Dual citizenship of natural persons in international investment arbitration

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Principia No. Especial 1–2025 pp. 57-105

Resumen: Durante más de dos siglos, el derecho internacional ha enfrentado el problema de la doble nacionalidad, otorgando con frecuencia un peso desproporcionado al criterio de la residencia. Este enfoque fue cuestionado por primera vez en el caso *Nottebohm* (1955), en el que la Corte Internacional de Justicia destacó la necesidad de considerar vínculos personales, familiares, culturales y económicos más amplios. Este razonamiento, confirmado posteriormente en el caso *Mergé* y desarrollado en los *Casos A/18* surgidos tras la crisis de los rehenes en Irán de 1979, dio lugar al concepto de "nacionalidad dominante y efectiva" y a la prueba del vínculo genuino, hoy centrales en la práctica estadounidense y en los tratados de inversión. Desde 2001, el arbitraje inversionista-Estado ha abordado la doble nacionalidad de forma inconsistente, con interpretaciones contradictorias de los mismos tratados. Tras revisar la jurisprudencia entre 1797 y 2023, incluido el caso *Serafin Garcia v. Venezuela*, el texto propone replantear los paradigmas tradicionales a la luz de la movilidad, las comunicaciones y el trabajo remoto, superando la primacía del criterio de la residencia.

Abstract: For over two centuries, international law has grappled with the problem of dual nationality, often giving disproportionate weight to an individual's residence. This approach was first challenged in the 1955 *Nottebohm* case, where the International Court of Justice emphasized the need to consider broader personal, family, cultural, and economic ties. This reasoning, later confirmed in *Mergé* and expanded in the *A/18 Cases* following the 1979 Iran hostage crisis, led to the concept of "dominant and effective nationality" and the genuine link test, now central in U.S. practice and investment treaties. Since 2001, investor–state arbitration has revisited dual nationality inconsistently, with conflicting interpretations of the same BITs. Reviewing case law from 1797 to 2023, including *Serafin Garcia v. Venezuela*, the text argues for rethinking traditional paradigms in light of modern mobility, communications, and remote work, moving beyond residence as the primary determinant.

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Palabras Claves: Dobles nacionales | Doble nacionalidad | Conflicto de nacionalidades | prueba del vínculo genuino

Keywords: Dual nationals | Dual nationality | Conflict of nationalities | genuine link test

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> I wanted you to see what real courage is, instead of getting the idea that courage is a man with a gun in his hand. It's when you know you're licked before you begin, but you begin anyway and see it through no atter what.
>
> *To kill a mockingbird*, Harper Lee (1960)

I. Introduction

The controversial issue of dual nationality is not new to the legal world, yet in recent years it has made a strong comeback in the field of international investment law, in the investor-state relationship. Previously, the issue of nationality was viewed from the perspective of who was a national and who could be denied nationality, as well as what were the ways to obtain a nationality. Well into the 20th century, no country recognized dual nationality[1]. The first regulation on dual nationality came from Italy in 1912, through Law No. 555[2]. Subsequently, gradually, different countries recognized the existence of this dual nationality, the United Kingdom in 1948[3], France in 1973, Canada in 1976, the United States in 1990 (among others). The questions that arise at this point are:

[1] In fact, Jackson H. Ralston, a leading member of the American Society of International Law, in the 1903 Mixed Claims Commission between Italy and Venezuela, in the claim styled as the *Brignone Case*, where he was umpire, stated that "[t]he coexistence of two nationalities in one and the same individual is not theoretically admitted in international law."

[2] See *Gazzetta Ufficiale*, Legge 13 giugno 1912, n. 555, art. 7, stating: Subject to special provisions to be stipulated in international treaties, an Italian citizen born and resident in a state foreign country, from which he is considered his own citizen by birth, retains Italian citizenship, but having become of age or emancipated, may renounce it. (The original Italian reads: "Salve speciali disposizioni da stipulare con trattati internazionali, il cittadino italiano nato e residente in uno Stato estero, dal quale sia ritenuto proprio cittadino per nascita, conserva la cittadinanza italiana, ma, divenuto maggiorenne o emancipato, puo′ rinunziarvi.") (https://www.gazzettaufficiale.it/eli/id/1912/06/30/012U0555/sg).

[3] In fact, the British Nationality Act 1948 removed any restrictions concerning dual nationality (see *British Nationality Act 1948*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/632318/dualnationality.pdf).

Why is this issue so relevant, and how is international investment law involved?

The legal community has always analyzed nationality as a concept, with political, legal, and social connotations, which is defined as "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"[4].

The public knows and understands that nationality is obtained in several ways by (i) *ius soli*, (ii) *ius sanguinis*, or (iii) voluntary acquisition. However, this way of acquiring nationality has led to a person born in a certain country having one nationality by way of *ius soli*, and another by way of *ius sanguinis*, that is, inherited from the parents or, at least, from one of them. These two nationalities will coexist in that person from birth, so we can have an Italian by *ius sanguinis*, who is an American because he was born in the United States[5]. This is what has been called in law the conflict of nationalities. This conflict can be positive (several nationalities) or negative (no nationality or statelessness). With the advancement of legislation, more and more people have two or more nationalities, all of them recognized by each country of origin and with their rights and obligations for the holder. As this issue of dual nationality has been developing strongly over the last 50 years, this has resulted in many investors around the world having at least two nationalities. In addition, the last thirty years, coinciding with globalization, investors have been characterized by intense mobility, South Americans living in Miami, Americans living in London, Bogota, or China. Every day we will see more and more people with the strangest mix of nationalities. However, what would be the problem for investors? Very simple, the main international investors conducting business under the cover of an investment treaty, either bilateral or multilateral, such as CAFTA-DR, could not sue the country of which they are nationals based on those treaties. In other words, if a country were to expropriate an investor who felt protected by a treaty, he would be excluded from that protection, regardless of whether that nationality is what he considers his principal nationality or whether that nationality was simply an accident of geography, because one of that person's parents was a transferred executive at the time the investor was born. As can be appreciated, every day we are moving more and more towards dual or triple nationality, and the issue should no longer be resolved with the approaches recommended by Vattel in

[4] See *Nottebohm Case* (Liechtenstein v. Guatemala), Judgment of April 6, 1955, at 23 (https://www.icj-cij.org/files/case-related/18/018-19550406-JUD-01-00-EN.pdf).

[5] In fact, as indicated by U.S. Secretary of State on its website "[p]ersons may have dual nationality by automatic operation of different laws *rather than by choice*." (emphasis supplied)

1758[6], in his work The Law of Nations. Neither can we continue using the criteria used by the Mixed Claims Commission United States-Venezuela of 1902/3[7], nor with the Nottebohm case of 1955[8], which was not even a case of dual nationality at birth but by naturalization[9]. Thus, we have seen how many cases of investors with dual nationality have emerged in investment arbitration, cases such as *Micula v. Romania*, *Olguin v. Paraguay*, *Ballantine v. Dominican Republic*, *Serafin Garcia Armas v. Venezuela*, *Manuel Garcia Armas v. Venezuela*, and *Carrizosa v. Colombia*, among others. With these cases in mind, an important complexity arises. A significant part of the doctrine states that an investor cannot sue the country of which he is a national, since most bilateral investment treaties and investment chapters of free trade agreements expressly prohibit this. In fact, Article 25 of the ICSID Convention expressly states that the dispute must be between a contracting state and a national of the other contracting state. However, there is an exception to this rule, which allows citizens with dual nationality to sue those states, provided that their dominant nationality is that of the other state and not that of the host state.

However, international investment arbitration is where nowadays most of the decisions involving private international law are being produced. It is essential to bear in mind that it is a very important source of law creation. As a basic tool to maintain legal certainty, therefore, we must -as a community- take a step forward to solve or start the path to leave behind the dilemma of dual nationality.

In order to better understand the subject, this analysis will consist of six distinct and yet deeply interrelated sections, namely: (i) historical background, (ii) the genuine link test, (iii) dual nationals in investor-state arbitration, (iv) the factors related to the determination

[6] See Emer de Vattel, *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* 192 (Joseph Chitty ed., T. & J.W. Johnson Publishers 1854) (1797). (Indeed, it is worth noting that Vattel echoed the principle of *ius sanguinis* with one exception. The point has its foundation in Book 1, Chapter 19, § 212 (Citizens and natives)).

[7] Mixed Claims Commission United States – Venezuela, Constituted Under Protocol of 17 February 1903 (https://legal.un.org/riaa/cases/vol_ix/113-318.pdf) (Indeed, in most of these cases (1902/3), as in those of the American-Venezuelan Commissions of 1885, the residence factor was given preponderant value as the cornerstone on which nationality rested. In this vein, Professor Tatiana de Maekelt, in 1962, pointed out that, at the end of the nineteenth century, the discussion of *lex patriae* versus *lex domicilii*, concluded in favor of the former. However, as a consequence of the World Wars, the concept had to be revised due to the constant migratory currents, an argument that ended up leaning in favor of domicile (*See Nacionalidad y domicilio en el Derecho Internacional Privado*, Revista de la Facultad de Derecho, Universidad Central de Venezuela (1962)).

[8] See *Nottebohm Case* (Liechtenstein v. Guatemala), Judgment of April 6, 1955.

[9] The Nottebohm case and its sequel, the Mergé case, are cases decided by the ICJ more than seven decades ago, which will be analyzed in this paper and whose basis is the place of residence, and which cannot be the only factor to be considered in 2023.

of dominant and effective nationality, (v) new times required new paradigms, and (vi) a conclusion.

II. Historical background

A. Once upon a time

The historical vision of nationality has varied, as is logical, over the course of the centuries. Here are some approaches:

In ancient Greece, citizens were considered to be those people who had the right to participate in the affairs of the state.

In Rome, there were two different concepts, the first from 753 BC, which recognized citizenship for patricians, that is, men over 17 years of age, who participated militarily and financially in the life of the city. The second concept arrived with the Republic in 504 BC, where it was understood that a citizen was a person committed to looking after the interests of the *res publica*, that is, the common good. In this phase of the city's history, citizens enjoyed civil and political rights[10].

In the 5th century, St. Augustine, in his work *De Civitate Dei*, refers to citizenship not from a political point of view, but from the concept of the religious community.

In 1274, St. Thomas Aquinas, in his *Summa Theologica*, analyzed the issue of nationality from a less political perspective, one closer to an understanding of the rights and obligations of individuals within communities. In this vein, he pointed out that "a person can be a member of several societies, as long as the laws of those societies do not contradict each other." In other words, we could infer that he saw the possibility that a person could be part of more than one political society, as long as the laws of those societies did not contradict each other[11].

In the first half of the 16th century, Francisco de Vitoria, one of the fathers of modern international law, understood that man had a right to citizenship and domicile in a country[12]. Indeed, Father Vitoria, a priest of the Order of Preachers, states in his work that it is valid for Spaniards to negotiate with the aborigines, as well as to take up residence in "some Indian city," to take a wife "as is the custom of foreigners in that country," and to naturalize in those lands, in order to enjoy "the privileges of citizenship that others enjoy, as long as they

[10] Among the civil rights they were the right to own property, the right to do business, and the right to marry members of the same social class. In the same vein, political rights were basically twofold: the right to run for public office and the right to vote, i.e., to elect candidates for public office. Among the political rights reserve for citizens was the right and duty so serve in the Roman Army.

[11] Indeed, in his work *Summa Theologica*, II–II, q. 104, a. 2, Aquinas establishes that "[a] person may be member of several societies, provided that the laws of those societies do not contradict one another." See Thomas Aquinas, *Summa Theologica*, trans. Fathers of the English Dominican Province (New York: Benziger Brothers, 1947).

[12] See Francisco de Vitoria, *Los derechos humanos – Antología* (Salamanca: Ed. San Esteban, 2ª ed., 1984), 241–58.

bear the same burdens as them"[13]. In the 17th century, Hugo Grotius, in his work *De Jure Belli ac Pacis*, partially laid the foundation for the subsequent development of the concept of nationality. Indeed, for Grotius, nationality was not just a political or legal status, but a moral dimension and a natural right. Grotius was convinced that human beings are part of a natural community and, as such, the natural community and nations are obliged to respect the natural rights of individuals regardless of borders.

Meanwhile, during the same 17th century, another authority of international law, Samuel Pufendorf, relates that citizenship and loyalty are linked to a broader theory of natural law and the role of individuals within civil society. For Pufendorf, individuals have natural obligations and duties, however, these duties can be regulated or extended through theories of social contracts and the formation of states[14].

In the 18th century, Vattel pointed out that nationality was fundamentally tied to the idea of sovereignty. A nation, or a state, was seen as a body of individuals united by common interests, laws, and customs. Vattel argued that individuals owe allegiance to their country and have a duty to the state that protects their rights. Nationality, in this vein, is both a legal and moral bond between the citizen and the state.

With the American (1776) and French (1789) revolutions, concepts based on the religious community were left behind in favor of a return to the political concept. Thus, Americans embraced a more individualistic vision of nationality, while the French tended to confuse citizenship with the idea of nation in political terms, going so far as to identify the two concepts. Along the same line of thought, Simón Bolívar, at the Congress of Angostura[15], told those present that, in order to be an active citizen, it was necessary to "know how to read and write and to profess a science or have a scientific degree"[16].

Until the beginning of the 19th century, the world understood citizenship and nationality as if they were synonymous,

[13] Francisco de Vitoria, *Relecciones teológicas* (Madrid: Librería Religiosa, 1917), 72 (available at https://archive.org/details/B0811971/page/n121/mode/1up).

[14] In his work *On the Duty of Man and Citizen*, Pufendorf states that "the word 'citizens' is often applied only to certain persons by whose union and consent the state was originally formed, or their successors, that is to say, the heads of households." At the end of his work, he points out that "[g]eneral duties last as long as a man remains a citizen." And he continues "[c]itizen ceases if a person leaves his country . . . to settle elsewhere...." (See Samuel Pufendorf, *On the Duty of Man and Citizen* (New York: Cambridge University Press, 1991), 138, 177).

[15] The Congress of Angostura, which was opened by Bolivar with his so-called Angostura Speech, was held between February 15th, 1819, and July 1821, and its objective was to draw up the constitution of Gran Colombia, and the fundamental law of the new republic.

