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A Tale of Two Nationalities: Dual Nationality and Jurisdiction *Ratione Personae* in Investment Treaty Arbitration

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Abstract: Dual nationality poses complex challenges in public international law, particularly in international investment law. In this context, nationality plays a key role: serving as a determining factor to establish who qualifies for protection under a treaty regime and acting as a *ratione personae* criterion to establish jurisdiction in dispute resolution forums. This study provides a doctrinal and policy-oriented analysis to understand how international investment tribunals approach the issue of dual nationality when determining the jurisdiction *ratione personae* and what interpretative trends emerge across different arbitration frameworks. The analysis introduces a threefold typology of interpretative approaches and is tested against the case Alicia Grace v. Mexico, which illustrates how recent tribunals navigate and balance the existent tensions. By examining the treatment of dual nationality across the ICSID and non-ICSID awards and analyzing the interpretative methodologies employed in addressing treaty silence, the study identifies an emerging pattern of convergence across different arbitration fora: in recent awards, tribunals apply functionalist tools when faced with treaty silence which leads to restrictive outcomes, i.e., excluding dual nationals from access to arbitration. This ultimately signals increasing sensitivity to the integrity of the arbitration system against abuse, such as treaty shopping or strategic structuring of nationality.

Keywords: international investment arbitration dual nationality nationality jurisdiction investor-state dispute settlement

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(A) INTRODUCTION

"It was the best of times, it was the worst of times". This opening line written by Charles Dickens can reflect the nature of dual nationality in international investment arbitration, where the coexistence of multiple national identities presents both opportunities and challenges for an international investor. While dual nationality may give the investor access to protections under different treaties, it may also operate as a jurisdictional barrier for arbitration or may trigger complex questions of nationality determination and the legitimacy of treaty access.[1] Dual nationality particularly presents a significant challenge to the jurisdictional framework of international investment arbitration in cases where the investor also holds the nationality of the host-state.[2] This subject and its implications become increasingly complex in today's globalized landscape due to, for instance, the proliferation of investment migration schemes, known as Citizenship or Residency by

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1 J. García Olmedo, 'Dual Nationals in Investment Arbitration: an Emerging Field of inconsistent Decisions', *EJIL: Talk!*, published on 27 July 2023, accessed 28 May 2025.

2 P. Spiro, 'Multiple Nationality', *Max Planck Encyclopedia of Public International Law,* published on 2018, accessed 2 April 2025.

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Investment Programs.[3] These activities, which allow individuals to obtain citizenship or residency in exchange for financial investment, depart from the traditional criteria for the attribution of nationality or residency on the basis non-transferrable attributes, such as ties to the jurisdiction in relation to descent or in relation to factual connection, which typically refer to the culture, language, or longstanding connections with the country.[4] As such, these schemes create a unique and challenging environment and with the increase in popularity of investment migration schemes, also augment the risk of abuse or misuse.[5] Moreover, in the context of investor-state dispute settlement (ISDS), nationality can become a controversial issue when it is classified as "of convenience", the risk resulting from a practice called "treaty shopping" or "treaty abuse", which allows the investor to channel their investment in a way that, by means of a nationality of convenience, they attain access to the treaty protection of a third-state.[6] Although it is true that international investment agreements (IIAs) both define the scope of investment protections and serve as a source of consent to arbitration between investors and states, jurisdiction is ultimately shaped by a combination of the treaty provisions and the applicable arbitration rules, which may impose additional procedural criteria.[7] Particularly, this raises significant challenges for the assessment of *ratione personae* jurisdiction, which results in tasking investment tribunals with determining whether such individuals fall within the scope of the applicable treaty and arbitration rules.[8]

This article examines why investment tribunals adopted particular interpretations in key cases which represent some of the most prominent awards in which tribunals directly addressed the treatment of claimants holding dual or multiple nationalities. The analysis considers the cases *Luis García Armas*, *Serafín García Armas*, *Saba Fakes*, *Champion Trading*, *Manuel García Armas*, and *Santamarta* to highlight contrasting approaches in interpreting nationality in investment arbitration with the purpose of uncovering the reasoning underlying their decisions. Section (B) firstly provides a three-fold classification of interpretative approaches and analyzes how different tribunals construe the concept of nationality, which is done through a comparative analysis of the key decisions. In Section (C), the article further explores whether the identified approaches can be applicable in other cases, taking as a case study the decision of the arbitral tribunal in *Alicia Grace and Others v. Mexico*. Finally, Section (D) considers the broader implications of the interpretative approaches from a normative, more systemic perspective to determine whether the practical implications of the interpretative approaches in the current investment arbitration practice aims to strike a balance between ensuring investor protection while curbing manipulation and maintaining the legitimacy of the dispute resolution systems. The section also explores

3 Financial Action Task Force and OECD, 'Misuse of Citizenship and Residency by Investment Programmes', *FAFT*, published in 2023, accessed 22 May 2025, at 5-11.

4 More on the methods of nationality attribution in I. Brownlie, 'The relations of nationality in public international law' *British Yearbook of International Law* (1964) 284-364, at 302 ff and; R. Donner, *The Regulation of Nationality in International Law* (Finnish Societas Scientiarum Fennica, 1983), at 44-45.

5 Financial Action Task Force and OECD, *supra* n. 3.

6 M. Casas, 'Nationalities of Convenience, Personal Jurisdiction, and Access to Investor-State Dispute Settlement' 49 *NYU Journal of International Law and Politics* (2016) 63-127, at 66-67.

7 I. Bantekas, *An Introduction to International Arbitration* (Cambridge University Press, 2015), at ch 4, 151 [doi: 10.1017/CBO9781316275696].

8 ibid, Z. Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) ch 3, at 149-150 [doi: 10.1017/CBO9780511581137].

whether investment arbitration is evolving toward a coherent approach to dual nationality. The aim of this article is to analyze the key awards' interpretative choices to argue that they are not solely technical jurisdictional matters but that rather express normative implications that are deeply connected to questions of fairness and the legitimacy of the ISDS regime as a whole.

(B) DOCTRINAL APPROACHES IN INVESTMENT ARBITRATION PRACTICE: CASE-SPECIFIC INTERPRETATIONS OF NATIONALITY

This section gives particular attention to how tribunals construe the concept of nationality, specifically, their methods of nationality determination based on either formal documents or functional ties, with particular attention to their underlying interpretative choice, that is, whether tribunals opt for a strictly literal reading of treaty provisions or incorporate broader legal doctrines. The purpose is therefore to contribute to the understanding of the evolving case law in investment arbitration law by systematically analyzing key cases and identifying patterns in the tribunals' interpretative approaches. This will help to better understand the analytical and normative discussions in the subsequent sections. The proposed threefold typology distinguishes the tribunals' determination of jurisdiction *ratione personae* according to (i) a formalist interpretation grounded in strict textual analysis; (ii) a flexible, functionally oriented analysis reflecting openness to genuine connections; or (iii) restrictive functionalism, where reliance on doctrinal principles ultimately curtails access to arbitration for dual nationals. The aim of this classification is to bringing clarity to a complex and fragmented case law by organizing and systematizing the interpretative methods into coherent categories.

The aim of this section is to evaluate whether the interpretative choices made by tribunals in key cases reflect broader trends in arbitral reasoning, in other words, the rationale behind the decisions. This legal-doctrinal focus aims to examine whether tribunals' reasoning i.e., their choice to apply treaty terms strictly and in accordance with their literal and ordinary meaning or introduction of legal doctrine aligns with a strict, formalist interpretation of nationality, or a more flexible approach, which reflects the functional realities of the investor. While a limited number of cases have directly engaged with customary international law, those that did so illustrated the tension between treaty-based formality and the more functional approach of customary international law in establishing jurisdiction *ratione personae* approaches before tribunals in ICSID and non-ICSID arbitration contexts. Here it is worth mentioning that the presence of multiple jurisdictional frameworks could explain the resulting divergence in approaches. On the one hand, the ICSID Convention contains an explicit bar on claims by dual nationals who also hold the nationality of the respondent state by expressly limiting jurisdiction to natural persons who possess the nationality of a Contracting state *other than* the respondent state and who do not hold the nationality of the respondent State at the time of consent and registration of proceedings.[9] On the other

[9] Article 25(2)(a) of the ICSID Convention specifies that the dispute must occur between a Contracting State and a national of another Contracting State but excluding "any person who on either date also had the nationality of the Contracting State party to the dispute"; Bantekas, supra n. 7, at 292.

hand, tribunals following the UNCITRAL Arbitration Rules in particular those under the aegis of the Permanent Court of Arbitration (PCA) or *ad hoc* arbitration tribunals are free from the jurisdictional limitations contained in the ICSID Convention.[10] As the UNCITRAL Arbitration Rules do not explicitly address the issue of dual nationality, they allow for more flexibility for parties and arbitral tribunals to determine the eligibility of individuals with multiple nationalities on a case-by-case basis, considering additional factors such as the dominant or effective nationality of the individual or the connection between the individual's nationalities and the dispute at hand.[11]

(1) A Formalist Interpretation of Nationality: Strict Textual Interpretation and Reliance on Domestic Status

Under this approach, when determining the classification of dual nationals, tribunals give primacy to the BIT text, which, in turn, refers to the domestic attribution of the status of nationality, that is, they focus on domestic law. This section evaluates the practical implications of formalism in individual cases, therefore focusing on examining how tribunals conceive nationality when assessing investor standing. In line with the concept that nationality is primarily determined by the state that grants it, tribunals that apply a formalist interpretation typically do not give weight to competing factual connections unless the domestic law provided so, for instance, by establishing that the acquisition of the new nationality was subject to the renunciation or invalidation of the previous one.[12]

(a) ICSID Tribunals' Reliance on Formal Nationality Evidence

Firstly, while the ICSID Convention's text does not provide for requirements for proof of nationality, its *travaux préparatoires* indicate the intention to favor the formal approach to nationality, placing the evidentiary presumption in favor of official documentation issued by the state and therefore primarily relying on the domestic laws regulating nationality. The practice of the ICSID has accordingly, consistently upheld the principle that the legal relationship between the Contracting State and its own nationals is a matter for regulation by that state alone and when the tribunals have to assess nationality, they do so on the basis of the domestic laws, with tribunals deferring to the sovereign authority of states. Even if a BIT does not exclude dual nationals from making a claim, the ICSID Convention itself prohibits jurisdiction over those claims, which leads to narrower interpretations of BIT investor definitions for the purposes of establishing what investors can bring a claim, as tribunals must read those in a manner consistent with the Conventions' restrictions. Nonetheless, ICSID tribunals retain discretion to assess the validity of a claimant's nationality in light of domestic and international law.[13]

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10 ibid.

11 D. Karkason, 'Dual Nationality in Arbitration: ICSID vs. UNCITRAL Rules' *Transnational Matters*, published on 10 May 2024, accessed 24 May 2025.

12 A. Mezgravis, 'The Arbitrary Deprivation of Dual Nationality' (2023) 39(4) *Arbitration International* 549-570, at 554 [doi: 10.1093/arbint/aiad044].

13 'Chairman's Report on Issues Raised and Suggestions Made With Respect to the Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States'

Secondly, this formal approach is supported by the treaty-based nature of investment arbitration, as a consequence, ICSID tribunals have consistently adopted a formal and evidence-based approach when determining the nationality of claimants. This was illustrated in the case *Olguín v. Paraguay*, a case which did not involve a claimant holding the nationality of the respondent state at the time of the claim. This is therefore not part of the main analysis objective of this section but serves a framing function by illustrating the ICSID tribunals' approach to establishing an investor's nationality.

The award *Olguín v. Paraguay* (1998) illustrates the ICSID's approach to relevant rules of international law in interpreting nationality issues and reflects the ICSID's general preference for a formal and evidence-based assessment of nationality which is shaped by domestic law and guided by documentary proof.[14] In its assessment, the tribunal determined that: "[w]hat is important in this case in order to determine whether the Claimant has access to the arbitral jurisdiction based on the BIT, is only whether he has Peruvian nationality and if that nationality is effective". The tribunal further held that, it was "satisfied with the effectiveness of his Peruvian nationality to judge that he cannot be excluded from the regime of protection of the BIT".[15] Consequently, it considered sufficient that the claimant held Peruvian nationality under Peruvian law regardless of his ability to exercise full political rights in that country which underscores the distinction between the concept of nationality as a legal status in international law and that found in domestic instruments, with the latter prescribing the duties and obligations attached to it internally.[16]

Additionally, in its analysis, the Tribunal followed the general position of ICSID tribunals in that the principle of effective nationality cannot be invoked where the relevant nationality under domestic law is clear and undisputed to deny an investor of the rights provided by a given BIT.[17] The Tribunal's assessment reaffirms the ICSID Convention's strict requirements regarding nationality to establish jurisdiction and serves to illustrate the tribunal's reluctance to invoke broader customary international law where domestic law nationality determination rules suffice. Moreover, it reflects the broader evidentiary trend in ICSID practice: a formal, documentary-based assessment of nationality for establishing *ratione personae* jurisdiction, which is rooted in domestic

(1964) in International Centre for Settlement of Investment Disputes, *History of the ICSID Convention* (1968) vol II, part I, at 579-580.

14 International Centre for Settlement of Investment Disputes, *supra* n. 13 vol II, part I, 122; S.W Schill, C. Schreuer, and A. Sinclair, 'Article 25' in S. Schill *et al*. (eds), *Schreuer's Commentary on the ICSID Convention* (Cambridge University Press, 2022) 438, at para 1127 ff [doi: 10.1017/9781316516584].

15 *Eudoro Armando Olguín* v. *Republic of Paraguay* (Award) [2001] ICSID Case No ARB/98/5, at para 61.

16 ibid; here, the Tribunal held that "[w]hat is important in this case in order to determine whether the Claimant has access to the arbitral jurisdiction based on the BIT, is only whether he has Peruvian nationality and if that nationality is effective. There is no doubt on this point". On the one hand, nationality in the international law context serves the main purpose of attributing individuals and populations to states, with nationality as the formal link. On the other hand, citizenship is the subject of internal politics and denotes the individual's possession of full political and civil rights within a given state; see P. Weis, *Nationality and statelessness in international law* (Stevens, London, 1956), at ch 1, 4-7.

