ABSTRACT

Objective: The paramount purpose of the study is to put forth conflicting decisions in International Law while arbitrating dual nationals under investment treaties.

Method: The majority of investment treaties are predicated on clauses that are somewhat wide and define qualified standards.

Result: According to the findings of a number of studies, the increased participation of dual nationals in investments in host countries will likely result in future issues for international investment law (IIL), particularly the ISA system. Because of this, it is essential to conduct an in-depth investigation on the level of protection that dual nationals receive from investment deals, especially from Investor-State Dispute Settlement’s point of view.

Conclusion: In investor-state arbitration (ISA) context, one’s nationality is an extremely vital factor. Most investment treaties provide that in order to be eligible for the protections afforded by the treaty, an investor needs to hold citizenship in the home state. However, determining a person’s nationality for the reason of an investment treaty can be an especially challenging endeavour, as it brings up a number of unanswered problems that are of significant relevance in practical terms.

Keywords: international investment policy, nationality, dual nationalities, investment treaties, investment arbitration.

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RESUMO

Objetivo: O objetivo primordial do estudo é propor decisões contraditórias no Direito Internacional, enquanto arbitrando duplos nacionais sob tratados de investimento.
Método: A maioria dos tratados de investimento são baseados em cláusulas que são um pouco amplas e definem padrões qualificados.

Resultado: De acordo com as conclusões de uma série de estudos, o aumento da participação de cidadãos com dupla nacionalidade em investimentos nos países de acolhimento resultará provavelmente em questões futuras para o direito internacional do investimento (IIL), em especial o sistema ISA. Por este motivo, é essencial realizar uma investigação aprofundada sobre o nível de proteção que os cidadãos com dupla nacionalidade recebem dos acordos de investimento, especialmente do ponto de vista da resolução de litígios entre investidores e o Estado.

Conclusão: No contexto da arbitragem investidor-Estado (ISA), a nacionalidade é um fator extremamente vital. A maioria dos tratados de investimento prevê que, para ser elegível para as proteções concedidas pelo tratado, um investidor precisa ter cidadania no estado de origem. No entanto, a determinação da nacionalidade de uma pessoa por causa de um tratado de investimento pode ser um esforço especialmente desafiador, uma vez que levanta uma série de problemas sem resposta que são de significativa relevância em termos práticos.

Palavras-chave: política de investimento internacional, nacionalidade, dupla nacionalidade, tratados de investimento, arbitragem de investimento.

1 INTRODUCTION

The rise in international trade and investment as a means of creating new economic opportunities in the global economy, for both developed and developing countries, has led to the rise of specialised international investment agreements (IIAs), which aim to regulate a range of issues related to foreign investment. These IIAs have been brought about as a result of the growth in international trade and investment as a means of creating new economic opportunities in the global economy. In this context, special consideration has been given to the interests of both overseas investors and the host countries with regard to the procedures for the resolution of disputes. The overwhelming majority of bilateral investment treaties (BITs), in addition to certain regional agreements and other instruments, include provisions for the settlement of disputes between private parties and the host state, as well as conflicts between states that are the result of investments.

When it comes to the protection of people's rights and interests in the field of international humanitarian law (IIL), the determination of nationality is a defining criterion of substantial importance. Treaties pertaining to investments can only be accessed by investors who meet the prerequisite of being citizens of one of the parties to the agreement. Nevertheless, it is essential to keep in mind that the majority of investment treaties are founded on comprehensive sections that define the criteria for defining suitable individuals or businesses. In the context of human beings, these agreements often
create the classification of protected investors as natural persons who hold the citizenship of the home state party in accordance with the laws that govern that state's internal affairs. Treaties pertaining to investments sometimes include few provisions for dealing with situations in which investors are looking for protection while simultaneously holding dual nationality with the parties to the treaty. [1]

The ICSID (International Centre for Settlement of Investment Disputes) Convention presents a notable deviation from the expansive nationality definition. According to Article 25(2)(a) [2], individuals who are nationals of the host state are explicitly excluded from the jurisdiction of the Centre. However, it is different in the scenario where an investor possessing dual nationality chooses to pursue other arbitral forums, like ad hoc arbitration governed by the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules.[3]

