School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
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Award Name and Date: Michael Ballantine and Lisa Ballantine v. The Dominican Republic (PCA Case No. 2016-17) – Award – 3 September 2019

Case Report by: Annalisa Ciampi**, Editor: Ignacio Torterola***

Summary: Claimants brought an action for relief against the Dominican Republic pursuant to the Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA) and the UNCITRAL Rules, alleging that certain environmental regulations established by the Dominican Republic violated their rights under the DR-CAFTA in relation to their investment in a luxury residential housing project located in the Dominican Republic. After hearing the jurisdictional objection together with the merits of the claim, the Tribunal determined by majority that it lacked jurisdiction because the Claimants' Dominican nationality was effective and took precedence over their American nationality.

Main Issues: determination of "dominant and effective nationality" of dual nationals under the DR-CAFTA.

Tribunal: Prof. Ricardo Ramírez Hernández (President), Ms. Marney L. Cheek (Arbitrator) and Prof. Raúl Emilio Vinuesa (Arbitrator)

Claimants' Counsel: Mr. Mr. Matthew G. Allison (Baker & McKenzie LLP, Chicago), Mr. Teddy Baldwin (Baker & McKenzie LLP, Washington, DC)

Respondent's Counsel: Ms. Yahaira Sosa, Mr. Marcelo Salazar, Ms. Leidylin Contreras, Ms. Raquel de la Rosa, Lic. Maria Amalia Lorenzo, Ms. Patricia Abreu, Ms. Rosa Otero, Ms. Claudia Adames, Ms. Johanna Montero, Mr. Flavio Darío Espinal, Mr. Paolo Di Rosa, Mr. Raúl R. Herrera, Ms. Mallory Silberman, Ms. Claudia Taveras, Ms. Cristina Arizmendi (Arnold & Porter Kaye Scholer LLP, Washington, DC)

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1. Relevant Facts

Michael Ballantine and Lisa Ballantine ('Claimants') are two US citizens whose stated domicile is in the US. The Claimants own and control enterprises organized under the laws of the Dominican Republic ('Respondent'). The dispute arose after the Claimants encountered certain difficulties when carrying out their activities in Jamaca de Dios, a luxury residential housing project located in Jarabacoa, they had begun developing in 2005. In particular, the Claimants alleged that certain environmental regulations established by the Respondent, and its corresponding enforcement, violated their rights under the DR-CAFTA (¶ 3).

Claimants requested that the Tribunal award monetary damages of not less than US$20 million dollars in compensation for losses sustained as a result of Respondent's breaches of its obligations under the DR-CAFTA and international law, including, *inter alia*, reasonable lost profits, direct and indirect losses (including, without limitation, loss of reputation and goodwill), losses of all tangible and intangible property, and moral damages; as well as all costs (including, without limitation, attorneys' fees and all other professional fees) associated with any and all proceedings undertaken in connection with this arbitration (¶¶ 157-159).

Respondent requested that the Tribunal dismiss all of the Ballantines' claims, on the basis of lack of jurisdiction, inadmissibility, and/or lack of merit; in any event, decline to grant any damages to the Ballantines on the basis that their damages calculations are unreliable, erroneous, and/or speculative; and grant to the Dominican Republic all of the costs of the proceeding, as well as the full amount of the Dominican Republic's legal fees and expenses (¶ 160).

