with its rules.

Romania reacted by disputing the Miculas' Swedish nationality, arguing that even if valid, it was not effective. The arbitration tribunal disagreed[61]:

> 98. It is clear for the Tribunal that there is one, and only one, nationality involved in this case: Swedish nationality. It has not been disputed that Messrs. Micula have renounced their Romanian nationality. Therefore, in the view of the Tribunal, a view that appears to be shared by Respondent, the relevant question is not about the choice of one nationality over another because the first is dominant or the second in ineffective.
>
> …

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[60] Idem, p. 134 and following.

[61] www.italaw.com/sites/default/files/case-documents/italaw3036.pdf

> 99. The Tribunal notes that the role of a genuine or effective link with the State of nationality is disputable in public international law, and is indeed disputed, particularly in the case of a single nationality.
>
> …
>
> 100. The Tribunal must nonetheless examine whether there is any room for the *Nottebohm* requirement of a "genuine link" in this proceeding. There is little support for the proposition that the genuine link test has any role to play in the context of ICSID proceedings. The ICSID Convention requires only that a claimant demonstrate that it is a national of a "Contracting State". In fact, Article 25(2)(a) of the ICSID Convention does not require that a claimant hold solely one nationality, so long as its second nationality is not that of the State party to the dispute.

The tribunal pointed out that the Sweden-Romania BIT does not impose any special requirements, such as "effectiveness," to determine nationality:

> 101. It is also doubtful whether the genuine link test would apply pursuant to the BIT. The Contracting Parties to the BIT are free to agree whether any additional standards must be applied to the determination of nationality. Sweden and Romania agreed in the BIT that the Swedish nationality of an individual would be determined under Swedish law and included no additional requirements for the determination of Swedish nationality. The Tribunal concurs with the *Siag* tribunal that the clear definition and the specific regime established by the terms of the BIT should prevail and that to hold otherwise would result in an illegitimate revision of the BIT.

The arbitrators did not agree that the Miculas should have to prove "effective" Swedish nationality, as this was not a requirement of the BIT. Making demands not so stipulated would amount to an "illegitimate revision" of the BIT, they argued. As we shall see, an UNCITRAL tribunal reached the same conclusion in the ***García–Venezuela*** case.

The same issue arose in ***Oostergertel v. Slovak Republic.*** In this case, two natural persons – a married couple – invoked their Dutch nationality for protection under the BIT signed between Holland and Slovakia after a company they owned in that country was declared bankrupt and its assets liquidated, at great prejudice to the claimants.

Slovakia countered that the claimants were not Dutch nationals, because they had subsequenty taken Belgian citizenship. The couple resided in Belgium and this was therefore their effective nationality, Solvakia argued. Their claim to Dutch nationality was merely a formality, given that their permanent residence was in Belgium. On these grounds, Solvakia asked the tribunal to rule that it had no jurisdiction in the case.

In response, the tribunal noted that Holland does make residence in the country a requirement for maintaining Dutch nationality, and that there was no basis for arguing that the claimants had lost their original Dutch nationality. Although Slovakia had proved that the claimants resided permanently in Belgium, it had no proof that they had taken Belgian citizenship. As far as the arbitrators were concerned, the Oostergertels were Dutch.

Finally, the tribunal explained that whether or not the claimants' nationality was "effective" was irrelevant, as this was not a requirement of Holland's BIT with Slovakia. It argued as followed:[62]

> 129.In the present case, the Respondent has not succeeded in establishing that the Claimants have either lost their Dutch citizenship pursuant to Dutch nationality law, or that they are dual citizens of both the Netherlands and Belgium. As a result, the Respondent's reliance on Champion Trading is also misplaced (R's Reply, para. 105), since in that case the claimants had two nationalities and hence the tribunal applied the effective nationality principle in order to determine which one of the two was the claimants' dominant nationality.
>
> 130.The Tribunal further observes that the BIT merely requires an investor to have "nationality of one of the Contracting Parties", which is moreover conferred upon such investor in accordance with the Contracting Party's national law. The BIT does not require such nationality to be "effective" or imposes any further conditions such as the existence of a genuine link to the respective Contracting Party. Nor. as a matter of fact, does the BIT require that the investor hold only one nationality .

