INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

LONGREEF A.V.V.

Claimant

v.

BOLIVARIAN REPUBLIC OF VENEZUELA

Respondent

ICSID Case No. ARB/11/5

DECISION ON JURISDICTION

Members of the Tribunal
Sir David A.O. Edward
Mr Alexis Mourre
Mr Enrique Gómez-Pinzón

Secretary of the Tribunal
Ms Natalí Sequeira

Date of Dispatch to the Parties: 12 February 2014

Representation of the Parties

Representing the Claimant

Mr Grant Hanessian
Mr Derek Soller
BAKER & MCKENZIE LLP
452 Fifth Avenue
New York, New York 10018

Mr Eugenio Hernández Bretón
Ms María Eugenia Salazar
Mr Héctor Martínez
BAKER & MCKENZIE
Centro Bancaribe, Intersección
Av. Principal de Las Mercedes
con inicio de Calle París
Urb. Las Mercedes
Caracas 1060 Miranda

Representing the Respondent

Dr Manuel Enrique Galindo
Procurador General Encargado
de la República Bolivariana de Venezuela
Paseo Los Ilustres c/c Av. Lazo Martí
Santa Mónica, Caracas – 1010
Venezuela

Mr Laurent Gouiffès
Hogan Lovells
17 avenue Matignon
Paris 75378, France

Mr Luis Bottaro
Mr Bruno Ciuffetelli
Mr Gonzalo Rodríguez Matos
Ms Marianna Boza
Hogan Lovells
Centro San Ignacio, Torre Copérnico
Oficinas TO-P3-04
Av. Blandín, La Castellana
Caracas 1060, Venezuela

Mr Alejandro López
Hogan Lovells
Paseo de la Castellana, 51 Planta 6ta
Madrid 28046, Spain

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A. INTRODUCTION

(i) The Scope of this Award

1. This Award concerns the jurisdictional objections raised by the Respondent (**'Venezuela'**) in response to the Request for Arbitration of the Claimant (**'Longreef'**) dated 14 January 2011 (**'RFA'**).

2. These objections were the subject of a hearing held in Paris on 18th and 19th June 2013.

(ii) The jurisdictional dispute: overview

3. Longreef was constituted on 12 February 1997 under the laws of the Kingdom of the Netherlands (**'Netherlands'**) with its registered address in Aruba. By 14 December 2001, it had acquired the entire issued share capital of Café Fama de América (**'CAFAMA'**), a Venezuelan company. CAFAMA has at all material times carried on business roasting and selling coffee in Venezuela, including through local subsidiaries.

4. Longreef seeks relief in respect of alleged expropriation of its interest in CAFAMA by Venezuela from July 2009 onwards. Longreef invokes the Centre's jurisdiction under the ICSID Convention,[1] relying on the arbitration provisions of a bilateral investment treaty between Venezuela and the Netherlands (**'BIT'**).[2]

5. The BIT entered into force on 1st November 1993 for a period of fifteen years. Venezuela gave notice of termination of the BIT on 21st April 2008 with effect from 1st November 2008.

6. Venezuela disputes the Centre's jurisdiction to adjudicate Longreef's claim. It contends that the jurisdictional requirements under ICSID are not satisfied for three reasons:

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[1] Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

[2] The Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela, signed on 22 October 1991, Art. 9.

(1) There is no consent to arbitration of Longreef's claim. Longreef cannot rely, to establish such consent, on the arbitration provisions of the BIT since the BIT was terminated by Venezuela in April 2008, that is to say, almost three years before the RFA was submitted.

(2) Longreef is not a protected investor. It is a vehicle through which Venezuelan nationals own CAFAMA. Consequently, it does not satisfy the foreign nationality requirements inherent in ICSID and the BIT.

(3) Longreef's interest in CAFAMA is not a protected investment since it lacks the objective and material characteristics necessary to qualify as an investment under ICSID and the BIT.

Underlying these jurisdictional objections are Venezuela's allegations that Longreef acquired its interest in CAFAMA in circumstances involving violation of Venezuelan company and tax law and/or in bad faith.

7. Longreef disputes each of Venezuela's jurisdictional objections. In summary, Longreef contends that:

(1) Venezuela's consent to arbitrate is established by the arbitration provisions of the BIT, which apply after termination by reason of the BIT's 'survival clause'.

(2) It suffices, to establish the nationality requirement under ICSID and the BIT, that Longreef is constituted under Dutch law. The beneficial ownership and control of Longreef is legally irrelevant under the terms of the BIT. Contrary to Venezuela's case, there is no basis for 'piercing the corporate veil' nor for a finding that Longreef has 'abused' its corporate personality.

(3) Longreef's shareholding in CAFAMA qualifies as an investment under ICSID and the BIT. If (which Longreef denies) it is jurisdictionally relevant whether its interest in CAFAMA has the objective and material characteristics contended for by Venezuela, it does in fact have those characteristics.

Longreef denies Venezuela's allegations of bad faith and illegality as legally irrelevant and/or unfounded.

(iii) The issues arising

8. The jurisdictional dispute between the parties raises three broad issues:

   (1) Has Venezuela consented to arbitration of Longreef's claim, notwithstanding its termination (or denunciation) of the BIT (the '**objection *ratione temporis***' or the '**consent/termination issue**')?

   (2) If so, does Longreef satisfy the nationality requirements of ICSID and the BIT (the '**objection *ratione personae***' or the **'nationality issue'**)?

   (3) If so, does Longreef's acquisition and maintenance of its interest in CAFAMA satisfy the investment requirements of ICSID and the BIT (the '**objection *ratione materiae***' or the **'investment issue'**)?

9. There also arises the more general question whether Venezuela's allegations of illegality and bad faith in relation to Longreef's acquisition of its interest in CAFAMA are relevant and, if so, well-founded.

(iv) Materials relied on by the parties

10. Each party relies on factual exhibits. These concern in particular CAFAMA's history and the background to, and transactions involved in, its acquisition by Longreef.

11. The parties further rely on legal exhibits, and in particular published awards of ICSID tribunals. Neither party suggests that this Tribunal is bound by these awards, but each invites the Tribunal to take account of them.

12. Each party relies on legal opinions as to the effect under international law of treaty denunciation or termination on a State's consent to arbitrate: Venezuela on opinions of Professor August Reinisch of the University of Vienna dated 26 June 2012 and 26 November 2012; Longreef on opinions of Professor Nico J. Schrijver of the University of Leiden dated 27 September 2012 and 15 January 2013.

13. In relation to Venezuelan company and tax law, Venezuela relies on an opinion of Professor Ezra Mizrachi of the Universidad Central de Venezuela dated 26 November 2012. Longreef relies, in response, on opinions, each dated 8 February 2013, of Professor Alfredo Morles-Hernández of the Universidad Católica Andrés Bello and Professor Carlos Weffe of the Universidad Central de Venezuela.

14. Venezuela also relies on a report by Mr Philip Haberman of the firm Ernst & Young dated 9 November 2012 on accountancy questions in connection with Longreef's acquisition and maintenance of its interest in CAFAMA.

B. PROCEDURE

15. On 20 January 2011, ICSID received the RFA from Longreef against Venezuela.

16. On 23 February 2011, the Secretary-General of ICSID registered the RFA in accordance with Article 36(3) of the ICSID Convention and notified the parties of the registration. In the Notice of Registration, the Secretary-General invited the parties to proceed to constitute an Arbitral Tribunal as soon as possible pursuant to Rule 7 of the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the **'Institution Rules'**).

17. The Arbitral Tribunal in this proceeding is composed of three members: Mr Enrique Gómez Pinzón, a national of Colombia, appointed by the Claimant on May 18, 2011; Mr Alexis Mourre, a national of France, appointed by the Respondent on June 6, 2011; and Sir David A.O. Edward, a national of the United Kingdom, President of the Tribunal, appointed on 24 August 2011 by the Chairman of the ICSID Administrative Council pursuant to Article 38 of the ICSID Convention.

18. In accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings ('**Arbitration Rules**'), on 9 September 2011, the Secretary-General notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms Natalí Sequeira, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

19. On 7 November 2011, the Respondent filed a proposal for the disqualification of Mr Gómez Pinzón.

20. The Tribunal and the parties held a first procedural session by telephone conference on 9 November 2011. In view of the Respondent's request for disqualification, the proceeding was suspended in accordance with ICSID Arbitration Rule 9(6).

21. On 15 November 2011, the Claimant filed observations on the proposal for disqualification and, as provided for ICSID Arbitration 9(3), on 9 November 2011 Mr Gómez Pinzón furnished explanations regarding Respondent's proposal. On 24 January 2012, the proposal for disqualification of Mr Gómez Pinzón was declined and the proceeding was resumed pursuant to ICSID Arbitration Rule 9(6).