2. Procedural History

Claimants notified the Respondent of their intent to submit a claim to arbitration under the DR-CAFTA on 12 June 2014. They submitted, on their own behalf and on behalf of their enterprises, their Notice of Arbitration and Statement of Claim pursuant to the UNCITRAL Rules on 11 September 2014 (¶¶ 4-5). The Tribunal was constituted on 3 June 2016 (¶ 10). The languages of the arbitration are English and Spanish and in cases of differences of interpretation, the English text shall prevail (¶ 13). By agreement of the parties, the place of arbitration is Washington, DC (¶ 14). On 16 June 2016, the Parties agreed on the Permanent Court of Arbitration as the registry and as administering institution (¶ 15). On 28 September 2016, the Parties and the Tribunal held the first procedural meeting through a conference call to discuss certain procedural issues (¶ 20). On 9 January 2017, the Claimants submitted their Amended Statement of Claim (¶ 24). On 18 February 2017, the Respondent submitted its Notice of Intended Preliminary Objection and Request for Bifurcation (¶ 25). The Claimants submitted their Response on 7 March 2017 and the Respondent submitted its reply on 8 March 2017 (¶¶ 26-27). On 21 April 2017, the Tribunal by majority rejected the bifurcation request and decided to hear the jurisdictional objection together with the merits of the Claimants' claim (¶ 30). The Respondent submitted its Statement of Defense and Objections to Jurisdiction on 26 May 2017 (¶ 31) and its Objection to Admissibility on 9 November 2017 (¶ 35). The Claimants submitted their Reply to the Respondent's Statement of Defense and their Response to the Respondent's Admissibility Objection on 9 and 18 November 2017, respectively (¶¶ 37-38). On 22 December 2017, the Tribunal decided to postpone the decision

on both the admissibility and merits of the Respondent's Objection to Admissibility until a later stage of the proceedings, inviting the Respondent to answer to the Claimants' Response in its Rejoinder, and in turn, the Claimants to submit their surreply in their Rejoinder on Jurisdiction (¶ 39). On 20 March 20, 2018, the Respondent submitted its Rejoinder on Jurisdiction and Merits. On 22 May 2018, the Claimants submitted their Rejoinder on Jurisdiction and Admissibility (¶¶ 41-42). Both the Republic of Costa Rica and the US filed a non-disputing party submission (¶¶ 43-44). From 3 to 7 September 2018, the Parties and the Tribunal held the hearing (¶ 46). Among other things, the Tribunal considered that the funding of the Claimants' legal costs by a third party did not raise a conflict of interests issue (¶¶ 49-50). The Parties filed their respective submissions on costs on 19 April 2019 (¶ 52).

3. Positions of the Parties on Jurisdiction

3.1 Claimants' Position

Claimants submitted that they have always been dominantly and effectively US citizens (¶ 199). As investors of a Contracting Party, other than the Dominican Republic, therefore, they qualify as "Claimants" under the DR-CAFTA. The appropriate time frame for the evaluation of the dominant nationality is exclusively the time the investment was made. The Claimants submitted that this is not a treaty shopping situation; they obtained Dominican citizenship six years after their initial investment because of the discriminatory treatment given by Dominican officials to foreign investors (¶ 203).

3.1.1 Time frame for the evaluation of the dominant nationality

Claimants argued that the Tribunal should only look at the nationality of the Claimants at the time the investment was made (¶ 199). Even if they have to establish that they were dominantly US citizens at the time of submission of their Notice of Arbitration, the Claimants argued that they still would not be required to demonstrate that they were dominantly US citizens during the time their claims arose, for this is not specifically required by DR-CAFTA or the provisions on dual nationality. In any case, the Claimants considered it unnecessary to decide on the appropriate time frame for the evaluation of the dominant nationality, since they were at all times dominantly and effectively US citizens (¶ 199).

3.1.2 Factors to determine which of two nationalities should be considered dominant

Claimants argued that since there is no test to decide which of the two nationalities should be considered dominant under the DR-CAFTA, the Tribunal should resort to international law (¶ 200). In the Claimants' view, the Respondent's approach is legally and factually unsubstantiated. Residency should not be equated with dominant nationality (¶ 207). Further, the personal attachment of an individual for a particular country is one of the factors to be considered by the Tribunal. The Claimants emphasized their deep connection to US culture and society, while they were only connected with the Dominican Republic for commercial reasons (¶ 209). The Claimants also resorted to the educational paths taken by each of their four children to show their dominant connection to the US (¶ 213). The Claimants further asserted that they considered themselves US citizens and foreign investors in the Dominican Republic. And equally important, the Respondent also considered them to be foreign investors and dominantly US citizens, while US officials had advocated for them *qua* US national (¶¶ 217-221).