While the Oostergertel case did not involve a claim against a State by one of its own nationals, the arbitrators' reluctance to consider requirements not explicity stated in bilateral investment treaties is relevant to cases involving the applicability of BITs to claimants with more than one nationality.

We turn now to the ***García–Venezuela*** case, which involves the specific situation addressed in this paper: when dual nationals pursue a claim against one of the States whose nationality they hold.

5. The case of garcía–venezuela

5.1. A New Standard

The decision on jurisdiction in the ***García–Venezuela***case affirmed the significance of BITs in establishing new standards for investment protection. These standards are governed strictly by the agreement between the contracting States rather than by commonly accepted international law. Therefore, diplomatic protection and its exclusion of natural persons who hold dual nationality is overridden. Bilateral investment treaties, the arbitration tribunal maintained, are *lex specialis*, and as such their rules take precedence in all matters they regulate:

> 151. … [I]n response to new developments in the world economy, International Law entered a new era in investment protection…. This new order included the principles of national treatment, most favored nation, protection of contractual rights, the guaranteed right to transfer earnings in convertible currency to thr

[62] www.italaw.com/sites/default/files/case-documents/ita1073_0.pdf.

country of origin, a ban on performance demands, and the possibility of submitting for arbitration disputes between investors and the receiving State.[63]

…

153. [BIT] protection aims to be more effective than the protections offered under customary International law….

154. The previous brief summary on the origin of [BITs] leads to the conclusión that these are special instruments, valid only between the contracting parties, and not subject to customary International Law. Every [BIT] is an individual instrument, drafted according to the interest of its signataries, as sovereign States, at the moment of its signing.

155. An examination of the language of some of the more than 2,500 [BITs] signed by different States demonstrates that, despite certain structural similarities between them, the specific solutions they adopt are not always identical….

156. Unlike multilateral treaties, bilateral treaties are limited exclusively to regulating the interests of the parties that subscribe to them, within the context of the goals they seek. Thus, independently of the existence or nonexistence of any norm of customary International Law regarding investments the Contracting Parties negotiate the conditions they would like to apply to investments made by natiionals of the investor State in the receiving State. That means that the particular conditions of bilateral investment treaties are established by the signatory States according to their respective interests, in each agreement and in each circumstance. International Law standards therefore do not generally apply to investment protection; rather, it is a matter of specific adjustments tailor made to reflect reciprocal concessions in the negotiating process.

…

158. All of this leads the Tribunal to the conclusion that [BITs] constitute *lex specialis* between the contracting parties and should be considered thus when their respective terms and conditions are interpreted to determine the effects of these instruments on their subscribers.

5.2. The Venezuela–Spain BIT Does not Exclude Dual Nationals

The decision on jurisdiction affirmed that the Venezuela-Spain BIT does not explicitly exclude persons with dual nationality, and that arbtration tribunals cannot impose requirements not stated in such treaties. When Venezuela (or Spain) have wanted to exclude dual nationals from a BIT, they have done so expressly, the arbitrators argued. Dual nationality would represent an obstacle only in these cases:

180. The fact that Venezuela has signed [BITs] with certain States whose application excludes nationals of both signatory countries [as is the case of its treaties with Iran and Canada], and others who do not make this exclusion, is

63 The ***García–Venezuela*** ruling was written in Spanish, the translation in this article is not official.

> evidence that this exception has always been stated expressly, and if it is not it is therefore not a part of the reciprocal commitments of the signatories to the respective [BITs].
>
> 181. For the same reason, the fact that the great majority of [BITs] signed by Spain (including its [BIT] with Venezuela) in 1990 - 2000 do not exclude protection for dual nationals (except for one treaty that did not adopt this solution), is evidence that a denial of this benefit must be stated expressly in the text of the Treaty for its application to prevail as part of the reciprocal commitments assumed by the States that are the [BIT's] signatories.