[16] See Armando Rojas, *Bolívar, la educación y su importancia* (available at https://repositorio.unal.edu.co/bitstream/handle/unal/26794/13535-38316-1-PB.pdf?sequence=1&isAllowed=y).

however, that would change with Mancini and his doctrinal school.

Indeed in 1851, Pasquale Mancini, in a speech delivered at the University of Turin, pronounced his famous maxim "nationality must follow the person like the shadow follows the body," which summarizes his main idea, that is, "that every nation had the right to become a state and that, for such purposes, the international community should recognize the norms that it dictated and apply them to 'all its nationals,' regardless of where those nationals were located"[17].

Mancini's conception was echoed in Germany, which was made up of multiple states until the unification in 1871. Even though there was no single citizenship based on a political concept, the country was united by the idea of the *volk*, that is, a common essence. Therefore, each person was born with a nationality that could not be changed at any time in their life[18].

Thus, the legal world is debating, for the first time, between the concepts of domicile and nationality. The United Kingdom and the United States are inclined towards the first –*lex domicilii*–and France, Germany, Italy, Spain, and Portugal, among others, towards the second, that is, lex patriae. Towards the end of the century, the conflict was resolved in favor of *lex domicilii*[19].

It is this *lex domicilii* that has been applied by arbitration tribunals in conflicts between investors and states, to undermine the legitimacy of those investors who have dual or multiple citizenship and who are the subject of this study.

We will now examine how dual nationality was acquired and how cases of this type were resolved until 1930.

B. Ius Soli or Ius Sanguinis

As indicated, historically there have been two fundamental principles that nations have used to determine who are their nationals and who are outside their protection. These principles are inheritance and place of birth, i.e., *ius sanguinis*[20] or *ius soli*[21]. The law of inheritance or blood, which implies that the children of nationals will be nationals of a country, is a newer and more revolutionary concept than the original use of ius soli by nations. In fact, in the 14th century, Baldo degli Ubaldi, in his analysis and com-

[17] See Mercedes Soto Moya, "El Derecho Humano a la Nacionalidad: Perspectiva Europea y Latinoamericana," *Araucaria* 20, no. 40 (2018).

[18] This concept reached its maximum expression in 1913, when the law established that Germans, wherever they lived, would always maintain their German nationality.

[19] See Tatiana Bogdanowski de Maekelt, "Nacionalidad y domicilio en el Derecho Internacional Privado," *Revista de la Facultad de Derecho*, Universidad Central de Venezuela (1962).

[20] See Aaron X. Fellmeth et al., *Guide to Latin International Law* (1st ed., Oxford: Oxford University Press, 2011). (Ius sanguinis is "the right to claim citizenship based on race or nationality, as when a person acquires the nationality of a state because one or both parents have the nationality of the state.")

[21] See *Nottebohm Case* (Liechtenstein v. Guatemala), Judgment of April 6, 1955 (defining *ius soli* as the "right to acquire the nationality of a state by virtue of having been born within its territory").

mentaries on Justinian's *Corpus Iuris Civilis*, pointed out the difference between citizenship of origin and acquired citizenship[22]. Thus, he said that a citizen of origin is the one born in a certain city, and refers to the example, if someone was born in the city of Florence is Florentine. Consequently, the states that were born in Europe, throughout the fourteenth, fifteenth and sixteenth centuries, were adopting the use of ius soli.

With the passage of time, the philosopher and jurist Emer de Vattel, in his 1758 work, *The Law of the Nations*, while referring to "our native country," pointed out a new concept:

> The citizens are the members of the civil society; bound to this society by certain duties, and subject to its authority, they equally participate in its advantages. *The natives, or natural-born citizens, are those born in the country, of parents who are citizens*. As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, those children naturally follow the condition of their fathers, and succeed to all their rights. The society is supposed to desire this, in consequence of what it owes to its own preservation; and it is presumed, as matter of course, that each citizen, on entering into society, reserves to his children the right of becoming members of it. *The country of the fathers is therefore that of the children; and these become true citizens merely by their tacit consent*. We shall soon see whether, on their coming to the years of discretion, they may renounce their right, and what they owe to the society in which they were born. I say, that, *in order to be of the country, it is necessary that a person be born of a father who is a citizen; for, if he is born there of a foreigner, it will be only the place of his birth, and not his country*[23]. (emphasis supplied)

For the first time, we see that reference is made to inheritance as a fundamental factor for the acquisition of a nationality, moving away from the principle proposed by Baldo. However, the concept related to inheritance, even when it is embodied in the work, does not achieve popularity and Europe continues with the fundamental *ius soli*. Indeed, during the French Revolution, the Constitution of 1799, in its articles 2 and 3[24], indicates how French citizenship is acquired, either by being born on French

[22] See Carlos Amunátegui Perelló, "El surgimiento del *ius sanguinis* como criterio general de asignación de la nacionalidad: Algunos antecedentes que explican su aparición," *Ius et Praxis* 24, no. 3 (diciembre 2018). (In fact, Prof. Amunátegui leaves the quotation in Latin: "In loco originis, et in colatus, cogitur quis subire onera... Nota ex eo, quod dicit, Biblium ex origine, quod ítem est, quod dicere Florentinum, et natum de Florentia, quod declara, ut plene dixi in l.j. ad munic.... De incolis, et ubi quis domicilium habere videtur. Et de his, qui studiorum causa in alia civitate degunt.")

[23] *See supra* n. 6.

[24] In fact, article 2 established that "[a]ny man born and residing in France, who, having reached the age of twenty-one years, has had himself registered in the civic register of his municipal arrondissement, and who has remained for one year in the territory of the Republic, is a French citizen." Likewise, article 3 stated that "[a] foreigner becomes a French citizen when, after reaching the age of twenty-one years, and having declared his intention to take up residence in France, he has had his residence there for ten consecutive years."

soil or when a foreigner who has reached 21 years of age and who has lived 10 years in France, declares his intention to take up residence in that country. The United States of America, meanwhile, continues the tradition and embraces *ius soli* as the method of acquisition of American nationality.

A few years later, during the deliberations for the drafting of the French Civil Code, between 1800 and 1804, the issue of nationality was raised as a topic of conflict, involving jurists, the Council of State and the Consul, Napoleon Bonaparte[25]. During the deliberations, voices were raised about nationality by birth or nationality by inheritance. One stream maintained as a fundamental idea that those born in French territory would be French; while the others pointed out that only the children of French nationals, born inside or outside the territory, would obtain the nationality. The latter idea was rejected, since a child without parents, even if born in France, would be stateless. The discussion ended with the adoption by the Council of State of the concepts of *ius soli* and *ius sanguinis* as ways of acquiring French nationality[26].

Over the nineteenth century, the countries of Central and South America adopted both concepts, so that nationality would be acquired by birth or by inheritance from parents, the idea being that the highest number of people would have nationality to populate the new countries. For instance, Venezuela provides for nationality by birth, or for the children of Venezuelans, regardless of where they are born, if they are children of a Venezuelan father or mother. Now in the 21st century, there are few countries that limit their nationality to ius sanguinis, as is the case of Germany[27], Japan[28], or Saudi Arabia[29].

C. How the dual nationality issue was resolved up to 1930

The issue of dual nationality has been present in all ages. As mentioned, in the 14th, 15th and 16th centuries, it had already been defined who were the nationals of each country, so that the allegiance of the subject to a crown was clear. How-

[25] Bonaparte was born in Corsica the year after France acquired the island from the Republic of Genoa.

[26] Indeed, according to the Decree of March 8th, 1803, which constitutes Title I, Chapter I, of the French Civil Code, on Article 9 states: "Every individual born in France of a foreigner, may... claim the quality of Frenchman." Likewise, Article 10 indicates: "Every child born of a Frenchman in a foreign country is French." See *French Civil Code*, Decree of March 8, 1803, Title I, Chapter I, arts. 9–10 (http://files.libertyfund.org/files/2353/CivilCode_1566_Bk.pdf).

[27] *See* Section 4 of German Nationality Act (https://www.gesetze-im-internet.de/englisch_stag/englisch_stag.html) (The act, in general terms, establishes that "[a] child acquires German citizenship by birth if one parent has German citizenship."

[28] *See* Article 2 of the Japanese Nationality Act (https://www.moj.go.jp/EN/MINJI/minji78.html#a04)

[29] Decree 20, of 1960, amended article 7 of the Saudi Arabian Nationality Law, which was worded as follows: "A Saudi is the person who is born inside or outside the Kingdom of Saudi Arabia and whose father is a Saudi national; or whose mother is a Saudi national and his father of unknown nationality, or without nationality; or who is born inside the Kingdom of Saudi Arabia and his parents are unknown - A foundling is considered born in Saudi Arabia unless otherwise proved."

ever, there were cases in which some national resorted to some kind of court to clarify what his allegiance was and, therefore, what his nationality was. There are a couple of rather old cases that are worth mentioning and then we will turn to the cases of the mixed commissions created by treaties and settled by arbitrators or umpires, a distant relative of today's investment promotion and protection treaties.

1. The Isaac Williams Case

It was a case decided by the district court of Connecticut on February 27, 1797. It involved a United States national who accepted a commission with the government of the French Republic and committed acts of hostility against Great Britain, claiming that he had voluntarily expatriated from the United States and become a French citizen. The expatriation plea raised a doubt that had to be settled by the Supreme Court. Justice Ellsworth, one of the Founding Fathers of the United States, analyzed the case and gave his opinion in 1799, noting that a government cannot consent to a person expatriating himself[30] and, therefore, any argument to that effect on the part of Williams was "totally irrelevant," considering which, the Williams was found guilty, fined, and imprisoned[31].

2. Heirs of James Drummond Case

After his abdication, King James II, went into exile in France in 1688, where he was accompanied, among others, by James, Earl of Melfort. The family continued to live in France. Thus, James Lewis Drummond, inherited from his father the English title of Duke of Melfort, and from his mother an estate of Lussan in Langedoc. James Drummond additionally held the title of Colonel in the French army, even during the war with Great Britain in 1780. In October 1792, the Langedoc property was seized, because of the enforcement of decrees against French émigrés and was subsequently sold in 1794. Drummond's heirs brought the case before the Commission for Liquidation, established by the Treaty of Paris of 1814 (first Treaty of Paris) which was rejected by the Commissioners in 1827. Having failed the first attempt, the heirs filed a second claim before the Commissioners for Liquidating the Claims of British Subjects on France, based on the Treaty of Paris of 1815 (known as the second Treaty of Paris). During the deliberations, Sir Herbert Jenner, argued that "a treaty speaks of the subjects of any nation, it must mean those who are *actually and effectually* under its rule and government, not those, who although

[30] Indeed, the Chief Justice pointed out "[t]he present question is to be decided by two great principles; one is, [i] that all the members of civil community are bound to each other by compact. The other is, [ii] that one of the parties to this compact cannot dissolve it by his own act."

[31] The Williams case was referred by James Brown Scott in the article *Nationality, Jus Soli or Jus Sanguinis*, *The American Journal of International Law*, vol. 24, no. 1 (January 1930), 61.

living out of its dominions, and never having been subject to its government, it may choose to designate its subjects, in its own municipal laws and statutes. It never could have been the intention of the framers of this treaty that the expression, 'British subjects,' should include persons who were also, French subjects"[32].

The Commissioners' decision rejected the petition because they considered that Drummond was not British because "though formally and literally, by the law of Great Britain... the question is, whether he was a British subject within the meaning of the treaty. He might be a British subject and might also be a French subject; and if he were a French subject, then no act done towards him by the Government of France could be considered an illegal act... therefore, [was] James Lewis Drummond, in the years 1792 and 1794, a French subject, according to the law of France then existing?"[33] The commission concluded that "although James Lewis Drummond was technical a British subject in the years 1792 and 1794, yet, he was also, at the same time, in form and in substance, a French subject, domiciled in France, with all the marks and attributes of French character. He and his family had resided in France for more than a century; and the act of violence that was done towards him, was done by the French Government in the exercise of its municipal authority over its own subjects."[34]

In other words, faced with the dilemma of whether Drummond was of one or the other nationality, the Commission chose to declare that although he had both nationalities, the French nationality prevailed in the case under consideration, making use of elements such as domicile, that Drummond had never lived in Great Britain, that he had been part of the French army and, consequently, the expropriation suffered was of a Frenchman by his government, being under the rule of French law, in other words, lawfully.

3. Hammer and de Brissot's cases

Hammer and de Brissot[35], two diplomatic protection cases, filed before the American Venezuelan Commission, based on the 1885 Treaty[36], sought compensation for the heirs of Hammer and de Brissot, two widows and their children, who held both American and Ven-

[32] See *Drummond's Case* [1834] 2 Knapp 295, 12 Eng. Rep. 492.
[33] *Drummond's Case* [1834] 2 Knapp 295, 12 Eng. Rep. 492.
[34] *Drummond's Case* [1834] 2 Knapp 295, 12 Eng. Rep. 492.
[35] Case referred by William L. Griffin, "International Claims of Nationals of Both the Claimant and Respondent States – The Case History of a Myth," *International Lawyer* 1 (1967): 400.
[36] See *Convention concerning arbitration of claims between the United States of America and Venezuela* (December 5, 1885) (https://jusmundi.com/en/document/treaty/en-convention-between-the-united-states-of-america-and-venezuela-to-remove-doubts-as-to-the-meaning-of-the-convention-signed-december-5-1885-1888-convention-concerning-arbitration-of-claims-between-the-united-states-of-america-and-venezuela-1888-thursday-15th-march-1888).

ezuelan nationality. The widows had the American nationality by marriage and the children by *ius sanguinis*. The Commission concluded that the claimants were not American nationals under the terms of the treaty. The arguments used were[37]: (A) regarding the widows: (i) they were born in Venezuela, (ii) they married Americans in 1853, before the entry into force of the 1855 law, which would have made them American citizens, (iii) they always resided in Venezuela, (iv) after becoming widows, they did not make any declaration of willingness to keep the American nationality, (v) they never went to the United States, and (vi) they preferred to keep the Venezuelan citizenship. (B) Regarding the children: (i) they were born and always resided in Venezuela, (ii) they did not make any declaration of will to maintain the American nationality, (iii) they never lived in the United States. Having analyzed the above, the Commission pointed out that, in the event of a conflict between several nationalities, the nationality acquired by birth in the territory and domicile should be considered decisive. Therefore, neither the widows nor the children had standing before the Commission.