22. By Claimant's letter of 31 January 2012 and Respondent's letter of February 29, 2013, the parties confirmed the procedural agreements discussed during the First Session held on 9 November 2011. On 6 April 2012 and further to consultations with both parties, the Tribunal issued certified copies of the minutes of the First Session that stated, *inter alia,* that the Tribunal had been properly constituted, that the applicable Arbitration Rules would be those in effect from April 10, 2006 and that the procedural language would be English and Spanish. It was also agreed that the place of proceeding would be Washington DC and that the Tribunal reserved its right to hold hearings at any other place it deemed appropriate.

23. The Respondent filed its memorial on jurisdiction on 29 June 2012. The Claimant filed its counter-memorial on jurisdiction on 1 October 2012. The Respondent filed a reply on 27 November 2012 and the Claimant filed a rejoinder on 8 February 2013. The hearing on jurisdiction was held in Paris on 18th and 19th June 2013. The following persons were present at the hearing:

Tribunal:

Sir David A.O. Edward	President of the Tribunal
Mr Alexis Mourre	Co-Arbitrator
Mr Enrique Gómez Pinzón	Co-Arbitrator

ICSID

Ms Natalí Sequeira	Secretary of the Tribunal

On behalf of the Claimant	
Mr Grant Hanessian	Baker & McKenzie, New York
Mr Eugenio Hernández Bretón	Baker & McKenzie, Caracas
Ms María Eugenia Salazar	Baker & McKenzie, Caracas
Mr Derek Soller	Baker & McKenzie, New York
Mr Héctor Martínez	Baker & McKenzie, Caracas
Ms Alice Allard	Baker & McKenzie, Paris

Claimant's Experts:	
Dr Carlos Weffe	Universidad Central de Venezuela
Dr Alfredo Morles-Hernández	Universidad Católica Andrés Bello
Dr Nico J. Schrijver	Leiden University

On behalf of the Respondent	
Dra Yarubith Escobar	Procuraduría General de la República
Mr Laurent Gouiffès	Hogan Lovells (Paris)
Mr Luis Bottaro	Hogan Lovells (Caracas)
Mr Gonzalo Rodríguez-Matos	Hogan Lovells (Caracas)
Ms Melissa Ordoñez	Hogan Lovells (Paris)
Mr Alejandro López	Hogan Lovells (Madrid)
Ms Ana Morales	Hogan Lovells (Madrid)
Ms Lucie Chatelain	Hogan Lovells (Paris)
Mr Ben Gaston	Hogan Lovells (Paris)

Respondent's Experts:	
Professor August Reinisch	University of Vienna
Mr Philip Haberman	Ernst & Young
Professor Ezra Mizrachi	Universidad Central de Venezuela

C. FACTUAL BACKGROUND TO THE JURISDICTIONAL ISSUES

(i) Longreef

24. Longreef was constituted under Dutch law on 12 February 1997, being registered in the Commercial Register of the Chamber of Commerce of Aruba under number 21523, with its registered address at Watapanastraat 7, Oranjestad, Aruba.

(ii) CAFAMA

25. CAFAMA was constituted under Venezuelan law on 5 December 1960, succeeding to a coffee roasting and selling business which was initially carried on by members of the González family, and latterly by them through Bernardo González R & Cía.

26. CAFAMA subsequently carried on that business, including through two wholly-owned subsidiaries incorporated under Venezuelan law, namely Fama de América SA (**'FAMASA'**) and Coffee Trade & Service, C.A. (**'Coffee Trade'**).

(iii) Longreef's acquisition of its interest in CAFAMA

27. Upon transfer of the business of Bernardo González R & Cía to CAFAMA, and subsequently, members of the González family or their descendants became shareholders and/or directors of CAFAMA. The relevant individuals included Mrs Guillermina González Rodríguez (**'GGR'**) and two of her nephews (the **'Azuajes'**). By summer 1997, there had arisen a family dispute among the shareholders of CAFAMA, opposing one branch of the family (the Arvelos) to the other branches of the family including GGR and the Azuajes.

28. In July 1997, GGR and the Azuajes acquired the whole share capital of Longreef and were appointed its directors. GGR and the Azuajes at all material times thereafter retained control of Longreef, including through Panamanian companies. At the same time, GGR and the Azuajes acquired the whole share capital of another company registered in Aruba, Pontic Investments AVV ('**Pontic**') and were appointed its directors.

29. On 12 August 1997, at a CAFAMA Special Shareholders' Meeting, it was resolved:

    (i) to increase CAFAMA's capital stock by capitalizing the CAFAMA loan amount, existing shareholders waiving their right to subscribe in favour of Longreef;
    (ii) to convert certain existing common shares in CAFAMA into preference shares carrying the right to a one-time preferred dividend, upon the payment

of which preference shareholders would redeem their shares, CAFAMA's capital stock being reduced accordingly; and

(iii) to pay the preferred dividend against CAFAMA's Undistributed Retained Earnings and Accumulated Results by Exchange Conversion, as those accounts were reflected in CAFAMA's balance sheet as at 30 September 1996. That balance sheet was approved at a CAFAMA Shareholders' Meeting on 18 November 1996, and registered in the Commercial Registry on 5 December 1996.

30. Pursuant to these corporate resolutions, Longreef acquired CAFAMA's newly created capital stock (i.e. 95.42% of CAFAMA's then issued non-preference shares). It is not disputed that Longreef made this acquisition by capitalization of what Longreef contends to have been (but which Venezuela disputes genuinely was) a loan to CAFAMA of US$10.6 million (the **'Longreef Loan'**).

31. At the same time, the relevant preference shareholders (i.e. the Arvelos and Ms Carmen Evarista González de Azuaje (**'CEGdA'**)) received a dividend of USD 6,022,279.00 upon redemption of their shares, and thereafter had no further interest in CAFAMA.

32. Longreef subsequently became the sole shareholder of CAFAMA pursuant to resolutions at a CAFAMA Special Shareholders' Meeting on 14 December 2001.

(iv) Venezuela's contentions in relation to these facts

33. Venezuela does not dispute that the corporate resolutions referred to were made, or that CAFAMA's shareholding changed pursuant to them. Venezuela's case is that the circumstances in which this occurred show that the transactions involved were a 'sham' for the sole purpose of evading tax. (At some points in the hearing, counsel for Venezuela used the word 'fraud' to characterise these transactions.)

34. At the hearing Venezuela referred in particular to documents exhibited in the course of a simulation claim brought against Roberto Azuaje by his ex-wife Marina Rodriguez. These refer to '*Operación Amazonia*', a series of transactions taking place between 2001 and 2006, involving companies incorporated in Aruba and Panama

(Mawson, Amazonia, Longreef, Cinnamon and Pontic), the purpose of which was to conceal the true ownership of Longreef.

35. In support of its contentions, Venezuela relies in particular on the following facts and matters:

36. *First*, Venezuela refers to the use by GGR and the Azuajes - all Venezuelan nationals - of 'ready-to-use' offshore companies registered in Aruba and Panama, by which they "deliberately concealed their shares of CAFAMA and other Venezuelan assets through a scheme of companies".[3]

37. *Secondly*, regarding the Longreef Loan, Venezuela notes that its date and terms are not disclosed in the minutes of the 12 August 1997 shareholders meeting. Venezuela disputes whether Longreef in fact paid USD 10.6 million to CAFAMA, but alleges that even if it did, such sums "did not belong to Longreef".[4] Venezuela refers in this connection to a bank statement exhibited by Longreef, noting that: (i) it does not show the recipient of the transfer of USD 10.6 million; and (ii) it indicates that the Longreef account from which it was paid, having previously recorded a zero balance, received on the day of the transfer, and from unidentified sources, sums of USD 3 million and USD 7.6 million, i.e. in total USD 10.6 million. The inference must be that the sums paid by Longreef in connection with the August 1997 transactions were funded by other (unidentified) sources.

38. *Thirdly*, Venezuela refers to an interest free loan of USD 4.5 million made by CAFAMA to Pontic in August 1997 (the **'Pontic Loan'**). Venezuela contends in this connection that:

    (i) the Pontic Loan was paid by CAFAMA from sums received under the Longreef Loan, the balance being used by CAFAMA to pay the dividend to preference shareholders under the August 1997 transactions; and

[3] Memorial, paragraph 55.
[4] Reply, paragraph 9.

(ii) the benefit of the Pontic Loan was later assigned by CAFAMA to Longreef, in or around December 2001, as a dividend paid upon Longreef's becoming the sole shareholder in CAFAMA.