17 H. Haeri and D. Walker, '"And you are . . .?" Dual Nationals in Investment Treaty Arbitration' 3(2) *BCDR International Arbitration Review* (2016) 153-180, at 175 [doi: 10.54648/BCDR2016024]; M. Palacios La Manna, 'La situación de los inversores doble nacionales y criterios para determinar la nacionalidad efectiva' 2 *Boletín Iberoamericano de Arbitraje y Mediación* (2022) 39-49, at 45.

law and is typically supported by official evidence such as passports, certificates or registration records. This is in line with the preparatory documents which indicate that the ICSID Convention is based on the principle that the legal relationship of nationality between the Contracting States and the investors is a matter for regulation by the state, as part of their *domaine réservé*.[18] This trend can be observed throughout ICSID cases dealing with dual nationality.[19]

A similar approach was taken by the Tribunal in the *Luis García Armas* case, which albeit outside the ICSID Convention arbitration framework, i.e., under the ICSID Additional Facility Rules, nevertheless adheres to the ICSID tribunals' predominant trend toward deference to formal nationality status, as established by domestic, internal rules. In this case, the Tribunal took into account that the investor had registered himself as Venezuelan "national investor" in the SIEX, the agency that regulates and controls foreign investment.[20] In doing so, the Tribunal examined the principle of *ratione voluntatis* and concluded that renunciation of a nationality must be carried out through an express and formal act. It therefore rejected Venezuela's argument that the investor had "implicitly renounced" to their Spanish nationality.[21] Here, it is evident that the Tribunal placed emphasis on objective indicators, such as the registration and the date of registration. This emphasis is further underscored by the language used by the Tribunal, who referred to the claimant as "Spanish national" without entertaining other factors such as the residence or factual links. Notably, the Tribunal, when applying the Vienna Convention on the Law of Treaties (VCLT) interpretation rule, placed more emphasis on the object and purpose of the BIT and therefore also dismissed the applicability of *Nottebohm*'s genuine and effective link, a principle of general international law.[22]

Venezuela additionally put forward that "allowing the domestic investor to raise a claim against their own state would constitute an abuse of the investment arbitration system".[23] However, the Tribunal did not consider this to be a case of abuse of process but rather one of inexistence of *ratione personae* as a result of the terms of the BIT in conformity with the interpretation rules set out by Article 31 of the VCLT: "Sin embargo,

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18 'Chairman's Report on Issues Raised and Suggestions Made With Respect to the Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' (1964) in International Centre for Settlement of Investment Disputes, *History of the ICSID Convention* (1968) vol II, part I, 579-580; International Centre for Settlement of Investment Disputes, History of the ICSID Convention (1968) vol II, part I, 122; S.W Schill, C. Schreuer, and A. Sinclair, 'Article 25' in Schill *et al*. *supra* n. 14, 438, at para 1127 ff; see *Nationality Decrees Issued in Tunis and Morocco (Great Britain* v. *France)* (Advisory Opinion) [1923] PCIJ Rep Series B no 4; K. Ziegler, 'Domaine Réservé', *Max Planck Encyclopedia of Public International Law*, published in 2013, accessed 27 February 2025.

19 The tribunals in *Saba Fakes* and *Champion Trading*, while operating under the ICSID system and applying the ICSID Convention, follow this general approach. However, for the purposes of this classification, they are discussed in detail under the second category, to highlight important nuances.

20 *Luis García Armas* v. *The Bolivarian Republic of Venezuela* (Award) [2024] ICSID Case No RB(AF)/16/1, at para 213; A. Pellet, 'Additional Expert Report: Dual or Plural Nationality In a BIT Context' for *Manuel García Armas and others* v. *The Bolivarian Republic of Venezuela* and *Luis García Armas* v. *The Bolivarian Republic of Venezuela*, at para 38.

21 ibid, Luis García Award, at para 224.

22 ibid, at para 212 ff.

23 C. Schreuer, 'Legal Opinion: Questions of Jurisdiction relating to Nationality' (2017) for *Manuel García Armas and others* v. *The Bolivarian Republic of Venezuela* and *Luis García Armas* v. *The Bolivarian Republic of Venezuela*, at para 156 ff.

en el presente caso no estamos ante un mero abuso de derecho sino ante una inexistencia objetiva de jurisdicción *ratione personae* como resultado de la interpretación de las disposiciones pertinentes del TBI, de conformidad con la regla general de interpretación del artículo 31 de la Convención de CVDT".[24] In taking this position, the Tribunal implied that, even if it could establish jurisdiction *ratione personae*, the claimant's acquisition of his Spanish nationality could have still been considered as strategically motivated, which would amount to an abuse of the treaty. The Tribunal thereby reaffirmed that the object and purpose of investment treaties is that they are designed to protect bona fide investments made by foreign investors, and do not allow for the investor to modify their status only to accede to arbitration.

(b) Non-ICSID Tribunals' Reliance on Formal Nationality Evidence

Building on the discussion of ICSID tribunals' reliance on formal nationality evidence, the case *Serafín García Armas* also confirms this approach by affirming the Tribunal's jurisdiction ratione personae over claims brought by Spanish-Venezuelan dual nationals. The Tribunal interpreted the Spain-Venezuela BIT as allowing such claims in the absence of an explicit exclusion, even where the dual national held also the nationality of the host state. In doing so, the Tribunal did not allow to subject the definition to the added condition of the nationality's effectiveness or dominance.[25] This case represents an important instance of tribunal reasoning grounded in the treaty's *lex specialis* nature and displays a formalist approach that largely sidelines customary international law. Even though the outcome was permissive i.e., the Tribunal established jurisdiction ratione personae over dual nationals with the nationality of the respondent state in the absence of bar over dual nationals claims the determination of nationality itself was firmly grounded in a formalist approach.[26]

On its part, Venezuela tried to invoke the customary international law principle of 'effective and dominant' nationality to argue that the claimants could not invoke their Spanish nationality against it under the BIT, because that nationality was merely formalistic, in contrast with their deeper actual ties to Venezuela.[27] The Tribunal however, held that BITs constitute *lex specialis* between the contracting parties and, as the textual interpretation of the provisions does not result in an ambiguous interpretation, they are not "subject to the application of customary international law".[28] As such, the tribunal deemed unnecessary to inquire into the claimants' effective or dominant nationality, accepted the Spanish nationality as sufficient for the purposes of the BIT,[29] and rejected the objection of the respondent state. In doing so, the Tribunal gave decisive weight to

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24 Luis García Award, *supra* n. 20, at para 251-252.

25 This is explained further in Schreuer *supra* n. 23, at para 155.

26 E. Nana Adjei, 'Arbitration Involving Dual Nationals Under Investment Treaties: A New Area Of Conflicting Rulings In International Law' 11(11) *Journal of Law and Sustainable Development* (2023) 1-9, at 3 ff [doi: 10.55908/sdgs.v11i11.1961].

27 C. Trevino, 'Treaty Claims by Dual Nationals: A New Frontier?', *Kluwer Arbitration Blog*, published on 8 October 2015, accessed 29 April 2025.

28 *Serafín García Armas and Karina García Gruber* v. *The Bolivarian Republic of Venezuela* (Decision on Jurisdiction) [2014] PCA Case No 2013-3, at para 158, 159-166, 174-175.

29 ibid, at para 200-206.

the formal criterion of nationality as recognized by domestic law. Thus, even if the claim was brought against Venezuela, a nationality possessed by the claimants, emphasizing the absence of dual nationality bar in Spain-Venezuela BIT, the Tribunal found jurisdiction *ratione personae*. This decision illustrates how tribunals operating outside the ICSID framework may also rely solely on the formal legal status rather than functional or contextual nationality tests when the treaty provides no reference to the effective and dominant test.

(2) Emerging Flexibility: Theoretical Openness to Functionalist Interpretation

Under this approach, tribunals continue to ground their reasoning in the treaty text and formal indicators of nationality, similarly to those following a formalist approach. However, they have also acknowledged the relevance of principles of general international law, without applying them to the case at hand, therefore reflecting a "theoretical openness" to consider the substantial ties of the individual with the state by incorporating the dominant and effective nationality doctrine. Although this interpretative approach does not mark a full shift, it suggests growing willingness to move beyond formalities when determining nationality for the purposes of establishing arbitration jurisdiction and more flexibility and sensitivity to the realities of the dual nationality investors.

Similarly to *Olguín v. Paraguay*, *Micula v. Romania*, a single nationality case, illustrates the ICSID tribunals' approach, which, albeit cautiously suggests a potential openness to functional interpretation in specific contexts.[30] In this case, the claimants submitted certificates of naturalization to prove their Swedish nationality and, by extension, the protection under the relevant BIT as well as the Tribunal's jurisdiction *ratione personae*. The Tribunal accepted these documents as sufficient and affirmed that there "exists a presumption in favor for the validity of a State's conferment of nationality. The threshold to overcome this presumption is high".[31] Although in its reasoning, the Tribunal stressed the relevant role that the BIT pointing to the national Swedish law, this decision is in line with the ICSID's formalist approach, which generally treats certificates as conclusive evidence.[32] In line with the ICSID's formalist approach, the Tribunal assessed the applicable Swedish law, which required three prerequisites for naturalization that were met in this case: the alien "must have been at least 18 years old, he must have lived in Sweeden for at least five years, or three years if married to a Swedish national, and must have led a respectable life". Subsequently, the Tribunal observed that once naturalized, the claimants had no need to demonstrate closer links to Sweden.[33]

Importantly, the Tribunal noted that it would be inappropriate to consider the claimants' nationality to be Swedish for the purpose of the ICSID Convention and the BIT if it were shown that they had obtained it in a manner inconsistent with

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30 The claimants had possessed Romanian nationality in the past but had renounced to it and only possessed Swedish nationality at the relevant times.

31 *Ioan Micula and others* v. *Romania* (Decision on Jurisdiction and Admissibility) [2008] ICSID Case No ARB/05/20 24, at para. 87.

32 Ursula Kriebaum, 'Article 42' in Schill *et al. supra* n. 14, 438, at para 1127.

33 *Micula and others* Award, *supra* n. 31, at para 102.

international law, for instance, through fraud or material error.[34] In this respect, as the respondent state did not submit any evidence to indicate this, the Tribunal considered that the respondent state did not meet the burden of proof to establish grounds for the Tribunal to question the nationality of the claimants.[35] In pointing out the absence of fraud or bad faith of the claimants in acquiring Swedish nationality, the Tribunal noted a major distinction between the present case and the *Nottebohm* case. In this case, Romania had agreed to the claimants' Swedish nationality when they accepted their renunciation of Romanian nationality. This case, while still remaining anchored in the formalist evidentiary framework of the ICSID relying on the domestic classification of the claimants as nationals it can be considered a slight shift from a hardline formalist approach. The Tribunal's willingness to acknowledge the relevance of good faith and the absence of fraud as relevant considerations influencing the assessment of nationality suggests the possibility to take factors, other than official documentation, into account, albeit, in the very narrow situation of fraud or legal error. In this instance, however, the Tribunal did not find any indication that the links of the claimants were of such nature as to warrant the Tribunal's questioning the effectiveness of their Swedish nationality.[36]

Following the ICSID tribunal's still cautious approach but hinting at a limited openness to functional interpretation in certain contexts, the *Saba Fakes* award acknowledges the possibility of interpreting jurisdictional rules beyond a purely formalistic approach but still reinforces the strict wording of Article 25(2)(a) of the ICSID Convention. The Tribunal noted that the article "expressly excludes from the Centre's jurisdiction any natural person who holds the nationality of a Contracting State to the dispute".[37] Moreover, it observed that this jurisdictional bar was the only one envisioned by the drafters of the Convention and that it was not subject to the test of effectiveness of the host state's nationality. Additionally, as the BIT did not leave room as to the question of whether the Parties intended for the effectiveness test to apply, the Tribunal concluded that the doctrine was not applicable in the present case. As a consequence, the effectiveness of the Claimant's Dutch nationality was considered irrelevant for determining the Tribunal's jurisdiction and in its analysis, the Tribunal relied on formal, documentary evidence of nationality. The result is that this decision reaffirmed the primacy of domestic determination of nationality over broader substantive or functional tests to determine jurisdiction *ratione personae* in ICSID arbitration.[38]

In reaching this conclusion, the Tribunal found support in the fact that Mr. Fakes' Dutch nationality is demonstrated by the fact that both of his parents held Dutch nationality as well as his wife and three children. This determination of nationality by the domestic legislation follows the reasoning *ius sanguinis*. And the fact that he holds a Dutch passport and driver's license, all formal and official documents issued by The Netherlands. This was further supported by the fact that he spent a significant part of his childhood and early adulthood in the Netherlands and that he studied there too,

34 ibid, at para 91, 95.
35 ibid, at para 95-96.
36 ibid, at para 104.
37 *Saba Fakes* v. *Republic of Turkey* (Award) [2010] ICSID Case No ARB/07/20, at para 59
38 ibid, at para 79.

so the Tribunal found the links to be genuine and effective.[39] The Tribunal additionally noted that this nationality could not be considered to be acquired involuntarily or to have been acquired out of *convenience*.[40] Here, it is worth noting the Tribunal's mention of the exceptional circumstances in which the claimant could not satisfy the nationality requirements of ta BIT and Article 25(2)(a): when acquiring the disputed nationality involuntarily or by convenience.[41]

Even earlier, in 2003, the Tribunal in *Champion Trading* had followed a similar approach when determining that the claimants had Egyptian nationality, regardless of the weak links they maintained with that country, consequently barring the claims of the dual nationals, as they held the nationality of the respondent state from ICSID arbitration. In its assessment, the Tribunal relied on Egyptian domestic law, which provided that the sons of Egyptian nationals retain nationality for one hundred generations, regardless of where they are born and where they live.[42] In doing so, the Tribunal confirmed the ICSID's Convention formalistic approach to nationality, emphasizing legal status over factual connection. Additionally, this case further reinforces the broader ICSID approach that rejects the applicability of the *Nottebohm* doctrine in the context of ICSID investment arbitration where the Convention provides a clear rule for dual nationals possessing the nationality of the Sate party to the dispute..

In its assessment, the Tribunal acknowledged the concern that the application of *ius sanguinis* principle over multiple generations, as provided by Egyptian domestic law, might raise the question about the general appropriateness of the blanket exclusion in Article 25(2)(a).[43] However, it found that the present case did not give rise to such question and therefore it did not need to be answered.[44] This consideration was nevertheless significant as, in fact, the respondent state in *Saba Fakes* later referred to this judgment when it tried to construe this Tribunal's decision as it "does not in any way exclude the application of the effective nationality test set forth in *Nottebohm* or in *Decision A/18* in general. Rather, it merely concludes that these decisions "find no application in the present case, namely in the presence of dual nationals having the nationality of the Host State (Egypt and the United States) subject to the Article 25(2)(a) exception."[45] Moreover, this case presents one of the envisioned situations later mentioned by the Tribunal in *Saba Fakes* in 2010, where nationality acquired involuntarily *could* or *should* be disregarded.[46]

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39 ibid, at para 80.