4. The blockade of Venezuelan ports in 1902 and the subsequent arbitrations in 1903

The arbitrations of 1903 had their origin in pecuniary claims of Great Britain, Germany, and Italy against the Republic of Venezuela. Faced with the refusal of the latter to sit down to resolve the pending issues, on December 11, 1902, Great Britain decided to blockade militarily the ports of Venezuela. Two days later Venezuela proposed an arbitration, but the three European nations rejected this proposal and decided to extend the blockade for a week. The following week they opted for arbitration, for which Venezuela signed a Protocol in Washington with the three countries joined by the United States of America, France, Spain, Belgium, The Netherlands, Sweden and Norway, and Mexico. The Protocol was clear in that the three original countries had preference over the others in any payment that Venezuela could make. Within this framework, the Protocol between Germany and Venezuela for the reference of Certain Questions to the Permanent Court of Arbitration at The Hague (Washington, May 7, 1903) was signed.

Based on this Protocol, eleven international arbitration tribunals were installed in Caracas in 1903, seven of whose cases involved dual nationality issues[38]. The

[37] *See supra* n. 35, at 416.
[38] *Id.* at 417.

cases were: (i) Mathison, (ii) Stevenson, (iii) Brignone, (iv) Miliani, (v) Poggioli, (vi) Maninat, and (vii) Massiani. We will analyze what problems were found and how they were solved.

i. *The* Mathison *Case*[39]: The claim was brought for damages caused to property of the Mathison family by troops of the Venezuelan government, in the amount of £4,766. Mr. Mathison, aged 45 in 1903, was the son of a British citizen born in Trinidad. Under British law he was a national of Great Britain (*ius sanguinis*) and under the Venezuelan Constitution he was a Venezuelan by birth (*ius soli*). Umpire Plumley analyzed the constitutions of Venezuela and the peaceful definition of national by birth. He further made the analysis with the following elements: "It is not egotism for a country to assume that a man who becomes *de facto* a citizen by (i) his established domicile, (ii) who there erects his rooftree, (iii) there selects and locates his wife, and (iv) there rears his children, (v) has deliberately chosen that such country shall be for his children their native land, to whom they, if not he, shall owe allegiance. If citizenship is thereby imposed, it is not by the state, but by the parent"[40]. Based on that analysis it concluded that Mr. Mathison was, to the eyes of international law, only a Venezuelan national, as he had always lived in Venezuela, married a Venezuelan, and raised his children in that country.

ii. *The* Stevenson *Case*[41]: The case was brought by the heirs of J.P.K. Stevenson, a British national who married Julia Arostegui, a Venezuelan national by birth and with whom he fathered 12 children. The marriage was celebrated in Trinidad, because Mr. Stevenson was a Protestant and the parish priest of Maturin refused to celebrate the union. Of the Stevenson's children, 10 were born in Venezuela and the last two, Juan and Guillermo, in Port of Spain (Trinidad). When the case was brought before the umpire, he analyzed the issue of dual nationality. In fact, Mrs. Stevenson held Venezuelan nationality by birth and English nationality by marriage to a British national. Likewise, ten of her children had British nationality for having been born to a British father and Venezuelan nationality for having been born on Venezuelan soil. Juan and Guillermo, on the other hand, were British by birth and on their father's side. Plumley, the umpire, in reference to the widow and the ten children born in Venezuela, pointed out

[39] See *Opinion of Plumley, Umpire* (https://jusmundi.com/en/document/decision/en-mathison-case-opinion-of-plumley-umpire-thursday-1st-january-1903).
[40] *Id.* at 492.
[41] See *The Stevenson Case* (on merits), 494–510 (https://legal.un.org/riaa/cases/vol_IX/494-510.pdf).

that being Venezuelan by birth and having resided in Venezuela, except for very short periods of time, the rule of public law[42], according to which a person with dual nationality should be considered a national of the country in which he is domiciled, should be applied, in the case under study, Venezuela. In the case of Juan and Guillermo, on the contrary, even though they held public positions, the first, and in the Venezuelan army, the second, it did not constitute any limitation to the British nationality by birth that they both held. Therefore, they were each awarded compensation for one thirteenth of the claimed damages.

iii. *The* Brignone *Case*[43]: This matter was part of the cases analyzed by the Italian- Venezuelan Joint Commission. The case was brought by the heirs of Sebastiano Brignone, namely his widow and children. The Italian commissioner pointed out that the widow was a national of Italy since she had acquired the nationality by marrying an Italian national. The Venezuelan commissioner, on the other hand, only said that Mrs. Brignone was Venezuelan by birth and had always lived in Venezuela. Umpire Ralston in his analysis stated that, in effect, although the widow had Venezuelan nationality, because of her marriage she should be considered Italian. However, when he analyzed the law of both countries, he found that both Italian and Venezuelan law were clear in stating that the Italian nationality protected her while she was married, but, when the bond ceased due to the death of her husband, Mrs. Brignone had resumed her original nationality. In conclusion, Ralston pointed out that the widow, upon reassuming the Venezuelan nationality, did not have standing before the Commission. Likewise, the other heirs were granted compensation, up to 50%, "but without prejudice as to the right of the widow to pursue her remedies elsewhere"[44].

iv. *The* Miliani *Case*[45]: This case is a little different from the others. Mr. Michele Miliani, an Italian national, who lived in Venezuela for a long time. Between 1871 and 1872, revolutionary leaders gave him *vales* (promissory notes) for assets expropriated during the so-called Yellow Revolution (named after the color representing the liberals). In the same way, between 1899 and 1900, the estate of Michele Miliani suffered

[42] *Id.* at 500 (The rule of public law, referred here, was applied by umpire Plumley himself in the *Mathison case*.)
[43] See Brignone Case, 542–551 (https://legal.un.org/riaa/cases/vol_X/542-551.pdf).
[44] *Id.* at 551.
[45] See *Miliani Case*, *Reports of International Arbitral Awards* 1903, Vol. X, 584–91 (United Nations, 2006) (https://legal.un.org/riaa/cases/vol_X/584-591.pdf).

new expropriations. Earlier, in 1872, he had married Matilde, a Venezuelan national. Again, the claim came from the Italian commissioner, who alleged that Miliani's widow and children were undoubtedly nationals of Italy, one by marriage and the others by *jus sanguinis*. Umpire Ralston, said: "So far as the rights of the widow are concerned, the questions affecting them were disposed of in the case of the estate of Sebastiano Brignone, wherein it was held that in the event of conflict of laws the status of a woman born in Venezuela, married here to an Italian, and becoming a widow and always residing here, was to be determined by the laws of Venezuela, the land of her domicile, which declared her to be Venezuelan. The condition of the widow in this case being identical, her claim must be rejected for lack of jurisdiction, but without prejudice to her other remedies"[46]. As for the Miliani children, the Umpire said that they could be considered by Italy as Italians, before any country in the world except Venezuela, because they were - equally - Venezuelan by birth. Hence, Ralston said "A decree may therefore be entered dismissing the claim, but without prejudice to such rights as the claimants may have elsewhere"[47].

v. *The* Poggioli *Case*[48]: Without much ado, the umpire decided in accordance with the two previous cases by stating that "[t]he widow and children of an aggrieved Italian, who were all born in Venezuela and have always lived in that country, cannot claim as Italian subjects before this Commission (affirming Brignone and Miliani cases)"[49].

vi. *The* Maninat *Case*[50]: An extremely complicated case, it involved several of Jean Maninat's relatives. In fact, his brother Pierre Maninat filed the claim stating that, in 1898, his brother Jean was ill-treated and wounded in the presence of a general who served as second-in-command of the expeditionary army of General Andrade's government. As a result of his wounds, he died a month later. For his part, Pierre suffered persecution and at the time of the claim he was residing in Guatemala. Umpire Plumley, who had already acted in the Mathison case, said that "[t]here is also the rule that in conflict of laws, the law of the place of domicile

[46] *Miliani Case*, *Reports of International Arbitral Awards*, vol. X, 589.
[47] *Miliani Case*, *Reports of International Arbitral Awards*, vol. X, 591.
[48] See *Poggioli Case*, *Reports of International Arbitral Awards* 1903, Vol. X, 669–92 (United Nations, 2006) (https://legal.un.org/riaa/cases/vol_X/669-692.pdf).
[49] *Poggioli Case*, *Reports of International Arbitral Awards*, vol. X, 669.
[50] See *Heirs of Jean Maninat Case*, *Reports of International Arbitral Awards* 1905, Vol. X, 55–83 (United Nations, 2006) (https://legal.un.org/riaa/cases/vol_X/55-83.pdf).

should prevail"[51]. In fact, he said that heirs who were born and raised in Venezuela should be considered Venezuelan, giving force to the argument of the law of domicile. However, the Commission decided that those who had proven to have French nationality, such as Pierre, who had served in the military service for France and there was evidence of his interactions with the French consuls in Venezuela and Guatemala, were granted an indemnity of one hundred thousand francs.

vii. *The* Massiani *Case*[52]: The story is like the previous ones, a French national, Thomas Massiani, settled in Venezuela, where he married Carmen Silva and fathered five children. The family resided in the town of Carúpano, where Mr. Massiani died in 1901. The question before the Commission was whether the heirs had French nationality in order to obtain compensation for damages from the arbitral tribunal, in other words, whether or not the tribunal had jurisdiction. The umpire was Mr. Plumley. The answer, as in other cases decided by Plumley, was that both the widow and the children were born in Venezuela and had always lived there. In the case of the widow, it was said, that just as she had acquired French nationality by marriage, according to Venezuelan law, she had lost it with the death of her husband. Consequently, according to Venezuelan law they were Venezuelans[53]. However, the claim was dismissed for lack of jurisdiction, but, without prejudice to the rights of the claimants in other jurisdictions, "to whom is especially reserved every right which would have been theirs had this claim not been presented before this mixed commission"[54].

5. Mexican Claims Commissions

Between 1923 and 1934, Mexico was faced with seven mixed commissions to resolve conflicts submitted in favor of foreign nationals, with France, Great Britain, Germany, Italy, Spain and two of them with the United States. In these seven commissions some cases of dual

[51] *Heirs of Jean Maninat Case*, *Reports of International Arbitral Awards*, vol. X, 56. (Indeed, the umpire's comment was that "in conflict of laws the law of the place of domicile should prevail" because if France would intervene when the claimant is Venezuelan according to the laws of Venezuela "and French under the laws of France would make the law of France superior to the law of Venezuela, which is not permissible between two sovereign nations.")

[52] See *Heirs of Massiani Case*, *Reports of International Arbitral Awards* 1905, Vol. X, 159–84 (United Nations, 2006) (https://legal.un.org/riaa/cases/vol_X/159-184.pdf).

[53] *Heirs of Massiani Case*, *Reports of International Arbitral Awards*, vol. X, 183. (In fact, the award stated that "governed by the laws of their domicile, they are Venezuelans.")

[54] *See supra* n. 52, at 184.

nationality were analyzed, here we will summarize one of them[55].

i. *The* Pinson *Case*[56]: This was a case heard by the Franco-Mexican commission. Mr. Georges Pinson was the son of a French immigrant who fathered two children in Mexico, the first born in 1872 and Georges in 1875. The father died in 1884. When Georges reached the age of majority, he was in Algeria doing military service for France. He then returned to Mexico where he had a son in 1904. In 1914, at the outbreak of war, he returned to France. The issue of dual nationality arose because, by birth, Georges was Mexican, and by right of blood he was French. The Mexican Constitution, at that time, required that (i) those born on Mexican soil, upon reaching the age of majority, declare their willingness to acquire the other nationality, otherwise they would be considered Mexicans; and (ii) it stated that those who rendered their services to a foreign power would lose their Mexican nationality. Therefore, the commission concluded that the Constitution was clear, Mr. Pinson "was engaged in French military service and thereby lost any color of Mexican nationality he may have possessed"[57]. Therefore, the compensation requested from the Commission was granted.

6. The Hague Convention on the Conflict of Nationalities of 1930

In the forum of the League of Nations, in the Committee of Experts created in 1924, some issues were considered that needed to be analyzed. One of the topics was nationality. Indeed, out of that came the Hague Convention on Certain Questions Relating to Conflicts of Nationality of April 12, 1930[58]. Despite what the experts inferred, there was not the necessary ripeness to analyze the subject in depth[59], to the extent that the convention was ratified by very few states. Of that Convention, which consists of 31 articles in 8 pages, only two of them deal with the issue of dual nationality, having missed the opportunity to settle the problem once and for all. The articles in reference establish:

[55] See Sir John H. Percival, "International Arbitral Tribunals and the Mexican Claims Commissions," *Journal of Comparative Legislation and International Law* 19, no. 1 (1937): 98–104.

[56] See *Georges Pinson v. United Mexican States*, *Reports of International Arbitral Awards* 1928, Vol. V, 327–466 (United Nations, 2006).

[57] *Georges Pinson v. United Mexican States*, *Reports of International Arbitral Awards*, vol. V, 328.

[58] *See* the full text of the convention at https://prawo.uni.wroc.pl/sites/default/files/students- resources/Convention%20on%20certain%20questions%20relating%20to%20the%20conflict%20of%20nationality% 20laws%20FULL%20TEXT_0.pdf

[59] In fact, Bar-Yaacov commented that "[t]he Commission decided to defer further consideration of the topic because it was not of immediate urgency and because governments would not be prepared to make any concessions which might lead to its solution." (See Nissim Bar-Yaacov, *Dual Nationality* (London: Stevens & Sons Limited, 1961), xi).

> Article 4: A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.
>
> Article 5: Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, *a third State shall*, of the nationalities which any such person possesses, *recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected*. (emphasis supplied)

It should be mentioned that the two articles have different inclinations, Article 4 concerns public international law, and Article 5 belongs to the compass of private international law.

The Conference did not make significant progress on the topic of dual nationality; however, it recommended that States should adopt legislation favoring the *renunciation of nationality where the person does not reside*[60]. The Convention entered into force in 1937.