The tribunal also cited the ***Pey Casado*** case:

> 204. … [T]he fact that the Claimant has dual nationality that incudes the nationality of the State that is the object of the claim does not exclude the Claimant from the scope of application of the [BIT].

5.3. Demostrating Effective Nationality Is Unnecessary

The arbitrators rejected Venezuela's demand that the García s demonstrate predominant and effective nationality in Spain, concluding that proof of Spanish nationality was sufficient:

> 200. As a result, the Tribunal consider as irrelevant Venezuela's characterization of the Claimants' Spanish nationality as "a mere formality." For the purposes of the BIT, it is enough for them to have Spanish nationality. The text place no limitations on dual nationals and it is impossible to invalidate the effects of nationality granted freely by one State and accepted by the other.

They also made it clear that bilateral investment treaties take precedence over diplomatic protection, under whose precepts States cannot extend their protection to persons who are nationals of the State named in the claim:

> 172. The International Court of Justice's interpretation… underscores the growing importance of investment treaties and the corresponding decline of customary International Law with regard to diplomatic protection…. In consequence, the role of diplomatic protection has diminished, invoked only when treaties either do not exist or are inoperable.

5.4. Article 25 of the ICSID Convention Is Not Applicable in UNCITRAL Arbitration

With regard to the mention in the BIT of the ICSID Center, the decision stated:

> 190. The Claimant argues that the precedence of ICSID arbitration on the list of alternatives contained in the [BIT] as a mechanism for resolving disputes between an investor and a receiving State implies the applicability of the rule stated in Article 25(2) of the ICSID Convention, according to which a [BIT's] rules do not apply to "persons who [...] also hold the nationality of the State that is a party to the dispute."
>
> …

192. [It is] obvious that, as the Parties themselves established, UNCITRAL rules are the only ones applicable to this dispute, and that these rules contain no restrictions on allowing a person who simultaneously holds nationality in both States (the investor and receiver) to invoke the [BIT's] protection against one of these States.

193. The Tribunal considers it necessary to emphasize that the exclusion of dual nationals established in Article 25(2) of the ICSID Convention is not applicable to these proceedings.

5.5. Nationality at the Time of Investment

As for whether it was neccessary for the claimants to hold Spanish nationality at the time they made the investment, the tribunal argued:

214. The majority of the Tribunal [one of the arbitrators, Rodrigo Oreamuno, abstained from voting on this point] does not consider it relevant for the effects of the present Decision on Jurisdiction to inquire about the Claimants' nationality on the dates that they made their investments in Venezuela, becasue these dates do not constitute a determining factor for deciding the [BIT's] applicability. The relevant moments for being able to invoke [BIT] protection are: (a) the date when the alleged violation occurred (in this case, the Measures); and (b) the start date of the arbitration proceedings to resolve the dispute between the investor and the receiving State stemming from the alleged violation.

215. The conclusion the Tribunal has reached is consistent with the vision adopted by other arbitration tribunals with regard to the time element of the investment. In effect, a decisive factor in obtaining [BIT] protection is for the party who invokes it to have the nationality of the investor State on the date that the alleged violation of the treaty occurred.

Rodrigo Oreamuno's dissent was based on his reading of the BIT, specifically the definition of investors and investments. For him, for an investment to be protected under the BIT in the case in question it would have to have been made by a Spanish investor, and a person who did not hold Spanish nationality at the time of the investment could not be considered Spanish. His dissenting opinion cited Article I of the BIT:

7. Article 1 of the Bilateral Invesment Treaty (BIT) between the Kingdom of Spain and the Repubic of Venezuela establishes that:

"For the purposes of this Treaty:

1. The term 'investors' is understood to mean:

a) Physical persons who have the nationality of one of the Contracting Parties in accordance with its legislation and who make investments in the territory of the other Contracting Party."

8. This concept is reinforced by the text of Subparagraph 2 of the same article, which states:

> "The term 'investments' designates all types of assets invested by investors from one of the Contracting Parties in the territory of the other Contracting Party."
>
> 9. In the opinion of the below-named Arbitrator, there is not the slightest doubt that, for a person to be considered an investor and, in consequence, for his investment to be protected under the BIT, he must have the nationality of one of the Contracting Parties when he effects his investment in the territory of the other.
>
> 10. It is not enough to obtain this nationality after making the investment; it must be held at the time the investment is made or the investor will not benefit from the Treaty's protection.