Thus, money received by CAFAMA under the Longreef Loan remained in CAFAMA for less than seven days; part of that money was in any case returned to Longreef through the triangular Pontic Loan; and Longreef made no real contribution to CAFAMA.

39. *Fourthly*, Venezuela contends that there is a lack of clarity regarding the circumstances in which, in December 2001, Longreef became sole shareholder of CAFAMA.

40. *Fifthly*, Venezuela alleges that Longreef's acquisition of CAFAMA did not contribute to the growth of CAFAMA's business. There is no connection between Longreef's acquisition of CAFAMA's shares in 1997 and 2001, and CAFAMA's growth during that period and subsequently, in particular in circumstances where:

(1) by 13 August 1997, none of the Longreef Loan funds remained in CAFAMA;

(2) the Pontic Loan, which was interest free, provided no benefit to CAFAMA; and

(3) Longreef was not involved in the management of CAFAMA's business.

41. *Sixthly*, it is alleged that Longreef has concealed its ownership from Venezuela. Reliance is placed, in this respect on:

(1) the skein of Aruban and Panamanian companies used by GGR and Azuajes to hold (and conceal) their interest in CAFAMA; and

(2) Longreef's failure in 2000 to obtain recognition as a foreign direct investor from the relevant Venezuelan regulator, the Superintendencia de Inversiones Extrajeras (**'SIEX'**).

42. *Seventhly*, Venezuela alleges violations of its company and tax laws in connection with Longreef's acquisition of CAFAMA.

43. Venezuela contends that, for the above reasons, the transactions involving Longreef were a 'sham'. Venezuela relies on this contention in relation to each of the Nationality and Investment Issues, arguing that it follows that Longreef cannot establish the relevant requirements under ICSID and/or the BIT.

(v) Longreef's response to Venezuela's allegations

44. Responding to the allegations of Venezuela, Longreef emphasises the following general points:

(1) It is not in dispute that:
   (i) Longreef was properly constituted under Dutch law in February 1997, and was duly registered in the Commercial Register of the Chamber of Commerce of Aruba;
   (ii) CAFAMA was properly constituted under Venezuelan law in 1960, and that FAMASA and Coffee Trade were its subsidiaries;
   (iii) As a result of the transactions occurring in August 1997, Longreef acquired 95.42% of CAFAMA's then issued share capital;
   (iv) At all times since December 2001 and until expropriation in July 2009, Longreef held the entirety of CAFAMA's issued share capital.

(2) There is no dispute as to the validity of the corporate resolutions at the meetings in August 1997 and December 2001. These were agreed to by all those who attended, and duly notified to the Venezuelan Commercial Registry.

(3) The Longreef Loan and its capitalization was not concealed from Venezuela. On the contrary, it was reflected in CAFAMA's balance sheet as of 11 August 1997 and in its audited financial statements for the fiscal year 1997.

(4) Venezuela, through SIEX, expressly acknowledged Longreef as the sole (foreign) owner of the entirety of CAFAMA's stock in the Constancia de Calificacíon which SIEX issued to CAFAMA on 9 June 2003. (The refusal of recognition in 2000 referred to in paragraph 41(2) above related to registration of Longreef as a

foreign *direct* investor which was refused in the absence of proof of entry of foreign currency.)

(5) Prior to this arbitration, neither Longreef's shareholding in CAFAMA nor its activities in Venezuela has been challenged.

45. Longreef's response to the specific arguments of Venezuela, as set out at paragraphs 36-43 above, is as follows:

46. *First*, Longreef does not deny that it was used as a 'Special Purpose Vehicle' (**'SPV'**) to invest in CAFAMA, but contends that the transactions involved were "no more or less a 'sham transaction' than any other transaction in which a special purpose entity is used".[5] In any event, the use of Longreef as an SPV is not relevant to the issue of jurisdiction.

47. *Secondly*, regarding the Longreef Loan, and CAFAMA's use of sums received under it, Longreef's position is that:

(1) Its payment of USD 10.6 million to CAFAMA on 5 August 1997 is adequately evidenced, the relevant transfers having occurred between Longreef's and CAFAMA's respective Citibank accounts, in New York. Venezuela's contrary position is advanced in bad faith in circumstances where Venezuela has access to CAFAMA's corporate records.

(2) There is no factual or legal basis for Venezuela's assertion that the sums paid by Longreef "did not belong to Longreef"[6] prior to transfer, there being no dispute that the account from which they were paid belonged to Longreef.

(3) The ultimate source of the funds from which Longreef paid those sums is legally irrelevant, but in any event "in many, if not most, cases" SPVs are funded by their shareholders.[7]

[5] Rejoinder, paragraph 8(i).
[6] Reply, paragraph 9.
[7] Rejoinder, paragraph 16.

(4) It is also legally irrelevant that CAFAMA used the sums received to fund the preference share dividend to the Arvelos and CEGdA.

48. *Thirdly*, the circumstances in which Longreef acquired the remainder of CAFAMA in December 2001, is not relevant to the issue of jurisdiction.

49. *Fourthly*, as regards Longreef's role in CAFAMA's growth since August 1997:

(1) It is not disputed that CAFAMA's business grew considerably during the relevant period.

(2) During that period, most of CAFAMA's profits were not paid out as dividends to Longreef (as would have been its entitlement), but rather were reinvested as capital expenditure or retained earnings, and this reinvestment was evidently sufficient to permit CAFAMA's growth and development.

(3) It is legally irrelevant that CAFAMA paid out Longreef's contribution of USD 10.6 million shortly after receiving it. Longreef notes that it is very often the case that changes to a company's ownership do not entail the provision of new capital to the company. For example, where investment funds are paid by the party acquiring shares directly to the party selling them, this would not effect a change in the relevant company's net financial position. Longreef notes that Venezuela has identified no case which has held that the purchase of shares was not an 'investment' for ICSID purposes on the ground that the purchase price was not paid to the relevant company.

50. *Fifthly*, Longreef denies that it concealed its ownership from Venezuela:

(1) There was no requirement under Venezuelan law, nor any mechanism, for disclosure of the facts allegedly concealed by Longreef, i.e. its beneficial ownership.

(2) The relevant corporate transactions of CAFAMA in August 1997 and December 2001 are presumed (under Venezuelan law) *iuris et de iure* to be known to all

persons upon their registration in the Commercial Registry and publication in a local newspaper.[8]

(3) Longreef was noted as CAFAMA's owner in Venezuela's publicly available corporate register and with SIEX.

(4) GGR's and the Azuajes' directorships of Longreef and CAFAMA were listed in publicly available registers in Aruba and Venezuela.

(5) Under Aruban law, and in accordance with its articles of association, Longreef may act as a parent or holding company.

(6) Under Venezuelan law, foreign companies may hold shares in Venezuelan companies.

51. *Sixthly*, Longreef's denies as irrelevant and unfounded Venezuela's allegations that its (Longreef's) acquisition of CAFAMA involved violations of Venezuela's company and tax law.

52. For the foregoing reasons, Longreef contends that Venezuela's allegations of 'sham' transactions are unfounded and that there is no justification for use of the word 'fraud'. In any event, the transactions in question do not provide any legal basis for contesting the jurisdiction of the Tribunal.

(vi) Alleged violations of Venezuelan law in connection with Longreef's acquisition of CAFAMA

The allegations of Venezuela

53. Venezuela alleges violations of Venezuelan company and tax law in connection with Longreef's acquisition of CAFAMA. The violations alleged are that:

[8] Law on Public Registry and the Notary of 2001, Art. 50, and Law on Public Registry and the Notary of 2006, Art. 52, Legal Authority **CL-1**.

(1) payment of the preferred dividend to some of CAFAMA's shareholders, on 12 August 1997, violated Article 292 *et seq* of the Venezuelan Commercial Code;

(2) such payment also violated Article 307 of the Venezuelan Commercial Code, which requires payment from liquid and collected profits;

(3) the inclusion in CAFAMA's balance sheet of the Longreef Loan was an accounting irregularity in violation of Article 304 of the Venezuelan Commercial Code; and

(4) the rearrangement of CAFAMA's shares, through a series of artificial transactions, amounted to tax fraud in violation of Article 93 of the Venezuelan Tax Code.

54. In essence, Venezuela's case is that these violations prevent Longreef's interest in CAFAMA from qualifying as an investment under ICSID and the BIT and thus deprive the Tribunal of jurisdiction. Contrary to Longreef's case, Venezuela is not estopped from relying on these violations by reason of its failure to take action in respect of them at the time.