III. The Genuine Link Test

The so-called genuine link test, which refers to the dominant and effective nationality of a subject, was first brought up in the Drummond case in 1834, where it was stated that although Drummond was formally a national of Great Britain, he was also a national of France, with the aggravating circumstance that his actual connections to that country were more important than to the former. Indeed, he lived in France, he was a member of the army, his property was in France and, therefore, he was considered a national of France, losing the opportunity to claim compensation for the damages caused by France, because as a national of that country, the expropriation did not violate the principles of international law. Later, in several of the arbitration's cases involving Venezuela and Mexico, the Commissioners applied the rule of the real, genuine, or dominant connection, as it has been called. Likewise, the rule of dominant and effective nationality was embodied in Article 5 of the Hague Convention on Conflicts of Nationalities, when it stated that "a third State shall, of the nationalities which any such person possesses, recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected." Finally, the cases of Nottebohm and Mergé, gave a new dimension to the rule when they expanded

[60] Bar-Yaacov, *Dual Nationality*, 81–82. (In fact, the text states "[t]he Conference recommends that States should adopt legislation designed to facilitate, in case of persons possessing two or more nationalities at birth, the renunciation of the nationality of the countries in which they are not resident, without subjecting such renunciation to unnecessary conditions.")

the spectrum of the genuine link. The analysis of both cases is compelling.

A. Nottebohm Case

The venerable Nottebohm case[61], now criticized and even disapproved, is not a case of dual nationality by birth, but, rather, a case of nationality acquired by naturalization. Nottebohm has the merit of having originated the contemporary interpretation of the dominant and effective standard. Although rivers of ink have flowed over the history of Nottebohm, a review of the case and its conclusions is necessary because, despite the proliferation of literature on the subject, little has been contributed by way of sustained analysis of the nature of the test it applies. Friedrich Nottebohm, a German citizen by birth (1881), applied for naturalization in Liechtenstein in 1939, still holding German nationality. However, Mr. Nottebohm had resided in Guatemala since 1905, where the main seat of his business was located. In 1939, at the dawn of World War II[62], Nottebohm applied for Liechtenstein nationality, which was granted on October 20, 1939. In January 1940, two months after acquiring Liechtenstein nationality, Nottebohm returned to Guatemala with the new nationality. Although Guatemala had remained neutral to the war, after the attack on the United States at Pearl Harbor, Guatemala declared war on Germany. Despite the change of nationality, Nottebohm was treated as a German citizen, his property was seized, he was arrested, detained, and expulsed from the country, and he was forbidden to return to Guatemala[63]. On these grounds, the Principality of Liechtenstein, using diplomatic protection, moved to sue Guatemala to demand the return of the expropriated property and compensation for damages caused to a national of the Principality.

In its reply, Guatemala "expressly stated that it could not 'recognize that Mr. Nottebohm, a German citizen subject habitually resident in Guatemala, has acquired the nationality of Liechtenstein without changing its habitual residence'"[64]. Indeed, the ICJ framed the case in a single paragraph:

> In the present case it is necessary to determine whether the naturalization conferred on Nottebohm can be successfully invoked against Guatemala, whether, as has already been stated, it can be relied upon as against that State, so that Liechtenstein is thereby entitled to exercise its

[61] See *Nottebohm Case* (Liechtenstein v. Guatemala), *I.C.J. Reports*, Second Phase (April 6, 1955), 4–23. See the general analysis discussed here concerning the *Nottebohm Case* was argued by the author in the PCA case No. 2018-56, styled *Carrizosa v. Colombia* (https://www.italaw.com/cases/7175).

[62] World War II, at the European stage, began on September 1, 1939, and culminated with the capitulation of Germany on May 9, 1945.

[63] *Nottebohm Case* (Liechtenstein v. Guatemala), *I.C.J. Reports*, Second Phase (April 6, 1955), 7.

[64] *Nottebohm Case* (Liechtenstein v. Guatemala), *I.C.J. Reports*, Second Phase (April 6, 1955), 19.

protection in favour of Nottebohm against Guatemala[65].

The ICJ answered the question in the negative. In doing so, the ruling articulates and relies three times on the antecedent of the "dominant and effective" test, which it expressed as "real and effective" nationality[66].

The elements to be considered in reaching the "real and effective" standard were broad, flexible, and non-exhaustive. Indeed, the Court said that there were different factors to be considered, the importance of which could vary from one case to another, such as "[t]he habitual residence of the individual concerned is an important factor, but there are other factors such as the center 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"[67].

In other words, the application of the "real and effective" test turn out to be more sophisticated than a simple counting of the elements between the three states, Liechtenstein, Guatemala, and Germany, meaning that a qualitative rather than quantitative approach was necessary. In fact, the ICJ struggled to determine whether Nottebohm's naturalization in Liechtenstein had been strategic and for a single purpose, or whether it was *bona fide* or disingenuous[68].

For instance, the Court noted that Nottebohm lived 34 years in Guatemala, but his connections with Liechtenstein were very weak[69]. The ICJ even recalled in its decision that Nottebohm was visiting the Principality when he decided to initiate the naturalization process[70].

In its analysis the ICJ further found that Nottebohm (i) had no activity or economic interests in Liechtenstein, and that (ii) his only real connection was that one of his brothers resided in Vaduz, the capital of the Principality. In other words, even if the nationality had been acquired in accordance with Liechtenstein law, it was not opposable in law to Guatemala, as it lacked genuineness, because, clearly, given the arguments presented in the case, Nottebohm's lack of connection with Liechtenstein was evident, contrary to the long-standing link with Guatemala, a link that the naturalization did not weaken in any way[71].

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[65] *Nottebohm Case* (Liechtenstein v. Guatemala), *I.C.J. Reports*, Second Phase (April 6, 1955), 21.
[66] *Alberto Carrizosa et al. v. Colombia*, Memorial on Jurisdiction, PCA Case No. 2018-56, 130.
[67] *Nottebohm Case* (Liechtenstein v. Guatemala), *I.C.J. Reports*, Second Phase (April 6, 1955), 22.
[68] *Alberto Carrizosa et al. v. Colombia*, Memorial on Jurisdiction, PCA Case No. 2018-56, ¶197.
[69] In fact, after being deported from Guatemala, Nottebohm established residence in Switzerland and not in the Principality.
[70] *Nottebohm Case* (Liechtenstein v. Guatemala), *I.C.J. Reports*, Second Phase (April 6, 1955), 25.
[71] *Nottebohm Case* (Liechtenstein v. Guatemala), *I.C.J. Reports*, Second Phase (April 6, 1955), 26. "*That naturalization was not based on any real prior connection with Liechtenstein*, nor did it in any way alter the manner of life the person upon whom it was conferred in exceptional circumstance of speed and accommodation. In both respects, *it was lacking in the genuineness requisite to an act of such importance*, if it is to be

The ICJ determined that Nottebohm had indeed engaged in treaty shopping. The Nottebohm case was instructive for investment law cases, however, it merits five observations: (i) The ICJ in Nottebohm analyzed a case of second nationality status by naturalization, quite distinct from dual nationality by birth, which are the ones that today give most subject matter for study, (ii) Nottebohm naturalized in order to replace his status as a national of a belligerent state with that of a national of a neutral state, for the sole purpose of thereby entering into the protection of Liechtenstein, but never with the intention of attaching himself to its traditions, interests, way of life or of assuming the obligations -other than fiscal- and exercising the rights corresponding to that nationality, (iii) the fundamental question in Nottebohm consisted in determining to what extent the legitimate exercise of national law by a State may, unilaterally, impose on another State obligations under public international law, (iv) Nottebohm was a case of diplomatic protection, the objectives of which differ greatly from the public international law of foreign investment protection, as diplomatic protection lacks elements such as the expectations of investors, the nature and bona fide character of an investor, as well as the limitations that necessarily pertain to the exercise of a State's regulatory and judicial sovereignty, and (v) finally, the complexities of the application of the predecessor, "real and effective" standard applied in Nottebohm are multiplied and worsened in the context of that case due to the presence of three States: Liechtenstein, Germany and Guatemala. Such issues are not common to investor-state arbitration.

In addition to the useful contrasts that the five referenced factors bring to treaty-based investor- state arbitration addressing the contemporary test of "dominant and effective," Nottebohm also brings a second analytical talisman, relevant and useful to the application of the standard. "The Nottebohm 'link test' is a (i) qualitative inquiry into the (ii) 'genuineness' of the citizenship status at issue during (iii) a relevant timeframe. In the case of Nottebohm, the material timeframe was '[a]t the time of his naturalization'"[72].

B. Mergé Case

The Italy-United States Conciliation Commission had to analyze the Mergé Case[73], which was decided immediately after the Nottebohm Case, on June 10, 1955. The Commission applied the principles enunciated in Nottebohm to determine whether Mrs. Mergé, a dual national of the United States and Italy,

entitled to be respected by a State in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations.") (emphasis supplied).

[72] *Alberto Carrizosa et al. v. Colombia*, Memorial on Jurisdiction, PCA Case No. 2018-56, ¶217

[73] See *Mergé Case* – Decision No. 55, *Reports of International Arbitral Awards* 1955, Vol. XIV, 236–48 (United Nations, 2006).

should be considered a national of the United States with *dominant character*[74] within the meaning of Article 78 of the Peace Treaty and therefore be allowed to assert claims for damages suffered during World War II.

Claimant, Florence Strunski, was born in New York in 1909. In 1933, she married Salvatore Mergé, an Italian national working for the Ministry of Foreign Affairs, in Rome. As a result of their marriage, the new Mrs. Mergé "acquired Italian nationality by operation of Italian law"[75]. Despite this, she continued to use her American passport on her travels. After living in Rome for four years, Mr. Mergé was transferred, in 1937, to the Italian Embassy in Japan. Mrs. Mergé traveled to Tokyo with an Italian passport, however, upon arrival in the city, she registered with the American Consulate as a U.S. national. When the war between Japan and the United States ended, Mrs. Mergé was offered to be transferred to her country by the American military forces based in Japan, however, she wanted to stay in Tokyo with her husband. In 1948, she applied for a passport at the U.S. Consulate in Yokohama and traveled to the U.S., where she stayed for nine months. While in New York, she applied to the Italian Consulate for a visa to travel to Italy. She arrived in Italy in September 1947. In October 1947, she registered at the American Consulate in Rome as a U.S. national, where she even signed an affidavit stating that his parents were his only link to the US and that "she did not pay income taxes to the Government of the United States"[76].

When the American Consulate in Rome issued a new passport to Mergé in 1950, she declared that her "legal residence"[77] was in New York, where she planned to return in the future. However, in 1955, when the Mergé case was settled, the Commission noted that she continued to reside in Italy. Mrs. Mergé's claim was for a grand piano and other personal property located in Frascati[78], a town outside Rome.

The Commission first met in Paris and then moved to Rome. In the meantime, the ICJ issued the Nottebohm decision. The Commission adopted the principles explained in Nottebohm and noted:

> The principle... based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle

[74] In fact, when the Commission engages in the analysis of the principles of international law, they refer to the principle of dominant and effective and point out the cases that were previously resolved based on that principle, including Miliani, Stevenson, Massiani, Pinson, and Nottebohm, among others.
[75] *Mergé Case* – Decision No. 55, *Reports of International Arbitral Awards*, vol. XIV, 237.
[76] *Mergé Case* – Decision No. 55, *Reports of International Arbitral Awards*, vol. XIV, 237.
[77] *Mergé Case* – Decision No. 55, *Reports of International Arbitral Awards*, vol. XIV, 237.
[78] *Mergé Case* – Decision No. 55, *Reports of International Arbitral Awards*, vol. XIV, 236.

of effective nationality whenever such nationality is that of the claiming State[79].

However, the practical conceptual application was that the Commission understood that *Nottebohm was not an admissibility criterion, but rather an expansive one* (i) particular to each case, (ii) in which "habitual residence"[80] was only one of many factors to be considered and not a dominant element, and (iii) the elements to be weighed were not exhaustive. The Commission reasoned:

> In view of the principles accepted, it is considered that the Government of the United States of America shall be entitled to protect its nationals before this Commission in cases of dual nationality, United States and Italian, whenever the United States nationality is the effective nationality.
>
> In order to establish the prevalence of the United States nationality in individual cases, *habitual residence can be one of the criteria of evaluation, but not the only one. The conduct of the individual in his economic, social, political, civic, and family life, as well as the closer and more effective bond with one of the two States, must also be considered*[81]. (emphasis supplied)

In view of the above, the Commission concluded that Mergé's dominant nationality -in accordance with Article 78 of the Treaty of Peace- was not that of the United States, but of Italy, and therefore the claim for compensation was definitively rejected.

Finally, the qualitative-quantitative test applied in Nottebohm and Mergé has been imported into public international investment protection law[82]. The qualitative-quantitative concept will be discussed in more detail later.

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[79] *Mergé Case* – Decision No. 55, *Reports of International Arbitral Awards*, vol. XIV, 247.

[80] However, it should be noted that, on the issue of effective nationality, both the U.S. and Italian governments, during the discussion of the Hague Convention on Nationality Conflicts (1930), made comments, which were considered for the Mergé Case, and which seem to be conclusive for the decision taken: The United States said, "There exists presently no established rule which permits a determination, in the case of an alien who possesses the nationality of two other States, of which one is the nationality that must be recognized by the United States. *There would appear to be no obstacle to the regulation of this question by international agreement, and we consider that the domicile of the interested party should be taken into consideration in order to determine his nationality.* "For its part, Italy noted that, "The Italian Government, in its Reply, declared itself *in favour of the nationality which is accompanied by habitual residence.* "(emphasis added).

[81] *Mergé Case* – Decision No. 55, *Reports of International Arbitral Awards*, vol. XIV, 247. (Indeed, the Commission ruled that: "Mrs. Merge 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. Merge 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.")

[82] *Georges Pinson v. United Mexican States*, *Reports of International Arbitral Awards*, vol. V, 223.

C. The Test Itself

As noted in the Nottebohm case, much has been written about the genuine connection. However, this does not mean that what has been said is definitive. In the Nottebohm case, the Court referred to "real and effective" nationality, or what is its later equivalent, "dominant and effective" nationality. The topic of "effective nationality," as discussed in Mergé, requires an analysis that should not be overlooked.