Oreamuno went on to point out that Serafín García Armas (who temporarily renounced his Spanish nationality, but reacquired it later) and his daughter, Karina García Gruber, were in fact Spanish nationals when they made their investments, or at least some of them:

> 13. Careful study of the date on which each of the Claimants made their investments allowed the undersigned arbitrator to confirm that Mr. García Armas made some of the investments that led to the dispute after he had recovered his Spanish nationality. As for Ms. García Gruber, the undersigned confirmed that she too made part of her investments after opting for this nationality.
>
> 14. In the judgment of the undersigned, the fact that the Claimants made part of their investments when they were already Spaniards is sufficient for them to enjoy BIT protection and, consequently, for this Tribunal to have jurisdiction (*competencia*) to hear their claims.
>
> 15. Given the evidence in the preceding paragraphs, the undersigned agrees with the conclusion of the Decision on Jurisdiction but considers it necessary to confirm the dissent expressed earlier.

The dissenting opinion did not lead to a different decision than the majority in this case, but it did make an important distinction: For a UNCITRAL arbitration tribunal to have jurisdiction in a claim by a dual Spanish-Venezuelan national, the claimant must have had Spanish nationality at the time the investment was made.

The decision in the ***García–Venezuela*** case, even accepting the validity of Rodrigo Oreamuno's dissent, opened the door for dual nationals to seek international arbitration against Venezuela for arbitrary confiscations of their property. The victims will undoubtedly seek satisfaction by invoking Venezuela's BITs with Spain, Portugal, Chile, Germany, and other countries, before international arbitration tribunals. The Venezuelan government clearly did not foresee, much less encourage, this course of action when it so clumsily withdrew from the ICSID Convention.

6. Review and perspectives

The question now is whether the arbitration tribunal's considerations and decisions in ***García–Venezuela*** are equally valid in international arbitration claims against Venezuela for seizure of property or other violations of the respective BIT by natural persons who hold dual Venezuelan and Chilean, Spanish, German or Portuguese nationality.

Naturally, the question also applies to investors from and with claims against other countries with BITs similar to Venezuela's. A recent example is the claim submitted in a UNCITRAL arbitration on September 21, 2015 by a Russian born national, ***Sergei Viktorovich Pugachev,***[64] who acquired nationality in France and is now suing the Russian government for acts perjudicial to his interests and in violation of Russia's BIT with France. The arbitration request acknowledges the complexity of the situation, which resembles the examples we have cited involving Venezuela.

6.1. The Weight of Tradition

It is important to keep in mind that dual nationality is historically a charged subject. As we have seen, when diplomatic protection was the most common means of pursing investment disputes, States were not permitted to protect their nationals if they held dual nationality in the country that was the object of the claim.

Nevertheless, during the wave of claims against Venezuela in 1903–1905 some governments (Great Britain, France and Italy) turned to the mixed commissions to seek indemnification for claimants with dual nationality in their country and Venezuela. They did so precisely because the Washington Protocols were silent on the point of dual nationality. In the ***Mathison, Stevenson, Massiani*** and ***Miliani*** cases, the mixed commissions dismissed the claims on the basis that the claimants not only formally held citizenship in Venezuela but also maintained a domicile in that country, making it impossible for them to deny their condition as Venezuelans.

The Permanent Court of Arbitration at The Hague reached the same conclusion in the ***Canevaro*** case, in which a dual Italian-Peruvian national invoked Italy's protection to demand indemnification from Peru. The court decided that Canevaro, who had exercised his political rights as a Peruvian and resided in Peru, could not therefore deny his Peruvian nationality. Without stating so explicitly, the court used the criteria of dominant nationality to dismiss Canevaro's claim.

In the 1955 ***Notttebohm*** case, the International Court of Justice approached nationality as a juridical link based on having a genuine union of interests or sentimental connection with the country in question. When forced to choose between one nationality and another in the case of dual nationals, the court ruled, it must favor the country where the person can be demonstrated to have close ties; in other words, nationality must be shown to be "effective."