The case of *Serafín García Armas and Karina García Gruber v Venezuela* [4] marked a significant milestone as it became the inaugural instance wherein a dual national's claim was scrutinized inside a non-ICSID [5] framework. This particular case, referred to as García Armas I, was heard under the auspices of UNCITRAL [6] on 15 November 2014. The tribunal determined that, given the absence of provisions in the relevant Venezuela-Spain Bilateral Investment Treaty [7] (BIT) regarding the status of individuals with dual nationality, the investors were eligible for the protections afforded by the treaty. As predicted in a previous blog post, this accolade has prompted dual citizens to make more claims. At least fifteen claims have been filed, and tribunals have made various awards. Arbitrators have faced several complex treaty interpretation questions. Do dual nationals fall under customary international law's 'dominant and effective' nationality? Should an investor have the home state party's nationality when the transaction begins? Should ICSID's host state nationality restriction be included in the definition of 'investor'? Tribunals have responded inconsistently to the enquiries, and several awards have been challenged in multiple jurisdictions.

### 2 THEORETICAL FRAMEWORK

The foundation for a comprehensive examination of matters involving dual nationality should be the ruling in García Armas I.[8] The two individuals, who hold dual citizenship of Venezuela and Spain, commenced legal action pursuant to the Bilateral Investment Treaty (BIT) between Spain along with Venezuela. This particular treaty
allows for arbitration under both the ICSID and the UNCITRAL. In order to surmount the jurisdictional obstacle presented by ICSID, the claimants opted to pursue UNCITRAL arbitration. Neither the BIT nor the UNCITRAL Rules provide explicit limitations on claims made by individuals holding dual nationality. Venezuela raised objections to jurisdiction based on three primary reasons, all of which have been subsequently claimed by states in similar situations.

In today's society, disagreements regarding financial investments are not uncommon. The act of investors investing their resources in foreign nations is becoming an increasingly widespread practise as a direct result of the phenomena of globalisation as well as the broadening scope of business across the world. Despite this, these investments regularly run into problems that must be resolved through the use of arbitration in a foreign country. In this particular setting, two well-known international organisations, namely the International Centre for the Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL), have both established arbitration systems with the intention of resolving conflicts of this kind. The issue of holding more than one nationality is a major source of worry in disputes over investments. The purpose of this article is to investigate the issues that pertain to dual nationality within the frameworks of the ICSID and the UNCITRAL, as well as to make comparisons between such issues.

Regarding the initial basis, Venezuela contended that, per Article 31(3)(c) [9] of the Vienna Convention on the Law of Treaties (VCLT) [10], the tribunal should employ "any pertinent rules of international law applied in the relations among the parties" to ascertain the legal position of individuals holding dual nationality under the BIT. In Venezuela’s case, the pertinent principle that addressed the gap in the treaty was the customary principle of 'dominant along with effective' nationality. The aforementioned principle, traditionally applicable to cases involving diplomatic protection claims, permits the endorsement of claims solely on the condition that it can be proven that the individual with dual nationality have stronger affiliations with the state asserting the claim. The primary objective of this rule is to prevent the involvement of foreign entities in issues that are strictly domestic in nature (Aghahosseini [11] and Draft Articles on Diplomatic Protection [12]).

Venezuela maintained that the claimants' family ties, commercial links, and habitual residence should take them beyond the Bilateral Investment Treaty's protection.
The panel rejected the challenge because a system for resolving investor-host state disputes makes diplomatic protection and its standards incompatible with bilateral investment treaties. (García Armas I, para 173 [13]). Thus, if the relevant investment treaty does not expressly exclude claims by dual nationals, an investor may use it to initiate legal proceedings against their own nation of citizenship. The Paris Court of Appeal recently affirmed the above discovery in connection with annulment proceedings. (Judgment, Paris Court of Appeal, 4 July 2023 [14]).

3 METHODOLOGY

Cases involving dual nationality not only give rise to inquiries about the implementation of the principle of "dominant and effective" nationality. Respondents have also contended that the investor is required to demonstrate their possession of the home state party’s nationality at the moment the transaction was initiated. According to the OECD Working Papers on International Investment 2012/02 [15], there has been a notable expansion in the range of forums available to investors through investment treaties. Among these forums, ICSID and UNICTRAL arbitration have emerged as the most commonly suggested options. As stated before, Article 25(2)(a) of the ICSID Convention includes a nationality requirement of a negative kind.