40 ibid, at para 77-78; in cases where the nationality was acquired out of convenience, the Tribunal could, in principle, ignore the state's rules on nationality for the purposes of the award on the grounds that the nationality was conferred in the absence of any effective link between the state conferring the nationality and the individual; L.P. MacDonald and R. O'Reilly, 'Investment Treaty Arbitration: Covered Investors' in 'In-Depth: Investment Treaty Arbitration', *Lexology*, published in 2024, accessed 24 May 2025.

41 ibid.

42 R. Wisner and N. Gallus, 'Nationality Requirements in Investor State Arbitration' 5 *Journal of World Investment & Trade* (2004) 927-944, at 929.

43 ibid; *Champion Trading Company; Ameritrade International, Inc* v. *Arab Republic of Egypt* (Decision on Jurisdiction) [2003] ICSID Case No ARB/02/9 16-17.

44 ibid.

45 *Saba Fakes* Award, *supra* n. 37, at para 75.

46 ibid, at para 77-78.

Continuing this approach to carefully balance between formalism and interpretative flexibility, in 2017, the Tribunal of *Bahgat v. Egypt* applying UNCITRAL Rules, firstly recalled the well-established principle that, "as a matter of international law, it is the law of the state whose nationality is claimed that will govern whether an individual is a national of that state". The Tribunal then affirmed its authority to examine issues of nationality for the purposes of international law despite the existence of this general principle, which was concretely reflected in the two BITs relevant for the present case.[47] Crucially, in its award on jurisdiction, the Tribunal recognized that while general international law principles may play a role in the analysis on dual nationality, they do not override treaty-specific provisions. Here, both the Egypt-Finland and Egypt-UAE BITs were silent on the exclusion of dual nationalities.

It is worth noting that the Tribunal acknowledged that, while domestic determinations constitute *prima facie* evidence, they only create a presumption of nationality that may be rebutted.[48] Further, as the Tribunal concluded that "general international law principles concerning the consequences of dual nationality in respect of jurisdiction *ratione personae* do not trump the explicit language of the BITs", it turned to the BIT provisions, which in this case referred to the domestic law.[49] Accordingly, the Tribunal accepted that the claimant's Finnish nationality was correctly determined pursuant to Finnish law by the Finnish Court.[50] Here, although domestic law prevailed the *Bahgat* Tribunal shows greater flexibility when approaching claims by dual nationals, making their acceptance dependent on how the BIT is drafted. As in Egypt-Finland BIT, dual nationality is not expressly barred, the Tribunal successfully established *ratione personae* jurisdiction based on the claimant's Finnish nationality even for a claim against Egypt, the other state of nationality.[51]

(a) Theoretical Openness: a Minimal Departure from Hardline Formalism

The ICSID Tribunals' reasoning is firmly grounded in the formalist evidentiary approach, relying on the domestic classification. However, the cases *Micula v. Romania*, *Saba Fakes*, and *Champion Trading* reflect a marginal, largely theoretical shift from strict formalism that might contribute to prevent abuse of treaty protections. This seems to offer a narrow, conceptual opening to consider factors beyond formal documentation. However this openness is still confined to exceptional circumstances and found no practical effects in neither of the cases: as in each case, the Tribunals ultimately did not find it necessary to question the validity or effectiveness of the nationality as established by the domestic laws. Similarly, under the aegis of the PCA and following UNCITRAL rules, Tribunals have demonstrated a still cautious but more perceptible openness to functionalist approaches in determining the investor's nationality. The *Bahgat* award illustrates how some tribunals navigate a formalist approach yet increasingly sensitive

47 *Mohamed Abdel Raouf Bahgat* v. *Arab Republic of Egypt* (Decision on Jurisdiction) [2017] Case PCA No 2012-7, at para 156-164.
48 ibid, at para 156, 164.
49 ibid, at para 231-232.
50 ibid, at para 156-159, 185 ff.
51 ibid, at para 231-233.

to functionalist reasoning. This approach remains formalist at its core but open to functional interpretations however it calls for a more nuanced assessment of nationality, often importing concepts from general international law, such as effective nationality, especially in dual nationality scenarios. Although this interpretative approach may not yet represent a full doctrinal shift, it signals to emerging openness that, in the context of ICSID arbitration, was considered only theoretical earlier in this section.

In the cases categorized under this section, tribunals generally evaluated nationality through a combination of formal documentation and domestic determinations of nationality of the state whose nationality was at stake. Here, while formal nationality still remains central, some tribunals have entertained functional or factual considerations when establishing their jurisdiction *ratione personae*, especially in the absence of express treaty provisions governing dual nationality. This, albeit theoretical, evidentiary and interpretive flexibility stands in contrast to ICSID's generally formalistic stance and marks the importance of treaty text in determining whether dual nationals can access investment arbitration forums. Even though Tribunals still rely on the traditional, formal conception of nationality grounded in treaty-defined criteria and evidenced through domestic issued legal documentation, similar to the ICSID Convention's approach these decisions reveal openness to functionalist reasoning. This shows more sensitivity to functional realities that investors face, in particularly, in cases involving dual nationals but also considerations of treaty abuse. As such, these cases show the interplay growing tension underlying the formal approach in tribunals' reasoning.

(3) Restrictive Functionalism: When Reliance on Doctrinal Principles Denies Access to Arbitration

Recent developments in international arbitration case law reveal a growing tension with the formalist and functionalist approaches adopted by tribunals to determine the investor's nationality vis-à-vis dual nationals. A functional approach emphasizing factual and contextual ties such as residence, economic and family ties was invoked in the aforementioned awards to support a broader interpretation of the conditions necessary to establish the nationality of the investor and thereby grant access to arbitration. This stands in contrast with the formalist approach, which solely relies on objective legal status as conferred by domestic law. In previous cases, parties had invoked the doctrine of dominant and effective nationality from customary international law to favor a more expansive reading and allow claimants to qualify as investors and therefore grant the access to arbitration.[52] However, a new trend seems to have emerged, in which a functionalist approach is adopted not to broaden the *ratione personae* jurisdiction requirement and consequently extend protection to dual home-host state nationals, but to restrict access to dual nationals.[53] This shift reflects what may be termed as "restrictive functionalism". Tribunals adopting this approach, such as those in *Manuel García Armas* and *Santamarta v. Venezuela*, have interpreted the silence or ambiguity of the investment

[52] P. Mori Bregante, 'The Passports' Game: Chronicle Of A Foretold Death For Dual Nationals' Claims', *Kluwer Arbitration Blog*, published on 20 January 2020, accessed 20 May 2025.

[53] J. García Olmedo, 'Recalibrating The International Investment Regime Through Narrowed Jurisdiction' 69(2) *International and Comparative Law Quarterly* (2020) 301-334, at 311-312 [doi:10.1017/S0020589320000044].

treaty terms as a gateway to incorporate broader doctrines from general international law, notably the dominant and effective nationality test to limit claims by dual nationals with stronger ties with the respondent state.

(a) Doctrinal Principles and the Exclusion of Dual Nationals

In contrast to previous awards, where tribunals considered that rules of international law from the field of diplomatic protection were not applicable to the interpretation of investment treaties, both the *Manuel García Armas* and *Santamarta* Tribunals considered the principle of dominant and effective nationality, borrowed from diplomatic protection, as important in the field of investment arbitration. As a consequence, where the relevant BIT is silent on the issue of dual nationals, tribunals following this approach do not preclude dual nationals but require the dual national claimants to prove that their dominant and effective nationality is not that of the host state; otherwise, their claims will be dismissed based on lack of *ratione personae* jurisdiction.[54] What is particularly significant in this shift is the way in which tribunals have applied the concept despite the fact that neither the domestic law in these cases, which was contemplated as applicable by the BIT, nor the applicable *lex speialis* constituted by the applicable BIT. The domestic law on nationality did not foresee the possibility of disregarding one of the claimant's nationalities, the result reached through the application of dominant and effective nationality.[55] The reliance of the principle of dominant and effective nationality in these cases thus reflects a shift in interpretative approaches, where tribunals incorporate functional criteria, even in the absence of an explicit treaty basis for such assessment. This emerging approach, where functional tools are used to restrict access, is further exemplified in a more recent decision rendered in 2024, *Alicia Grace and others v. Mexico*, which is analyzed in detail in the next section.

In *Manuel García Armas*, the Tribunal took a distinctively restrictive stance toward the dual national claimant seeking protection under the Spain-Venezuela BIT, which departs notably from the broader, more permissive approach, adopted in *Serafín García Armas* which had allowed access to the dual nationals only a few years earlier in a closely related case.[56] In its reasoning, the Tribunal rejected the idea that dual nationals could bring claims against one of their state of nationality without limits.[57] The Tribunal then admitted that although "[l]a cuestión de si una persona posee o no la nacionalidad de un determinado Estado corresponde al derecho doméstico del Estado en cuestión […], los efectos de dicha nacionalidad en el plano internacional es un asunto que compete al derecho internacional".[58] In doing so, the Tribunal reaffirmed the role of the BIT as *lex specialis* while maintaining the relevance of functionalist considerations, as required by general international law.[59]

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54 C. McLachlan, L. Shore, and M. Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2017) ch 5, at 182-185 [doi: 10.1093/law/9780199676798.001.0001]; Mori Bregante, *supra* n. 52.

55 Mezgravis, *supra* n 12, at 549 567.

56 *Manuel García Armas and others* v. *Bolivarian Republic of Venezuela* (Decision on Jurisdiction) [2019] PCA Case No 2016-08, at para 729.

57 ibid, at para 705.

58 ibid, at para 707.

59 ibid, at para 644-645.

In its assessment of nationality, the Tribunal held that "[l]os Demandantes en ningún momento han alegado que su nacionalidad dominante sea la española. De hecho, simplemente se han limitado a afirmar que su nacionalidad española 'no es puramente formal', y el Tribunal concuerda con ellos en ese sentido". As such, the Tribunal adopted the *Nottebohm* effective nationality test and took into account that Venezuela was the country were the claimants had lived for decades, had established family ties, where they exercised political rights and where the center of their economic activity lied.[60] In the end, the Tribunal concluded that the claimant's possession of Venezuelan nationality barred them from bringing claims against Venezuela under the BIT, as that was their dominant and effective nationality, despite their simultaneous possession of Spanish nationality. As such, the *Manuel García Armas* award takes the reasoning that was only considered theoretical and approached with caution in the previous section and takes into account considerations other than the formal nationality when interpreting the nationality of a dual-national claimant with the result of denying jurisdiction *ratione personae*.

More recently, a different Tribunal rendered a decision in jurisdiction in 2023 for the case *Santamarta v. Venezuela*. The respondent state clarified that the application of the principle does not imply questioning the nationality of the person but determine the effects that can be attributed to the nationality at an international level.[61] Moreover, the *Santamarta* Tribunal rejected the application of broader principles such as sovereign equality and no-responsibility as relevant in determining whether dual nationals are protected by the BIT.[62]

With regard to the principle of dominant and effective nationality, the Tribunal found it to be applicable to the case at hand, as the principle governs the resolution of nationality claims involving dual nationals even in the context of investment arbitration since, although the BIT constitutes a *lex specialis*, it is not a self-contained regime and is therefore subject to other rules of customary international law.[63] Consequently, the Tribunal considered other factors such as habitual residence, center of personal, family, and social life, or the fact that he exercised full political rights in Venezuela. Interestingly, these were not considered relevant for dominant and effective nationality test.[64] However the Tribunal assessed the claimant's center of economic interests, i.e., precisely the fact that he had his investment in the territory of Venezuela, one of the states of his nationalities, which ultimately determined that his dominant and effective nationality was Venezuela. Despite, the claimant's own declaration regarding his close links with Spain and concluded that the ties with Spain are insufficient to establish Spanish nationality as dominant, therefore deciding that the claimant's dominant nationality was Venezuelan, therefore excluding him from the protection of the BIT.[65]

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60 ibid, at para 734-737.

61 *Raimundo J Santamarta Devis* v. *Bolivarian Republic of Venezuela* (Award on Jurisdiction *Ratione Personae*) [2023] PCA Case No 2020-56, at para 247.

62 ibid, at para 458-459; 464-465.

63 J. Torrealba and A. Gallotti, 'A Never-ending Story? Dual Nationals in Investment Arbitration: A Commentary on Santamarta v. Venezuela', *Kluwer Arbitration Blog*, published on 29 November 2023, accessed 29 April 2025.

64 ibid; *Manuel García Armas* Award, *supra* n. 56, at para 505.

65 ibid, at para 503-518, emphasis on 510-511.

(C) CASE STUDY: ALICIA GRACE AND OTHERS V. MEXICO

This section brings attention to a case study, an award delivered in August 2024, to assess whether and how the Tribunal of *Alicia Grace and others v. Mexico* confirms, challenges, or departs from existing approaches to dual nationality in investment arbitration and what this means for the evolving treatment of dual nationals in investment arbitration. In other words, this award is used as a representative case study to test the classification of interpretative approaches developed in Section (B). This is a particularly significant case, as it directly engages with the interpretation and application of dual nationality rules in international investment arbitration, within the framework of the ICSID Convention and interpreting the NAFTA, and deals with its intersection with treaty interpretation principles and customary international law. Importantly, this case serves as a bridge between doctrinal classification, explained in the previous section, and normative stakes, which will be explored in the Section (D), offering a detailed practical example of evolving doctrine and jurisdictional reasoning.

This section gives particular attention to the tribunal's interpretative method and how this shapes the outcome of its analysis. This section, after giving a brief background and context, offers both doctrinal insight, i.e., a recent application of the functional but restrictive approach, and an illustration of the broader legal and policy dilemmas surrounding *ratione personae* jurisdiction in the presence of dual nationality. Although this award is relatively recent and temporally close to other decisions within the "restrictive functionalism" category, i.e., *Manuel García Armas* and *Santamarta*, it offers a clear and deliberate application of functional reasoning that ultimately narrows jurisdiction *ratione personae* and consequently restricts access to investor-state arbitration, therefore reflecting the third trend identified in this study.