55. The nature and effect of these alleged violations of Venezuelan law were developed in the pleadings and at the hearing as follows:

Violation of Article 292 of the Commercial Code of Venezuela (Código de Comercio de Venezuela)

56. Article 292 of the Commercial Code provides that "shares must be of equal value and give their holders equal rights unless the articles of association provide otherwise"[9]. In the present case, Title III (*De las Acciones*) of CAFAMA'S Bylaws (*Estatutos*), adopted in 1984, provides: "*FIFTHLY*, shares are nominative, of one class and confer on their holders equal rights" [Tribunal's Translation].[10]

[9] *Artículo 292 : Las acciones deben ser de igual valor y dan a sus tenedores iguales derechos, si los estatutos no disponen otra cosa.* Legal Authority **RL-62**.
[10] *QUINTA : Las acciones son nominativas, de una misma clase y confieren a sus titulares iguales derechos*, Exhibit **R-58**.

57. No modification of CAFAMA's Bylaws took place prior to the conversion of ordinary shares into preferred shares (see paragraph 29 above) nor was this published in the commercial register.

58. Venezuela relied on the Opinion of Professor Ezra Mizrachi to the following effect:

> "[The] conversion of common shares into preferred shares without first modifying the by-laws of the company is a violation of article 292 of the Commercial Code. According to this provision, all shares are of equal value and grant the same rights to the shareholders, unless otherwise stipulated in the by-laws. Further, article 293 of the Commercial Code was breached as no share certificates indicating the rights accorded were published. Finally, by not making the necessary modification of the by-laws, and much less the registration or publication required by Articles 19 Num. 9° and 217 of the Venezuelan Commercial Code, and because such a conversion affects third parties and necessitates an amendment of the bylaws, these acts are of no effect pursuant to Articles 25 and 221 of the Venezuelan Commercial Code."[11]

Violation of Article 307 of the Commercial Code of Venezuela

59. Article 307 of the Commercial Code provides that "Dividends may not be paid to shareholders other than from liquid and collected profits" [Tribunal's Translation].[12]

60. One of the accounts from which the dividend declared on 12 August 1997 (see paragraph 29(iii) above) was paid was a 'Monetary Translation Reserve' resulting from currency conversion.

61. According to Professor Mizrachi and Mr Haberman, this account did not represent 'liquid and collected profits' and consequently could not be applied to payment of dividend.

62. Professor Mizrachi explained that:

> "Venezuelan authorities [*la doctrina venezolana*] have clarified that the distribution of profits among shareholders should adhere to the principle that the amounts to be distributed should correspond to profits actually earned by

[11] Paragraph 21 of the Opinion dated 26 November 2012.

[12] *Artículo 307: No pueden pagarse dividendos a los accionistas sino por utilidades líquidas y recaudadas.* Legal Authority **RL-29**.

the company and highlight that the provisions of Article 307 of the Commercial Code seek to maintain the integrity of the share capital.

"Article 307 of the Commercial Code is a regulation of strict public policy, that cannot be modified by agreement between the parties and further imposes personal liability on the directors."[13]

Violation of Article 304 of the Commercial Code of Venezuela

63. Article 304 of the Commercial Code provides:

> "The management of the company shall present to the statutory auditor, at least one month before the day set for the meeting to discuss it, the respective balance sheet along with the supporting documents, and it shall clearly state :
> 1º The capital stock that actually exists
> 2º The executed deliveries and the delays.
> The balance sheet will show with evidence and accuracy the profits actually obtained and the losses suffered, setting the company's assets at actual value or presumed value. Uncollectable debts shall not have any value assigned" [Tribunal's Translation].[14]

64. In relation to the matters referred to in paragraphs 37-38 and 47 above, Professor Mizrachi expressed the following opinion:

> "From the documents reviewed, and in particular, the extract of Longreef's bank account submitted as Exhibit C-25, I understand that there is no evidence that the loan from LONGREEF entered into CAFAMA's cash account because the cited document does not identify the account receiving the transfer of US$ 10,600,000 made by Longreef on 5 August 1997. If the entrance in CAFAMA's cash account of the loan allegedly made thereto is not verified, it is unlikely that the loan from CAFAMA to PONTIC reflected in the balance sheet was made. This would constitute a violation of Article 304 of the Commercial Code as a consequence of the inaccuracy of the balance sheet in this regard.
>
> "Moreover, since the 'monetary translation' was considered as a gain from which part of the dividends were distributed, there was an inaccurate statement of the actual profits obtained, in breach of the above mentioned regulation."

[13] Paragraphs 24 and 25 of the Opinion dated 26 November 2012.
[14] *Artículo 304: Los administradores presentarán a los comisarios, con un mes de antelación por lo menos el día fijado para la asamblea que ha de discutirlo, el balance respectivo con los documentos justificativos, y en él se indicará claramente:*
1°- El capital social realmente existente.
2°- Las entregas efectuadas y las demoradas.
El balance demostrará con evidencia y exactitud los beneficios realmente obtenidos y las pérdidas experimentadas, fijando las partidas del acervo social por el valor que realmente tengan o se les presuma. A los créditos incobrables no se les dará valor. Legal Authority **RL-29**.

Violation of Article 93 of the Tax Code of Venezuela (Código Orgánico Tributario)

65. Article 93 of the Tax Code in force at the material time provided:

> A fraud is committed where through simulation, concealment, machinations or any other form of deception, a party obtains for himself or for a third party, an illicit gain at the expense of the tax beneficiary's rights.[15]

66. In relation to the transactions following upon the shareholders' resolutions on 12 August 1997 (paragraph 29 above, points (ii) and (iii)), Professor Mizrachi said that

> "the shareholders who 'redeemed' their shares and ceased to be shareholders of the company in exchange for the received dividends, avoid[ed] payment of the income tax that would have accrued in case the shares had been sold."
>
> "Had they conducted a normal transaction in order to dispose of their shares in CAFAMA –the sale of shares-, the benefit received – the price of the sale minus the cost of the acquisition – would have been subject to taxes, and the seller would have been required to pay income tax, in accordance with the Income Tax Law of 1995. By contrast, the dividends were not subject to taxes at the time they were distributed pursuant to that law."[16]

67. Professor Mizrachi concluded that:

> "The series of transactions described above that lead to the exit of certain shareholders and the entry of LONGREEF into CAFAMA's capital constituted at the time a 'fraud', as established by Article 93 of the Venezuelan Tax Code in force at the relevant time."[17]

Longreef's response

68. Longreef responds to Venezuela's case as follows:

(1) The violations alleged are jurisdictionally irrelevant because they do not implicate Longreef and/or because the laws relied on do not govern the admissibility of investments under Venezuelan law, such that the alleged violations (if established) could not deprive the Tribunal of jurisdiction.

[15] *Artículo 93: Comete defraudación el que mediante simulación, ocultación, maniobra, o cualquier otra forma de engaño, obtenga para sí o para un tercero, un provecho indebido a expensas del derecho del sujeto activo a la percepción del tributo.* Legal Authority **RL-65**.

[16] Paragraphs 40(a) and 41 of the Opinion dated 26 November 2012.

[17] Paragraph 55 of the Opinion dated 26 November 2012.

(2) In any case, Venezuela, having failed to challenge the transactions prior to this arbitration, is estopped now from doing so.

(3) In any case, the violations alleged are denied.

69. Longreef relied on the opinions of Professor Morles and Professor Weffe.

Violation of Article 292 of the Commercial Code

70. Professor Morles said that in his opinion the transaction effected by the shareholders' resolutions on 12 August 1997 was properly to be treated as an 'Accordion Transaction', its characteristics being that:

> "All [the actions constituting the transaction] were instantly carried out during the course of the shareholders' meeting, so the conversion, redemption of shares and reduction of the capital barely lasted a few seconds, because immediately thereafter the capital increase took place and the subscription of the new shares by the new shareholder."[18]

71. Professor Morles concluded that:

> "The minutes of the shareholders' meeting that adopted the set of these resolutions were subsequently registered with the Commercial Registry. As of that date, for a term of five years, it was possible for any person having a legitimate interest (someone affected by the decisions adopted) to file a claim against the Accordion Operation as a whole or against any of the individual actions thereof, according to Article 1.346 of the Civil Code, which provides a term of five years to request the nullity of a legal act of the kind adopted at the shareholders' meeting of CAFAMA of August 12, 1997. Nobody objected and the action (the Accordion Transaction) became legally firm."[19]
>
> "The decisions of the approval of the balance sheet and dividend distribution were adopted unanimously by the shareholders. According to Venezuelan corporate law, these decisions by the shareholders were subject to challenge by the shareholders or third parties affected hereby. In order for shareholders to object, they had to be dissenting shareholders, that is, they should have disagreed with the decision (although none did) or be absent from the meeting (none

[18] Paragraph 11 of the Opinion dated 8 February 2013.
[19] Paragraph 28 of the Opinion dated 8 February 2013.

were absent). Third parties would have had to show that they had been prejudiced as a result of the decision adopted by the shareholders' meeting. Fifteen years after the first shareholders' meeting, 12 after the second and 11 after the third, the statutes of limitations have been exceeded without any such challenges.

