One of the elements that give an investment arbitration tribunal jurisdiction is the nationality of the investor. That is why the notion of investors, like investment, represents a pillar for the investing arbitration system. Despite the importance of nationality, one aspect that has not been expressly addressed by many treaties is how to manage the protection for persons or entities with dual nationalities. Particularly, what happens when a person or entity holds the nationality of the host State in addition to the home State. The absence of explicit provisions in this matter has contributed to create a duality of solutions between ICSID and Non ICSID cases. Since the ICSID Convention provides a solution for dual national cases, the Non ICSID cases remain as one of the most controversial when the applicable treaty does not explicitly address this issue.

In this essay I will address some of the concerns that have arisen regarding the treatment that has been given to natural persons with dual nationality in Non ICSID cases. In my opinion dual nationals should not lose their protection due to the simple fact that a treaty does not expressly address the issue of dual nationals. Not only is it unreasonable to interpret that the silence of a treaty implies the negation of a protection but there are also tools in the investment arbitration system that can be as satisfactory (and less questionable) than the application of the effective nationality doctrine.

I. THE IMPORTANCE OF WORDING

Investment arbitrations under the ICSID Convention have not presented problems for tribunals in relation to dual nationals. This is because article 25(2)(a) of the ICSID Convention includes an express rule regarding this issue. The ICSID Convention states that an investor “does not include any person who on either date also had the nationality of the Contracting State party to the dispute”. This provision has been understood as a rule of "positive" and "negative" nationality. This means that an investor must have the

nationality of a home state (positive aspect) but not the nationality of the host state (negative) at the same time. This rule has been understood indisputably by tribunals. An example of this can be found in *Champion Trading v. Egypt* or *Siag and Vecchi v. Egypt*.

From the solution provided by the ICSID cases we can obtain an important conclusion: the states parties to the ICSID Convention expressly agreed that their disputes under such forum will have a restriction for dual nationals under article 25(2)(a). Due to the subscription of the ICSID Convention, the States receive the guarantee that their own nationals will not be able to use the investment arbitration system to file claims against them. However, such benefit (or restriction from the point of view of the nationals of the home state) is the consequence of having agreed through a treaty such restriction. This is nothing more than the exercise of each State's sovereignty. Investment arbitration, like any other type of arbitration, is a creature of the agreement. Therefore, the content of the agreement that gives jurisdiction to a tribunal (treaty) must be the pinnacle on which the tribunal's jurisdiction is decided. The rules and conditions set forth in a treaty should always be respected; that is why the Vienna Convention on the Law of Treaties (VCLT) establishes that treaties must be interpreted on the basis of the ordinary meaning of their terms. With this I do not want to infer that other rules may not be applicable in an investment arbitration case, but that the regime set by a treaty must always be present.

II. THE SOLUTION TO DUAL NATIONALS SO FAR

Currently the discussion on dual nationals in Non ICSID cases revolves around the *Serafín Armas v. Venezuela* case. Despite the fact that France's national courts have gone back and forward on the award's validity, the tribunal's logic in this case is interesting. In this case, the tribunal declared that they had jurisdiction even if one of the investor's nationalities was the same as the host State. For this, the tribunal relied on three aspects:

(i) it ruled out the application of the effective nationality doctrine (*Nottebohm* case); (ii) the practice of Venezuela in signing investment treaties that deal with the issue of dual nationals; and, (iii) the nationality of the investors at the time the investment and breach occurred.

One of the most controversial aspects of this decision lies in the tribunal's refusal to apply customary international law. In particular, the effective nationality doctrine. It has been argued that with this decision one would be denying that international law is conformed by a broad group of rules larger than BITs.

I consider this criticism unfounded. First, it is arguable that the effective nationality doctrine is a standard rule applicable in investment arbitration cases. What practice shows us is that not only there is a position contrary to the application of diplomatic protections (such as the effective nationality) to investment cases (*Case Concerning Ahmadou Sadio Diallo* or *UN Draft Articles on Diplomatic Protection*) but several tribunals in Non ICSID cases have already ruled out the application of the effective nationality doctrine (*Oostergetel v. Slovak Republic* or *Pey Casado v. Republic of Chile*). The common denominator in these cases is the primacy given to the rules established by the treaties since the tribunal should not incur in a "Illegitimate revision of the BIT" (*Micula v. Romania*) to include rules that the parties did not expressly establish.