Not forgetting that Mrs. Mergé's claim was a grand piano and some personal effects, the Conciliation Commission, composed of one delegate from each country and, as a third member, the academic José de Yanguas Messia, an Spaniard expert in international law, who had written an article about dual nationality in 1925[83], decided to go a step further and analyze the principles of international law regarding effective nationality. Let us see what they pondered:

1. On dual nationality, they pointed out that there were two possible solutions (i) through diplomatic protection (public international law), and (ii) through the principle of effective or dominant nationality (in the sphere of private international law).
2. In analyzing the Hague Convention on Conflict of Nationalities, it concluded that, in Article 5, it gave two options (i) to recognize as effective nationality that of the country *where the person resides*, or (ii) the nationality with which he or she *appears to be most closely connected*.
3. Regarding the study of precedents, the Commission cited several cases, including the 1903- 5 Venezuelan arbitrations, the Canevaro case from Peru, the Barthez de Monfort case, the Pinson case, and the Nottebohm case.
4. The commission analyzed the legal literature on diplomatic protection and effective nationality, with particular emphasis on a concept of developed by Jules Basdevant, based on the Venezuelan arbitrations, according to which "the conflict between two nationalities must be resolved by giving prevalence to the law with which *the real nationality* of the person in question corresponds[84]."

Having analyzed the above, the Commission concluded that (i) diplomatic protection and (ii) the *principle of effective nationality, in the sense of dominant*, had been accepted by the Hague Convention and the International Court of Justice[85].

To resolve the Mergé case, the Commission used the evaluation criteria proposed by the United States for cases be-

[83] In fact, Yanguas authored *La doublé nationalité en Amérique*, *Revue de Droit International et Législation Comparée* (Bruselas, 1925).
[84] *Mergé Case* – Decision No. 55, *Reports of International Arbitral Awards*, vol. XIV, 245–46.
[85] *Mergé Case* – Decision No. 55, *Reports of International Arbitral Awards*, vol. XIV, 245–46.

fore the Commission to determine whether a person has American nationality. These criteria comprised:

a. The habitual residence.

b. Americans by birth, but of Italian parentage, where they have habitually lived.

c. Italian naturalized Americans, if they reacquire Italian nationality as a consequence of the law for having lived more than two years in Italy if they do not intend to establish definitive residence in Italy.

d. Regarding American women married to Italians, the nationality prevails if they have lived in the USA, and if the *permanent interests of the head of the family* are in the U.S.

e. In case of the end of the marriage, if the family lived in Italy and the widow moves to the U.S., *the habitual residence will not be decisive*, but the education given to the children will be what indicates the prevailing nationality.

To date, the test, although not defined in any document, has been regularly applied in several cases, for example, as defined in Nottebohm[86] and Mergé was further refined in the cases of the Islamic Republic of Iran and the United States of America (Case A/18), and has continued to be used, for example, in investor-State cases. This test implies that the dominant and effective nationality will consider factors such as (i) habitual residence, (ii) center of interests, (iii) family ties, (iv) participation in public life, (v) dominant and effective nationality during the relevant period[87]. These requirements are the ones that have been analyzed by tribunals in investor-state cases in recent years, without taking into consideration the dynamism of humanity in the past thirty years.

D. Habitual Residence

To date, it can be inferred that the fundamental element for declaring the dominant nationality of a person with dual nationality is the place of residence, even though it had been said, *ad infinitum*, that it was only one more factor, and not the fundamental criterion.

However, this criterion of residence, which may have seemed so stable and, perhaps, conclusive in 1903, 1930, or 1955, has changed radically in the last thirty years, in a globalized world. Indeed, in the decade of the twenties of the twenty-first century, we have very interesting statistics. For example, in some of the world's most important financial cen-

[86] *Alberto Carrizosa et al. v. Colombia*, Memorial on Jurisdiction, PCA Case No. 2018-56, 130.

[87] See *Islamic Republic of Iran v. United States of America*, IUSCT Case No. A-18, ¶51 (https://jusmundi.com/en/document/decision/en-islamic-republic-of-iran-v-united-states-of-america-decision-decision-no-dec-32-a18-ft-friday-6th-april-1984)

ters, the populations include foreigners in the following proportions: 90% of the population of Dubai, 40% of Sydney, 37% of New York, 37% of London, 29% of Singapore, 29% of Madrid, 20.52% of Miami, 15% of Paris, 3% of Shanghai, and 1.34% of Hong Kong. As for the populations of Miami and New York, of that percentage of foreigners, a group has naturalized, but the remaining 8.6% in Miami[88], and 9.38% in New York[89], continue with their foreigner status. Likewise, there are several nationals of the former Soviet republics residing in London[90].

Soon, many of the children of those foreigners, will become dual nationals, by *ius soli* or *ius sanguinis*, and they will be investors and new problems will arise from nationality, but the criterion of residence cannot have so much value, in a world in which the main form of transportation is the airplane, where investors have private jets, and today they are in London and tomorrow they will be in New York. The criterion must be holistic[91], leaving behind the exaggerated value that has historically been given to residence.

Likewise, dual nationality contains several problems or, perhaps, one problem with several edges. What does dual nationality entail? On the one hand, whether a person can sue one of the countries of which he is a national, on the other, whether he can export his earnings to the country with which he has closer ties.

IV. Dual Nationals in Investor-State Arbitration

It is well known that the first bilateral investment treaty (BIT) was signed between the Federal Republic of Germany and Pakistan. The BIT, like most of the BITs that followed, dealt exclusively with investment protection, and initiated the modern era of international foreign investment protection law[92]. It is also the first treaty to contain the basic standards of protection that comprise virtually all

[88] In fact, according to World Population Review, foreign residents in Miami are distributed by origin as follows: 77.68% Latin American, 9.35% Asian, 8.13% European, 3.15% North American, 1.44% African and 0.26% from Oceania.

[89] According to World Population Review, NYC's foreign residents are distributed by origin as: 51.55% Latin American, 29.49% Asian, 11.83% European, 1.7% North American, 4.79% African and 0.64% Oceania.

[90] In this group are Roman Abramovich, who has Russian, Israeli and Portuguese nationalities, Len Blavatnik, Lubov Chernukhin, a major donor to UK Conservative Party campaigns, and a group of young people who, being of Soviet origin, have resided and been educated in London.

[91] Merriam-Webster Dictionary defines holism as a philosophical school of thought according to which "the universe and especially living nature is correctly seen in terms of interacting wholes (as of living organisms) that are more than the mere sum of elementary particles." See *Merriam-Webster Dictionary*, s.v. "holism," https://www.merriam-webster.com/dictionary/holism.

[92] Pedro J. Martinez-Fraga and Joaquin Moreno Pampín, "Reconceptualizing the Statute of Limitations Doctrine in the International Law of Foreign Investment Protection: Reform beyond Historical Legacies," *New York University Journal of International Law and Politics* 50 (2017): 838.

BITs today[93]. Consequently, investment arbitration under ICSID rules began in 1972, in the case styled *Holiday Inns S.A. v. Morocco*, and during these fifty-plus years 970 cases have been filed[94]. In these five decades there have been a few cases involving dual nationality, among them *Olguin v. Paraguay*, *Champion Trading v. Egypt*, *Micula v. Romania*, not a very long list because ICSID rules prohibit a person from suing the country of which he or she is a national[95]. At the same time, there have been the cases of the Islamic Republic of Iran against the United States of America, and several cases under UNCITRAL rules, such as *Oostergetel v. Slovakia*, *Serafin Garcia v. Venezuela*, *Ballantine v. Dominican Republic*, *Alberto Carrizosa v. Colombia,* and *Fraiz v. Venezuela*. To have an overview of the approach to dual nationality in arbitral tribunals over the last fifty years, we will briefly refer to what happened in each of these arbitrations.

A. Iran – U.S. Claims Tribunal

To summarize, in 1981, the United States and Iran signed the Algiers Accords, which ended the hostage crisis at the U.S. Embassy in Tehran and created a Tribunal to resolve disputes between the two countries and their nationals. Nearly 4,700 private U.S. claims were filed against the Government of Iran before the Tribunal and most were settled, resulting in more than $2.5 billion in awards to U.S. nationals and companies. Among those there were cases of dual nationals, two of which are outlined here:

1. *Diba v. Iran*[96]: Mr. Diba was a dual national of the US and Iran, and the tribunal had to apply the genuine link test contained in the Algeria Agreements. The tribunal began by analyzing Mr. Diba's nationality on the basis of the decision in case A/18 of April 6, 1984, which stated that in order to be considered a US national it was necessary to define the dominant and effective nationality, and this was accomplished by taking into consideration "the claim-

[93] Martinez-Fraga and Moreno Pampín, "Reconceptualizing the Statute of Limitations Doctrine in the International Law of Foreign Investment Protection," 839.

[94] See *ICSID World Bank Group, Cases Database* (https://icsid.worldbank.org/cases/case-database).

[95] In fact, article 25(2)(a) provides that: "'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 pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute...." (emphasis supplied). See *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Convention), art. 25(2)(a), opened for signature Mar. 18, 1965, 575 U.N.T.S. 159.

[96] See *Benny Diba and Wilfred J. Gaulins v. The Islamic Republic of Iran, The Iranian Ministry of Housing and Urban Development*, IUSCT Case No. 940 (Iran-US Claims Tribunal) (Award) (October 31, 1989) (https://iusct.com/wp-content/uploads/2020/11/C940-Doc-167eng.pdf).

ant's from birth, and all relevant factors which evidence the reality and the sincerity of the choice of national allegiance they claim to have made," i.e., "habitual residence, center of interests, family ties, participation in public life, and other evidence of attachment to that country[97]." After analyzing Mr. Diba's life and even though he seemed to have integrated into the U.S. culture, after his divorce, Mr. Diba went to live in Iran, and traveled very little to the U.S. He was also unable to demonstrate any financial interest he had with the USA. Therefore, the court concluded that Mr. Diba's dominant and effective nationality during that period was not that of the U.S. and, therefore, it did not have jurisdiction to review the case against Iran[98].

2. *Malek v. Iran*[99]: This was the case of a doctor, born in Iran, who at the age of 17 went to study medicine in England, and finished his studies in Rochester, Minnesota. Dr. Malek sued for USD 3.5 million in compensation for expropriation of property in Iran. The claimant had become a naturalized U.S. citizen on November 5, 1980. In developing the case, the tribunal found that the *claimant had met the test of dominant and effective nationality*[100], for which it conducted an extensive analysis. It emphasized that "[o]bviously, in order to establish what is the dominant and effective nationality on the date on which the claim arose, it is necessary to scrutinize the events in Claimant's life prior to this date[101]." The Tribunal further reasoned that "[i]n effect, Claimant's entire life, from his birth, and all the factors which, during this span, evidence the reality and sincerity of the choice of national allegiance he claims to have made, are relevant[102]." Mr. Malek's predicament was that his American nationality was limited to a very short period, between November 5, 1980 and January 19, 1981 and, during that very short period, there was no expropriation act against him by the Iranian authorities, therefore, the tribunal considered that no compensation was due.

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[97] *Benny Diba and Wilfred J. Gaulins v. The Islamic Republic of Iran*, IUSCT Case No. 940, 5.

[98] *Benny Diba and Wilfred J. Gaulins v. The Islamic Republic of Iran*, IUSCT Case No. 940, 8.

[99] See *Reza Said Malek v. The Government of the Islamic Republic of Iran*, IUSCT Case No. 193 (Iran-US Claims Tribunal) (Award No. ITL68-193-3) (June 23, 1988) (https://iusct.com/cases/final-award-no-534-11-august-1992/).

[100] *Reza Said Malek v. The Government of the Islamic Republic of Iran*, IUSCT Case No. 193, ¶ 25. (Indeed, "[i]n the Interlocutory Award the Tribunal found that the Claimant's dominant and effective nationality was that of the United States of America as from 5 November 1980 to 19 January 1981.")

[101] *Alberto Carrizosa et al. v. Colombia*, Claimant's Reply to Respondent's Answer on Jurisdiction, PCA Case No. 2018-56, ¶ 798.

[102] *Alberto Carrizosa et al. v. Colombia*, Claimant's Reply to Respondent's Answer on Jurisdiction, PCA Case No. 2018-56.

B. ICSID Cases

As noted previously, there are not many dual nationality cases brought under ICSID rules because Article 25(2)(a) bars a person from suing the country of which he or she is a national.

1. *Olguin v. Paraguay*[103]: The claimant, a U.S. and Paraguayan national, brought an ICSID claim against the Republic of Paraguay arising out of a treaty breach related to an investment in the food processing sector in Paraguay, which was to be owned and operated by a Paraguayan entity. Although dominant and effective nationality was not considered because the applicable BIT was silent on the matter, the Tribunal expressed the relevant propositions as part of its analysis and determined that it lacked jurisdiction due to the preclusive effect of the ICSID regime on the issue. However, the Tribunal recognized that "[t]here is no dispute that [the claimant] has dual nationality, and that both are effective[104]."
2. *Champion Trading v. Egypt*[105]: This case was brought by Champion Trading and the Wahba brothers, three dual nationals, in connection with a cotton export business they had in Egypt. The Wahba brothers, although American by birth, were the children of an Egyptian father and an American mother, and in making the investment in Egypt they identified themselves as nationals. The tribunal concluded, after analyzing the elements of the Nottebohm case and the A/18 cases, that, regardless of the reason for which they identified themselves as Egyptian nationals, the ICSID Convention prohibited a person from suing the country of which he was a national, and therefore the claim was dismissed out of hand, because although the claimants wanted the dominant and effective nationality to be analyzed, the reality was that article 25 of the ICSID Convention was clear and definitive. Only the validity of the nationality was sufficient to dismiss the claim[106].

[103] See *Eudoro Armando Olguin v. Republic of Paraguay*, ICSID Case No. ARB/98/5 (Award) (July 26, 2001).

[104] *Alberto Carrizosa et al. v. Colombia*, Claimant's Reply to Respondent's Answer on Jurisdiction, PCA Case No. 2018-56, ¶¶ 820–21.

[105] See *Champion Trading v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9 (Decision on Jurisdiction) (October 23, 2003).

[106] *Champion Trading v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, 17. (Indeed, the tribunal held that "[t]he mere fact that this investment in Egypt by the three individual Claimants was done by using, for whatever reason and purpose, exclusively their Egyptian nationality clearly qualifies them as dual nationals within the meaning of the Convention and thereby based on Article 25(2)(a) excludes them from invoking the Convention.")