(1) Background and context of the dispute

In *Alicia Grace and Others v. Mexico*, a group of U.S. investors brought claims under the North American Free Trade Agreement (NAFTA)[66] against Mexico, which allegedly caused substantial losses caused through government actions to their oil-related investments. The case involved 27 investors including two Mexican U.S. dual citizens who collectively held 43% holdings of Integradora Oro Negro, a Mexican company operating offshore platforms via Singaporean subsidiaries contracted to provide services to Mexico's state-owned oil company, PEMEX.[67] In this analysis, only the nationality issues arising in relation to two claimants, Mr. Carlos Williamson-Nasi and Mr. José Antonio Cañedo White, two natural persons, will be discussed. In relation to these two claimants, Mexico objected to the jurisdiction *ratione personae* on the basis that the claimants' dominant and effective nationality being Mexican precluded them from bringing a claim against that

66 North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) (NAFTA), now replaced by the United States, Mexico and Canada Agreement (UMSCA).

67 V. Dritsa, 'Tribunal in oil platform dispute applies dominant and effective nationality test to conclude that claimants lacked standing for reflective losses claims under NAFTA', *Investment Treaty News*, published on 27 January 2025, accessed 31 May 2025.

state.[68]With regard to the procedural framework, the decision, although formally titled "award", it deals exclusively with jurisdictional issues and the case was administered under UNCITRAL Arbitration Rules by the ICSID, therefore the exclusionary rule contained in Article 25(2)(a) of the ICSID Convention for dual nationals bringing claims against their own state does not apply. Here, it is worth noting that Mexico is not a party to the ICSID Convention, therefore NAFTA cases involving Mexico proceeded either under the Additional Facility Rules or the UNCITRAL Rules.[69] The absence of a textual prohibition of dual nationals, similar to the case of *Luis García Armas* allows the tribunals more flexibility when interpreting nationality issues. For this reason, a more functionalist approach, such as that seen in *Manuel García Armas* and *Santamarta*, which relies on customary international law borrowed from diplomatic protection, concretely the dominant and effective nationality doctrine.

Mexico's jurisdictional objection raised to the Tribunal's jurisdiction *ratione personae* was in relation to Messrs. Williamson-Nasi and Cañedo White and in relation to requirements in NAFTA's Articles 1116 and 1117.[70] The respondent state argues that Messrs. Williamson-Nasi and Cañedo White are Mexican nationals, for which reason they would not qualify as protected investors under the terms of the NAFTA.[71] Moreover, the respondent state argued that, as nothing in NAFTA provided that dual nationals (or permanent residents)[72] of two NAFTA Contracting States should be permitted to bring claim against either party, the rule of customary international law that a national may not bring claims at the international level against his or her own state, i.e., non-responsibility, should prevail.[73] Furthermore, Mexico contended that, even if claims by dual nationals were, in principle, permitted under the NAFTA, arbitral tribunals should apply the well-established customary rule of dominant and effective nationality.[74] On the other hand, the two claimants contended that, in the absence of a textual bar, they should be allowed to proceed and they pointed out their deliberate choice to submit the claim under the UNCITRAL Rules. Since Article 1120 of the NAFTA provided the option to initiate proceedings under either the ICSID Convention, the ICSID Additional Facility Rules, or UNCITRAL Rules, the claimants argued that their choice of UNCITRAL Rules excludes any potential restriction on dual nationality arising out of the ICSID regime.[75]

From the perspective of the treaty framework, the context of NAFTA's Chapter XI is critical to understand the scope of investor protection and access to arbitration. Under Chapter XI of NAFTA, investors had a direct right of access to various arbitration

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68 *Alicia Grace and others* v. *Mexico* (Final Award) [2024] ICSID Case No UNCT/18/4, at para 240, 445 ff.

69 D.A.R. Williams, 'Jurisdiction and Admissibility' in P. Muchlinski, F. Ortino, and C. Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) ch 22, at 907. [doi: 10.1093/oxfordhb/9780199231386.001.0001].

70 *Alicia Grace and others* Award, *supra* n. 68, at para 435.

71 ibid, at para 455.

72 Article 201 of the NAFTA; ibid, while Mr. Williamson-Nasi held both U.S. and Mexican nationality (at para 479), Mr. Cañedo White was a Mexican citizen and a permanent resident of the U.S., which, for the purposes of the arbitration under NAFTA, was analogous to that of a dual national holding both Mexican and U.S. citizenship (at para 459).

73 *Alicia Grace and others* Award, *supra* n. 68, at para 241.

74 ibid, at para 40-42, 242.

75 ibid, at para 175.

rules the ICSID Convention, the ICSID Additional Facility Rules, and the UNCITRAL Rules [76] which could be invoked against the state parties for alleged breaches of the treaty. Specifically, Article 1101 of NAFTA defines the scope of Chapter XI and provides:

> "1. This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party existing at the date of entry into force of this Agreement as well as to investments made or acquired thereafter by such investors; and (c) with respect to Article 1106 [Performance Requirements], all investments in the territory of the Party existing at the date of entry into force of this Agreement as well as to investments made or acquired thereafter".

Additionally, Article 1116 on the entitlement of an investor to bring claims on their own behalf provides that: "[a]n investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation […]". While Article 1117 permits the investor to bring a claim on behalf of the enterprise that they own or control. These provisions delineate both the substantive scope and jurisdictional threshold for arbitration however they fail to address interpretative questions where dual nationals are concerned, regarding who qualifies as an "investor of another party" in the absence of explicit exclusionary language.[77]

(2) The Tribunal's Analysis on Jurisdiction

This section analyzes how the Tribunal in *Alicia Grace v. Mexico* addressed jurisdiction *ratione personae* with particular focus on the issue of dual nationality and the interpretative approach adopted in its reasoning. The key question arises: *can the dual nationals bring a claim against one of their own states of nationality under NAFTA?* When evaluating the jurisdictional objections raised by the respondent state on dual nationality, the Tribunal first considered whether the claimants qualified as protected investors under the NAFTA and consequently whether they could bring claims on their own behalf under Article 1116 of NAFTA or on behalf of an enterprise under Article 1117.[78] Unlike some investment treaties which explicitly address investor nationality for arbitration eligibility, NAFTA was silent on the issue. This silence gave rise to ambiguity which the Tribunal had to address to determine whether, in the absence of a textual prohibition, customary international law or other interpretative principles might preclude such a claim.[79] As such, the Tribunal, being aware of the broad terms of the NAFTA's definitions of investors and protected investments, conducted its jurisdictional analysis by taking into account principles from international law as interpretative principles as interpretative tools to address the treaty's silence.[80]

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76 Article 1120 of NAFTA.

77 Williams, *supra* n. 69, ch 22, at 908-909.

78 *Alicia Grace and others* Award, *supra* n. 68, at para 440, 446.

79 D. Charlotin, 'Analysis: UNCITRAL tribunal hearing oil rig dispute with Mexico adopts dominant and effective nationality test, and finds that claimants cannot pursue reflective losses under NAFTA Article 1116', *Investment Arbitration Reporter*, published on 19 September 2024, accessed 10 June 2025.

80 *Alicia Grace and others* Award, *supra* n. 68, at para 436.

(a) The Role of CIL in Shaping or Limiting the Definition of Nationality

When addressing the issue of dual nationality, the Tribunal of *Alicia Grace* first acknowledged that NAFTA's Article 1120 provides a deliberate choice to investors allowing them to submit their claims under the ICSID Convention, the ICSID Additional Facility Rules, or the UNCITRAL Rules. By choosing arbitration proceedings administered by ICSID but under non-ICSID rules like UNCITRAL, the bar of ICSID Convention Article 25(2)(a) for dual nationals bringing claims against their own state, as it is specific to ICSID Convention arbitrations, would not apply. In this regard, while the UNCITRAL Rules do not contain any restriction on claims submitted by dual nationals, which stands in contrast to the approach of the ICSID Convention, the Tribunal was cautious not to read such silence as dispositive. Firstly, it noted that the UNCITRAL Rules were adopted in the context of international commercial arbitration, which could potentially explain why it did not address matters pertaining to dual nationality.[81]

Article 1101(1) of the treaty establishes the scope of application of the treaty by defining who qualifies as an "investor", which extends to "(a) investors of another Party" and "(b) investments of investors of another Party in the territory of the Party", which suggests "diversity of nationality" between the investor and the respondent state, NAFTA recognizes claims of foreign investors only and does not allow claims against a state by its own nationals.[82] Thus, while the NAFTA did not expressly address dual nationality in its definition of an investor, nationality remains central to determine its jurisdictional framework since the treaty itself, along with the rules of international law, govern the resolution of disputes brought under Article 1116 or 1117.[83] Within this framework, the Tribunal had to consider how to interpret this issue in light of the VCLT rules, to which the NAFTA was subject and which are binding on investment tribunals.[84] As such, the Tribunal relied on Article 31(3)(c) of the VCLT which included principles of general international law and, as such, incorporated the doctrine of dominant and effective nationality.[85]

The Tribunal observed that the Non-Disputing Parties shared the view that "a dual national may bring a claim under the NAFTA to the extent that such a claim is presented against a NAFTA Party other than that of their dominant and effective nationality".[86] It further considered the relevance of subsequent practice in related cases,[87] which generally requires that the claimant does not hold the state's nationality. Here, it is

81 ibid, at para 468.

82 ibid, at para 469; C. Vijayvergia, 'Dual Nationality of a Private Investor in Investment Treaty Arbitration: A Potential Barrier to the Exercise of Jurisdiction Ratione Personae?' 36(1) *ICSID Review-Foreign Investment Law Journal* (2021) 150-170, at 157-158 [doi: 10.1093/icsidreview/siaa054].

83 Y. Banifatemi, 'The law applicable in Investment Treaty Arbitration' in K. Yannaca-Small (ed), *Arbitration under International Investment Agreements A Guide to the Key Issues* (Oxford University Press, 2010), at ch 9, 204 [doi: 10.1093/law/9780198758082.001.0001].

84 *Alicia Grace and others* Award, *supra* n. 68, at para 430-433, 471.

85 ibid; V. Dritsa, 'Tribunal in oil platform dispute applies dominant and effective nationality test to conclude that claimants lacked standing for reflective losses claims under NAFTA', *Investment Treaty News*, published on 27 January 2025, accessed 31 May 2025.

86 *Alicia Grace and others* Award, *supra* n. 68, at para 471.

87 Following Article 31(3)(b) of the VCLT.

worth noting that the practice of tribunals' exercise of jurisdiction *ratione personae* from disputes arising out of the NAFTA was primarily developed through cases pertaining to claims of corporate entities. In that context, tribunals have held that the aim of the NAFTA is to protect foreign investors from the host state's actions and not to provide extra privileges to that state's own nationals.[88] For instance, in *Waste Management v. Mexico*, the arbitral tribunal rejected arguments that implied that the NAFTA did not protect investments held indirectly through a national of a third state, i.e., it found that it was impermissible to imply additional requirements not provided, either explicitly or implicitly, in the treaty's text.[89] Although, the application of the dominant and effective nationality of an investor in cases involving natural persons remains unsettled in the context of international arbitration of disputes arising out of the NAFTA, tribunals have generally agreed that a dual national would not be allowed to raise claims against one of the states of its nationality.[90]

Since *Alicia Grace* involved natural persons instead of legal persons, the Tribunal determined whether dual nationals could bring a claim against one of their states of nationality under NAFTA in light of the dominant and effective nationality doctrine. In this context, the Tribunal held that, as the NAFTA parties expressed agreement regarding the appropriateness of the dominant and effective nationality as a test to address matters of dual nationality, a standard that has also gained traction in arbitral practice.[91] To support its reasoning, the Tribunal considered conflicting precedents to address this "controversial and delicate" matter, such as *Manuel García Armas* and *Serafín García Armas*.[92] Therefore, contrary to what the claimants argued that in the absence of an explicit prohibition on claims by dual nationals in NAFTA or the UNCITRAL Rules, the Tribunal could not infer additional jurisdiction restrictions, the Tribunal opted for a more nuanced approach, i.e., that the "dual nationals [could] bring investment claims as long as they prove that their dominant and effective nationality is different from that of the Respondent State".[93] Accordingly, when addressing the claimants' standing, the Tribunal required that their dominant and effective nationality must be different from that of Mexico and that they had to prove that their dominant and effective nationality was that of the U.S.[94]

The Tribunal therefore took a nuanced functional approach to interpret nationality, moving beyond a purely formalistic approach and taking into account the claimants' connections to the relevant states by considering a range of factors indicative of their genuine connection with Mexico. These included the claimants' personal and family ties, continued residence, and the center of gravity of their economic affairs. On these bases, the Tribunal found that both claimants showed deeper, more substantial ties with Mexico than those entertained with the U.S. Consequently, the Tribunal held that it lacked jurisdiction *ratione personae* to hear the claims brought by these two claimants, as their

88 Vijayvergia, *supra* n. 82, at 157-158.
89 Schreuer *supra* n. 23, at para 103
90 Vijayvergia, *supra* n. 82, at 157-158.
91 *Alicia Grace and others* Award, *supra* n. 68, at para 471-473.
92 ibid, at para 463-465; V. Dritsa, 'Tribunal in oil platform dispute applies dominant and effective nationality test to conclude that claimants lacked standing for reflective losses claims under NAFTA', *Investment Treaty News*, published on 27 January 2025, accessed 31 May 2025.
93 *Alicia Grace and others* Award, *supra* n. 68, at para 467, 475.
94 ibid.

effective and dominant nationality was that of the respondent state.[95] In reaching this conclusion, the Tribunal clarified that it did so, not based on abstract and generalizable precedent, but rather as a matter of the NAFTA provisions interpretation in light of the VCLT, and in coordination with the UNCITRAL Rules.[96]

(3) Takeaway: Broader Implications of Alicia Grace and Others for Dual Nationals in Investment Arbitration

This section examines the doctrinal and practical implications of *Alicia Grace and Others v. Mexico* by focusing on the Tribunal's interpretative approach to determine its place within the typology developed in this study. The decision highlights the challenges that dual nationality poses to the investment arbitration framework, particularly in the absence of specific treaty provisions on claims by dual nationals. In this light, the tribunals must navigate the silence with a strict formalist approach, broader functional considerations or a mix of both. As such, *Alicia Grace* illustrates how these interpretative tensions continue to evolve in arbitral practice, which Section (D) will explore in more abstract and normative terms.

