Swiss Supreme Court upholds award that declined jurisdiction over dual national against Venezuela

by *Practical Law Arbitration*, *with Schellenberg Wittmer Ltd*

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In *Decision 4A_466/2023*, the Swiss Supreme Court upheld an award in which the tribunal had declined jurisdiction over a Spanish-Venezuelan investor making a claim under the Spain-Venezuela BIT, concluding that, given the treaty's silence on the issue of dual nationals and based on the findings of fact in the award, the arbitral tribunal had rightly determined the claimant's dominant and effective nationality to be that of Venezuela.

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- Swiss Private International Law Act (PILA)
- Spain-Venezuela bilateral investment treaty 1995 (BIT)
- Vienna Convention on the Law of Treaties (VCLT)

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Speedread

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In a recent French-language decision intended for official publication, the Swiss Supreme Court addressed for the first time the issue of whether a dual national could bring claims against one of his home states under a bilateral investment treaty concluded between his two home states. The Supreme Court stressed that its task was not to provide a general and abstract response to the dual nationality debate, but only to determine whether, in the case at hand, the claimant qualified as a protected investor under the applicable Spain-Venezuela treaty.

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The Supreme Court agreed with the arbitral tribunal that the treaty's silence on the issue of dual nationals could not be interpreted as either allowing or excluding all claims by dual nationals and therefore that there was a gap in the treaty. It further agreed that this gap could be filled by having recourse to customary international law on diplomatic protection and the principle of dominant and effective nationality, being a relevant rule of international law applicable in the relations between the parties within the meaning of article 31(3) of the Vienna Convention on the Law of Treaties.

The Supreme Court held that the arbitral tribunal's conclusion that the claimant's dominant and effective nationality was that of Venezuela was not a finding of fact, which could not be reviewed by the court, but a question of law, which could be reviewed based on the findings of fact in the award.

The Supreme Court held that the arbitral tribunal had rightly considered that the usual criterion of residence was not helpful, as the claimant had been living in the US since 1989. Instead, the criterion of the centre of the claimant's economic activities was not only appropriate but also decisive to assess his dominant and effective nationality.

According to the findings of fact in the award, the centre of the claimant's economic interests had always been Venezuela, notwithstanding that he had been a resident of the US since 1989 and had travelled regularly to Spain, and that the claimant had always mentioned only his Spanish nationality in official documents in Spain and had voted there. Based on the tribunal's findings of fact, the Supreme Court held that the arbitral tribunal had rightly decided that the claimant's dominant and effective nationality was that of Venezuela and, accordingly, it had correctly declined jurisdiction. (*Decision 4A_466/2023 (6 February 2025)*.)

Background

Swiss Private International Law Act (PILA)

Article 190(2)(b) of the PILA provides that arbitration awards may be challenged if the arbitral tribunal wrongly accepted or declined jurisdiction.

Spain-Venezuela bilateral investment treaty 1995 (BIT)

Article I(1)(a) of the BIT defines "investors" as "[a]ny physical person who possesses the nationality of one Contracting Party pursuant to its legislation and makes investments in the territory of the other Contracting Party" (free translation of the Spanish original).

Article XI of the BIT provides that an investor may initiate proceedings against the host state either before the host state national courts or before ICSID; should ICSID arbitration not be available for whatever reason, or if both parties agree, the dispute shall be submitted to an ad hoc arbitral tribunal under the UNCITRAL arbitration rules.

Vienna Convention on the Law of Treaties (VCLT)

Article 31 of the VCLT (General rule of interpretation) states:

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"(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…

…

(3) There shall be taken into account, together with the context:

…

(c) any relevant rules of international law applicable in the relations between the parties."

Facts

The claimant, Raimundo Santamarta, was born in Venezuela in 1954 to a Venezuelan mother and a Spanish father. In 1959, he lost his Spanish nationality by operation of Spanish law, after his father obtained Venezuelan nationality. However, he recovered it in 1999, while keeping his Venezuelan nationality. Mr. Santamarta lived in Venezuela until he moved to the US in 1989, while spending long periods of time in Spain. He had not gone back to Venezuela since 2018.

Mr. Santamarta filed arbitration proceedings against Venezuela under the BIT, seeking damages for the expropriation of his family pharmaceutical companies.

The Geneva-seated UNCITRAL arbitral tribunal declined jurisdiction, on the ground that Mr. Santamarta's dominant nationality was that of Venezuela and therefore that he was not entitled to file a claim under the BIT against Venezuela.