3. *Micula v. Romania*[107]: This case involved Swedish investors (originally from Romania) and Romania. After the overthrow of Ceausescu's communist regime in December 1989, Romania found itself in a complicated economic and social turmoil. In this situation, Romania adopted measures to attract and promote investment. Among these measures was Emergency Government Ordinance No. 24/1998 ("EGO 24"), which established a framework for the granting of investment incentives in "disadvantaged" regions of Romania. The Claimants are two Swedish nationals, Viorel and Ioan Micula, and three companies owned by them. Beginning in 1998, relying on the incentives offered by EGO 24, the investors started building an integrated food platform designed to produce consumer products and beverages for the Romanian market. In August 2004, Romania thwarted the Miculas' plans by announcing that it would repeal EGO 24, effective February 22, 2005. The repeal of the incentives caused the Miculas to suffer cash flow constraints that made impossible for them to complete the projects they had planned based on EGO 24. The Miculas filed a claim against Romania before ICSID in 2005 and obtained a favorable decision in September 2008. The tribunal analyzed that the respondent argued that "the [claimants'] Swedish nationality is effective and was obtained solely 'to advance their purpose.'" As to whether there was a *genuine connection*, the defendant argued that the claimants resided "permanently and remain physically almost constantly in Romania." It also concluded that "their professional and economic interests, as well as their cultural, social, and family ties are in and with Romania. As a result of these strong and continuous ties to Romania, considered that the claimants "cannot invoke their Swedish nationality with respect to Romania." However, the Tribunal rejected such assertions and found that respondant's argument that claimants' Swedish nationality could not be binding in Romania because of claimants' alleged tenuous ties to Sweden *was without merit*[108]. Finally, with regard to the

[107] See *Ioan Viorel Micula, F.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipak S.R.L. v. Romania*, ICSID Case No. ARB/05/20 (Decision on Jurisdiction and Admissibility) (September 24, 2008).
[108] *Alberto Carrizosa et al. v. Colombia*, Claimant's Reply to Respondent's Answer on Jurisdiction, PCA Case No. 2018-56, ¶805 (In fact, the court—making use of the genuine link test—noted that: (i) the claimants had "assets in Sweden"; (ii) one of the claimants had "in-laws ... living in Sweden"; (iii) one of the claimants had "two daughters of Swedish nationality"; (iv) the claimants "intended to retire in Sweden"; (v) the claimants paid "into pension funds to that effect"; and finally (vi) the Tribunal reasoned that "[t]he fact that [the Claimants] currently reside in Romania is not a decisive factor. Indeed, it is clear that they have done so

claimants having their residence in Romania, the tribunal's analysis found that "[t]he fact that they presently reside in Romania is not a decisive factor. Indeed, *it is clear that they have done so in order to run their business, and as testified by Mr. Viorel Micula they could live in another country if they had their business located somewhere else*[109]."

C. UNCITRAL Cases

Contrary to the ICSID rules, the UNCITRAL rules do not provide that a person may not bring a claim against the country of which it is a national. In this group of cases, in fact, what is done is to look at the BIT and see if the extremes required therein are met. Under the UNCITRAL rules there are a few known cases of dual nationality, where different interpretations have been given to the issue of dual nationality, making use, most of the time, of the Nottebohm and Mergé decisions, as well as the U.S.-Iran decision A/18, in other words, the dominant and effective nationality has been reviewed, according to *the genuine link test*.

1. *Oostergetl v. Slovakia*[110]: An unusual case. The applicants filed a claim based on the 1991 BIT between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic. The claim was filed in 1993, when Slovakia was independent. The claimants, of Dutch nationality, had an investment in Slovakia, consisting of a majority shareholding in a yarn and thread company, Bratislavská Cvernová Továreň (BCT), which had previously been privatized by the Government. The claim concerned actions and omissions by the Slovak authorities that resulted in the bankruptcy of BCT, in particular, actions taken by a Bratislava court and the local tax office. During the course of the arbitration, the *ad-hoc* tribunal had to deal with the issue of the claimants' dual nationality, as Slovakia pointed out that the claimants had dual Dutch and Belgian nationality. In this regard, Slovakia proposed to define the dominant and effective nationality of the claimants, which according to them was that of Belgium, and not that of the Nether-

in order to run their business, and as testified by [one of the Claimants] they could live in another country if they had their business located somewhere else.").

[109] *Alberto Carrizosa et al. v. Colombia*, Claimant's Reply to Respondent's Answer on Jurisdiction, PCA Case No. 2018-56, ¶104 (This observation is fundamental, because the issue of residence has been so closely linked to the way of defining dominant and effective nationality, that this time, the arbitrators stepped out of the comfort zone and used all the elements, without giving an inordinate value to residence, as we have seen historically, despite the fact that the residence criterion is not the only criterion, nor one of greater value over the others. However, this maxim was abandoned in later cases, as if it had never existed.).

[110] See *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Ad-Hoc Arbitration (Decision on Jurisdiction) (April 30, 2010) (https://jusmundi.com/en/document/decision/en-jan-oostergetel-and-theodora-laurentius-v-the-slovak-republic-decision-on-jurisdiction-friday-30th-april-2010#decision_506).

lands. In the Decision on Jurisdiction, the tribunal said that Slovakia had not been successful in proving the claimants' dual nationality. Moreover, the tribunal noted that Slovakia's mention of "Champion Trading... is also misplaced, 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[111]." For their part, the claimants -based on Micula- questioned the application of the effective nationality principle in single nationality cases, as opposed to dual nationality[112]. Finally, the tribunal noted that the claimants "hold and have continuously held the Dutch nationality at all time periods that are relevant to this Tribunal's jurisdiction in the present case[113]." In the decision on the merits, the Tribunal did not agree with the plaintiffs, since it considered that the losses derived from the ordinary risks of any business and that they did not originate from Slovakia's actions or omissions. Although this is not, strictly speaking, a dual nationality case, the tribunal nevertheless analyzed the elements of Nottebohm[114], the Champion Trading[115] case, and the Micula[116] case, among other cases, to define the nationality of the claimants.

2. *Serafín García v Venezuela*[117]: The case involved an investor of Spanish origin, Serafín García, who emigrated to Venezuela in 1961, and his daughter Ana García Gruber, born in Venezuela in 1980. Serafín García lost his Spanish nationality in 1972, by naturalization in Venezuela. Between 2003 and 2004, both reacquired the Spanish nationality. During the expropriation furor of the Venezuelan government of Hugo Chávez in 2010, the companies of these investors were occupied and then expropriated. The investors filed their claim under the BIT signed between Spain and Venezuela in 1995. In the development of the case, Venezuela alleged that both

[111] *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Ad-Hoc Arbitration (Decision on Jurisdiction), ¶129.
[112] *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Ad-Hoc Arbitration (Decision on Jurisdiction), ¶131.
[113] *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Ad-Hoc Arbitration (Decision on Jurisdiction), ¶135.
[114] *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Ad-Hoc Arbitration (Decision on Jurisdiction), ¶¶112, 132.
[115] *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Ad-Hoc Arbitration (Decision on Jurisdiction), ¶112
[116] *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Ad-Hoc Arbitration (Decision on Jurisdiction), ¶131.
[117] See *Serafin Garcia Armas & Karina Garcia Gruber v. The Bolivarian Republic of Venezuela*, PCA Case No. 2013-3 (Decision on Jurisdiction) (December 15, 2014).

investors were Venezuelan nationals and argued that it was essential to define the dominant and effective nationality of the investors[118]. In the decision on jurisdiction, the arbitrators who analyzed the case, undertook the task of reviewing all the BITs subscribed by Venezuela, those subscribed by Spain, and even the treaty of friendship subscribed between both nations in 1990. The conclusion was that the BIT stated that investors would be understood as "[p]hysical persons having the nationality of one of the Contracting Parties according to its legislation and making investments in the territory of the other Contracting Party" and, therefore, "it is sufficient that they possess Spanish nationality[119]." Thus, it continued "[t]his text does not impose any limitation on dual nationals, and it is not possible to deprive the nationality freely granted by one State and accepted as valid by the other of its effects[120]." Summarizing, the tribunal held that "[t]he conclusion reached by this Tribunal that a non-existent condition in the BIT on the nationality of investors protected by that Treaty cannot be added to the BIT is consistent with the conclusions reached by other arbitral tribunals that have considered these issues[121]."

The case was decided on its merits, with a finding against Venezuela for expropriating the investors in the amount of USD 214 million. Venezuela took the case to the Paris Court of Appeals, which annulled the award, noting that the investors did not have Spanish nationality at the time of making the investment. The investors appealed the decision and the French Court of Cassation pointed out that the Court of Appeals erred by adding as a condition that the investors had to have Spanish nationality at the time of making their investment, a condition that the treaty had not foreseen. Finally, on June 27, 2023, the Paris Court of Appeals[122] stated that the reasons proposed by Venezuela for the annulment were rejected and ordered Venezuela -as a pun-

[118] *Serafin Garcia Armas & Karina Garcia Gruber v. The Bolivarian Republic of Venezuela*, PCA Case No. 2013-3 (Decision on Jurisdiction), ¶ 81 (Indeed, Venezuela argued that "[i]n the first instance, a natural person having the nationality of both Contracting States does not satisfy the definition of 'investor' set forth in the BIT, because that Treaty does not allow a national to sue its own State before an international forum. Secondly, the rules and principles of international law applicable to nationality preclude the admission of claims brought by natural persons having dual nationality, especially if the nationality of the respondent State is the dominant or prevailing nationality.") (emphasis added).

[119] *Serafin Garcia Armas & Karina Garcia Gruber v. The Bolivarian Republic of Venezuela*, PCA Case No. 2013-3 (Decision on Jurisdiction), ¶197

[120] *Serafin Garcia Armas & Karina Garcia Gruber v. The Bolivarian Republic of Venezuela*, PCA Case No. 2013-3 (Decision on Jurisdiction), ¶200

[121] *Serafin Garcia Armas & Karina Garcia Gruber v. The Bolivarian Republic of Venezuela*, PCA Case No. 2013-3 (Decision on Jurisdiction), ¶206

[122] See *Cour d'appel de Paris*, RG n° 22/02752 (27 juin 2023) (https://www.italaw.com/sites/default/files/case-documents/180098.pdf).

ishment- to pay 150,000 euros, for expenses not included in the legal costs, in accordance with article 700 of the French Code of Civil Procedure.

It appeared that the 2014 Decision on Jurisdiction, and the subsequent Decision on the Merits in April 2019, embodied a before and after, leaving for history Nottebohm, Mergé, the A/18 cases, and many of those mentioned here, all of them inclined to the application of the *genuine link test*, and to give excessive value to residence. However, as soon as September 2019, the *Ballantine v. Dominican Republic* case was decided, against any logical criteria.

3. *Ballantine v. Dominican Republic*[123]: The scarcity of treaty-based arbitral awards interpreting dominant and effective nationality in the context of public international investment protection law was observed in a case filed in September 2014 founded on alleged violations of the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA). Despite the slow analysis of the case, since it took three years from the time it was filed until the tribunal in issuing Procedural Order No. 2 on April 21, 2017, offered some valuable insights that were consistent with the expansive qualitative construction of the dominant and effective test that we have been studying.

The case involved the Ballantine family, Americans who went in 2000, to do Christian missionary work in the Dominican Republic. After about a year, they returned to the U.S., however, they were captivated by the place and decided to undertake a project called Jamaca de Dios. The project began to be developed in 2005, and consisted of two phases, the first one for luxury housing and the second one for a luxury hotel with spa and other services. In 2005 the Ballantines sold their business in the U.S. and moved with their children to the Dominican Republic, year in which they were approved for permanent residency, which was later renewed in 2008. On December 30, 2009, they were approved for naturalization and formally acquired citizenship in 2010. During that time, they lived on the island, their children attended schools there and voted in Dominican elections, among other things. Likewise, they continued to travel to the United States, they kept in touch with the family, they celebrated Thanksgiving with the family in the U.S., they had the money in accounts in the U.S., and finally, when the children finished high school, they went to the U.S. to study at the college. In that background, it was necessary to analyze, at the request of the Dominican Republic,

[123] See *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17 (Award) (September 3, 2019) (https://jusmundi.com/en/document/decision/en-michael-ballantine-and-lisa-ballantine-v-the-dominican-republic-award-tuesday-3rd-september-2019).

which was the dominant nationality, since the country considered that the dominance was for the Dominican nationality. The tribunal in Procedural Order No. 2, observed "that any comprehensive interpretation of the dominant and effective test would need to be rooted in the factual particularities of the case before it. It specifically observed having to examine (i) "the immediate context" of the factual matrix, (ii) Claimants' "acquisition of Dominican nationality," (iii) the "asserted reasons for acquiring that nationality," (iv) "the facts surrounded by the investment" at issue, (v) "the conduct of the host-State vis-à-vis the [Claimants]", (vi) "Claimants' conduct with respect to the host State," and (vii) "the evidence concerning the facts previous to the date of filling for arbitration[124]."

Similarly, the tribunal decided not to bifurcate the case and go straight to the merits, on the grounds that "the facts relating to the Objection [the dominant and effective nationality of the claimants] appear to be intertwined with those relating to the merits, which would justify their being considered together[125]."

When everything seemed to indicate that a qualitative analysis of the genuine link test would be taken forward, the tribunal issued its award in September 2019. Again, an arbitral tribunal analyzed the Nottebohm, Mergé and A/18 cases, and noted that the dominant and effective nationality analysis should encompass the claimants' entire lives, however, that analysis "is relevant but not determinative in assessing whether nationality is dominant and effective[126]."

Surprisingly, the Ballantine Tribunal omitted the application of customary international law in its analysis, and instead applied its own limited four-pronged test of (a) habitual residence, (b) the individual's personal attachment to any particular country, (c) the center of the person's economic, social and family life, and (d) the circumstances under which the second nationality was acquired, taking into account the specific context of the dispute[127].