(a) Doctrinal significance of the case and placement within interpretative categories

The *Alicia Grace* award illustrates the Tribunal's nuanced assessment of nationality requirements in the context of a claim brought by a dual nationality, as it did not consider formal criteria sufficient and required with more substantial factors to determine which nationality should prevail for the purposes of arbitration. The Tribunal did not rely solely on the formal status of Mr. Williamson-Nasi who held both U.S. and Mexican nationality, according to which it could have potentially established jurisdiction merely on the basis of the possession of U.S. nationality or the equivalent (under the NAFTA) permanent residence status.[97] However, the Tribunal expressed concern over potentially strategic distancing from his Mexican nationality based on "pragmatic considerations" given his recent relocation to the U.S. a year after the arbitration was initiated and the lack of evidence demonstrating that his investment portfolio was oriented toward non-Mexican investments.[98] For Mr. Cañedo White, on the other hand, who was a permanent resident of the U.S. alongside his nationality in Mexico, which, for the purposes of the arbitration under NAFTA, was a situation analogous to that of a dual national holding both Mexican and U.S. citizenship.[99] In this light, the Tribunal noted how recent his move to the U.S. was, which it considered as insufficient to show detachment from his Mexican ties. This indicates some caution from the Tribunal in accepting a purely formalistic approach and its preference for a fact-based, functional assessment of the claimants' genuine link to the respondent state. The tribunal found further support in the fact that, by extending its protection to permanent residents, NAFTA reflects the idea of "capturing factual realities

95 ibid, at para 479 ff, 492 ff.
96 ibid, at para 463.
97 ibid, at para 479.
98 ibid, at para 485-487.
99 ibid, at para 459.

beyond formal titles. Hence facts must take precedence over formal qualifications".[100] This reasoning ultimately led the Tribunal to apply the dominant and effective test.

For these reasons, the *Alicia Grace* award can be understood as an instance of restrictive functionalism within the typology developed in this study. It does not fall within the formalist category, as the Tribunal did not rely solely on domestic definitions but rather took that as a starting point and required a further substantial analysis of the claimants' personal and economic links, which ultimately lead to the exclusion of the dual nationals from the tribunal's jurisdiction. Moreover, the award directly engaged with the doctrine of dominant and effective nationality, therefore not falling within the category of theoretical openness. Instead, the Tribunal's reasoning reflects a restrictive functionalism approach, where the Tribunal assessed the genuine links of the claimants with the respondent state, which ultimately led to the exclusion of the claimants from the Tribunal's jurisdiction. This approach emphasizes substance over form by rejecting a strict reliance on domestic nationality definitions and embracing international law interpretative tools. Concretely, the Tribunal relied on the VCLT treaty interpretation rules, particularly 31(3)(c), which included rules and principles of general international law and, as such, incorporated the doctrine of dominant and effective nationality.[101] As such, the Tribunal's reasoning shows a preference for factual realities and contextual assessments of nationality over formal titles.[102] Although the Tribunal applied these international law standards through the VCLT rules rather than asserting them as self-standing rules of customary law, through its own general nature, this method suggests that the tribunal was willing to apply functional and expansive nationality interpretations to protect the system of international arbitration, as it prevents domestic investors from recharacterizing themselves as foreign claimants.[103]

This award is also consistent with the *Manuel García Armas* and *Santamarta* approaches, where the respective tribunals emphasized the international based definition of "investor" over purely formal domestic labels where the applicable treaty gives rise to ambiguities on nationality interpretation. By affirming this approach, the Tribunal in *Alicia Grace* contribute to the body of awards that reflect this doctrinal evolution. This also shows deeper legitimacy concerns tied to dual nationality and access to ISDS, which will be discussed in detail in the following section from a broader normative and systemic perspective.[104]

(b) Broader Implications and Policy Considerations

The *Alicia Grace* award not only reflects a specific doctrinal approach to dual nationality, it also brings to light several broader policy considerations that underpin investment

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100 D. Charlotin, 'Analysis: UNCITRAL tribunal hearing oil rig dispute with Mexico adopts dominant and effective nationality test, and finds that claimants cannot pursue reflective losses under NAFTA Article 1116', *Investment Arbitration Reporter*, published on 19 September 2024, accessed 10 June 2025; ibid, at para 476.

101 ibid, at para 474.

102 ibid, at para 476.

103 ibid, at para 463.

104 G. Minervini and A.F. Sánchez Miguel Castro, 'Drawing Jurisdictional Limits: Reflective Loss and Dual Nationality in the Alicia Grace v. Mexico Award', *Kluwer Arbitration Blog*, published on 28 August 2025, accessed 8 September 2025.

arbitration. While the Tribunal's reasoning remained doctrinal and did not explicitly include normative or systemic concerns in its reasoning, the case raises important normative questions about the boundaries of investor protection. The Tribunal's reasoning suggests an underlying intention to protect the integrity of the ISDS regime and curb treaty shopping by discouraging both treaty shopping and the strategic structuring of nationality to secure access to arbitration. While these policy considerations are only briefly outlined here, they frame the broader debate on how dual nationality is treated under evolving arbitral case law, which will be explored further in the next section.

A central issue in this context is the doctrine of non-responsibility, that is, the principle that a state cannot be held internationally accountable to its own nationals. Although this principle is not absolute and exceptions exist in various fields of international law,[105] in the context of investment arbitration, I allowing dual nationals to bring claims against one of their states of nationality risks undermining this principle by eroding the distinction between domestic and international legal remedies and may result in affording more procedural advantages to nationals of a state when compared to foreign investors. By upholding Mexico's objection, the Tribunal acknowledged the host states' sovereign right not to be sued by its own nationals, even when presented in a dual-national capacity. This further upholds the reciprocal nature of investment remedies, which, as argued by some scholars, is undermined by treaty shopping, as it "undermines principles of good faith and reciprocity, which are aimed to prevent the misuse of the law".[106] In practice, many states have raised concerns that such practices abuse their consent and violates the principle of reciprocity.[107] Accordingly, the Tribunal in *Alicia Grace* declined to extend protection to individuals who, in law or in fact, maintained ties with the respondent state, thus preserving the host state's sovereign prerogatives and aligning with the principle of non-responsibility, a consideration that carries particular weight in procedural contexts. At the same time, this reasoning also reveals the tension in the current system, where similar claims can often proceed when structured through foreign-incorporated entities.[108] This award nevertheless reflects an effort to uphold the legitimacy and coherence of the investment arbitration regime in the context of dual nationality of natural persons.

The Tribunal's approach furthermore can be reflective of the broader consideration of the procedural purpose of ensuring that investment arbitration is not misused i.e., allowing an investor from one state to bring an arbitral claim against the other state,

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[105] Limitations of this principle exist notably in the field of human rights, where the state can be held responsible towards its own nationals; G. Gaja, 'The Position of Individuals in International Law: An ILC Perspective' 21(1) *European Journal of International Law* (2010) 11-14, at 13 [doi: 10.1093/ejil/chq002].

[106] K. Soloveva, 'Instrumentalising Nationality of Natural Persons: Legitimate Strategic Planning versus Abuse of Procedural Rights' 39(3) *ICSID Review – Foreign Investment Law Journal* (2025) 621-642, at 636 [doi: 10.1093/icsidreview/siae043]; for more information, see A. Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights' 56(2) *Harvard International Law Journal* (2015) 383-417.

[107] J. Lee, 'Resolving Concerns of Treaty Shopping in International Investment Arbitration' 6(2) *Journal of International Dispute Settlement* (2015) 355-379, at 357-360 [doi: 10.1093/jnlids/idv011].

[108] Although the restructuring of legal entities to obtain foreign nationality is not acceptable in all circumstances to establish jurisdiction, this highlights the inconsistency in how nationality is treated differently between individuals and legal entities, which further raises questions about coherence and legitimacy in the investment arbitration regime; McLachlan, Shore, and Weiniger, *supra* n. 54, at 189, 204 ff; see Casas, *supra* n. 6, at 66.

the host State they do not permit investors to sue their own home state. Concretely, as mentioned earlier, the aim of the NAFTA the applicable treaty to this dispute is to protect foreign investors from the host state's actions but it does not intend to provide extra privileges to that state's own nationals.[109] Although the Tribunal did not specify this in its analysis, the Tribunal's avoidance of this situation could indicate sensitivity towards the concerns that underpin the formalist approach, i.e., the potential abuse of nationality through the structuring of investments to fabricate a foreign status. Allowing the claimants to bring a claim against one of their states of nationality, Mexico, have breached this principle and could have given rise to an alleged/disputed instance of abuse of process. The Tribunal thus maintains the balance struck by NAFTA: that is, offering protections to foreign investors while avoiding the risk of allowing nationals to disguise themselves as foreign claimants. Although the doctrine of abuse of process has been mostly considered relevant and developed in the context of corporate investors [110] who fall outside the scope of this study it provides a useful point of comparison. In several cases involving corporate investors, tribunals acknowledged that where restructuring of the legal entities was made strategically and in bad faith e.g., it took place after the dispute arose and for the purpose of taking advantage of access to arbitration such actions may amount to potential abuse of rights and thus serve as grounds for declining jurisdiction.[111] Although the Tribunal in *Alicia Grace* did not reflect on the abuse of process principle in such a way, it seems to present a comparable concern that underpins the Tribunal's reasoning, specifically noting the weak links of the claimants to their formal nationality or permanent residence status to the U.S and therefore suggesting a functional assessment aimed at preventing opportunistic or insubstantial claims.[112]

Fundamentally, this case invites to reflect on how tribunals balance the rights of investors against the interest of state sovereignty of the respondent in cases involving dual nationals. The Tribunal's approach in *Alicia Grace* seems to be deeply rooted in a restrictive approach, which ultimately aims at preserving the legitimacy of the arbitration system and avoid risk of treaty shopping or investment migration schemes, which could undermine the former. As a result, *Alicia Grace* confirms a trend of convergence across ICSID and non-ICSID toward restricting access to arbitration to dual nationals by using expansive, functionalist constructions of "nationality" in their reasoning. This seems to be in line with recent attempts at curbing treaty shopping, whereby tribunals introduce restrictions to narrow their *ratione personae* jurisdictions. That is, to avoid taking an overly permissive approach to nationality when interpreting broad treaty definitions of "investors" and thus limiting the number of unqualified investors.[113] Moreover, by

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109 Vijayvergia, *supra* n. 82, at 157-158.

110 For an in-depth discussion on nationality planning of corporations or corporate restructuring, J.D. Branson, 'The Abuse of Process Doctrine Extended: A Tool for Right Thinking People in International Arbitration' 38(2) *Journal of International Arbitration* (2021) 187-214 [doi: 10.54648/JOIA2021011]; E. Gaillard, 'Abuse of Process in International Arbitration' 32(1) *ICSID Review* (2017) 17-37, at 32 [doi: 10.1093/icsidreview/siw036].

111 McLachlan, Shore, and Weiniger, *supra* n. 54, at 204 ff; C. Martinez Lopez, 'Corruption, Fraud and Abuse of Process in Investment Treaty Arbitration', *Lexology*, published on 27 April 2020, accessed 3 June 2025..

112 *Alicia Grace and others* Award, *supra* n. 68, at para 479 ff, 492 ff.

113 García Olmedo, *supra* n. 53, at 334.

applying the functionalist concept of nationality, the Tribunal employs a teleological interpretation with the aim to set limits beyond the treaty, which ultimately seeks to preserve the legitimacy of the system while ensuring investor protection by protecting *bona fide* foreign investors while discouraging misuse of nationality claims.[114]

(D) NORMATIVE IMPLICATIONS OF DUAL NATIONALITY IN ARBITRAL PRACTICE

This section moves beyond the individual case analysis to examine how the tensions surrounding dual nationality issues manifest in arbitral tribunals' reasoning and what this reveals about the evolving framework of international investment arbitration. Specifically, it considers the practical implications of the interpretative approaches adopted by arbitral tribunals, that is, the implications of whether they lean toward expanding investor protection or whether they adopt a more restrictive stance to curb potential abuse of treaty protections by dual national. This section considers why each tribunal has opted for the interpretative approaches introduced in Section (B) when handling with the absence of explicit treaty provisions addressing claims by dual nationals. It argues that the interpretative choices are not purely doctrinal but that they also reflect underlying policy and normative concerns present in the field of international investment law. First, this section reconsiders the underlying purpose of dual nationality exclusion and their role in delimiting access to investment arbitration. Then, it explores the normative tensions between investor protection and abuse prevention as well as broader implications for fairness and sovereign autonomy. Finally, it evaluates whether tribunals' approaches are aligned with the underlying objectives of investment treaties by considering their intrinsic policy objectives. Ultimately, this article demonstrates how tribunals' decisions in the face of treaty silence reveal structural tensions in investment law signal an emerging trend toward greater normative coherence when assessing *ratione personae* jurisdiction for dual nationality claims.

(1) Rethinking the Function of Dual Nationality Rules for *Ratione Personae* Jurisdiction

Where treaty rules do not contain clear rules on dual nationality, tribunals are tasked with interpreting ambiguous or silent provisions. This section examines how tribunals' choice to navigate such interpretative gaps relying on different legal sources, reveals a functional understanding of investor status. By analyzing the practical outcomes that the choice of legal sources render, this discussion determines whether the rules expand or limit access to arbitration to explain the underlying role of nationality rules in practice. This highlights the functional role of dual nationality rules as a jurisdictional safeguard to limit access here, nationality does not serve merely as a legal status but also as a jurisdictional threshold. In practice, both ICSID and non-ICSID tribunals tend to exclude dual nationals who also hold the nationality of the respondent state.

[114] Lee, *supra* n. 107, at 374.

Whether diplomatic protection principles influence investment treaty arbitration, that is, whether they are "relevant" rules of international law for this field, remains contested; while these principles retain some relevance, it is often characterized as limited.[115] Although the interpretation of investment treaties is partly influenced by the rules on dual nationals developed in diplomatic protection and elaborated through the work of the ILC,[116] particularly, in relation to jurisdiction *ratione personae*, a number of investment tribunals have rejected the application of rules relating to diplomatic protection where special agreements are in place.[117] In particular, those tribunals have argued that the principle's application in the field of investment arbitration is flawed as it is merely based on analogy and it risks conflating two conceptually different domains.[118] Despite these doctrinal concerns, the rationale underpinning the effective nationality doctrine has gained relevance in practice due to the increase of international investment and economic activity, which calls for a departure from the traditional rules regarding nationality and dual nationality and the adoption of a framework that adapts to the demands of the new economic realities.[119] From a treaty interpretation perspective, if the dominant and effective nationality doctrine is considered an established part of general international law, it constitutes one of the "relevant rules of international law" referred to by the ICSID Convention and the VCLT interpretation rule. Therefore, the principle of effective nationality whether a general principle of international law or customary law being part of general international law, it is considered a "relevant rule of international law" within the meaning of the VCLT's principles of treaty interpretation for the purposes of ICSID and BITs. However this would not make the principle dispositive, as it would still have to be used and balanced against more weighty principles of interpretation.[120] For instance, where specific provisions of the BIT exist functioning as *lex specialis* they would trump the general principle and take precedence.

