Double Trouble: Paris Court Annuls Dual National Treaty Award (Again)

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Claims by dual nationals against Venezuela under investment treaties have prompted several recent decisions interpreting the scope of a tribunal's jurisdiction over dual nationals. On 3 June 2020, the recently created International Chamber of the Paris Court of Appeal set aside in full one of those awards, rendered in favor of dual Spanish-Venezuelan nationals under the Spain-Venezuela bilateral investment treaty of 2 November 1995 (the "Treaty").[1]

This is the Chamber's first decision on investment treaty awards and its third decision on set-aside, following the *Dommo* decision on arbitrator disclosure (on which we reported here) and the *Sofregaz* decision on the impact of economic sanctions against Iran on the validity of an arbitral award (on which we reported here). The same award had earlier been set aside in part by the Paris courts, and the French *Cour de Cassation* remanded for the Court of Appeal to reconsider the issue of jurisdiction.

The decision provides a first insight into the Chamber's approach to its role in reviewing treaty awards and marks a contribution to the evolving guidance on treaty jurisdiction over dual nationals.

The Serafín García Armas Decision. Mr. Serafín García Armas and his daughter Ms. Karina García Gruber (the "Claimants"), who at the time were Venezuelan nationals, acquired shares in certain Venezuelan companies in 2001 and 2006. The Claimants later also acquired Spanish nationality. Following various measures taken by Venezuela in 2010, the Claimants commenced arbitration proceedings under the Treaty pursuant to the 1976 UNCITRAL Arbitration Rules and seated in Paris.

In 2014, the arbitral tribunal upheld its jurisdiction over the claims—one of the first decisions dealing in detail with investment treaty claims by dual nationals against one of their States of nationality when the treaty is silent on the issue.[2]

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

2 *Serafín García Armas et al. v. Bolivarian Republic of Venezuela*, UNCITRAL, PCA Case No. 2013-3, Decision on Jurisdiction, 15 December 2014.

Venezuela sought to set aside the jurisdictional decision. On 25 April 2017, the Paris Court of Appeal annulled the decision in part, finding that the arbitral tribunal had wrongly upheld its jurisdiction and exceeded its mandate in concluding that the disputed assets were covered "investments" under the Treaty without giving due consideration to the nationality of the investors at the time when the investments were made.[3] The *Cour de Cassation* subsequently reversed that decision, finding that in *partially* setting aside the decision the Court of Appeal failed to draw the consequences of its findings, and remanded the case to the Paris Court of Appeal.[4] Meanwhile, the arbitration continued in parallel, and in April 2019 the arbitral tribunal rendered its final award in favor of the Claimants, finding that Venezuela had breached the Treaty.

On 3 June 2020, the International Chamber of the Paris Court of Appeal annulled the *Serafín García Armas* jurisdiction decision in full.

When Is Nationality Assessed? Venezuela argued that the tribunal wrongly upheld its jurisdiction and exceeded its mandate when it found that the Claimants had made protected investments without considering if they had Spanish nationality at the time they made those investments.

The Court ultimately annulled the jurisdiction decision in full, finding that the tribunal lacked jurisdiction *ratione materiae* based on the definition of "investments" in the Treaty. As a corollary to the *compétence-compétence* principle, French courts review jurisdiction *de novo*—as the Court put it, "considering all elements of law or fact."[5] The Court thus began by applying the interpretative principles in Articles 31 and 32 of the Vienna Convention on the Law of Treaties to determine whether the definition of "investments" under the Treaty required that claimants hold a protected nationality at the time of making the investments.[6]

The Treaty provided that "investments" were all kinds of assets "invested by investors" of one contracting State in the territory of the other contracting State. "Investors," in turn, were defined in relevant part as "[p]hysical persons that have the nationality of one of the contracting Parties pursuant to their domestic law and that make

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3 Paris Court of Appeal (Chamber 1-1), 25 April 2017, No 15-01040.