Mr. Santamarta challenged the award before the Swiss Supreme Court, arguing that the arbitral tribunal had wrongly declined jurisdiction by adding a requirement that was not present in the BIT. Spain and Venezuela could have inserted provisions to exclude dual nationals from the BIT protection if that had been their intention, given that such clauses already existed at the time the BIT was concluded, especially in BITs signed by Spain.

Decision

The Swiss Supreme Court dismissed the setting-aside application, finding that the arbitral tribunal had correctly declined jurisdiction.

Preliminary consideration

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As a preliminary matter, the Supreme Court observed that the issue of whether (and if so, under what conditions) a dual national could bring claims against one of its home states under a bilateral investment treaty concluded between the two home states was a hotly debated issue that had received diverging answers in case law and doctrine.

The Supreme Court underlined that, although the present case raised a question of principle, its task was not to provide a general and abstract response to the dual nationality debate, but only to determine whether, in this case, the claimant qualified as a protected investor under the BIT.

Interpretation under Article 31(1) of the VCLT: The BIT's silence on dual nationals cannot be interpreted as either allowing or excluding all claims by dual nationals

The Supreme Court reiterated that in challenges to an arbitral tribunal's decision on jurisdiction, the court has a full power of review over legal issues, but is bound by the factual findings of the award.

The Supreme Court acknowledged that in three other cases under the BIT (*Serafín García Armas v Venezuela*; *Manuel García Armas v Venezuela* and *Fernando Fraiz Trapote v Venezuela*), the arbitral tribunals and state courts had reached different conclusions on the dual national issue. However, the Supreme Court should carry out its own analysis of the BIT, applying the rules on treaty interpretation contained in articles 31(1) (and following) of the VCLT.

The Supreme Court agreed with the arbitral tribunal that article I(1)(a) of the BIT, 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, was silent on the issue of dual nationals and therefore that there was a gap in the BIT. Accordingly, a dual national could not be equated with a person having only one nationality. Among other things, the Supreme Court held that:

- In article I(1)(a) of the BIT, starting with the ordinary meaning of that provision in relation to protected investors, a good faith reading of the term "one" ("physical person who possesses the nationality of one Contracting Party") did not limit that qualification only to individuals holding a single nationality, as opposed to individuals holding the two nationalities of the BIT parties. The purpose of the word was only to set the minimum requirement that an individual must hold at least one of the nationalities of the BIT parties, and must have made an investment in the territory of the other BIT party. This only excluded claims by an individual against their single state of nationality, but did not allow for any conclusion as regards claims by dual nationals against one of their home states. The Supreme Court also agreed with the arbitral tribunal that the BIT's object and purpose were not helpful to determine whether dual nationals were allowed to bring claims against one of their home states.

- The fact that the BIT was silent on dual nationals did not lead to the conclusion that dual nationals could be treated, without more, as individuals having the nationality of only one of the two contracting parties. On the contrary, the arbitral tribunal had convincingly demonstrated that the situation of dual nationals under international law was not always the same as that of individuals with only one nationality. The Supreme Court thus agreed with the tribunal's finding that the silence of the BIT on the issue of dual nationals could not be interpreted in good faith as either allowing or excluding claims by dual nationals.

- Turning to the context of article I(1)(a) of the BIT, the arbitral tribunal had been correct in its analysis of the dispute resolution mechanism contained in article XI of the BIT, according to which an investor could opt for UNCITRAL arbitration if ICSID arbitration was unavailable "for whatever reason". The tribunal had rightly considered that there was no reason to import the exclusion of dual nationals provided in the ICSID Convention to an arbitration governed by other rules.

The Supreme Court distinguished the present case from its ruling in *Clorox v Venezuela* (*146 III 142*), in which it had set aside an award that had declined jurisdiction on the ground that the arbitral tribunal had wrongly added a condition to jurisdiction

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(the necessity for the investor to carry out an active act of investing) not contained in the treaty. There, the Supreme Court had noted that the definition of "investment" in the treaty was deliberately broad and that the contracting parties had knowingly not included any additional condition for an asset held by an investor to qualify as a protected investment, although such clauses were already common when the treaty was signed in 1995. By contrast, the BIT was completely silent on the issue of dual nationals and there was no indication that the contracting parties had intended, by their silence, to confer full protection on dual nationals. Also, the Supreme Court was bound by the tribunal's finding of fact that, when the BIT was signed, there was no widespread or emerging practice granting protection to dual nationals absent an express exclusion. Hence, contrary to *Clorox*, it was not a matter of adding additional requirements not deliberately provided in the BIT, but of filling a gap in that treaty.

Interpretation under article 31(3) of the VCLT: Relevance of customary international law principle of dominant and effective nationality

The Supreme Court held that, given the silence of the BIT on the matter, the arbitral tribunal had rightly examined whether there were relevant rules of international law applicable in the relations between the parties, as required by article 31(3) of the VCLT.