3.1.3 Rationale of the rule on dominant and effective nationality

Claimants submitted that the dominant and effective nationality rule contained in the DR-CAFTA is a codification of the existing rule of customary international law on effective nationality for dual nationals in the context of diplomatic protection. The test of dominant and effective nationality was created to prevent "treaty shopping" and looking for diplomatic protection from a stronger state, while there is no genuine link of nationality between the individual and the state (¶ 218).

4. Respondent's position

Respondent argued that the Ballantines are not "claimants" for the purposes of the DR-CAFTA, nor does their claim involve any obligations under the DR-CAFTA, because neither at the time of submission nor at the time of the alleged violations, their dominant and effective nationality was that of the US (¶ 163).

4.1 Relevance of the time of submission of the claim for the question of nationality

In the Respondent's view: first, should DR-CAFTA be silent on the relevant timing for the question of nationality, the Tribunal would be required to decide the issue on the basis of international law. Under international law, one of the relevant dates for purposes of jurisdiction is the date on which the claim was filed (¶ 167). Second, in fact DR-CAFTA is not silent on this issue, but rather it is connected to the issue of consent (¶ 168). Third, the Claimants' assertion that the issue of dominant and effective nationality only becomes relevant if the investor holds dual nationality at the time of the investment is to be rejected (¶ 169). Fourth, even the DR-CAFTA's definition of "investor of a Party" does not support the claim that the question on the nationality refers to the date of the investment. The two requirements – that (i) there must be a "national of a Party"; and that (ii) the national must attempt "to make, is making or has made an investment" in the territory of another Party – are cumulative and disjunctive. The notion of dominant and effective nationality is only related to the first requirement (¶ 170). Fifth, the Claimants' assertion that the Tribunal should not merely take a snapshot in time and, at any specific date, attempt to weigh as of that date the Ballantines' connections to the US against their connections to the Dominican Republic, is misguided. The Responded considered that the Claimants' contention is not supported by the Uran-US Claims Tribunal case law relied upon by the Claimants (¶ 171). Respondent concluded that because the Claimants held dual nationality at the time of the submission of their claims to arbitration, the question is which nationality was the dominant and effective one at that time.

4.2 "Dominant" and "effective" nationality

Respondent noted that the effective nationality refers to whether there is a genuine connection between the person and the State. The dominant nationality refers to which nationality is stronger (¶ 172).

4.3 Standard for determining dominant nationality

Respondent approached the question of the standard for determining dominant nationality – since the DR-CAFTA includes none – applying international law. Relying on case law from the ICJ, the Italian-US Conciliation Commission and the Iran-US Claims Tribunal,

Respondent argued that the Tribunal should take into account several factors, such as the State of habitual residence, the circumstances in which the second nationality was acquired, the subject's personal attachment for the country, and the center of a person's economic, social and family life (¶ 173). Respondent further argued that the consideration of additional factors such as the country of residence of the Claimants' immediate family, where the Claimants went to college, where their children were born, the primary language spoken at home or, their religious faith and practice finds no jurisprudential, doctrinal or logical support (¶ 174). Considering all relevant factors, Respondent concluded that the Claimants' dominant and effective nationality was Dominican at the relevant times (¶ 178). Respondent added that US law, case law and doctrine support a similar conclusion (¶ 185).

5. Tribunal's analysis

The Tribunal concluded that Claimants' Dominican nationality took precedence over their American nationality during the relevant times, i.e. at the time the alleged measures were taken and at the time of the submissions of the claim. As a result, the Tribunal found that the Claimants did not qualify as "investors of a Contracting Party" under the DR-CAFTA (¶ 600), and the Tribunal therefore lacked jurisdiction over any of the Claimants' claims (¶ 637).

5.1 Whether the Claimants were investors of a Party under the DR-CAFTA

The Tribunal stated its analysis to be based both on the DR-CAFTA and the applicable rules of international law (¶ 505). The Tribunal further stated to concur with the general approach followed by other DR-CAFTA tribunals that the Claimant has the burden to prove facts necessary to establish jurisdiction (as it positively asserts); and that the Respondent has the burden to prove that its positive objections to jurisdiction are well-founded (¶ 510).