"Regarding the nullity of the decisions adopted by a shareholders' meeting, any challenge should have been filed within five years after the registration and publication of minutes for the shareholders meeting held in 1997 and 2000, and within one year following their registration and publication of shareholders' meetings held after November 13, 2001, the effective date of the Law on Public Registries and Notaries' Offices.

"Since those terms have more than elapsed, the shareholders' meetings of CAFAMA of August 12, 1997, December 7, 2000 and December 14, 2001, are immune from any challenge or judicial controversy."[20]

Violation of Articles 304 and 307 of the Commercial Code

72. Professor Morles assessed the situation as follows:

"When the shareholders unanimously decide to deem the income recorded in the balance sheets as 'Results Accrued from Monetary Translation' to be liquid and collected, and they partially charge the dividend against that account, it is because they are certain that it is an income that may enter the corporate treasury at any moment, because they are the controlling shareholders of the controlled subsidiary.

"The only potential negative effects of this operation would be an alteration of the capital stock, had it been equal to the equity figure, but the dividend distribution is made in such a way that the equity or net worth continues to exceed the capital stock, as evidenced by the balance sheet itself. If the distribution of dividends had affected the capital stock, the shareholders were responsible for that insufficiency, because they were running a risk for which they were responsible. However, there was no claim because nobody was affected. …

"[In] any event it would have been necessary to file an action for the nullity of the shareholders' meeting that adopted the decision.

"Such a legal action for nullity could only be brought by the

[20] Paragraphs 92-94 of the Opinion dated 8 February 2013.

shareholders of the company. The pertinent observations have already been made regarding this issue. The Tax Administration could also have filed an appeal, which it did not, because there were no tax infringements."[21]

Violation of Article 93 of the Tax Code

73. In the opinion of Professor Weffe,

> "[The] events analyzed constitute a case of *economy of option*, that is, the legitimate exercise of the free will of the parties involved in the operations under analysis to organize their business in the most advantageous or less burdensome manner for tax purposes, lawfully using the alternatives offered by the Venezuelan legal system that was in force on the date of these operations, using typical and reasonably suitable legal forms that adequately reflect the *real* intention of the parties in the structuring of their legal business, and therefore cannot be characterized as 'overtly inappropriate' to achieve the economic purposes sought thereby, or much less as illegal, according to the Venezuelan tax system in force on August 12, 1997."
>
> "Even if the conduct of LONGREEF, PONTIC and CAFAMA were deemed to constitute tax *avoidance* under any form of indirect business structured in an 'overtly inappropriate' manner to achieve the economic purpose sought, , that conduct is not a violation of the Venezuelan tax law that should be penalized pursuant to Article 93 of the Organic Tax Code in force on August 12, 1997."[22]

The evidence of the expert witnesses at the hearing

74. Each of Professors Mizrachi, Morles and Weffe, and Mr Haberman were called as witnesses at the hearing, and maintained the position they had adopted in their written Opinions.

75. Professor Mizrachi said, in relation to the matter mentioned in paragraph 64 above, that he had since seen documents to show that CAFAMA did indeed receive a transfer from Longreef.

76. In answer to a question by a member of the Tribunal, as regards the consequences of the alleged violations of the Commercial Code, he stated:

[21] Paragraphs 107-110 of the Opinion dated 8 February 2013.
[22] Paragraphs 12 and 14 of the Opinion dated 8 February 2013.

> "The Venezuelan Commercial Code states that the consequence is the non-opposability by third parties of those interested, in this case, creditors, because the distribution of dividends is something that is done on a regular basis and this is something that could constitute, that could damage the interest of any third party creditor. Otherwise, the consequences of these infringements are virtually non-existent, there is no penalty. There is no sanction of declaring the act null and void, for example."[23]

77. Also in answer to a question by a member of the Tribunal, as regards the consequences of irregularities for ownership of CAFAMA, he said that, in his opinion, Longreef is, under Venezuelan law, a shareholder of CAFAMA.[24]

(vii) Venezuela's alleged expropriation of Longreef and the dispute arising from it

78. Longreef alleges that in July 2009, Venezuela began a course of conduct amounting to an unlawful expropriation of Longreef's interest in CAFAMA, and indirectly Longreef's interest in CAFAMA's subsidiaries FAMASA and Coffee Trade.

79. Having advanced its jurisdictional objections, Venezuela has not made any specific submissions in response to Longreef's allegations as to expropriation. Venezuela does not, however, suggest that there is no dispute as to those allegations.

D. LEGAL BACKGROUND TO THE JURISDICTIONAL ISSUES

80. The following summary of the relevant legal provisions was accepted by the parties.

(i) Relevant agreements between Venezuela and the Kingdom of the Netherlands

81. The ICSID Convention entered into force in the Netherlands on 14 October 1966, and in Venezuela on 1 June 1995. The BIT entered into force for each of those States on 1 November 1993.

82. On 21 April 2008, Venezuela served notice to terminate the BIT.[25] This took effect on 1 November 2008 in accordance with the terms of the BIT.[26]

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[23] Transcript, Day 2, pages 280-281 (answering questions from Mr Gomez-Pinzón).
[24] Transcript, Day 2, page 273 (answering questions from Mr Mourre).

83. The RFA was dated 14 January 2011.

84. On 24 January 2012, Venezuela gave notice of its intention to denounce ICSID. This took effect on 25 July 2012 in accordance with the terms of ICSID.[27]

(ii) ICSID: relevant provisions

85. The Centre is established under Article 1 of the ICSID Convention, which provides that the purpose of the Centre is:

> "to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention" [28]

86. As set out in the Preamble to the ICSID Convention, the establishment of the Centre reflects the "particular importance" which Contracting States attached to making available to relevant parties facilities for consensual resolution of investment disputes.[29] The Preamble provides that:

> "no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention, and without its consent, be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration"[30]

87. Article 25(1) provides for the jurisdiction of the Centre:

> "The Jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State… and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties to the dispute have given their consent, no party may withdraw its consent unilaterally."

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[25] Notice of Termination of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and Venezuela dated 21 April 2008, Exhibit **R-49**.
[26] BIT, Arts. 14(1) and 14(2).
[27] ICSID Convention, Art. 71.
[28] ICSID Convention, Art. 1(2).
[29] ICSID, Preamble, §4. Preamble, §7. The Preamble records that the Contracting Parties had agreed to provide for those facilities "considering the need for international cooperation for economic development, and the role of private international investment therein" (§1) and "bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States" (§2) and "recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases"(§3).
[30] ICSID Preamble, §7.

88. Article 25(1) thus imposes three jurisdictional requirements (which correspond to the three issues between the parties to the present dispute):

89. *First*, the parties must "consent in writing" to the submission of their dispute to the Centre. The Report of the Executive Directors on ICSID (**'ICSID Report'**) explains that, whilst such written consent must exist when the Centre is seised, ICSID does not otherwise specify the time at which, or form in which that consent must be expressed.[31] Accordingly:

> "…Consent may be given, for example, in a clause included in an investment agreement, providing for submission to the Centre of future disputes arising out of that agreement… Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host state might in its investment promotion legislation offer to submit disputes arising out of certain classes of investment to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing". [32]

Once the parties to the dispute have given their 'written consent' under Article 25(1), it cannot unilaterally be withdrawn.

90. *Secondly*, the Centre's jurisdiction extends only to disputes between particular parties, i.e. disputes between "a Contracting State" and "a national of another Contracting State". Article 25(2) defines the latter phrase, and provides in material part as follows:

> "(2) "National of another Contracting State" means:
>
> (a) [certain natural persons]… ; and
>
> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consent to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention"

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[31] ICSID Report, §24.
[32] ICSID Report, §24.

Article 25(2)(b) thus distinguishes between natural and juridical persons, the provisions for the latter being more 'flexible'.[33] That flexibility arises because there are two bases upon which a juridical person will satisfy the nationality requirement under Article 25(1):

(i) as a national of a Contracting State other than the State party to the dispute; or

(ii) as a juridical person which the parties have agreed to treat as foreign national because of its foreign control.

In the present case, Longreef claims to satisfy the nationality requirement under the Convention (and the BIT) on the basis of (i) alone because it is a Dutch national.