4 Cass. Civ. (Chamber 1), 13 February 2019, No. 17-25851.

5 Paris Court of Appeal (Chamber 5-16), 3 June 2020, Case No. 19-03588, para. 45: ". . . le juge de l'annulation contrôle la décision du tribunal arbitral sur sa compétence, qu'il se soit déclaré compétent ou incompétent, en recherchant tous les éléments de droit ou de fait permettant d'apprécier la portée de la convention d'arbitrage. Il n'en va pas différemment lorsque, comme en l'espèce, les arbitres sont saisis sur le fondement des stipulations d'un Traité bilatéral d'investissement."

6 Paris Court of Appeal (Chamber 5-16), 3 June 2020, Case No. 19-03588, para. 46 : "Conformément aux dispositions des articles 31 et 32 de la Convention de Vienne sur le droit des Traités, un Traité doit être interprété de bonne foi suivant le sens ordinaire à attribuer aux termes du Traité dans leur contexte et à la lumière de son objet et de son but."

investments in the territory of the other contracting Party." According to the Court, the ordinary meaning of these terms made clear—"without it being necessary to interpret them"—that in order for an asset to be a protected investment, it needed to have been made by an investor satisfying the nationality requirement at the time it was invested, and not only at the time the breach occurred or the arbitration was commenced.[7] It was not disputed that the Claimants were not Spanish nationals at the time they first made their investments in the relevant companies; therefore, the tribunal lacked jurisdiction *ratione materiae*, and the jurisdiction decision had to be annulled in full. The Court refused to distinguish between investments made before the acquisition of Spanish nationality and those made after, as the arbitral tribunal itself had not made that distinction.

What Next for Dual Nationals? The latest decision in the *Serafín García Armas* saga provides important guidance for parties considering Paris as a seat for arbitrations by dual nationals.

Since investment treaties rarely stipulate a seat for the arbitration under the UNCITRAL Rules, in choosing a seat, parties will need to consider the likely approach of national courts to reviewing jurisdiction—especially if, as in France, national courts review jurisdiction *de novo*.

The series of French court decisions in *Serafín García Armas* may be the first time national courts have addressed the relevance of the timing of the acquisition of dual nationality for jurisdiction over dual national claims. They arise in the context of a series of recent decisions declining jurisdiction over dual nationals for different reasons. In two decisions rendered last year, both in cases against Venezuela—*Heemsen v. Venezuela* (seated in Paris) and *Manuel García Armas v. Venezuela* (seated in The Hague)—arbitral tribunals declined jurisdiction over dual nationals, among other things because they interpreted the relevant treaties' reference to ICSID arbitration as the primary arbitral forum to mean that the State parties intended to bar claims by dual nationals.[8] It was also recently reported that another UNCITRAL tribunal (seated in Madrid), by majority and interpreting different treaty language, declined jurisdiction over claims by a dual

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[7] Paris Court of Appeal (Chamber 5-16), 3 June 2020, Case No. 19-03588, para.51: "Il résulte des termes du TBI suivant leur sens ordinaire, sans qu'il soit nécessaire de les interpréter, que l'investissement protégé par le Traité est un actif investi par un investisseur de l'autre partie contractante, de sorte que l'investissement justifiant la compétence *ratione materiae* du tribunal arbitral est celui réalisé par un investisseur qui détient la nationalité de l'autre partie contractante, en vertu de sa législation, à la date à laquelle il réalise cet investissement sur le territoire de l'autre partie."

[8] *See Enrique Heemsen and Jorge Heemsen v. Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Decision on Jurisdiction, 29 October 2019; *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019.

national who acquired the protected nationality after he made the putative investments.[9]

Although the *Serafín García Armas* decision does not purport to apply a general principle of law and is tied to its specific facts, as national courts increasingly confront issues of investment treaty interpretation, it remains to be seen whether the French courts will continue to lead the way on the issue of dual nationality.

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[9] *See Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Award, 18 June 2020 (unpublished).