Second, in the *Serafín* case the tribunal does not directly deny that the customary international law should not be applied. For the tribunal the regime established by the treaty (*lex specialis*) in relation to "investors" was clear enough to have the need to resort to other interpretation mechanisms. The tribunal granted a quite common interpretation in law to silence on dual nationals: you cannot distinguish where the parties have not done so. Especially when the tribunal found that the definition given in the treaty to the

term “investor” described as the only requirement that the investor be a national of "one" of the parties, nothing more. It seems correct to me that the analysis of the concept of investor begins and ends in the treaty itself. Sometimes the absence of something means that it is just not there. This is because the deprivation of rights is such a relevant regulation that cannot be submitted to concepts such as the effective nationality doctrine that shown a no clear consensus in their application in Non ICSID cases. In addition, when comparing Venezuela’s practice on the regulation of dual nationals it is possible to identify that Venezuela has singed treaties (Italy, Canada and Iran) expressly restricting claims from dual nationals. It means that when Venezuela wanted to establish such limitation, Venezuela said so. It would not make sense that, despite not having agreed a restriction for double national under the BIT with Spain, Venezuela tried to include during the arbitration an agreement that was previously excluded.

The solution provided by *Serafin* tribunal is not an absolute decision. One of the characteristics of the investment arbitration system is that tribunals are not bound by the decision of other tribunals. But even if we consider that *Serafín* solution in not applying customary international law is a dangerous way to go through, there are other aspects that the tribunals could consider in order to address a similar solution.

III. AN ALTERNATIVE SOLUTION

It has been argued that the no consideration of customary international rules such as the effective nationality doctrine, would open the doors to the “internationalization” of national claims through the possibility of acquiring a second nationality. To put it another words, “passport shopping”.

This assertion is based on the fact that the effective nationality doctrine would be the only way out to avoid the “passport shopping” scenarios. However, is this so? I consider

that the answer is no. Actually, the tribunals have a much more flexible tool to deal with this situation: the abuse of process.

The fact that a national investor was trying to obtain a different nationality for the sole purpose of obtaining a benefit that otherwise would not obtain, is similar to the issue that was analyzed in *Pac Rim* or *Phillip Morris*. While in those cases the issue revolved around legal entities and not natural persons, the conclusion reached was that tribunals are authorized to decline jurisdiction if they identify the existence of facts that demonstrate a legal but improper conduct performed by the investor in order to obtain certain benefits. Therefore, it can be said that if an investor acquires a State's nationality with the sole purpose of being able to file a claim against the host State, this situation could qualify as abuse of process. This solution would avoid applying the effective nationality doctrine, questioned by its nature (diplomatic protection) and scope, and would bring a similar result. We cannot forget that the main goal of apply effective nationality application is to prevent abusive investors from looking for a forum that they are not allowed to access. Same objective of the abuse of process. Taking this road will imply that not only the nationality of the investor should be taken into account, but also the moment in which the investor acquired said nationality. This is because the most common scenario would be that the investor who wants to illegitimately use a specific nationality, obtains such nationality *after* having made the investment or, even more questionable, *after* the breach has occurred. This situation could be analyzed under the foreseeability standards proposed by the tribunals in cases of abuse of process. Bear in mind that this solution does not require going outside the treaty's regimen and regulation but applies a comprehensive interpretation of the silence and a broad disposition about

the definition of investor. This solution is restrictive only for those cases when the investor abuses of such situation.

In my opinion, it does not seem fair that an investor will be deprived of the possibility of accessing the coverage of a treaty just because it has dual nationalities. Much worse when the investor holds dual nationalities *before* making their investment. This statement is particularly relevant since it reflects the objective of the investment system in general: to encourage investment through the granting of guarantees. An investor makes an investment decision in a jurisdiction taking into account the benefits that a BIT gives to him. To better benefits, greater incentives for the investor. Therefore, a BIT containing restrictions for dual nationals' investors would be a disincentive for investors of such condition. However, if there are no regulations in this regard in a BIT, there is no reason to consider that such situation generates the same effect as an express restriction. On the contrary, that silence guarantees investors a broad sense of coverage. Even for dual nationals. Different would be the case of an investor that, having made an investment and being in a dispute with a State, seeks to benefit from a specific nationality with the sole purpose of being able to access a forum that he could not otherwise access.

IV. CONCLUSION

I believe that the analysis of investment treaties should always take as reference the rules and conditions proposed by the treaty itself. This is not only in accordance with the VCLT, but it is also the best way to prevent treaty provisions finding their way in through the windows when the parties have closed the doors.

The current answers to dual nationals have polarized the discussion on whether diplomatic protections, such as the effective nationality doctrine, should apply to investment arbitration cases. Beyond the solutions given so far, I believe that tribunals

can use less controversial solutions in cases where there is no express rule for the treatment of dual nationality. In particular, the abuse of process principle can help to create a more harmonious rule that allows the tribunals to analyze their jurisdiction when investors want to use their nationalities in a non-legitimate way.