91. *Thirdly*, the Centre's jurisdiction extends only to "legal dispute[s] arising directly out of an investment". The Convention contains no definition of such disputes, or of what constitutes an "investment". The ICSID Report notes, in this connection that:[34]

> "… No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4))"

92. Articles 71 and 72 of the Convention provide for denunciation of the Convention by a Contracting State, and its effects. Those provisions provide as follows:

> *Article 71*
> "Any Contracting State may denounce this Convention by written notice to the depository of this Convention. The denunciation shall take effect six months after receipt of such notice."
>
> *Article 72*
> "Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depository."

[33] ICSID Report, §30.
[34] ICSID Report, §27.

93. Venezuela relies on these provisions in support of its interpretation of the 'survival clause' under the BIT. It does not, however, suggest that its notice to denounce ICSID, in January 2012, would itself deprive the Tribunal of jurisdiction which it would otherwise have arising from any consent previously given by Venezuela to arbitrate the present dispute.

(iii) The BIT: relevant provisions

94. The Preamble to the BIT records the desire of the Contracting Parties to:

> "extend and intensify economic relations between them, particularly with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting party"

and their recognition that:

> "agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment of investment is desirable"

95. The BIT accordingly provides for the protection, by various means, of 'investments' of a 'national' of each Contracting State. The BIT applies, as regards the Netherlands, to, amongst other places, Aruba.[35]

96. The terms 'investments' and 'national' are defined for the purposes of the BIT by Article 1, which provides:

> "For the purposes of this Agreement:
> (a) The term 'investments' shall comprise every kind of asset and more particularly though not exclusively:
>
> > …
> > ii. rights derived from shares, bonds, and other kinds of interests in companies and joint ventures…
>
> (b) The term 'nationals' shall comprise with regard to either Contracting Party:

[35] BIT, Art. 13.

> i. natural person having the nationality of that Contracting Party;
> ii. legal persons constituted under the law of that Contracting Party;
> iii. legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii) above."

97. The Protocol to the BIT permits a Contracting State to demand of a legal person claiming nationality under Article 1(b)(iii) proof that it is controlled by persons qualifying as nationals under Article 1(b)(i) or (ii), and gives examples of what may be considered acceptable proof.

98. By Article 2 of the BIT, each of the Netherlands and Venezuela agreed to accept 'investments' of the other's 'nationals':

> "Either Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation through the protection in its territory of investments of nationals of the other Contracting Party, Subject to its right to exercise powers conferred by its laws or regulations, each Contracting party shall admit such investments"

The BIT continues to provide for various benefits and protections for such 'nationals' in relation to their 'investments'.

99. Article 6 of the BIT provides:

> "Neither Contracting Party shall take any measures to expropriate or nationalize investments of nationals of the other Contracting Party or take measures having an effect equivalent to nationalisation or expropriation with regard to such investments, unless the following conditions are complied with:
> (a) the measures are taken in the public interest and under due process of law;
> (b) the measures are not discriminatory or contrary to any undertaking which the Contracting Party taking such measures may have given;
> (c) the measures are taken against just compensation. Such compensation shall represent the market value of the investments affected immediately before the measures were taken or the impending measures became public knowledge, whichever is the earlier, it shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants."

100. Article 9 provides for the resolution by the Centre of investment disputes between a Contracting State and a national of the other Contracting State:

> "(1) Disputes between one Contracting Party and a national of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the latter, shall at the request of the national concerned be submitted to the [Centre] for settlement by arbitration or conciliation under [ICSID]
>
> …
>
> "(4) Each Contracting Party hereby gives its unconditional consent to the submission of disputes as referred to in Paragraph 1 of this article to international arbitration in accordance with the provisions of this Article."

101. Article 14 of the BIT provides for its entry into force, its term, and its termination:

> "(1) The present Agreement shall enter into force on the first day of the second month following the date on which the Contracting Parties have notified each other in writing that the procedures constitutionally required therefor in their respective countries have been complied with, and shall remain in force for a period of fifteen years.
>
> "(2) Unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement shall be extended tacitly for periods of ten years, each Contracting Party reserving the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity.
>
> "(3) In respect of investments made before the date of the termination of the present Agreement the foregoing Articles thereof shall continue to be effective for a further period of fifteen years from that date. …"

102. As set out more fully below, Article 14(3) of the BIT is the 'survival clause' upon which Longreef relies in the present case. The principal question in relation to the Consent/Termination Issue is whether (as Longreef contends and Venezuela denies) Article 14(3) preserves, for the purposes of the present dispute, the effect of Article 9.

(iv) The Vienna Convention on the Law of Treaties ('VCLT')

103. Both parties, and the legal opinions on which they rely, refer to provisions of the VCLT (and particularly Article 70) in support of its position regarding the proper interpretation of Article 14(3) of the BIT, notwithstanding that Venezuela is not a party to the VCLT.

104. Articles 31 and 32 of VCLT lay down general rules for the interpretation of treaties, and provide in material part as follows:

> Article 31: *General rule of interpretation*
>
> "(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> "(2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> ……
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."
>
> Article 32: *Supplementary means of interpretation*
>
> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable."

105. Article 54 of VCLT provides that the "termination of a treaty or the withdrawal of a party from it may take place: (a) in conformity with the provisions of the Treaty…".

106. Article 70 provides as follows for the consequences of termination of a treaty:

> "(1) Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

> (a) releases the parties from any obligation further to perform the treaty;
>
> (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination."

E. THE PARTIES' SUBMISSIONS ON THE CONSENT/TERMINATION ISSUE (THE OBJECTION *RATIONE TEMPORIS*)

107. It is common ground that the Tribunal's jurisdiction depends, in accordance with Article 25(1) of ICSID, upon the establishment of the parties' written mutual consent to the arbitration by the Centre of the present dispute.

108. Longreef's case is that such consent is manifest in Venezuela's offer to arbitrate under Article 9 of the BIT and Longreef's acceptance of that offer by its RFA. It is essential to Longreef's case in this respect that, by virtue of Article 14(3) of the BIT, the offer to arbitrate under Article 9 remained open for acceptance for a period of fifteen years after termination of the BIT.

109. Venezuela disputes that the offer to arbitrate under Article 9 remained open after termination of the BIT. Venezuela does not, however, dispute that if, on the contrary, Article 14(3) had the effect that the offer to arbitrate under Article 9 remained open as at the date of the RFA, Article 9 constituted a written offer to arbitrate which Longreef has accepted in writing, thereby satisfying the consent requirement under Article 25(1) of ICSID.

Venezuela's submissions

110. Venezuela submits that it gave notice of its intention to revoke its offer to arbitrate when it gave notice to terminate the BIT on 21 April 2008. In accordance with the terms of the BIT, that notice took effect 6 months later, upon which date Venezuela's offer was revoked.

111. Venezuela emphasises two preliminary points in relation to the consent requirement under Article 25(1) of ICSID:

(1) Article 25(1) requires an agreement to arbitrate: it is not satisfied by a State's unaccepted offer to do so; Article 25(1) recognises a party's right unilaterally to revoke an unaccepted offer.

(2) The existence of that right is supported by the provisions of ICSID (Articles 71 and 72) regarding the effect of denunciation, as regards which commentators have recognised that denunciation effects the withdrawal of the relevant Contracting State's unaccepted consent to arbitrate. In this connection, Venezuela refers to Professor Schreuer's *Commentary* on Article 72, where he reports that

> "With respect to a general declaration containing submission of claims to the Centre, Mr Broches stated that it would not be binding until it had been accepted by an investor. If the State were to withdraw its unilateral statement by denouncing the Convention before it has been accepted by any investor, no investor could later bring a claim before the Centre". [36]

112. Relying on the Opinions of Professor Reinisch dated 26 June and 26 November 2012, Venezuela contends that the 'survival clause' under Article 14(3) of the BIT does not apply to, and so cannot extend, Venezuela's offer to arbitrate under Article 9. Venezuela relies particularly on the distinctions drawn by Professor Reinisch between

    (i) substantive continuous obligations and
    (ii) 'procedural' obligations,

and between

    (i) 'executory' provisions of a treaty that create an obligation to act or to refrain from acting on an on-going and permanent basis (Article 70(1)(a) VCLT) and
    (ii) 'executed' provisions that can create and transfer rights (Article 70 (1)(b) VCLT).

113. Venezuela advances three principal arguments:

[36] Schreuer, *The ICSID Convention – A Commentary*, 2nd edition, page 1279.

114. *First*, Article 14(3) should be interpreted to apply only to substantive provisions of the BIT for the following reasons:

(1) Article 14(3) refers specifically to 'investments' which 'unambiguously' indicates that it applies only to substantive protections granted to investments under the treaty, but not procedural provisions, such as the offer to arbitrate [in Article 9].