Also in 1955, a mixed US-Italian commission ruled in the ***Mergé*** case that if a choice must be made between two nationalities, the one that can be judged to be "effective" should have precedence.

In 1984, the Iran-US Claims Tribunal, acting in plenary, also stated a preference for "dominant and effective" nationality.

In addition, as we have seen, the United Nations Commission on International Law allows for diplomatic protection in cases of dual nationality as long as the State invoking this right can be shown to be the claimant's "predominant" nationality.

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[64] http://www.italaw.com/cases/3661

Among recent ICSID claims involving the issue of dual nationality, the ***Soufraki*** case is most relevant to our purposes. In it, the arbitration tribunal maintained that while a State has the right to decide who its nationals are, the tribunal itself must examine the facts to decide whether this nationality does in fact exist. This implies the right to reject an individual's claim to nationality, which is quite a big step.

We have also looked at the case of ***Champion Trading***. Here the arbitration tribunal ruled that it made no sense to recognize the nationality of a natural person simply because of ancestry tracing back three or four generations when that person has few or tenuous connections to the country in question. The tribunal's comments may have been *obiter dicta,* but they show that resistance persists to the notion of dual nationality, as well as enduring concern with the issue of effective or dominant nationality.

In his dissenting opinion in the ***Siag–Vecchi*** case, Orrego Vicuña cites the ***Nottebohm*** case to resurrect the issue of "effective" nationality, although it is worth noting that he doesn't include the term "dominant," which usually precedes "effective" in discussions of this issue.

In fact, a number of recent mulilateral treaties have adopted the criteria of dominant and effective nationality. For example, the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA), in effect for all parties since 2006, includes the following definitions in Article 10.28:

> **investing party** means a Party or company from one State, or a national or company of this Party, who attempts to make, is making or has made an investment in the territory of the other Party; however, a natural person who holds dual nationality **will exclusively be considered a national of the State in which their nationality is dominant and effective.**[65] (Second emphasis added).

In sum, there seems to be a consensus that for a natural person to invoke one nationality over another, that nationality must be proven to be both dominant and effective.

6.2. New Norms and the Criteria for Their Interpretation

One could argue that the old decisions and criteria were adopted when the only institution in force was diplomatic protection, and that we now live in a different juridical world. Investment disputes are no longer handled through diplomatic protection. When two States sign a BIT (or a multilateral treaty), in effect they abandon diplomatic protection and commit to resolving such disputes by allowing the investor to take direct action against the aggressor State, generally with the option of seeking international arbitration. In addition, BITs usually prohibit States from resorting to diplomatic protection.

It's worth noting, however, that the defining moment for the issue that concerns us here was the drafting and signing of the ICSID Convention, which created the ICSID Center for handling direct actions by investors against States. The ICSID Convention was responsible for establishing the absolute inadmissibility of claims by dual nationals against a State in which they hold nationality. When the ICSID Convention was drafted, the most negative and

[65] See: http://www10.iadb.org/intal/intalcdi/pe/2007/00078.pdf

exclusive criteria prevailed. As we have seen, this inadmissibility also applies to the Additional Facility.

Against this backdrop of absolute exclusion, the ***García–Venezuela*** case burst on the scene in December 2014. For now it remains an isolated decision, but other *obiter dicta* arguments in the same vein featured in some of the previous decisions we have examined, including the ***Pey Casado***, ***Ostergertel*** and ***Micula*** cases.

One of the main premises of the ***García–Venezuela*** decision is that the text of BITs should be interpreted based on their own merits and separate from obsolete rules of diplomatic protection. The arbitrators in the case ruled out adding conditions and requirements that do not appear in the original BIT; therefore, they concluded, BITs that do not exclude dual nationals from their protection may be invoked by individuals who hold the nationality of the State they are suing.