The Tribunal stated to consider the rule established under the DR-CAFTA to determine the relevant nationality where an individual is a dual national ("a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality") in accordance with the general rules on the interpretation treaties (¶¶ 511-514). The Tribunal found that in order to determine if the Claimants are covered investors under DR-CAFTA, two questions must be answered: (i) what are the relevant times in which an individual shall comply with the nationality requirement?, and (ii) what is the legal standard under the DR-CAFTA to determine dominant and effective nationality (¶ 515).

5.2 Relevant times for the compliance of the nationality requirement

The Tribunal considered that in accordance with the general rules of interpretation of treaties the term "investor" and to which Party that investor belongs, is determinant for the application of the DR-CAFTA investment chapter. If there is no measure relating to an investor of another Party, then there is no obligation and thus there can be no treaty breach (¶ 518).

The Tribunal recalled the two constitute elements that must be fulfilled to qualify as an investor: (i) the existence of a national (ii) who attempts to make, is making or has made an investment. The Tribunal observed as well that in order to be a claimant, an investment dispute must also exist (¶¶ 519-521).

The Tribunal stated that the moment in which an investment dispute arises depends upon the facts and special circumstances of each case. However, because under the DR-CAFTA both parties should initially seek to resolve the dispute through consultation and negotiation, the DR-CAFTA presumes the existence of such dispute before the submission of a claim. In any event, DR-CAFTA makes clear that a claimant must exist at the moment of submission of a claim, that is at the moment the notice of arbitration along with the statement of claim is received by the Respondent (¶ 522). The Tribunal further stated that another relevant time in which the nationality condition must be fulfilled is the date in which knowledge of the breach is or should have been acquired (¶ 523).

The Tribunal further held that the nationality condition as part of the investor qualification is not only relevant at the moment the investment was made. The Tribunal did not address the principle of continuous nationality applied by other investment tribunals. The Tribunal stated to be only called upon to determine whether the Claimants qualified as investors as of the date in which the claim was submitted to arbitration as well as of the date of the alleged breach, as relevant times (¶ 525).

The Tribunal concluded that the examination of dominant and effective nationality should not be circumscribed to the moment the investment was made, but that compliance with this requirement is fundamental at the moment the claim was submitted, in this case, September 11, 2014 and at the moment of the alleged breach, which allegedly took place starting from 2011, when the Claimants were naturalized as Dominicans (¶ 527).

5.3 Dominant and effective nationality standard under the DR-CAFTA

The Tribunal stated that although the rule on dual nationality under DR-CAFTA does not expressly refer to customary international law, the expression "dominant and effective nationality" is rooted on customary international law (¶¶ 529-531). The Tribunal, however, considered it appropriate under the general rules on the interpretation of treaties, to give specific meaning to the terms used in the DR-CAFTA rather than directly incorporating any other standard. The Tribunal held that the factors developed under customary international law cases are instructive but not determinative as they reflect an interpretation developed in a specific period of time and under different circumstances from the ones present in this case, i.e. a dual nationality case related to investment protection provided for in a specific treaty (¶ 533).

The Tribunal also noted the uniqueness of the case which deals with the question of whether the Claimants, who acquired in addition to their US nationality, the citizenship of the host State before submitting their claim, lost their right to access to arbitration because they were dominant and effective nationals of the respondent State at the time of the alleged breach and the submission of their claim. Usually, investment tribunals are confronted with the question of whether an investor acquired nationality in order to gain access and protection through a treaty (¶ 534).

The Tribunal held that a nationality has to be both dominant and effective for a natural person to qualify as an investor of a Contracting Party (¶ 535). The DR-CAFTA does not simply require nationality to exist, it requires that nationality complies with two specific qualities, different from the existence of that legal bond (¶ 539).

The Tribunal stated that "dominance" refers to the degree or magnitude in which the connections to a particular State are stronger than the connections that could have also been built by the individual in relation to another State that has also bestowed its nationality. Such connections are defined by several factors, a cluster of elements that make up the life of an individual, such as: the time spent by the individual in that country, family and personal attachments, language, education, work, economic or financial attachments (¶ 538).