(2) The 'procedural' status of offers to arbitrate, such as that contained in Article 9, is clear, and has been acknowledged by the refusal of the Tribunal in *Plama Consortium Limited v Bulgaria*[37] to incorporate such an offer from other BITs *via* 'most favoured nation' clauses.

(3) The interpretation of Article 14(3) for which Venezuela contends would accord with the Contracting Parties' legitimate expectations upon termination of the BIT.[38] According to Professor Reinisch:

> "[One] cannot assume that general and unspecific survival clauses can establish jurisdiction by prolonging the essentially important consent to arbitration originally contained in a terminated BIT. When consent is expressly revoked by the termination of a BIT it should not be lightly presumed to continue as a result of a vague survival clause."[39]

Venezuela maintains that

> "States are sovereign entities acting under the prerogative of public power; their consent to arbitrate is therefore a derogation from this sovereignty, and, as such, should not be forced. In fact, dispute resolution clauses and treaty provisions in general should be interpreted with deference to a State's sovereignty."[40]

(4) The purpose of Article 14(3) of preserving legal security for investments, does not support an interpretation which would preserve the effect of procedural provisions such as Article 9. The initial period of the BIT was 15 years, and its termination could take effect only upon 6 months' notice. Any investor therefore

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[37] *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005.

[38] *Société Ouest Africaine des Bétons Industriels v Sénégal*, ICSID Case No. ARB/82/1 ('SOABI'), paragraph 4.10: *Le Tribunal estime qu'une convention d'arbitrage, comme toute convention entre parties, doit être interprétée dans le respect du principe de bonne foi, c'est-à-dire en tenant compte des conséquences de leurs engagements que les parties doivent être considérées avoir raisonnablement et légitimement envisagées.*

[39] Opinion dated 26 June 2012, paragraph 69.

[40] Memorial, paragraph 81.

knew with certainty (i) the period during which Venezuela's offer of consent to ICSID arbitration stood open and (ii) that he would have at least six months' notice of the withdrawal of such offer. Longreef had the benefit of this certainty. In the *CEMEX* case[41], arbitration proceedings under the BIT were initiated two days before termination took effect.

115. *Secondly*, the interpretation of Article 14(3) of the BIT for which Venezuela contends accords with general principles on the effect of treaty termination, as set out in Article 70(1) VCLT (see paragraph 106 above):

(1) The terms of Article 70(1) reflect a conscious decision by the drafters of the VCLT to distinguish, as regards the effect of treaty termination, between its executed and executory provisions.

(2) Article 14(3) of the BIT derogates from Article 70(1)(a) only insofar as it provides for the continued application of *executory* provisions of the BIT which confer substantive protection on investments; Article 9 is not such a provision. In this respect, the 'survival clauses' at issue in the *Ambatielos* case[42] and the *Yukos* cases[43], were, as Professor Schrijver accepted, explicit as to survival of the dispute settlement mechanisms.

(3) Article 9 did not give rise to a "right, obligation or legal situation" within the meaning of Article 70(1)(b). That could have occurred only if Longreef had accepted, prior to its revocation, Venezuela's offer to arbitrate; but Longreef failed to do so.

116. *Thirdly*, Venezuela contends that its interpretation of Article 14(3) is supported by considerations relating to its sovereignty, and to Venezuela's particular purpose in denouncing the BIT, which was to prevent perceived misuse of ICSID jurisdiction by

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[41] *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010 ('*CEMEX*'), paragraphs 140-158.

[42] *Ambatielos Case (Greece v United Kingdom)*, Preliminary Objection, Judgment, 1 July 1952, [1952] ICJ Rep. 28, pages 43-44.

[43] *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, PCA Case No. AA 226, *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No. AA 227, and *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, PCA Case No. AA 228, Interim Award on Jurisdiction and Admissibility, 30 November 2009, paragraph 339.

Dutch incorporated companies. (Venezuela does not, however, suggest that these considerations would justify overriding its obligations under the BIT.)

117. For all these reasons, and relying upon the legal opinions it has filed, Venezuela contends the consent requirement under Article 25(1) of ICSID is not satisfied, with the consequence that the Tribunal has no jurisdiction over Longreef's claim.

Longreef's submissions

118. Longreef contends, relying on the Opinions of Professor Schrijver dated 27 September 2012 and 15 January 2013, that Article 14(3) of the BIT, properly interpreted, applies to Article 9, with the consequence that Venezuela's offer to arbitrate remained open for acceptance, and was accepted by Longreef when the RFA was submitted. Longreef advances two principal arguments in support of this interpretation:

119. *First*, Longreef's position is supported by the plain language of Article 14(3) of the BIT:

(1) Article 14(3) applies "in respect of investments made *before* the date of the termination of the present agreement" and provides that "*the foregoing articles thereof* shall continue to be effective for a further period of fifteen years" (emphasis added). Longreef acquired CAFAMA 'before' the BIT terminated in November 2008; and 'the foregoing articles' include Article 9.

(2) Venezuela's reliance on commentary as to the effect of denunciation of ICSID is misplaced in circumstances where Venezuela (rightly) accepts that the RFA was submitted before Venezuela's denunciation of ICSID.[44] (Denunciation of ICSID under Article 71 is to be distinguished from termination of a BIT.)

(3) There is no authority for the proposition, nor is it correct, that a promise to consent to arbitration, such as that contained in Article 9 of the BIT, is not an 'obligation' binding upon Venezuela.

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[44] Professor Schrijver cites an article by Professor E. Gaillard in the *New York Law Journal* (Vol. 237, No. 122, 26 June 2007), where he says: "…in the case of denunciation of the ICSID Convention, a state's consent to ICSID arbitration in such treaties may remain in effect long after it has ceased to be an ICSID contracting party."

(4) Venezuela's suggestion that Article 14(3) applies only in relation to certain provisions of the BIT (i.e. those conferring substantive protection on 'investments') cannot be reconciled with the fact that Article 14(3) applies expressly to the 'foregoing articles' of the BIT. Had it been intended that Article 9 should not be included as one of the 'foregoing articles', this would have been stated as was done in Article 10 of the BIT:

> "The provisions of this Agreement shall, from the date of entry into force thereof, also apply to investments which have been made before that date, but *shall not apply to any disputes concerning an investment which arose, or any claim concerning an investment which was settled before its entry into force*"

(5) The overwhelming weight of commentary supports the conclusion that 'survival clauses' such as Article 14(3) of the BIT encompass BIT provisions by which States consent to arbitration. Longreef also relies on the decision of the Arbitral Tribunal in *Eastern Sugar v Czech Republic*[45].

120. *Secondly*, Longreef contends that nothing in the VCLT justifies departure from the plain meaning of Article 14(3) of the BIT. Article 70(1) of the VCLT, upon which Venezuela relies, is expressed to be subject to contrary provision in the relevant treaty. Here the relevant treaty is the BIT. Article 14(3) of the BIT makes unambiguous provision for the effects of termination, including the preserved effectiveness of Article 9 for 15 years. Accordingly, even if the distinction between executory and executed obligations for which Venezuela contends were in general well-founded (which Longreef does not accept), it has no application under the BIT.

121. For all these reasons, and relying on the legal opinions it has filed, Longreef contends that the consent requirements under Article 25(1) of ICSID were satisfied upon the acceptance, by Longreef's RFA, of Venezuela's offer to arbitrate the present dispute.

[45] *Eastern Sugar BV v Czech Republic*, SCC Case No. 088/2004, Partial Award, paragraphs 172-180 (dealing with a 'survival clause' in terms materially identical to Article 14(3) of the BIT, and noting that it would have applied to give the tribunal jurisdiction in the event that the relevant BITs were terminated).

The evidence of the expert witnesses at the hearing

122. At the hearing, Professors Reinisch and Schrijver maintained their respective positions as set out in their Opinions.

123. In answer to questions from a member of the Tribunal, as regards the obligation of a State to go to arbitration, Professor Reinisch said that, in his opinion, such an obligation came into existence only upon acceptance of the offer to do so. Until acceptance of the offer, the obligation was only 'contingent' or 'potential'.[46]

124. Professor Reinisch also accepted that the consequence of his opinion would be that, on termination of the BIT (and in the absence of any obligation arising out of a contract between the investor and the host State), the options available to the investor would be either to seek a remedy in the national courts of the host State or to invoke diplomatic protection from the State of which it was a national. In the latter event, the States concerned might agree to refer the matter to arbitration, but that would not be within the power of the investor.[47]

F. THE PARTIES' SUBMISSIONS ON THE NATIONALITY ISSUE (THE OBJECTION *RATIONE PERSONAE*)

125. It is common ground between the parties that, in order to establish the Centre's jurisdiction, it is necessary to satisfy the nationality requirements of each of ICSID and the BIT.