Under the ICSID context, Article 25(2)(a) of the ICSID Convention sets a clear jurisdictional bar excluding dual nationals who also possess the nationality of the host or respondent state.[121] In this light, a strict and treaty-based approach has prevailed when assessing dual nationality for jurisdiction purposes. Where the underlying BIT which defines the nationality of the investor is clear, tribunals do not reach for broader norms to supplement the text, which they consider to constitute a strict *lex specialis*. As such, arbitration tribunals established under the ICSID Convention have generally departed from the genuine link principle to give primacy to the domestic legal rules

115 McLachlan, Shore, and Weiniger, *supra* n. 54, at 5, 163-164; Rodrigo Polanco, *The Return of the Home State to Investor-State Disputes Bringing Back Diplomatic Protection?* (CUP 2019) ch 2, 41.

116 Special Rapporteur Roberto Córdova (ILC), 'Report on Multiple Nationality' in *Yearbook of the International Law Commission*, vol II (1954) UN Doc A/CN.4/83, para 16; Draft Articles on Diplomatic Protection 34-35.

117 McLachlan, Shore, and Weiniger, *supra* n. 54, at 166-167.

118 S. Michalopoulos and E. Hicks, 'Dual Nationality Revisited: a Modern Approach to Dual Nationals in Non-ICSID Arbitrations' 35(2) *Arbitration International* (2019) 121-148, 144.

119 ibid 131.

120 ibid; Andreas Kulick and Panos Merkouris, 'Article 31 of the VCLT: General rule of interpretation: General rule of interpretation' 136-140 in Andreas Kulick and Michael Waibel (eds), *General International Law in International Investment Law: A Commentary* (OUP 2024).

121 International Centre for Settlement of Investment Disputes, *History of the ICSID Convention* (1968) vol II, part I, at 162-164; Palacios La Manna, *supra* n. 17, at 43.

governing nationality.[122] In this context, the principle of a genuine link has therefore been somewhat diluted, where the focus is on ensuring that foreign investors can access the protections offered by their home state under investment treaties, even when their connections to that state are minimal and limited to formal nationality.[123] Tribunals in the ICSID context have generally shown limited interest in assessing substantive bonds following *Nottebohm*, often accepting claims based on formal nationality even when the claimant lacks a strong connection to the state in question, reinforcing the focus on the legal framework over substantive ties.[124] This trend appears to echo the ILC's position on prioritizing the domestic legal framework over substantive connections in the context of single nationality. On the other hand, other investment arbitration tribunals have been more willing to set aside states' domestic rules on nationality for the purpose of the award on the grounds that the nationality was conferred in the absence of any effective link between the state conferring the nationality and the individual. This has been particularly predominant in cases where there were doubts about the sincerity of the nationality in question, especially in light of the so-called practice of obtaining 'nationalities of convenience', obtained through mere compliance with specified procedural steps in order to gain access to protections.[125]

In *Micula v. Romania*, the Tribunal noted that the BIT did not impose additional requirements such as genuine link when assessing the nationality of the claimant and that, moreover, the genuine link test could not be considered as a general principle applicable to cases of ICSID proceedings.[126] In *Saba Fakes*, the Tribunal noted that international arbitration against the host state is a separate mechanism as that of diplomatic protection therefore making the rules of customary international law applicable in diplomatic protection inapplicable in this context. However this case did not involve a dual national holding the nationality of the respondent state.[127] Moreover, the Tribunal considered the text of Netherlands-Turkey BIT and moreover noted that the clear language of the treaty which did not leave room for broader doctrines.[128] In *Champion Trading*, which did concern a dual national claimant who held the nationality of the respondent state, the Tribunal ruled that the dominant and effective nationality rule had no application given the clear and specific rule set out in Article 25(2)(a), which established a clear *lex specialis* regime.[129] Even in *Luis García Armas*, in the context of the Additional Facility Rules of the ICSID, the Tribunal determined that the interpretation of the BIT should be in a manner consistent with the VCLT interpretation rules. Under these, the object and purpose of the BIT did not support extending protection to a claimant who was also a national of the respondent state at the time of the investment and registration of the dispute.[130]

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122 P. Spiro, 'Nottebohm and "Genuine Link": Anatomy of a Jurisprudential Illusion' (2019) Investment Migration Working Paper 1/2019, at 14, accessed 18 March 2025 [doi: 10.5040/9781509955251.ch-005].

123 R.D. Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' 50(1) *Harvard International Law Journal* (2009) 1-60, at 37 ff.

124 ibid, at 39.

125 MacDonald and O'Reilly, *supra* n. 40.

126 *Micula and others* Award, *supra* n. 31, at para 99-101.

127 *Saba Fakes* Award, *supra* n. 37, at para 69.

128 ibid, at para 64-66.

129 *Champion Trading Company* Award, *supra* n. 43, at para 16.

130 ibid, at para 212 ff.

Outside the ICSID system, tribunals, also seem to reinforce that treaty text prevails as *lex specialis* despite the developments in customary international law and the absence of a clear framework restriction such as the one in Article 25(2)(a). Under the rules of UNCITRAL, in *Bahgat v. Egypt*, the Tribunal emphasized that any developments in international law must yield to the *lex specialis* established by the applicable investment treaty, thus do not trump the explicit language of the BITs, according to the Tribunal's finding.[131] Similarly, in *Serafín García Armas*, the Tribunal held that the doctrine of effective and dominant nationality was not applicable to investment cases, and that "[e]s necesario recurrir al derecho internacional únicamente cuando la letra del Tratado no es suficientemente clara para su interpretación".[132] Thus giving primacy to treaty text over rules drawn from general international law. That Tribunal moreover held that it is not permissible to add to the BIT a condition that does not exist in it on the nationality of the protected investors under the treaty.[133] For this case, it is worth noting that, as the Spain-Venezuela BIT allows for arbitration under both the ICSID and the UNCITRAL the claimants' choice of UNCITRAL arbitration could be considered a strategic choice that allowed them to surmount the jurisdictional obstacle to claims by dual nationals against their own state of nationality posed by Article 25 of the ICSID.[134]

By contrast other tribunals operating outside the ICSID framework, while also applying UNCITRAL Rules, have approached the issue with greater flexibility and some tribunals have even openly applied the doctrine in cases where the applicable treaty is silent on dual nationality. This was found despite the BITs *lex specialis*, as the tribunals clarified that the latter operate within a broader international law legal framework, therefore making the principle determinative to assess *ratione personae* jurisdiction. The Tribunal in *Manuel García Armas* found that, although BITs do indeed constitute *lex specialis* between the parties however, they are not applied in isolation.[135] And therefore, as established by Article 31(1)(3)(c) of the VCLT, the customary international law or general international law are applicable *unless* the *lex specialis* established by the BIT provides otherwise.[136] Similarly, the Tribunal in *Santamarta* openly departed from the approach of Serafín and held that, when interpreting BITs, in conformity with article 31(3)(c) of the VCLT,[137] before treaty silence, the principle of dominant and effective nationality is relevant to determine the treatment of dual nationals.[138] In a similar fashion, the Tribunal in *Alicia Grace*, despite being within the context of ICSID but applying the UNCITRAL Rules, clarified that it applied the doctrine of dominant and effective nationality to interpret nationality of the claimants not based on abstract and generalizable precedent, but as a matter of the NAFTA provisions interpretation in light of the VCLT.[139]

Together, these cases reveal how the choice of legal sources may be determinative of whether dual nationals gain access to investment arbitration. The analysis shows that

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131 *Bahgat* Award, supra n. 47, at para 231-232; García Olmedo, *supra* n. 1.
132 *Serafín García Armas* Award, *supra* n. 28, at para 154-158, 167 ff.
133 ibid, at para 173
134 Nana Adjei, *supra* n. 26, at 3-4.
135 García Olmedo, *supra* n. 53, at 310-311.
136 *Manuel García Armas* Award, *supra* n. 56, at para 704; Pellet, *supra* n. 20, at para 107.
137 *Santamarta* Award, *supra* n. 61, at para 485.
138 ibid, at para 493-495.
139 *Alicia Grace and others* Award, *supra* n. 68, at para 463.

the doctrine of effective nationality is not necessarily supported by arbitral awards in the context of investment arbitration;[140] its applicability remains heavily dependent on the language of the treaty and even more so on the arbitration forum and tribunals' interpretative approaches. Strict readings emphasizing treaty text and the *lex specialis* character of investment law result in restricting jurisdiction, especially under the ICSID, but this approach is also followed by PCA tribunals. On the other hand, other tribunals under the PCA consider the *lex specialis* of the BIT to still be open to the doctrine of dominant and effective nationality with the effect of also denying jurisdiction. This indicates that, while the doctrine of dominant and effective nationality exists in general international law, and is arguably relevant in investment arbitration, it has not crystallized as a binding rule of customary international law within the investment arbitration context. These divergent approaches have moreover created, what some scholars refer to as "a precarious situation, where the fate of dual nationals' claims uncertain".[141]

Customary international law principles drawn from the field of diplomatic protection – particularly those concerning the technical requirements of double nationality and the general reluctance to allow claims by dual nationals against one of their home states – are typically employed from an interpretative perspective when addressing nationality questions. This implies that they are not applied directly but rather serve to influence the interpretation of treaty rules,[142] which, in turn, seems to suggest that claims by dual nationals can be restricted through the incorporation of the rule of non-responsibility or the rule of dominant and effective nationality in reading BITs.[143] Sloane and García Olmedo offer a compelling reinterpretation, according to which *Nottebohm* should not be seen as enshrining a general rule of effective nationality but as a narrow decision grounded in the principle of abuse of rights.[144] As noted by García Olmedo, "*Nottebohm* may operate in international investment law as a norm of exclusion against the manipulation of nationality by investors with the purpose of gaining access to investment treaties".[145] The policy considerations that led to the application of the abuse of rights principle in *Nottebohm* – to prevent what the Court perceived as a "bad-faith" attempt to manipulate nationality for the purposes of evading responsibilities imposed by the domestic law and accessing diplomatic protection [146] also resemble contemporary arguments surrounding the strategic use of nationality through citizenship by investment schemes. This suggests that the choice of sources

140 Michalopoulos and Hicks, *supra* n. 118, at 146 [doi: 10.1093/arbint/aiz012].

141 M. Krishna, 'French Courts Keeping the Door Open for Dual Nationals' Claims?', *Kluwer Arbitration Blog*, published on 30 December 2023, accessed 30 April 2025; in general, on the goals that consistent investor-State arbitration serves, namely equality, continuity, predictability, and legitimacy see I. Ten Cate, 'The Costs of Consistency: Precedent in Investment Treaty Arbitration' 51 *Columbia Journal of Transnational Law* (2013) 418-478, at 448 ff..

142 M. Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility' 24(2) *European Journal of International Law* (2013) 617-647 at, 641-642 [doi: 10.1093/ejil/cht025].

143 García Olmedo, *supra* n. 53, at 311-322.

144 Sloane, *supra* n. 123, at 1, 15; J. García Olmedo, 'In Fairness to Nottebohm: Nationality in an Age of Globalization' 15(1) *Asian Journal of International Law* (2025) 76-106, at 86-88 [doi: 10.1017/S2044251324000067].

145 ibid, García Olmedo, at 78, 97ff; J. García Olmedo, 'Nottebohm Under Attack (Again): Is it Time for Reconciliation?', *EJIL: Talk!*, published on 10 December 2021, accessed 6 April 2025..

146 Here, it is important to note the Court's attention to the exceptional speed with which Nottebohm acquired the disputed nationality, as well as the absence of genuine integration into that state; *Nottebohm* (*Liechtenstein v. Guatemala*) (Judgment) [1955] ICJ Rep 4, at 26.

to base treaty interpretation cannot be considered purely technical but as normatively motivated, which will be further explored in the following section.

(2) Doctrinal Approaches in Practice: Balancing Investor Protection and Abuse Prevention

Building on the preceding analysis on how dual nationality rules function as a jurisdictional threshold, this section turns to the normative stakes underpinning the doctrinal approaches identified in Section (B). To that end, the identified approaches are examined in relation to competing normative goals: the prevention of abuse and the preservation of state sovereignty on the one hand, and facilitation of investor access and legal predictability on the other. The aim is to answer the question: *why do these doctrinal approaches matter in practice and what are their implications for investment law and for policy?* After examining how tribunals currently approach dual nationality, it is essential to consider the practical consequences of these choices, particularly, how they affect the policy objectives of investment arbitration. This study proposes that dual nationality is not merely a technical issue, it reflects broader tensions in investment law, notably, the balance between state sovereignty and investor protection. The interpretative approach that a tribunal adopts, whether formalist or functional, can significantly shape outcomes and, in turn, influence the direction of policy and doctrinal development in this field.

This section briefly introduces the main normative tensions surrounding dual nationality in investment arbitration, concretely the tension between investor protection by ensuring access to ISDS to genuine foreign investors while preventing abuse of treaty protections. This issue is gaining urgency as nationality planning which has been a concern for legal persons, could also become a concern for natural persons due to growing number of individuals holding multiple nationalities and the increasing use of citizenship by investment schemes.[147] Although this section does not attempt to provide a comprehensive and detailed assessment, it aims to identify the core normative implications that arise from tribunals' evolving approaches to dual nationality, therefore the following discussion highlights the key policy concerns underpinning the competing approaches.[148] The normative dilemma is relevant to this study as it helps understanding why tribunals adopt certain interpretative approaches and how those choices reflect or respond to competing policy goals is key to evaluating the coherence of the regime.[149]

(a) Dual Nationals' Claims Against their State of Nationality and the Need for Abuse Prevention

"Nationality planning can be defined as the practice whereby investors use a passport or a corporation of convenience to benefit either from an IIA providing for ISDS when

147 R. Polanco, *The Return of the Home State to Investor-State Disputes Bringing Back Diplomatic Protection?* (Cambridge University Press, 2019) ch 2 [doi: 10.1017/9781108628983].