The Tribunal considered that "effectiveness" requires a nationality bond to go beyond a formality with no apparent further effect, to be of substance rather than merely declaratory (¶ 539).

The Tribunal further clarified that the legal standard to assess dominance and effectiveness is one and criteria used to determine if nationality is dominant can be useful to determine effectiveness (¶ 540).

5.5 Factors to be considered in assessing dominant and effective nationality

The Tribunal stated that customary international law has developed and crystalized relevant factors to determine, in cases dealing with dual nationality, which is the dominant and effective one (¶ 547). The Tribunal considered the following elements to be pertinent under customary law to discern both dominance and effectiveness: the State of habitual residence, the circumstances in which the second nationality was acquired, the individual's personal attachment for a particular country, and the center of the person's economic, social and family life" (¶ 552).

The Tribunal further considered that the investment itself, the status of investor as well as other circumstances surrounding those elements such as the conduct of a particular State towards the investor, how the investor presented himself or herself, or the reason underlying the investor's decision to apply for naturalization, may be relevant factors for assessing nationality and its dominance and effectiveness under the DR-CAFTA (¶ 554). The Tribunal added that a claimant's entire life is relevant but not dispositive in cases of double nationality. In the Tribunal's view, a holistic assessment should be performed to examine how, at a particular time, the connections to both States could be characterized in terms of dominance and effectiveness (¶ 554).

Applying these principles to the facts of the case, the Tribunal analysed in relation to each of the Claimants: a) habitual residence (place of birth, place where the majority of their life was spent and place of permanent residence; ¶¶ 560-566); (b) the individual's personal attachment for a particular country (personal and professional relationships; ¶¶ 567-573); (c) the center of the person's economic, social and family life (¶¶ 574-577); and (d) the circumstances in which the second nationality was acquired: the Claimants' naturalization and the reasons to be naturalized as Dominicans (¶¶ 578-584). Bearing in mind the specific context of the dispute, the Tribunal further considered the conduct of the Dominican Republic as the host State and of the authorities of the US (¶¶ 585-587) as well as how the Claimants presented themselves (¶¶ 588-596). The Tribunal stated that while it could not be denied that during the relevant period the Claimants maintained connections to the US, where they were born and lived for the majority of their lives, the Dominican nationality was effective and took precedence over the American nationality both at the time the alleged measures were taken and at the time of the submissions of the claim (¶¶ 597-600).

6. Costs

The Tribunal ordered each Party to bear its own legal costs and that the common costs of arbitration be borne in equal halves by the Parties (¶ 637).

6.1 Allocation of costs of the arbitration

The Tribunal held that the provisions of the DR-CAFTA and the UNCITRAL Rules grant the Tribunal with discretion to allocate costs and fees between the Parties (¶¶ 618-621). The Tribunal further held by majority that such discretion is qualified, first, by the determination of whether the claimant's claim is frivolous, and secondly, by the consideration of the particular circumstances of the dispute such as the complexity and novelty of the issues involved, the manner in which the Parties have conducted throughout the arbitration, including any misconduct, and whether the Parties presented solid or meritorious arguments. If the losing party's claim was not frivolous, the Tribunal has discretion to decide whether there are circumstances that justify a reasonable allocation. The Tribunal also noted that the approaches followed by other tribunals in exercising their power to allocate costs, such as in *RDV v. Guatemala*, *Corona Materials v. Dominican Republic*, *Pac Rim v. El Salvador* and *Aven and others v. Costa Rica*, vary from one dispute to another (¶¶ 622-623).

Applying these principles to the dispute, the Tribunal noted that this was a case of first impression, which involved a complex and novel issue (¶ 629). The Tribunal further considered that both Parties had conducted themselves in good faith and presented their arguments in support of their claims or defenses in a professional manner. Neither Party caused an undue delay to this proceeding or otherwise had a procedural misconduct (¶ 630). Relying on *Commerce Group* and *Corona Materials*, the majority of the Tribunal did not find elements to consider that the claim was "frivolous" (¶¶ 632-633). On this basis, the majority Tribunal found that it would be reasonable for each party to bear half of the arbitration costs and its own legal fees and expenses incurred in this proceeding. Moreover, the Tribunal did not find any other element which would warrant an award on costs in favour of the Respondent (¶ 635).