Will other tribunals agree with the arbitrators' decision in ***García–Venezuela***? One of the most common criticisms of the current structure of investment arbitration proceedings is the unpredictable nature of their outcome. The reasoning expressed in decisions by arbitration tribunals constituted under the rules of ICSID, the Additional Facility, UNCITRAL, the International Chamber of Commerce and other instruments are as diverse as their members, who represent a range of countries, ideologies, juridical training and legal disciplines.

According to Anthea Roberts, the field of investment arbitration reflects its roots in both public and private international law, with elements of private law and international commercial arbitration. Each member of an arbitration tribunal attempts to impose his or her discipline, leading to what she calls a "clash of paradigms". Investment arbitration may be unpredictable because it is a new field, still in its nascent phase and with little theory to back it up. Roberts writes:

> Comprehending the investment treaty system has proven… problematic. Investment treaties are clearly creatures of public international law: they are entered into by two or more States and are substantively governed by public international law. However, they are distinct from most public international law treaties because the vast majority of them permit investors to bring arbitral claims directly against host States based on procedural rules and enforcement mechanisms developed largely in the context of international commercial arbitration and investor-State contracts. Accordingly, the system grafts private international law dispute resolution mechanisms onto public international law treaties.
>
> …
>
> Like international trade law, investment treaties are international economic law agreements that require a delicate balancing between economic and noneconomic interests. And like certain international human rights regimes, investment treaties are interstate agreements that regulate a State's treatment of nonstate actors within its territory and permit those actors to challenge governmental conduct before an international body.
>
> …

> Investment treaties have traditionally been short and vaguely worded, while the system as a whole is new and undertheorized. As a result, participants routinely draw on comparisons with other legal fields when seeking to fill gaps, resolve ambiguities, or understand the system's nature.
>
> …
>
> The investment treaty system is in the early stages of its evolution… with most awards having been rendered only in the last dozen years. As the field evolves from its infancy and awkward adolescence, we can expect solutions to develop that sit "between the poles"…. The investment system exists at the intersection of multiple fields, and it will not achieve adulthood until participants embrace and theorize its *sui generis* [character].[66]

It is also important to point out that arbitration tribunals are not obliged to consult or uphold the opinions and conclusions expressed by their predecessors. The tribunal's members may cite them or not, depending on how convincing or relevant they find them to be.

It would be quite possible, therefore, for an arbitration tribunal to support an argument by Venezuela that it has no jurisdiction to hear investment claims brought by natural persons with Venezuelan nationality. The tribunal could argue that the structure created by BITs and the arbitration tribunals charged with deciding investment disputes was designed to protect true foreigners with investments in States not their own. Venezuelan nationals with disputes against their government, this argument holds, must take them to the Venezuelan courts. A number of authors have published opinions supporting this view,[67] among them Austrian professor Christoph H. Schreuer, who wrote of the ICSID Convention:

> The basic idea of the Convention, as expressed in its title, is to provide for dispute settlement between States and foreign investors… **Disputes between a State and its own nationals are settled by that State's domestic courts…**
>
> **The Convention is designed to facilitate the settlement of investment disputes between States and nationals of other States**. It is not meant for disputes between States and their own nationals. The latter type of dispute is to be settled by domestic procedures, notably before domestic courts.[68] (Emphasis added).

As is well known, the Vienna Convention on the Law of Treaties governs the interpretation of BITs.[69] Article 31.1 of the convention directs:

> SECTION 3. INTERPRETATION OF TREATIES

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66 *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 American Journal of International Law 45 (2013). See: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2033167.

67 Campbell McLachalan, Laurence Shore and Mathew Weininger, *International Investment Arbitration: Substantive Principles*, Oxford University Press, 2007, pp. 131-133. See also Jeswald W. Salacuse, *The Law of Investment Treaties*, Oxford University Press, 2010, pp. 186-189. Both works are cited and partially reproduced in R. Doak Bishop, James Crawford and Michael Reisman, Foreign Investment Disputes, second edition, Wolters Kluwer, 2014, pp. 324-326.

68 Christoph H. Schreuer, *The ICSID Convention: A Commentary*, Cambridge University Press, 2001, pp. 158, 290.

69 Venezuela is not a signatory to this Convention on the grounds that it is contrary to general principles of international law. See: http://www.derechos.org/nizkor/ley/viena.html

> Article 31. GENERAL RULE OF INTERPRETATION
>
> 1. 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.