The Supreme Court found that the arbitral tribunal had convincingly explained why it was justified to have recourse to customary international law governing diplomatic protection in order to fill the gap in the BIT. The tribunal had explained in a detailed and defensible way the relationship between public international law on diplomatic protection and BITs. In particular, it had found that the *lex specialis* (special law) character of a BIT did not exclude the application of customary international law to issues on which the BIT is silent. The Supreme Court noted that this approach was consistent with article 17 of the International Law Commission's Draft Articles on Diplomatic Protection, which provides that the "draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments". According to the Supreme Court, there was no such incompatibility, since the BIT is silent on dual nationals.

The Supreme Court confirmed that the arbitral tribunal had rightly concluded that the principle of dominant and effective nationality had acquired the status of customary international law rule in the field of diplomatic protection, and had also been applied in other areas of international law. The Supreme Court thus found that, although certain arbitral tribunals had ruled out this possibility, the principle of dominant and effective nationality was capable of constituting a relevant rule of international law applicable between the contracting parties, within the meaning of article 31(3) of the VCLT, including in matters of investment protection. However, the Supreme Court added that the application of this test in investment arbitration required that "particular attention" be given to the risk of treaty shopping by investors multiplying nationalities.

Since interpretation according to article 31 of the VCLT neither left the meaning of the BIT ambiguous or obscure, nor led to a result that was manifestly absurd or unreasonable, recourse to the supplementary means of interpretation under article 32 of the VCLT was not necessary.

Determination of the claimant's dominant and effective nationality

The Supreme Court held that the arbitral tribunal's conclusion that Mr. Santamarta's dominant and effective nationality was that of Venezuela was not a finding of fact, which could not be reviewed by the Court, but rather a question of law, which could be reviewed based on the factual findings of the award. In this respect, the Supreme Court held that:

- The arbitral tribunal had rightly considered that the usual criterion of residence was not helpful because Mr. Santamarta had been living in the US since 1989. It had also been correct, in the "absolutely unique circumstances of the case at hand", to find that, where the personal, familial and social sphere of the claimant was located in a third state, the centre of the claimant's economic activities was a decisive and appropriate criterion when deciding Mr. Santamarta's effective nationality. Furthermore, in the Swiss court setting-aside proceedings, Mr. Santamarta had neither argued that the

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tribunal's factual findings on the centre of his economic activities were tainted by any of the grounds for setting aside under Swiss law, nor "veritably" challenged the legal relevance of this criterion.

- On the basis of findings of fact in the award, the centre of Mr. Santamarta's economic interests had always been Venezuela, even though he had been a resident of the US since 1989 and regularly travelled to Spain. Based on these findings of fact, the Supreme Court found that the arbitral tribunal had rightly decided that Mr. Santamarta's dominant and effective nationality was that of Venezuela. Accordingly, the arbitral tribunal had rightly declined jurisdiction.

Comment

This is the first time that the Swiss Supreme Court has ruled on the highly controversial question of whether investors who hold the nationality of both state parties to an investment treaty are entitled to sue their own home state where the treaty is silent on the issue of dual nationality.

Importantly, the Supreme Court stressed that it was not providing an abstract solution to the dual nationality debate, but was only resolving the particular case under the applicable treaty and based on the factual findings of the award. Furthermore, the outcome of the setting-aside proceedings was at least partly driven by considerations of Swiss procedural law in relation to what the arbitral tribunal considered to be the decisive criterion for the determination of Mr. Santamarta's effective nationality. Nonetheless, the Supreme Court gave useful general indications on more general questions of approach, when consistently confirming the tribunal's careful interpretation of the BIT and thorough application of international law principles.

The following considerations were of particular interest:

- When the treaty is completely silent on dual nationals, this cannot be interpreted as allowing or excluding claims by dual nationals absent an indication that the contracting parties intended, by their silence, to confer or exclude full protection to dual nationals.
- The fact that the treaty provided for ICSID arbitration as one option amongst other arbitral forums was no reason to exclude dual nationals from arbitrations conducted under other arbitration rules.
- A gap in a treaty on the issue of dual nationality can be filled by recourse to relevant rules of international law applicable to the relations between the parties within the meaning of article 31(3) of the VCLT.
- The principle of dominant and effective nationality is part of customary international law rule on diplomatic protection and, as such, can constitute a relevant rule of international law applicable to contracting parties, within the meaning of article 31(3) of the VCLT.

Case

Decision 4A_466/2023 (Swiss Supreme Court) (6 February 2025) (French language).

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