7. Partially Dissenting Opinion of Marney L. Cheek on jurisdiction

Marney L. Cheek dissented with regard to the legal test articulated for assessing the dominant and effective nationality of the Claimants. Article 10.8 of the DR-CAFTA does not articulate an investment treaty-specific test but incorporated the customary international law standard for the treatment of dual nationality that the Tribunal is bound to apply (¶ 3).

Relying on the ICJ *Nottebohm Case* and subsequent cases of the Italian-US Conciliation Commission and the Iran-US Claims Tribunal, Ms. Cheek opined that to determine a natural person's dominant and effective nationality is an objective factual inquiry that focuses on the totality of one's personal, familial, economic, and civic ties over a lifetime. The habitual residence is an important factor, but there are other factors such as centre of interests, family ties, participation in public life and other evidence of attachment (¶¶ 3-10). The relevant period of time for determining dominant and effective nationality on the date the claim arose and the date the claim was submitted for purposes of jurisdiction, is an individual's contacts from birth over a lifetime (¶¶ 11-14).

Looking holistically at Ms. And Mr. Ballantine's life, the facts support a finding that under customary international law the Claimants' dominant and effective nationality is that of the US (¶¶ 15-22). Economic ties and economic self-interest as reasons for seeking a second nationality, are but two of many relevant factors to be considered in this analysis. The Ballantines did not acquire a second nationality as a form of treaty shopping to gain access to a dispute settlement mechanism. In fact, their Dominican nationality had the potential to defeat their ability to bring a claim. Under those circumstances, Mr. Cheek concluded that the second nationality does not become the dominant one by virtue of the investment-related motivations of the Claimants (¶¶ 23-29).

7. Partially Dissenting Opinion of Raúl Emilio Vinuesa on costs

Raúl Emilio Vinuesa opined that under the DR-CAFTA and the UNCITRAL rules, the guiding principle for the allocation of costs is "the unsuccessful party pays". The Tribunal enjoys broad, but not absolute discretion in considering the particular circumstances of the case to reach a reasonable result (¶¶ 2-5). Under no circumstances, does the determination as "not frivolous" of a claim set aside the guiding principle for cost allocation (¶¶ 6-7). First, the frivolity of a claim does not depend on "the facts or arguments put forward by the parties", but simply on the content and scope of the claim. Second, the *Commerce Group* and *Corona Materials* cases are insufficient to justify the decision of the majority on costs (¶¶ 9-25). Third, once a tribunal has decided that a claim is not frivolous, only then must it proceed to determine the apportioning of the costs bearing in mind the guiding criterion that "the unsuccessful party pays" and any other particular circumstances of the case, to reach a reasonable result (¶ 7).

Prof. Vinuesa emphasized that the starting point for reaching a reasonable result in the allocation of costs is the characterization of the successful party and unsuccessful party (¶¶ 27). The objection on the dominant and effective nationality of the Claimants is not a special circumstance that sets aside the guiding principle (¶¶ 28). Furthermore, the Claimants' opposition to the Respondent's request for bifurcation demanded greater costs which turned out to be unnecessary and fruitless (¶¶ 29). Moreover, a value judgment according to which "the Claimant brought a credible case" exceeds the scope of the Tribunal's decision as to the lack of jurisdiction. Because not only the Claimants, but also the Respondent, acted in good faith, it is not possible to consider the behaviour of one of the Parties as a special circumstance to benefit that Party as regards the other, which, as the successful Party, also displayed the same behaviour (¶¶ 30-32). Finally, any decision on costs must be verified in the light of the reasonability of the result caused (¶¶ 33). Prof. Vinuesa concluded that the costs of the PCA proceedings and the Tribunal's fees and expenses should be borne entirely by the Claimants after due consideration of the particular circumstances of the case that justify the reasonability of the abovementioned apportionment (¶¶ 35).