In order to mitigate the potential for opportunistic behaviour by investors, certain nations have put forth the argument that the incorporation of the ICSID as a means of resolving investment disputes should be seen as removing individuals with dual nationality from the treaty's protection, regardless of whether they seek recourse through an alternative arbitral court. The argument in question was first examined by the tribunal in Garcia Armas I. According to Article XI(2) [16] of the relevant BIT between Spain and Venezuela, the investor is granted the option to refer the disagreement to the national courts or the ICSID. According to Article XI(3) [17], in the event that the initial two methods are unavailable, the investor is granted the right to utilize the UNCITRAL Arbitration Rules. Venezuela posited that the inclusion of a direct mention of the ICSID Convention in Article XI(2) [18] serves as evidence that the Contracting Parties intended to prevent legal action by their own citizens before an international tribunal. The tribunal remained unpersuaded. According to the ruling in García Armas I, paragraph 194, it was established that the applicability of the requirements of the ICSID Convention is limited
4 RESULTS AND DISCUSSION

The investors in García Armas I were solely of Venezuelan nationality when they initiated their economic activities in Venezuela, which subsequently resulted in the creation and growth of the investment. Venezuela based its position on Article I(2) of the BIT [20], which offers a designation for 'investment' as 'any form of asset that is invested by individuals from one Contracting Party within the jurisdiction of the other' (García Armas I, para 50). The majority of individuals dismissed the objection, asserting that the pertinent dates for invoking the protection of the BIT are as follows:

(a) the date when the alleged breach took place (in this instance, the government measures)

(b) the date when the arbitration proceedings were commenced. The aforementioned source is referenced again.

The Paris Court of Appeals, in the context of the issuance of apart proceedings, rendered a decision in favour of the majority's conclusions. The court ruled that the Bilateral Investment Treaty (BIT) did not include any stipulation requiring the fulfillment of its nationality criterion at the moment of the investment's initiation. This result was delivered in the Judgment of the Paris Court of Appeal on 27 June 2023.

In Pugachev v Russia’s case [21], the tribunal adopted a distinct approach. The person who is claiming their rights, who was born in Russia but subsequently became a citizen of France through the process of naturalisation, has begun arbitration procedures in accordance with the France-Russia Bilateral Investment Treaty (BIT), which is managed by the UNCITRAL. The claimant directly attested to the fact that he had carried out his financial transactions before becoming a citizen of France. In the case of Pugachev v. Russia (UNCITRAL, 18 June 2020, paras. 397 and 417), the tribunal came to the conclusion that in order for an investment to be eligible for protection, it must have possessed a transnational nature from the very beginning of its existence. This was stated in paragraphs 397 and 417. As a consequence of this, it was determined that the person making the claim needed to have been a citizen of France at the time that the alleged investments were being made.
One additional issue sometimes presented by the respondent is to the correlation among the nationality obligation in investment treaties and Article 25(2)(a) of the ICSID Convention.

5 CONCLUSION

The prior analysis affords us the opportunity to derive three primary inferences. It is surprising that dual nationality claims in international investment law, which has varying consequences depending on how they are adjudicated, exist. The body of case law demonstrates that there are variations in the interpretation and application of the customary principle of 'dominant together with effective' nationality, the timeframes that are utilised to determine the nationality of the investor, and the significance of Article 25(2)(a) of the ICSID Convention. This case contributes ambiguity to international investment law, making it more challenging for states and investors to establish whether or not investment treaties are applicable to their situations.

In addition, the research of case law concerning dual nationality demonstrates that historically, businesses have been smart in navigating challenges relating to nationality. This is something that can be seen throughout history. On the other hand, there is a growing trend of people taking on a similar role in order to capitalise on opportunities that have inadvertently evolved as a result of acts taken by the state. Garc Armas I and Okuashvili v. Georgia [22] are two examples that demonstrate how investors today have the advantage of owning several passports, which they can use to establish themselves as investors in the host country and to carry out the activities associated with their interests there. These investors can also use their passports to negotiate compensation for investment treaties where it makes sense to do so. Nationality is another fluid notion that can be manipulated and utilised in unethical ways in today's world.

In conclusion, there is a high probability that claims of dual nationality will increase, leading to more in cases that are already underway. States that take offence at these allegations should think about incorporating additional controls into upcoming and existing treaties. In more recent accords, the definition of an investor must expressly contain either the "dominant and effective" nationality criterion or the harsher ICSID Convention criterion. Because the states play such an important role in finding a solution to the problem, there is reason to be cautiously optimistic.
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