The majority of the tribunal gave more weight to a consideration of residence - erroneously contextualized - than even to the set of factors applied. Finally, the majority considered that the dominant and effective nationality of the investors

[124] *Alberto Carrizosa et al. v. Colombia*, Memorial on Jurisdiction, PCA Case No. 2018-56, 298.
[125] *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17 (Procedural Order No. 2, ¶ 28) (https://www.italaw.com/sites/default/files/case-documents/italaw8772.pdf).
[126] See *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17 (Award) (September 3, 2019) (citing *Malek v. Iran*, Interlocutory Award, ¶ 14) (https://jusmundi.com/en/document/decision/en-michael-ballantine-and-lisa-ballantine-v-the-dominican-republic-award-tuesday-3rd-september-2019).
[127] *Alberto Carrizosa et al. v. Colombia*, Claimant's Reply to Respondent's Answer on Jurisdiction, PCA Case No. 2018-56, ¶ 987.

was that of the Dominican Republic and, therefore, the tribunal had no jurisdiction over the case.

As a result of the award, arbitrator Marney Cheek, made a separate and thorough dissenting opinion, in which, among other things, referring to dominant and effective nationality, she stated:

> I disagree with the Majority that 'the inclusion of this phrase [i.e., dominant and effective nationality] in an investment chapter within the broader framework of a Free Trade Agreement imbues that phrase with a specific meaning' and therefore 'it [is] appropriate to give specific meaning to the terms used in DR-CAFTA rather than directly incorporating any other standard ...[.] (citation omitted) The standard articulated in DR-CAFTA is not an investment treaty-specific test for dominant and effective nationality. Rather it is the well-established customary international law standard. My opinion this regard is consistent with the recent decision in *Aven v. Costa Rica*, where the tribunal applied the Nottebohm test in examine the question of dual nationality under DR- CAFTA Article 10.28[128].

In conclusion, Ms. Cheek carefully outlined what should be the appropriate temporal analysis from the relevant dates in line with the applicable standard established in customary international law and agreed to by the Contracting Parties:

> The proper inquiry should examine the Claimants ties to the United States and the Dominican Republic over the course of their lifetimes to determine whether, at the time of the alleged breach (i.e., 12 September 2011 and at the time of the submission of the claim to arbitration (i.e., 11 September 2014, the dominant and effective nationality of each Claimant was that of the United States or the Dominican Republic.

This case was not a fortunate conclusion, not least because the DR-CAFTA stated that a tribunal shall decide the issues in dispute in accordance with [the treaty] and the applicable rules of international law. That unconditional mandate could not be subject to any exceptions. It was not referential in nature but was intended to provide guidance for each Tribunal applying it to create its own ad hoc rule[129].

The tribunal missed the opportunity to move away from the perennial concept of residence and move towards the holistic concept advocated by Cheek[130].

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[128] *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17 (Partial Dissent of Ms. Cheek on Jurisdiction, ¶ 12).

[129] *Alberto Carrizosa et al. v. Colombia*, Claimant's Reply to Respondent's Answer on Jurisdiction, PCA Case No. 2018-56, ¶¶1001-2

[130] In fact, Cheek said that the dominant and effective nationality of Mrs. Ballantine at all times relevant to the case was that of the U.S., as was the case with Mr. Ballantine. Finally, arbitrator Cheek said that it was important to analyze the reason why the Ballantine acquired Dominican nationality, i.e., to protect their investments in that country, and that element was fundamental in the holistic determination of that dominant and effective nationality.

4. *Alberto Carrizosa v. Colombia*[131]: This case arose from the expropriation of a bank in Colombia in 1998, during the so-called "*crisis de fin de siglo*[132]." That crisis was generated by a decision of the government of Colombian President Ernesto Samper (1994-1998), which ordered the withdrawal of all public funds from financial institutions not subject to the control of the Colombian Financial Superintendency, generating the bankruptcy of some 300 cooperative banks and a financial crisis of colossal proportions. The Carrizosa was a married couple made up of a well-known businessman from Bucaramanga, Colombia and an American woman who landed in Colombia as part of John F. Kennedy's Peace Corps. The couple had three children, who obtained Colombian nationality by *ius soli*, and American nationality by *ius sanguinis*. The case had several edges, as for the expropriation of 1998, the Carrizosa's fought it in the Colombian courts that ended in a favorable sentence to the family in 2007, where Colombia was ordered to pay about one hundred million dollars for the expropriation. The opinion was issued by the Council of State, the highest contentious-administrative instance. The problem was that -in a strange intervention of the Colombian Constitutional Court at the request of the then President of the Republic- the opinion was revoked. That new opinion, SU-447, was of 2014, and represented a second expropriation to the Carrizosa family, which took the case to international instances, to UNCITRAL arbitration, under the administration of the Permanent Court of Arbitration in The Hague. Here we will limit ourselves to the case of the brothers, which had an important nationality component. In the case of *Alberto Carrizosa et al. v. Colombia*[133], the Claimants made a very substantial body of evidence to demonstrate that their *dominant and effective nationality*, as required by the U.S.-Colombia TPA, was that of the United States. To this end, the claimants submitted nine elements that, taken together, made it evident that the claimants' effective nationality was that of the USA. These factors were: (i) how and why they acquired the American nationality, (ii) how the plaintiffs considered themselves, (iii) family, (iv) education, (v) residence, (vi) language, (vii) finances, (viii) health, and (ix) cultural affinity. Fundamental factors, which must be considered as a unit, an amalgam. There is no reason for one to have more weight than another at the time

[131] *Alberto Carrizosa et al. v. Colombia*, Memorial on Jurisdiction, PCA Case No. 2018-56.
[132] Which translates into English as turn-of-the-century crisis.
[133] *Alberto Carrizosa et al. v. Colombia*, Memorial on Jurisdiction, PCA Case No. 2018-56.

of analysis, or what is the same, the residence factor cannot be the fundamental value, something that has been said since Nottebohm and Mergé, moreover, Micula shed light on the subject of residence. The Carrizosa brothers said that they were Americans by birth and that their mother had raised them as Americans, that is, the values, the language, the love for the U.S., they were also Colombians because they were born there, but they identified more with the U.S. culture. Subjectively, they said they considered themselves Americans, not Colombians. The family was educated as American, they by their mother, and their children by them. The education, both high school and college and postgraduate in the U.S. Their residence was in the U.S. from 1983 to 1990 and then from 2000 to 2007, in the case of Alberto, from 1983 to 1997, in the case of Felipe, and from 1983 to 2004, in the case of Enrique. They said that in the family the language spoken was English, that the center of their finances was in the U.S., where they paid taxes, that their health was controlled in the U.S., where they also had the surgeries they had had and, finally, that the cultural affinities of the three brothers, trips, family gatherings, celebrations such as 4th of July, Halloween and Thanksgiving, were observed in the family and the office, and that they expected to retire to live in the U.S., when the next generation takes control of the business[134].

These factors were confirmed with dates, certificates, addresses of residence in the U.S., among abundant evidence. Colombia refuted them with the legal argument, almost exclusively, of residency, and with evidence such as that Felipe Carrizosa was part of a golf club in Bogota, and that Enrique Carrizosa's wife, who is American by birth and rearing, had posted on Facebook a family photo when Enrique, his wife and daughters attended the *Festival de la Leyenda Vallenata*, and where he wore a t-shirt that read "*El rock de mi pueblo*[135]." Likewise, the three women wore traditional Colombian clothing.

While this was being discussed, the U.S. State Department decided to intervene, in a rather retaliatory position, for the plaintiffs' use of an expert, and presented as the State's position, that the dominant and effective nationality of the plaintiffs was not that of the U.S. but of Colombia. The tribunal, in an analysis said that it was necessary to consider: (i) the "[d]ifferent factors are taken into consideration, and their importance will vary from one case to the next: the habit-

[134] *Alberto Carrizosa et al. v. Colombia*, Memorial on Jurisdiction, PCA Case No. 2018-56, ¶¶ 835–944.
[135] *Alberto Carrizosa et al. v. Colombia*, Respondent's Answer on Jurisdiction, PCA Case No. 2018-56, ¶ 455.

ual 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.,[136]" (ii) the circumstances of acquisition of the nationality, as in Nottebohm[137], (iii) The prevalence of one nationality over the other citing Merge[138], and citing Ballantine, which connection is stronger[139], and (iv) Claimants themselves urged on the Tribunal the need to apply a qualitative, not quantitative, test, but by the same token, they suggest that the Tribunal should accord equal weight to all factors to which they (and Respondent) have drawn attention on the basis that: there is no authority setting forth a test or a methodology for the application of a test that sets forth a hierarchy between and among the various elements to be considered[140].

With those alleged factors under scrutiny and making it clear that the claimants were resident in Colombia, the tribunal said that it had "adopted a holistic approach in its analysis, albeit with the necessary emphasis on the period of the Critical Dates. In the face of irrefutable evidence of Claimants' long and deep-rooted connections with Colombia over many years, it would be a leap to conclude that, all evidence susceptible of objective examination to the contrary, Claimants' dominant nationality was that of the United States. In the Tribunal's view (having adopted the language of Respondent's submission):...there is no way anyone could reasonably conclude from all this that [Claimants] were predominantly [nationals] of the United States[141]," and therefore accepted what was said by Colombia's representatives, i.e., "[T]his is a Colombian family suing Colombia in an international forum contrary to one of the most long-standing and time-honored principles of international law, which is you cannot sue the State of your nationality in an international forum[142]." Given this conclusion, further analysis of the case was unnecessary.

Once again, an arbitral tribunal, in an investor-State case, missed the opportunity to make history and define, once and for all, the factors to be taken into account, but no, they chose to subject themselves to the residence factor[143], ig-

[136] *Alberto Carrizosa et al. v. Colombia*, Award, PCA Case No. 2018-56, ¶183.
[137] *Alberto Carrizosa et al. v. Colombia*, Award, PCA Case No. 2018-56, ¶184.
[138] *Alberto Carrizosa et al. v. Colombia*, Award, PCA Case No. 2018-56, ¶185.
[139] *Alberto Carrizosa et al. v. Colombia*, Award, PCA Case No. 2018-56, ¶186.
[140] *Alberto Carrizosa et al. v. Colombia*, Award, PCA Case No. 2018-56, ¶192.
[141] *Alberto Carrizosa et al. v. Colombia*, Award, PCA Case No. 2018-56, ¶253.
[142] *Alberto Carrizosa et al. v. Colombia*, Award, PCA Case No. 2018-56, ¶253.
[143] See generally ¶¶ 237, 238, 241, 244 y 248.

noring the Micula[144], and the reality of the world in 2020, which by the way, was going through a pandemic and people made video conferences for trials, business and to be in contact with their loved ones. Today, more than ever, the residence factor can be neither definitive nor binding.

5. *Fraiz v. Venezuela*[145]: This case was filed by a dual citizen of Spain and Venezuela. The claimant, based on the same BIT that gave rise to the judgment against Venezuela in the case of Serafin Garcia, filed a claim before the Permanent Court of Arbitration of The Hague, alleging that his investments -in media and public advertising- had been expropriated by Venezuela[146]. In this regard, the claimant asserted that between 1988 and 2014, he developed those businesses and that in different acts of the government, his rights over the investments were gradually being cut off until in 2014 he lost control of them, to the extent that today they are in the hands of the government or third parties[147]. As expected, the claimant presented all kinds of factual and legal arguments, the most valuable being that it had obtained Spanish nationality in 2003. Venezuela, on the other hand, requested to define what was the claimant's dominant and effective nationality, despite the fact that the Serafin Garcia arbitral tribunal had analyzed this point in depth, as well as the Paris Court of Appeals and the French Court of Cassation. Following its analysis of the claimant's particular situation, the tribunal said that (i) Mr. Fraiz was born in Venezuela in 1965, (ii) he acquired Spanish nationality in 2003, (iii) he studied in Venezuela, (iv) he married in Venezuela, (v) his daughter was born in Venezuela, and (vi) when he was expropriated, he settled in Miami, U.S[148]. The court noted that the question in the case was whether the claimant's Spanish nationality preponderated over his Venezuelan nationality[149]. The answer to that question was in the negative[150] and said that Fraiz was born and made social and family life in Venezuela, that he studied his professional career in Vene-

[144] *Ioan Viorel Micula, F.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipak S.R.L. v. Romania*, ICSID Case No. ARB/05/20 (Decision on Jurisdiction and Admissibility) (September 24, 2008), (Indeed, Micula's tribunal concluded that "[t]he fact that they presently reside in Romania is not a decisive factor. Indeed, it is clear that they have done so in order to run their business, and as testified by Mr. Viorel Micula they could live in another country if they had their business located somewhere else.")

[145] *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11 (Final Award, January 31, 2022), https://www.italaw.com/sites/default/files/case-documents/italaw16446.pdf

[146] *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, ¶¶3–5.

[147] *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, ¶¶87-9.

[148] *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, ¶¶191-7.

[149] *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, ¶¶413.

[150] *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, ¶¶414.

zuela[151], developed his business in Venezuela, and lived there from his birth until 2014, having never lived in Spain[152]. Therefore, the court concluded that the links with Spain were "insufficient" to have the protection of the BIT.

The case itself was of no great significance, except for the fact that, under the premises studied in Serafin Garcia, the claimant would have been considered as an investor, however, not having analyzed Article I.1(a) of the BIT -referring to the definition of investor- in the same manner, and having required the genuine link test, that is, the elucidation of which was the dominant and effective nationality, it demolished the claimant's aspirations, who certainly lost his assets in Venezuela.

V. The Factors, How They Have Been Analyzed and Applied - Qualitative, Not Quantitative Analysis

The cases analyzed so far allow us to conclude that, throughout 240 years, the factor that has been considered fundamental to decide whether a person -*who has two nationalities*- belongs to one country or another, has been the residence. We see this in most of the analyses, both in the oldest and in the most recent cases, such as Ballantine and Carrizosa.

In view of the preponderance that had been given to the factor prior to 1930, the Hague Convention on Conflicts of Nationalities went so far as to recommend that states adopt legislation that was *favorable to the renunciation of nationality where the person did not reside*[153]. However, an unexpected twist came with Nottebohm, Mergé and the A/18 cases, it was decided to analyze the life of the person with dual nationality, to verify his emotional, family, cultural and commercial ties, in short, "the whole life of the person[154]," in order to determine which would be the dominant and effective nationality.