While the rule encourages relying on the "ordinary meaning" of terms used in treaties, it also stipulates that the context of the treaty be taken into account, especially "its object and purpose." In addition, these considerations fall under the umbrella of "good faith."

The intentions expressed by the contracting parties to a treaty – in other words, the written text - are the first element to consider when interpreting its terms. As Dupuy and Kerbrat note, "(…) it is [the written text] that is the authentic expression of the parties' intent (…), and it is *prima facie* the most direct manifestation of their will (…)."[70]

These distinguished professors, however, go on to stress the importance of other elements, including the context, object and purpose of a treaty. They also express their disapproval of the idea proposed by some observers of investment protection rules as "self-sufficient regimes" independent of international law. For Dupuy and Kerbrat, international law is a field that should not be fragmented.

Other authors have also weighed in on the issue. Dallier, Forteu and Pellet argue that the means of interpretation recommended in the Vienna Convention are interdependent and that a treaty's text cannot be separated from its context. They cite a March 12, 2004 decision by the Permanent Court of Arbitration in the case of ***Apurement des comptes entre les Pays–Bas et la France***, which held that Article 31 of the Vienna Convention should be considered as a whole, not according to its component parts:

> All of the elements for interpretation are the basis of an objective and rational analysis to establish the parties' common will and intention.[71]

Could this statement be used to argue that the system created by BITs and, indeed, the entire modern system of investment protection are designed to protect only foreign investors and not domestic ones? Are the concepts of effective and/or predominant nationality still applicable to investors with dual nationality, or can they now be considered obsolete?

The context was admittedly different, but a few months following the decision in the ***García–Venezuela*** case, on April 3, 2015, an ICSID arbitration tribunal in the case of ***Venoklim Holding B.V. v. República Bolivariana de Venezuela***[72] refused to recognize a Dutch company as an international investor on the grounds that while the company was based in Holland, control over its actions was in the hands of companies and natural persons with Venezuelan nationality, who as such were not entitled to protection under the BIT between these two countries. The tribunal stated:[73]

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[70] Pierre–Marie Dupuy and Yan Kerbrat, *Droit Internationale Public*, 10th edition, Paris 2010, p. 353.
[71] Patrick Dallier, Mathias Forteu and Allain Pellet, *Droit International Public*, 8th edition, Paris 2009, p. 284.
[72] http://www.italaw.com/sites/default/files/case-documents/italaw4229.pdf
[73] Enrique Gómez Pinzón and Rodrigo Oreamuno served as the tribunal's arbitrators, with Yves Derains presiding.

> 156. Allowing Venoklim's investment to be considered a foreign investment merely because it is a company incorporated in the Netherlands, even though the investment involved in the dispute was clearly the property of companies in Venezuela [which in turn have natural persons with Venezuelan nationality as shareholders], **would be to allow this formalism to prevail over reality, betraying the object and purpose of the ICSID Convention.** In addition to the reasons expressed above, the Tribunal cannot reach a different conclusion, considering that Article 31 of the Vienna Convention establishes 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." (Emphasis addd)

We should note that the Venoklim case is still ongoing. At the time of writing, ICSID was processing an action to nullify the tribunal's ruling.

A tribunal familiar with these cases could still decide it has jurisdiction to hear similar disputes, but only if it can be proved that the nationality the claimant is invoking – whether Chilean, Spanish, Portuguese or German – is predominant and effective. In such cases, the arbitration tribunal will be following the same route taken by the mixed commissions, international courts and arbitration tribunals before it by basing its reasoning in international law. Because BITs do not clearly State whether dual nationals may take action against a State of which they are nationals, it can be argued that a vacuum exists that should be filled by the norms and criteria used in international law, meaning that the nationality invoked by the claimant must be dominant and effective. To make this case, claimants must provide proof of residence, domicile, investments, activities, studies, etc. demonstrating a closer and more intense bond with that country than with Venezuela.