148 For more detailed discussions on normative theories, see Lee, *supra* n. 107 and; Branson, *supra* n. 110.

149 E. de Brabandere, 'Coherence, Consistency, and the Reform of Investment Treaty Arbitration', in R. Buchan, D. Franchini, and N. Tsagourias (eds), *The Changing Character of International Dispute Settlement* (Cambridge University Press, 2023) 249-281, at 270-273 [doi: 10.1017/9781009076296.016].

none would otherwise be available or from an IIA that offers higher levels of protection in procedural and/or substantive terms."[150] Allowing claims of this nature, dual nationals with the nationality of the home state would be placed in a more favorable position compared to domestic investors, who only have access to domestic remedies. In this way, dual nationals could choose among the two nationalities to grant otherwise unqualified investors access to treaty protection or even in a way to allow a claim against either Contracting Party. This could create an incentive to "internationalize" claims through the acquisition of a second passport. This practice is facilitated through the "golden passport" programs,[151] which allow individuals to obtain residency and nationality through investment, therefore circumventing the traditional rules of attribution and acquisition of nationality.[152]

The debate surrounding dual nationality and nationality planning is most notable around corporation restructuring, particularly in the context of treaty shopping, therefore the discussion of dual nationality of individuals closely mirrors that discussion.[153] Despite the similarities, important differences remain: the nationality of natural persons is often tied to identity, culture and belonging, making changes of nationality of natural persons more profound and far reaching, as they are more intimately connected to lived experience than to corporate strategy.[154] Although less notable, the core issue in cases of an individual investor is the strategic manipulation of legal identity to access investment treaty protection.[155] In the ICSID arbitration context, tribunals have been reluctant to dismiss investor state claims solely on the basis of abuse of process, or abuse of right. However this concern has been raised in some awards, such as *Siag v. Egypt*, where the respondent state alleged that the claimant fraudulently obtained a different nationality to manufacture treaty jurisdiction. Given the seriousness of such allegations, the tribunal established a high standard of proof and ultimately rejected the state's allegations of fraud.[156] Still, such instances highlight how nationality planning can undermine the integrity of the system, as it allows investors to "shop" for the most favorable treaties.

To address these concerns and to maintain their sovereignty in deciding foreign investment policy, states attempt to reform and rebalance the investment protection system by placing substantive and jurisdictional limits on corporate nationality planning.[157] However, this solution renders limited practical results as international investment is highly decentralized and highly contextual.[158] In the short term, however, a more deliberate and purposive approach by arbitral tribunals could more effectively curb the most excessive cases of treaty shopping, which could maintain the current

150 García Olmedo, *supra* n. 53, at 307; M. Mazzeschi, 'Abuse of dual nationality: you can't have your cake and eat it too', *Mazzeschi Legal Counsels*, published on 30 June 2020, accessed 3 June 2025.
151 Financial Action Task Force and OECD, *supra* n. 3.
152 García Olmedo, *supra* n. 53, at 303, 312.
153 See, for reference key cases on corporate restructuring, such as *Autopista v. Venezuela and Tokios Tokelés v. Ukraine*; Branson, *supra* n. 110, at 194.
154 Soloveva, *supra* n. 106, at 634.
155 McLachlan, Shore, and Weiniger, *supra* n. 54, at 208.
156 Martinez Lopez, *supra* n. 111.
157 Lee, *supra* n. 107, at 361.
158 ibid 371-372; on the decentralized nature of the international investment law regime, see also Ten Cate, *supra* n. 141, at 424-426.

decentralized nature of the investment protection regime, while at the same time creating a more substantial test in determining whether a tribunal has jurisdiction *ratione personae*. In this sense, mitigating the risk of opportunistic behavior by investors, would depend on harmonizing, to a certain extent, the interpretation of dual nationality with the result of narrowing the personal jurisdiction of arbitral tribunals.[159] While some states have argued for the incorporation of the ICSID as a means of resolving investment disputes, considering the exclusion of dual nationals from the system's protection.[160] Broad definitions of protected investors together with a permissive approach towards nationality planning, have given a very large number of otherwise unqualified investors a remedy to adjudicate investment disputes. This has, in turn, exacerbated the unbalanced relationship between host states and investors.[161]

(b) Underlying Criticism on Nationality Interpretation Methods and Policy Tensions through Key Decisions

According to UNCTAD, there is a growing perception that the ISDS system lacks legitimacy and that, critically, it weakens the links between the host state and the investor, which undermines the very purpose of investment promotion.[162] UNCTAD further suggests, the need to shape the legal framework in a manner that maximizes possible benefits from FDI while also preserving a degree of national sovereignty in the developing and implementing economic policy.[163] Within this context, the choice of doctrinal approaches to nationality by tribunals in investment arbitration seems to be shaped these normative competing commitments regarding the balance between investor protection and state sovereignty.

A *formalist approach* to nationality relies on the legal status of nationality as formally defined in treaties or domestic law. This approach aims to prioritize legal certainty, legitimacy, and doctrinal consistency. However, tribunals following this approach have been criticized for being susceptible to treaty shopping and for failing to reflect genuine links between the investor and the state of nationality, potentially leading to manipulative claims. This approach is often justified as a tool to prevent abuse of process through the strategic acquisition or structuring of nationality to manufacture jurisdiction. However, abuse of rights argument is particularly challenging to raise by the respondent and tribunals generally refrain from discussing the matter or finding the abuse. So, conventionally, the changes in nationality of natural persons are accepted until it is adequately demonstrated that they amount to an abuse of process.[164] This connects to the principle of non-responsibility, which maintains that a state should not

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159 ibid, Ten Cate, at 441-445. Even if this established a consistent line of cases, which arbitrators should follow, they could still depart from it if were are "compelling reasons" to justify departure, for instance, the explicit exclusion of dual nationality or of the principle of dominant and effective nationality in the underlying treaty.

160 Nana Adjei, *supra* n. 26, at 5.

161 García Olmedo, *supra* n. 53, at 334.

162 Polanco, *supra* n. 147, ch 2, at 47.

163 P. Muchlinski, F. Ortino, and C. Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) ch 1, at 15 [doi: 10.1093/oxfordhb/9780199231386.001.0001].

164 Soloveva, *supra* n. 106, at 634-635.

be held internationally accountable to its own nationals, even in dual nationality cases. Furthermore, a central purpose of investment treaties is to provide foreign investors with a fair and predictable legal environment, a purpose that is emphasized by the formalist approach, which prioritizes objective legal criteria and therefore enhances investor confidence and legal protection, i.e., broader objectives of BITs and of the framework of international investment arbitration. Paradoxically, although this approach is designed to promote legal certainty through reliance on clear, objective criteria, a strict formalist approach may fall short by generating uncertainty in the treatment of claimants holding dual nationality by not accounting for their factual circumstances.

Building on the criticism arising from the formalist approach, the *functionalist approach* to nationality shifts the focus toward the substantive relationship between the investor and the state of nationality, which allows tribunals to consider factual connections. Additionally, this approach relies on invoking general principles of international law, which have been, often rejected by tribunals. While this approach may protect states against abusive treaty shopping, it is criticized for its vagueness, reliance on subjective standards, and the uncertainty introduced by factors beyond formal criteria, as well as the additional burden that requires tribunals to assess subjective ties. As noted from commentators, "[f]rom the outset of this expansion of the ISDS, respondent-states have raised abuse of process as a defence to investors' claims by urging tribunals to reject their jurisdiction where investors manipulated, in the host-state's opinion, the object and purpose for which the host-state entered into investment treaties".[165]

Although not all Tribunals addressed these considerations particularly, across the key cases, tribunals reveal some tension between formalist and functionalist approaches, reflecting deeper policy considerations around fairness, abuse prevention and legal certainty.

This section first, established that the tribunals in *Olguín v. Paraguay, Luis García Armas*, and *Serafín García Armas* followed a purely formalist approach when assessing nationality. Further, it revealed that cases such as *Micula v. Romania*, *Saba Fakes*, *Champion Trading*, and *Bahgat v. Egypt* did not yet follow the functionalist approach and adhered to the formalist approach but took into consideration the underpinning policy goals associated with functionalism, demonstrating a theoretical openness without fully departing from the formalist approach. Tribunals in *Micula v. Romania* and *Bahgat v. Egypt* recognize that official nationality documentation constitute *prima facie* evidence and therefore set a high threshold for rebuttal, in narrow situations and based on proof of fraud or legal error.[166] Moreover, the Tribunal in *Champion Trading* introduced the possibility of inadequacy of the domestic law in determining nationality. As mentioned earlier, the Tribunal acknowledged concern over the potential unfair results of the determination of nationality based on the domestic law, in light of the blanket exclusion in Article 25(2)(a).[167] Furthermore, in *Saba Fakes*, the Tribunal took into account that a nationality of convenience, acquired "in exceptional circumstances of speed and accommodation", for the purposes of bringing a claim before the Centre should not

[165] Branson, *supra* n. 110, at 193.
[166] *Micula and others* Award, supra n. 31, at para 104; *Bahgat* Award, *supra* n. 47, at para 162-166.
[167] *Champion Trading Company* Award, *supra* n. 43, at para 16-17.

be considered to satisfy the nationality requirements of a BIT and Article 25(2)(a) of the Convention.[168] Hence creating the possibility that, as a matter of the principle of good faith, inquiring behind an individuals' acquisition of nationality.[169] Although the Tribunal ultimately did not adopt this approach, it would have result in factually setting aside the state's rules on nationality for the purposes of the award on the grounds that the nationality was conferred in the absence of any effective link between the state conferring the nationality and the individual.

On the other hand, fairness and abuse prevention considerations in cases where there is only a minimum, merely formal link between the investor and the state of nationality seem to have motivated the tribunals in *Manuel García Armas*, *Santamarta*, and *Alicia Grace*.[170] While claimants had previously attempted to apply functional and context-sensitive interpretations to broaden access for dual nationals, these recent awards demonstrate that such interpretive tools are increasingly being used to deny jurisdiction. This trend effectively closes the "back door" namely, the absence of an express restriction on dual nationals in the arbitration rules paired with broad treaty definitions of a "qualified investor" thereby limiting the ability of dual nationals to seek protection through more favorable procedural avenues.[171] Since the ICSID Convention clearly forbids dual nationals to sue either of their own states, some investors sought to circumvent this bar by initiating proceedings under alternative procedural regimes, notably UNCITRAL Rules, which would allow them to create standing for dual nationals. However, these awards seem to suggest that this strategy is becoming ess viable, as tribunals applied functional and context-sensitive interpretations to deny jurisdiction. Therefore, no longer allowing dual nationals to exploit procedural differences between arbitration regimes to gain access to ISDS mechanisms.[172] As one scholar wrote in connection with this trend: "What cannot be obtained through the main door (ICSID) cannot be obtained through the back door (UNCITRAL) either", that is, the alternative of submitting a dispute to a non-ICSID arbitration forum is no longer an option for dual nationals.[173]

This development originated from the concerns that underpin the formalist approach, namely, the potential abuse of nationality, such as treaty shopping or the structuring of investments to fabricate foreign status or other forms of abuse of process.[174] These risks have prompted some tribunals across frameworks and international scholars to consider whether a more functional approach should be adopted. At the same time, this approach serves to correct an overly rigid formalist approach by considering factors such as allegiance, residence, or other connections for the purpose of applying international law rules, i.e., the functional approach of nationality aims to determine whether the investor's ties to a particular state are genuine and meaningful. Notably, the three key cases stemming from the dispute between the García Armas family and

168 *Saba Fakes* Award, *supra* n. 37, at para 77-78; MacDonald and O'Reilly, *supra* n. 40.
169 McLachlan, Shore, and Weiniger, *supra* n. 54, at 208.
170 Casas, *supra* n. 6, at 66.
171 Mori Bregante, *supra* n. 52.
172 ibid.
173 ibid.
174 Branson, *supra* n. 110; E. Gaillard, 'Abuse of Process in International Arbitration' 32(1) *ICSID Review* (2017) 17-37 [doi: 10.1093/icsidreview/siw036].

Venezuela highlight the inconsistency of investment arbitration,[175] as well as concerns about treaty shopping and the instrumental use of nationality when dual nationals bring a claim against their own state. Although the tribunals reached different results, they all dealt with similar factual background, the same BIT, and had to deal with similar arguments from Venezuela, which argued that "allowing the domestic investor to raise a claim against their own State would constitute an abuse of the investment arbitration system".[176] Particularly, in *Manuel García Armas*, the Tribunal's decision signals awareness of concerns that favor a functional interpretation, including the potential abuse of rights, a reasoning which seems to be rooted in the broader policy concern proposed by the respondent state: that the instrumental use of formal nationality when unconnected to the reality of the investment may undermine the legitimacy of ISDS.[177] In this sense, the Tribunal's approach ultimately reflects deference to the policy choices of States regarding how access to investment arbitration should be circumscribed.

Considering that an overly flexible interpretations may encourage treaty shopping or strategic nationality acquisition solely to invoke treaty protections and this, in turn, could undermine the legitimacy of ISDS, tribunals may employ teleological interpretations to set limits from beyond the treaty text. Accordingly, an essential preliminary step to redress the imbalanced nature of international investment law should be restricting the range of protected natural and legal persons.[178] As such, the interpretative choices are not neutral, they shape access to ISDS and they reflect broader tensions in the system. Although these awards were decided by different tribunals operating under different systems and applying different procedural rules and BITs, overall, these reflections underscore how they all take into consideration policy objectives, which shape the complex and evolving nature of dual nationality in the context of investment arbitration. This area, in an increasingly globalized landscape offers both expansive access to investor protections and justice, but also increasing constraints of judicial safeguards aimed at preventing abuse. The next and final section of this study will explore whether these tensions are resolving into convergence or fragmentation of the international investment arbitration field.

(3) Fragmentation or Emerging Standard?: The Treatment of Dual Nationals in International Investment Arbitration

Building on the doctrinal analysis in Section (B), which outlined three distinct interpretative approaches adopted by tribunals in investment arbitration, and the case-focused discussions of the previous sub-section, this section steps back to assess whether emerging interpretative patterns in the treatment of dual nationality reflect systemic convergence or ongoing fragmentation in international investment

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175 E. de Brabandere, 'Coherence, Consistency, and the Reform of Investment Treaty Arbitration', in R. Buchan, D. Franchini, and N. Tsagourias (eds), *The Changing Character of International Dispute Settlement* (Cambridge University Press, 2023) 249-281, at 265 ff. [doi: 10.1017/9781009076296.016].

176 Schreuer *supra* n. 23, at para 156 ff; see also *Serafín García Armas* Award, *supra* n. 28, at para 108; and Pellet, *supra* n. 20, at para 85.

177 *Manuel García Armas* Award, *supra* n. 56, at para 241, 433, 437 ff; Andres Rigo Sureda, *Investment Treaty Arbitration: Judging under Uncertainty* (Cambridge University Press, 2012) 7-19, at 16.