This criterion not only broadened the range of factors, but also directed us towards a qualitative, not quantitative analysis of factors, in other words, it is not an *album of stickers*, where the winner is the one who completes the stickers, but rather, the person must show what his level of affinity or commitment to a certain country actually is. For example, in Micula, we saw how the tribunal admitted that the investor, although born in Romania and residing there, had the dominant and effective nationality of Sweden,

[151] *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, ¶¶202, (In fact, one of the issues that affected the claim was that Mr. Fraiz always identified himself as Venezuelan, to the extent that he sent a letter to the president, Nicolas Maduro, dated January 17, 2014, "requesting his help and protection to be 'favored' by and in his capacity as a Venezuelan [investor] against foreign companies.")
[152] *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, ¶¶413-5.
[153] See note 59
[154] See note 99

because, as we said before, the tribunal reasoned that even if the claimants resided in Romania, it was not a decisive factor[155].

The arbitral tribunals, the few that have had this issue in their hands, have struggled to study the case and the factors to determine the dominant and effective nationality, even when it was not required by the text of the BIT, as it happened in *Fraiz v. Venezuela*, to reach the most disconcerting solution, as it is, to say that the important factor is the residence.

The issue cannot be limited to where the investors reside, but, as Arbitrator Cheek said in *Ballantine v. Dominican Republic*, to a holistic, all-encompassing analysis, which really analyzes the life of the investors, how they acquired their nationality, where they studied, whom they married, how they educated their children (not where), with which country they identify themselves more, where they have their medical check-up, where they pay taxes, where they have their savings, etc., all these factors should be analyzed, even more so after the Covid-19 pandemic, which has opened the world to telecommuting, i.e., we can work in a law firm in New York or London and yet reside in Australia or New Zealand. When arbitrators understand that they must analyze these elements -which carry as much as 69 years in the balance- the everlasting axiom of the preponderant importance of the residency factor will fall once and for all.

VI. New Times Demand New Paradigms

After having analyzed the issue of nationality, considering its form of acquisition, the test to determine which is the dominant and effective nationality, as well as the return to the common -and safe- place of residence, we must conclude that it is necessary to move forward. Why? Because this is not the society of 240 years ago, nor that of 70 years ago, nor even that of 30 years ago. We are at the dawn of a new era, as we said before, investors have several nationalities and reside, many times in places different from their nationality, in the place where they have the investment, and all the known and yet to be known variants. In other words, the capital of an investor should be able to be protected even if he invests in one of his home countries, as long as it is demonstrated in a holistic manner, which is his dominant and effective nationality, without the need to "*die*" with a 1930 concept, that is, the place where you reside[156].

As stated, new times require new paradigms, and those paradigms must include:

First, that the dual citizenship rule create a new class of investor; therefore, it

[155] See note 108

[156] However, there are exceptional cases, e.g., for Israel, the status of "foreigner" or "Israeli" depends on the country of residence, not on the country of citizenship.

broaden the set of jurisdictional investors. It is 2023, mobility, videoconferencing, and technology -in general- compel the consideration of dual or multi-nationals investors. The possibility of investing in one place or another, without imposing the limitation of residence, due to the fact that, otherwise, it would be limiting the possibility of third world countries receiving funds from their second generation children or from those who moved away seeking fortune and who, having achieved it, cannot help that country of nostalgia. This is important, for instance, from the list of billionaires with double or triple nationality[157], none of them could invest in their country of origin, since any expropriation would fall on a national and there is no right to international investment protection, all of which could be catalogued as a great loss for countries receiving investment, such as India, Bangladesh, Venezuela, Türkiye, or Colombia. In the case of Colombia, for instance, the law compels nationals who have dual nationality, by *ius soli* or *ius sanguinis*, to enter Colombia and identify themselves in all legal documents with the Colombian identification[158], so how can it be establish that a person is an American, if he is obliged by law to identify himself as Colombian? There would be no way. Therefore, it is necessary to understand that dual nationals belong to a new investor class that is becoming more common every day. How has it been done so far? Investments are made through corporations, but these are *euphemisms* that, in the end, are used to counteract a reality; the person is a national of the place where the investment was made, even if that nationality is not the dominant and effective one.

Second, the purpose of the dual nationality investor universe is to repatriate wealth and create new investment opportunities in the home host state. It sounds like a tongue twister, however, the objective sought by the dual nationality investor is to help the former home country, to create investment opportunities, to create wealth in that place, by investing from what is his new country and which, usually, will be the one of the effective and dominant nationality, regardless of the place of residence. Whether the person lives in the place where the investment is

[157] See infra Appendix A and Appendix B (The lists, which contain some twenty names, show (i) how many investors have dual nationality, and (ii) how many of those investors reside in a country other than the one of which they are citizens. It is simply a way of showing the dilemma that these investors may face and, no doubt, that their children will face in the future).

[158] In fact, Law 43 of 1993, in article 22 states: "Colombian nationals who have dual nationality in the national territory shall be subject to the Political Constitution and the laws of the Republic. Consequently, their entry and stay in the territory, as well as their departure, must always be done as Colombians, and they must identify themselves as such in all their civil and political acts." (In Spanish original reads, in pertinent part: *"El nacional colombiano que posea doble nacionalidad, en el territorio nacional, se someterá a la Constitución Política y a las leyes de la República. En consecuencia, su ingreso y permanencia en el territorio, así como su salida, deberán hacerse siempre en calidad de colombianos, debiendo identificarse como tales en todos sus actos civiles y políticos.")*

made is not relevant, the important issue is that he/she makes the investment and that he/she generates opportunities for that country[159]. Therefore, now the "only" important thing is not to be able to repatriate the profits to the country of origin of the investment, but to be able to invest in that place that, perhaps out of nostalgia or gratitude, the dual nationality investor wants to provide a service, even though his dominant and effective nationality is that of the country of origin of the funds.

Third, the general idea is to ferret out fraud, i.e., to prevent citizens of the host state from purposely making false vehicles as belonging to the capital-exporting states. Indeed, from the very beginning, almost 300 years ago, the idea of judges and arbitrators has been to prevent investors from protecting the capital they invest in host countries by subterfuge. The problem of dual nationals is that the only way to avoid appearing as national investors is to renounce the nationality of the country where they were born or where their parents came from, with the aggravating circumstance that, in many countries, there is no renunciation of citizenship[160]. Transparency is a fundamental objective of defining when a nationality is dominant and effective, hence exceeding the lower limit, which is represented by residence.

Fourth, dual nationality should be analyzed from a qualitative and not a quantitative criterion. We have analyzed this issue in depth. To define which is the dominant and effective nationality of a person, requires -by definition- to analyze the whole life of a person, to analyze all the factors, to give them the relevance that corresponds, therefore, the qualitative analysis, by means of the holistic approach, is the only solution to solve this already long conflict. The qualitative analysis, as mentioned above, oblige us to ponder the investor's life and how he/she acquired the nationality; where he/she studied; who he/she married; how he/she educates his/her children (not where); with which country he/she identifies him or herself more; where he/she has a medical check-up; where he/she pays taxes; where he/she has his/her savings; and others that allow to determine the dominant and effective nationality[161].

Fifth, no single factor, including the place of primary residence, is or should be decisive. Residence, as was the case with the previous point, has been the

[159] That was the tribunal's understanding in Micula and, therefore, stated that although the Miculas were originally from Romania, they were now nationals of Sweden and were only in Romania to take care of their investments.

[160] This subject of renunciation is very interesting. The heir to the Fiat empire, John Elkann, having been born in the USA of an Italian father and mother -the daughter of Gianny Agnelli- renounced his nationality acquired by *ius soli*, to be the sole holder of the nationality acquired by *ius sanguinis*.

[161] See supra at V. (The Factors, how they have been analyzed and applied - Qualitative, not quantitative analysis).

subject of extensive analysis in this work. Indeed, there are no preponderant factors in determining dominant and effective nationality, there are only factors, and they must be weighed by the tribunal. If all factors were given equal weight, we would not see so many awards returning to the commonplace of residence. Therefore, the residence factor is just another factor and not "the" *sine qua non* factor.

Sixth and finally, the factors to be considered are not exhaustive, there may be other factors, even more so in a world like today's, where artificial intelligence is making its first steps, but we do not know what the future may offer and that could be considered to define the dominant and effective nationality of an investor. We do not know what the future looks like, but as long as there are investors and nationalities, and even more so, nationals of several countries, it will be necessary to analyze each and every one of the factors that investors consider relevant to assert, so as to be able to determine what is that dominant and effective nationality that has been talked about since the cases of Mr. Nottebohm, and Mrs. Mergé and that appears as a fundamental element in the treaties of the United States and many other countries.

These latter paradigms suggest a refutable presumption that a kind of checklist -a form of new test- could be used as a starting point to define whether the nationality of the investor falls in the country receiving the investment, or in the country from which the investment originates.

As previously stated on several occasions, the tribunal must consider the entire life of the investor and not analyze solely their place of residence. Therefore, that checklist regarding investors should include:

i. how they acquired their nationality,

ii. where they studied,

iii. whom they married,

iv. how they educated their children (not where),

v. with which country they identify themselves more,

vi. where they have their medical check-up,

vii. where they pay taxes,

viii. where they have their savings,

ix. and, of course, where they have their residence, which is also a factor, in addition to others that the tribunal and the interested party may define in their claim.

VII. Conclusion

A uniform standard is essential. Reaching agreement cannot possibly be such a Herculean task. The outline of a standard was achieved in the Nottebohm, Mergé, and A/18 cases, however, in recent times, we have seen how practitioners have shown new and revolutionary factors in defining dominant and effective

nationality, and that path must be pursued further. Likewise, it is imperative that the tribunals proceed with a holistic approach, away from the simple and unfair route of downsizing everything to the place of residence. If the arbitration tribunals do not devote themselves to resolving the issue of the dual nationality of investors, we would be condemning them -under the current criteria- to an arbitrary deprivation of one of the nationalities they hold[162]. Understandably, arbitrators have been too fearful of confronting states defending themselves against expropriation of foreign investors, but there must be limits to this, for the own good of a solid international investment law with expectations for the future, which over the years has been losing lucidity, due to the positions of the defending states. This is what the quote from Harper Lee's novel refers to: that it takes *real courage* on the part of arbitrators to determine when the investor's dominant and effective nationality should be understood as being other than that of their place of residence, as this requires a more complex analysis. Otherwise, this difficulty will remain unsolved for a long time.

To paraphrase Professor Gabrielle Kaufmann-Kohler, in reference to the use of *stare decisis* in international investment law, defining dominant and effective nationality based on new factors "is a necessity... if only for the sake of the rule of law[163]."

[162] See Andrés A. Mezgravis, "The arbitrary deprivation of dual nationality in investment arbitration," *Arbitration International* 39, no. 4 (December 2023): 549–570.

[163] See Gabrielle Kaufmann-Kohler, in her lecture of November 14, 2006, entitled *Arbitral Precedent: Dream, Necessity or Excuse?* The text, in the form of an article, is available at https://lk-k.com/wp-content/uploads/Arbitral-Precedent-Dream-Necessity-or-Excuse.pdf. (In fact, in the last paragraph of the presentation she states: "[t]hese final points lead to the overall conclusion that 'arbitral precedent' is a necessity for certain types of disputes, if not only for the sake of the rule of law.")

Appendix A
List of renowned investors with dual nationality

Investor	Nationalities
Elon Musk	South Africa/Canada/U.S.A.
Adam Foroughy	Iran/U.S.A.
Safra Catz	Israel/U.S.A.
Eren Ozmen	Turkey/U.S.A.
Mortimer Zuckerman	Canada/U.S.A.
Andrew Chern	China/U.S.A.
Vinod Khosla	India/U.S.A.
Miriam Adelson	Israel/U.S.A.
Rupert Murdoch	Australia/U.S.A.
Thomas Peterffy	Hungary/U.S.A.
Pierre Omidar	France/Iran/U.S.A.
Eric Schmidt	U.S.A./Cyprus
Roman Abramovich	Russia/Israel/Portugal
Teddy Sagi	Israel/Cyprus
Liu Zhongtian	China/Malta
Pavel Durov	Russia/St. Kitts & Nevis
Myron Wentz	U.S.A./St. Kitts & Nevis
Evan Spiegel	U.S.A./France
Peter Thiel	Germany/U.S.A./New Zealand
Harlan Crow	U.S.A./St. Kitts & Nevis

Appendix B
Investors living in countries other than their country of nationality

Investor	Nationalities	Place of residence
Bernard Arnaud	France	Brussels
Francoise Bettencourt	France	Luxemburg
Giovanni Ferrero	Italy	Luxemburg
Klaus-Michael Kuhne	Germany	Switzerland
Jorge Paulo Lemann	Brazil/Switzerland	St. Louis, Mo, U.S.A.
Carolina Herrera	Venezuela/U.S.A.	N.Y., U.S.A.[164]
David Velez	Colombia	Uruguay
Jorge M. Perez	Argentina/U.S.A.	Miami, Fl., U.S.A.
Marcelo Claure	Bolivia	Miami, Fl., U.S.A.
Luis Carlos Sarmiento	Colombia	Miami, Fl., U.S.A.
Jaime Gilinsky	Colombia	London, U.K.
Gustavo Cisneros[165]	Venezuela	Miami, Fl., U.S.A.
Juan Carlos Escotet	Venezuela/Spain	A Coruna, Spain
Alicia Koplowitz	Spain	London, U.K.
Roman Abramovich	Russia/Israel/Portugal	Turkey
Teddy Sagi	Israel/Cyprus	London, U.K.
Myron Wentz	U.S.A./St. Kitts & Nevis	Grand Cayman
Pavel Durov	Russia/St. Kitts & Nevis	Dubai, U.A.E.
Muhammed Aziz Khan	Bangladesh	Singapore

[164] Special mention requires the case of this Venezuelan-born designer. There is no BIT between Venezuela and the USA. However, for the sake of discussion, let's assume that there was a BIT in force. In that case, the designer made her investment in the USA in 1982, became a naturalized American citizen in 2009, and settled permanently in New York in 2023. Undoubtedly, it could be said that this foreign investment of a Venezuelan investor in the U.S.A., until 2009, would have been protected by the BIT.

[165] Mr. Cisneros has passed away in 2023 in Miami, headquarters of the Cisneros Group.