At the other end of the spectrum is the main argument cited to support the ***García–Venezuela*** decision: the definition of investors included in the text of the Venezuela–Spain BIT (and Venezuela's BITs with Chile, Portugal and Germany). It reads as follows:

> Article I
>
> Definitions
>
> For the purposes of this Agreement;
>
> 1.- The term "investors" is understood to mean:
>
> a) physical persons who hold the nationality of one of the Contracting Parties in accordance with its legislation and who make invesstments in the territory of the other Contracting Party.

To be considered an investor under the agreement, therefore, one must be a Spanish or Venezuelan national and, of course, have investments in Venezuela. There is no language in Venezuela's BITs with Chile, Spain, Portugal or Germany expressly prohibiting a natural person with dual nationality – in other words, Chilean, Spanish, German or Portuguese nationality as well as Venezuelan - from taking action against Venezuela under the terms of a BIT.

When BITs have excluded natural persons with dual nationality from their protection, they have clearly stated so in their text. This is true, for example, of Venezuela's BIT with Canada – although, admittedly, this was at Canada's initiative and not Venezuela's.[74] That treaty defines the term "investor" as it applies to natural persons as follows:[75]

> ARTICLE I
> Definitions
> For the purpose of this Agreement:
> …
> g. "investor" means
> in the case of Canada:
>
> i. any natural person possessing the citizenship of Canada in accordance with its laws;
> …
> **who makes the investment in the territory of Venezuela and who does not possess the citizenship of Venezuela**; and
>
> in the case of Venezuela:
>
> i. any natural person possessing the citizenship of Venezuela in accordance with its laws;
> …
> **who makes the investment in the territory of Canada and who does not possess the citizenship of Canada**; (Emphasis added).

The treaty makes it clear that a Canadian with dual nationality in Venezuela cannot invoke its protection against that country. Similar language is included in Venezuela's BITs with Iran. This suggests that when Venezuela has wanted to exclude dual nationals from such agreements, it has done so explicitly.

Given the differences between the Venezuela's BITs with Chile, Spain, Portugal and Germany, on the one hand, and with Canada and Iran, on the other, one could argue that it is not appropriate for an arbitration tribunal to add terms to a BIT that it does not originally contain. By this logic, these BITs do not explicitly grant protection only to investors who have Chilean, Portuguese, Spanish or German nationality and withhold it from those who hold nationality in one of these countries as well as Venezuela. While they do not expressly allow for claims by dual nationals, one could argue that it would be unreasonable for an arbitration tribunal to add restrictions to a BIT that the contracting parties – Chile, Spain, Portugal and Germany, on the one hand, and Venezuela on the other – never established. The BITs we have examined require only that the natural person making the claim be a national of one of the contracting States. They do not make dual nationality in the State the person is suing an obstacle to seeking indemnification for confiscation of their property or other violations of the corresponding BIT.

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[74] This explicit exclusion can be explained by the fact that Canada was not a member of ICSID when it signed this BIT. Canada only became an ICSID signatory on December 1, 2013. See: http://www.sice.oas.org/Investment/BITSbyCountry/BITs/CAN_Venezuela_e.asp

[75] Idem.

Investment protection as practiced in today's world has moved far beyond diplomatic protection. The rules of diplomatic protection, among them a State's inability to pursue a claim on behalf of one of its nationals if that person is also a national of the State that is the object of the claim, assume that the context is one of disputes between States. Clearly, it would be inappropriate for a State to act in the interests of a person who is a national of the State with which it is involved in a dispute.

Under today's BITs, in contrast, investors act directly and on their own behalf. The context is no longer a dispute between States, but rather claims filed by private parties exercising rights conferred to them by a BIT.[76] It is up to the States negotiating a BIT to establish the rights they confer, as well as their limits. If a BIT is going to exclude dual nationals, it must do so explicitly. But if the protection afforded in BITs covers parties who are nationals of one of the contracting States without any express limits, this protection cannot be denied just because the party has dual nationality, even if the second nationality is that of the State named in the claim.

November 2015.

[76] Cfr. Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, pp. 321–323 and 325–327.