178 García Olmedo, supra n. 53, at 303.

arbitration. Specifically, this section examines why tribunals use legal sources and doctrinal approaches to navigate the underpinning tensions. The aim is to determine what the doctrinal choices mean for legitimacy, coherence, and investment arbitration to determine whether the evolving arbitral practice signals an emerging standard, particularly around a more restrictive threshold for *ratione personae*, even under more flexible frameworks. By placing individual tribunal decisions across different tribunal systems and procedural rules as well as their lack of consensus on whether to apply dominant and effective nationality test within the wider landscape of ISDS, this section aims to assess the trajectory of dual nationality standards.

The body of case law demonstrates varying application and interpretation of nationality, based on treaty text or general principles of international law, in particular, the doctrine of dominant and effective nationality, which in turn, is rooted on different doctrinal approaches to the concept of nationality. Therefore dual nationality claims in international investment law gives varying consequences depending on how they are adjudicated. To summarize the previous findings, tribunals have denied jurisdiction to arbitration when applying the ICSID Convention as well as the ICSID Arbitration Facility Rules based on the express exclusion in Article 25(2)(a) of the Convention, while interpreting nationality from a formalist perspective, i.e., relying on the nationality rules provided by domestic law. A similar approach is also taken by PCA tribunals applying UNCITRAL Rules. However there are also notable cases outside of the ICSID context, particularly PCA tribunals applying UNCITRAL Rules, where tribunals have been more open to applying the principle of dominant and effective nationality. The latter tribunals have employed a functional interpretative approach to nationality to reach the same conclusion, that is, deny jurisdiction over dual nationals' claims, even in the absence of a jurisdiction bar. These divergent approaches adopted by tribunals have led to a precarious situation which leaves the fate of dual nationals' claims uncertain.[179] This uncertainty and inconsistency is especially heightened by the lack of uniform thresholds for determining what natural persons qualify as "investors" and are thus entitled to standing before arbitral tribunals.[180] Notably, one award is an outlie and does not fit either of these trends, *Serafín García Armas*, where the absence of express exclusion of dual nationals' claims was interpreted as admissible based on a literal interpretation of the treaty text.[181] This case particularly contributes to this ambiguity, which makes it more challenging for states and investors to establish whether or not they are protected by investment treaties.[182]

Although it is true that tribunals are independent and are not held by *stare decisis*, when tribunals interpret nationality, seemingly there is no consensus on how to qualify an "investor".[183] ICSID tribunals and some of the PCA tribunals give rely on treaty text and give weight to formal declarations. While other tribunals emphasize habitual residence or economic interests to satisfy the test of dominant and effective nationality.

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179 Krishna, *supra* n. 141.

180 On the goals that consistent investor-state arbitration serves, namely equality, continuity, predictability, and legitimacy see Ten Cate, *supra* n. 141, at 448 ff.

181 McLachlan, Shore, and Weiniger, *supra* n. 54, at 184-185.

182 Nana Adjei, *supra* n. 26, at 7.

183 S. Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking' 12(5) *German Law Journal* (2011) 1083-1110, at 1093 [doi: 10.1017/S2071832200017235].

The lack of clear standards undermines coherence and predictability or arbitration, particularly in non-ICSID arbitration practice. For instance, In *Alicia Grace*, the Tribunal took these considerations into account when it explained:

> "the Tribunal recalls that in international law there is no doctrine of *stare decisis*. This Tribunal is independent of the tribunals that issued the decisions cited and there is no hierarchical subordination among them that could make the decision of one depend on the decisions adopted by others. Nevertheless, as a general principle, the Tribunal considers it desirable, to the extent that the circumstances of the case under analysis and the treaty at issue allow it, to encourage the development of a *jurisprudence constante* on the basis of previous decisions. This could provide some predictability to the disputing Parties and respond to an ongoing demand for more consistency within the international investment system, a demand rooted in the need to enhance its legitimacy."[184]

A similar reasoning motivated the tribunal in *Manuel García Armas*, as it based its decision to incorporate the treatment of dual nationals by the ICSID system to the relevant BIT to prevent differing definitions of "investor" under the same BIT and dependent on whether the claim is brought under the ICSID Convention or the UNCITRAL Rules.[185] Here, the Tribunal noted that "Otros tribunales se han manifestado de forma similar con relación al término 'inversiones', y la exigencia de mantener inalterable su definición con independencia del foro recurrido".[186]

Convergence, for the purposes of this study, would suggest growing consistency in how tribunals interpret and apply dual nationality rules, regardless of the forum and treaty, reflecting shared doctrinal preferences or policy objectives. The study demonstrates that across both ICSID and non-ICSID contexts, tribunals considered treaty interpretation in light of public international law to be necessary only when there was no treaty or when treaties were proven inoperative or ambiguous.[187] This approach clearly gives primacy to treaty text as a *lex specialis* regime and consequently, tribunals depart from customary law standards in favor of *lex specialis*.[188] At the same time, these tribunals have mostly prioritized formal (legal) nationality as established under domestic law, particularly when the treaty provides clear definitions. However, as shown earlier, multiple tribunals accepted formal nationality as the starting point but showed a theoretical willingness to consider factual ties in order to prevent abuse, suggesting qualified formalism emerging across cases. In recent awards however there is a clear shift, where tribunals have found that although BITs indeed constitute *lex specialis* between the parties, they cannot be applied in isolation.[189] And, as such, have interpreted the VCLT rules, concretely Article 31(3)(c), as incorporating customary international law or general international law unless

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184 *Alicia Grace and others* Award, *supra* n. 68, at para 432

185 *Manuel García Armas* Award, *supra* n. 56, at para 722-723.

186 ibid, at para 722.

187 E.P. Treves, 'Investment Treaty Arbitration: Dual Nationals are Now Welcome: A Way Out of ICSID's Dual Nationality Exclusion' 49 *NYU Journal of International Law and Politics* (2017) 607-618, 612.

188 *Saba Fakes* Award, *supra* n. 37, at para 16; Luis García Award, *supra* n. 20, at para 208-209, 212 ff; *Bahgat* Award, *supra* n. 47, at para 231-232; *Serafín García Armas* Award, *supra* n. 28, at para 173.

189 *Santamarta* Award, *supra* n. 61, at para 480-484; García Olmedo, supra n. 53, at 310-311; Mezgravis, *supra* n 12, at 556.

provided otherwise.[190] With these legal sources, tribunals have been able to depart from a formalistic conception of nationality towards a rather functional one, where factual connections are taken into account.

Section (D)2(b) highlighted that neither the formalist approach nor the functionalist approach fully resolve the normative tensions underlying the issue of dual nationality in investment arbitration. The formalist approach centers on the legal status of nationality as formally defined in treaties or domestic law, thus prioritizing legal certainty and systemic consistency but risking enabling opportunistic nationality planning, as it does not consider genuine links. By contrast, the functionalist approach focuses on the substantive relationship between the investor and the state, which better aligns with broader treaty objectives, such as discouraging opportunistic claims and preserving state sovereignty. However as functionalism explicitly weighs multiple factors beyond formal nationality, this approach can lead to less predictable outcomes. Despite diverging doctrinal approaches and legal sources invoked to assess dual nationals' claims where treaties are silent or ambiguous tribunals highlighting how treaty silence or gaps may be resolved differently the key cases reviewed demonstrate a growing, broader pattern. Tribunals are reaching similar outcomes, namely the exclusion of dual nationals where their ties to the foreign state are so weak that they appear to be strategically constructed or raise concerns of adequacy of the system. This trend does not indicate emerging convergence around a single interpretative method but around the underlying policy concerns: tribunals appear to be guided by the need to prevent treaty abuse by dual nationals and the preservation of investment arbitration. In doing so, tribunals appear to be upholding mechanisms that restrict access for dual nationals in order to preserve the credibility and stability of the investment arbitration regime.

As observed in earlier sections, in recent awards, tribunals appeared increasingly willing to integrate functional reasoning to respond to the risk of abuse, therefore narrowing the *ratione personae* jurisdiction of tribunals. While in previous cases the claimants had proposed the application of dominant and effective nationality to result in the expansion of jurisdiction *ratione personae*, recent cases show how the application of the very same principle has led to the restriction of the jurisdiction *ratione personae*. The trend towards introducing dominant and effective nationality in arbitration awards' analyses (*Manuel García Armas* (2019), *Santamarta* (2023), *Alicia Grace* (2024)) may indicate the idea that tribunals incorporate the rule of dominant and effective nationality claims to restrict claims by dual nationals.[191] Concretely, *Alicia Grace* illustrates a doctrinal and policy convergence: tribunals apply expansive interpretative tools to reinforce restrictive jurisdictional barriers, reinforcing the idea that the "back door", i.e., the absence of dual nationals exclusion by treaties other than the ICSID Convention, is increasingly being closed to dual nationals. Although this approach seems to have received attention in recent cases, it is still early to determine whether it reflects convergence of approaches in investment arbitration.

Whether these developments suggest a gradual shift toward doctrinal balancing where strict reliance on legal status is tempered by broader systemic considerations

[190] *Manuel García Armas* Award, *supra* n. 56, at para 704; *Santamarta* Award, *supra* n. 61, at para 485; *Alicia Grace and others* Award, *supra* n. 68, at para 430-433, 471.

[191] García Olmedo, *supra* n. 53, at 322.

raises the possibility that investment arbitration may be evolving through a converging normative ethos. In any case, the choice of tribunals between formalist and functionalist interpretative approaches, or the increasing mention of normative considerations, for the key awards falling within the type of emerging openness, seems to be grounded on procedural matters, i.e., whether dual nationals are allowed to access international investment arbitration, rather than on the substantive notion of "nationality".[192] Despite these recent developments, the divergent approaches still underscore a lack of consistent approach and of coherent criteria to address jurisdiction *ratione personae*. This, however, could be reconciled by reference to the underlying considerations of international investment law, such as investor protection, preventing treaty abuse, and maintaining the legitimacy of the arbitral system.[193] These tendencies often result in *de facto* convergence in outcomes even when the tribunals' reasoning and approach vary. Growing number of cases rejecting jurisdiction signals a restrictive approach and tribunals are aligning their interpretation with broader considerations, i.e., protection of genuine foreign investors while curbing abuse. This shift seems to reflect growing consent that treaty interpretation cannot be isolated from the functional realities and objectives of the ISDS system. The key cases seem to point toward an informal harmonization, in a way that the distinction between procedural regimes is becoming less determinative on the outcome. This seems to suggest that the way tribunals navigate relevant dual-nationality rules is contributing toward a coherent body of cases i.e., a *jurisprudence constante* that reconciles legal formality with policy objectives, thereby reinforcing the credibility and legitimacy of the investment arbitration regime as a whole.

(E) CONCLUSION

This article offers a systematic analysis of how international investment tribunals approach the nationality of dual nationals, an issue that intersects public international law, treaty interpretation, and procedural justice. To do so, the study provides a doctrinal and policy-oriented analysis to help understand the place of dual nationals in investment arbitration today. Particularly, as nationality functions as a criterion to grant access to investment arbitration, dual nationality raises questions about jurisdiction *ratione personae*, treaty interpretation, and even the legitimacy of investor-state dispute settlement. This study undertakes an analytical inquiry into the interpretative approaches, introducing a threefold typology: a formalist interpretation of nationality, which strictly relies on the domestic status; emerging flexibility, which reflects a theoretical openness to functionalist interpretation; and restrictive functionalism, where tribunals incorporate functionalist interpretations to obtain restrictive outcomes. Moreover, the article tests this classification against the 2024 *Alicia Grace v. Mexico* award, which additionally illustrated how tribunals navigate and balance tensions between access to investment protections and the need to preserve the integrity of the system against abuse, including nationality planning and treaty shopping.

This study illustrates how tribunals utilize legal sources and clarified the underlying purpose of dual nationality exclusion in delimiting access to investment arbitration. Both

[192] Casas, *supra* n. 6, at 97.
[193] Polanco, *supra* n. 147, ch 2.

ICSID and non-ICSID tribunals generally exclude dual nationals who also hold the nationality of the respondent State. In this context, while the status of the principle of dominant and effective nationality as customary international law in the field of investment arbitration is disputed, it is undeniably part of general international law and is therefore is considered a "relevant rule of international law" within the meaning of the Article 31(3)(c) of the VCLT. The application of this principle allows for a functional and substantial interpretation of the nationality of the investor when interpreting IIAs for the purpose of granting access to arbitration however its inclusion does not render it dispositive. Accordingly, where the underlying treaty to the dispute clearly defines "national", tribunals are hesitant to introduce additional standards from general international law. Only when the treaty is silent and there exists ambiguity, are tribunals free to introduce dominant and effective nationality in their analysis; in other words, treaty silence on dual nationality may open the door to customary international law based interpretation. With respect to access to arbitration Article 25(2)(a) of the ICSID Convention expressly bars claims by individuals who possess the nationality of the investor State, as such, ICSID tribunals do not allow dual nationals who also possess the nationality of the respondent State to bring claims before them. By contrast, non-ICSID tribunals, although not bound by the prohibition of the ICSID Convention have increasingly arrived to the same conclusions. This has been achieved either through a narrow interpretation of IIA provisions to exclude dual nationals or by incorporating functional interpretation tools in their analysis that ultimately lead to the same outcome of excluding dual nationals.

By examining the treatment of dual nationality across the awards in the ICSID and non-ICSID frameworks and analyzing the interpretative methodologies applied in the context of treaty silence, this study reveals an emerging pattern of convergence around tribunals employing functionalist tools in response to treaty silence which nevertheless lead to exclusionary outcomes. Notably, this trend does not appear to be grounded on the legal authority of the dominant and effective nationality test as part of general international law which requires a functional and substantive interpretation of the nationality of the investor but reflects the overarching normative concern of protecting the legitimacy and coherence of the ISDS system. While the tribunals carefully weigh the facts and treaty context of each dispute, the decision to exclude dual nationals does not result from a rigid application of the international legal framework but rather from seeking to maintain consistency in arbitral practice. Accordingly, there is an apparent convergence across arbitral fora that steers tribunals toward narrowing the scope of admissibility of dual nationals in investment arbitration. In conclusion, this thesis demonstrates that dual nationality is not solely a technical jurisdictional matter but one that reflects broader tensions in investment law, notably the balance between state sovereignty and investor protection. The incorporation of relevant rules of international law in dual nationality interpretation thus serves to safeguard the protection of genuinely foreign investors and thus prevent manipulation of treaty protections and uphold the legitimacy of ISDS mechanisms. Ultimately, the study concludes that the interpretative choices made by tribunals do not simply determine who can access dispute resolution, i.e., the *ratione personae* jurisdiction, but also reflect the underlying broader policy considerations. This is particularly relevant in light of the increasing concerns over the growing use of citizenship by investment schemes or strategic nationality acquisition by natural persons for the sole purpose of invoking treaty protections.