126. There is also no dispute that Longreef is validly constituted under Dutch law, with the consequence that, if the applicable nationality requirements for juridical persons depend solely on their constitution under the law of the relevant Contracting State (here the Netherlands), those requirements would be satisfied in Longreef's case.

[46] Transcript, Day 1, pages 160-164 (answering questions from Mr Mourre).
[47] Transcript, Day 1, pages 164-168 (answering questions from Sir David Edward).

127. In these circumstances, the essential dispute between the parties is whether, and if so what, nationality requirements additional to constitution under Dutch law apply to Longreef under ICSID and the BIT.

Venezuela's submissions

128. According to Venezuela, Longreef is in reality a mailbox company located in a tax haven 27 km from the coast of Venezuela with an initial capital stock of USD 1. It was acquired for purposes of 'tax evasion' and to enable rearrangement of assets within the Gonzáles family. Its annual maintenance fees are paid by its Venezuelan subsidiaries (CAFAMA and FAMASA) and it is ultimately owned and entirely controlled by the same Venezuelan nationals who managed CAFAMA.

129. In order to determine whether Longreef is a protected investor, one must look at the terms of both the ICSID Convention and of the BIT, bearing in mind that, according to Article 31 VLCT "A treaty shall be interpreted … in the light of its object and purpose."

130. According to its Preamble, the ICSID Convention is concerned with "the need for international cooperation for economic development, and the role of private international investment therein." The ICSID Report stated:

> "In submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it."[48]

Professor Schreuer in his *Commentary* explains that

> "The Convention is designed to facilitate the settlement of investment disputes between States and the nationals of other States. It is not meant for disputes between States and their own nationals."[49]

[48] Report of the Executive Directors, paragraph 9.
[49] Schreuer *Commentary*, page 290, paragraph 496.

131. Likewise, the Preamble of the BIT speaks of the desire "to extend and intensify the economic relations between [the Netherlands and Venezuela], particularly with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting Party." When presenting the BIT to the Chamber of Deputies of Venezuela, the Minister of Foreign Affairs said that

> "The [BIT] is an important instrument for achieving the goal of attracting foreign investments in Venezuela. Foreign investments are a fundamental requirement for the development of our country."[50]

132. According to Venezuela, "Venezuelan nationals disguised as foreigners are not protected under the ICSID Convention" and "Venezuelan nationals disguised as Dutch investors are not entitled to protection under the BIT."[51] Venezuela relies on the Dissenting Opinion of Professor Weil in *Tokios Tokelės v Ukraine*:

> "Since the object and purpose of this provision [Article 25(2)(b)] – and, for that matter, of the whole ICSID Convention and mechanism – is to protect *foreign* investment, it should not be interpreted so as to allow domestic, national corporations to evade the application of their domestic, national law and the jurisdiction of their domestic, national tribunals."[52]

133. *Alternatively*, Venezuela argues that, if regard is not to be had to Longreef's ownership and control, then Longreef's "corporate veil must be pierced on the basis of abuse of right and fraud."[53]

134. Venezuela argues that piercing of the corporate veil is justified where an investment was structured in violation of the host State law, to evade legal requirements or where it constitutes an abuse of right. In this connection Venezuela cites the Judgment of the International Court of Justice in the *Barcelona Traction* case:

> "[The] veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect

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[50] Letter from the Minister of Foreign Affairs of Venezuela to the President of the Chambers of Representatives dated 24 November 1992, Exhibit **R-57**, fourth page: "*Porque es un instrumento importante para lograr el objetivo de atraer inversiones extranjeras a Venezuela. Las inversiones extranjeras son un requisito indispensable para el desarrollo de nuestro país…*".

[51] Transcript, Day 1, pages 50-52.

[52] *Tokios Tokelės v Ukraine*, ICSID Case No. ARB/02/18, Dissenting Opinion on Jurisdiction, 29 April 2004 ('*Tokios Tokelės*'), paragraph 23. Venezuela also cites Garcia-Bolivar, "Protected Investment and Protected Investors: The Outer Limits of ICSID Reach", *Trade, Law and Development,* Vol.2, No. 1 2010, pages 159 and 167; and Schlemmer, "Investment, Investor, Nationality and Shareholders" in Muchlinski, Ortino, Schreuer (eds.) *Oxford Handbook on International Investment Law*, Oxford University Press, 2008, pages 79-80.

[53] Memorial, page 21.

> third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations."[54]

In *Tokios Tokelės,* the majority of the Tribunal refused to pierce the corporate veil, but this was because Ukraine had failed to show that Tokios Tokelės "used its corporate nationality to evade applicable legal requirements or obligations".[55] In *Aguas del Tunari v Bolivia* (a decision relied on by Longreef), the Tribunal recognised that "the corporate form may be abused and that form may be set aside for fraud or on other grounds", although it found "no such extraordinary grounds to be present on the evidence."[56]

135. In the present case,

(1) Longreef has no ties to Aruba apart from its incorporation there: it is controlled by Venezuelan nationals; it has no business activity; and its maintenance fees are paid by CAFAMA;

(2) Longreef's acquisition by the Azuaje brothers and Ms Gonzáles, and the subsequent transactions leading to its ownership of CAFAMA were solely designed to evade Venezuelan Taxes and were structured as a sham transaction in violation of Venezuelan commercial law;

Such measures taken to conceal the true nationality of the purported 'investor' are grounds for piercing the corporate veil and for regarding Longreef otherwise than as a Dutch national.

136. For these reasons, Venezuela contends that the nationality requirements under ICSID and the BIT are not satisfied in relation to Longreef.

Longreef's submissions

137. Responding to Venezuela's case regarding the interpretation and application of the nationality requirements under ICSID and the BIT, i.e. Article 25(2) and Article 1(b) respectively, Longreef emphasises the following preliminary points:

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[54] *Case concerning the Barcelona Traction, Light and Power Company, Limited*, Judgment, 5 February 1970 ('*Barcelona Traction*'), paragraph 56.
[55] *Tokios Tokelės, supra* note 52, paragraph 55.
[56] *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005 ('*Aguas del Tunari*'), paragraph 245.

(1) Save for the limited provision in Article 25(2), ICSID does not specify how Contracting States are to define nationality. No ICSID tribunal has held that ICSID itself imposes nationality requirements in addition to such requirements as may have been agreed by the contracting parties in a BIT.

(2) Certain BITs include requirements that, for example, a juridical entity have its seat or its principal place of business in the State where it is incorporated. Thus, for example, Article 1(2)(b) of the BIT between Venezuela and the Czech Republic dated 27 April 1995 provided that:

> "The term 'legal person of a Contracting Party' shall mean any entity incorporated or constituted in accordance with, and recognized as legal person by the laws of that Contracting Party, and having a permanent seat in the territory of that Contracting Party."

(3) Where BITs do not in terms contain such requirements, ICSID tribunals have refused to imply them. In *Rompetrol v Romania,* the Tribunal considered the definition of 'national' in Article 1(b)(ii) of the Netherlands-Romania BIT, which is materially identical to that found in Article 1(b)(ii) of the present BIT, and found that its application did not depend on 'corporate control, effective seat [or] origin of capital'.[57] In *Mobil v Venezuela*, the ICSID tribunal recognised that the 'outer limits' under Article 25 of ICSID:

> "…do not impose any particular criteria of nationality (whether place of incorporation, *siège social* or control). Thus the parties to the Dutch-Venezuela BIT were free to consider as nationals the legal persons constituted under the law of one of the Parties and those constituted under another law, but controlled by such legal persons. The BIT is thus compatible with Article 25 of the ICSID Convention." [58]

(4) In the present case, the Protocol to the BIT provides that:

> "A Contracting Party may require legal persons referred to in Article 1 Paragraph (b) (iii) to submit proof of such control in order to obtain the benefit provided for in the provisions of the Agreement. For example, the following may be considered acceptable proof:
>
> a. that the legal person is an affiliate of a legal person constituted in

[57] *The Rompetrol Group NV v Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008 ('*Rompetrol*'), paragraph 110.

[58] *Venezuela Holdings BV and others v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010 (formerly '*Mobil and others v Venezuela*'), paragraph 157.

the territory of the other Contracting Party;
b. that the legal person is economically subordinated to a legal person constituted on the territory of the other Contracting Party;
c. that the percentage of its capital owned by national or legal persons of the other Contracting Party makes it possible for them to exercise control."

No such requirement is made in relation to a claimant under Article 1(b)(ii), such as Longreef.

(5) Regarding Venezuela's plea for a purposive interpretation of ICSID and the BIT as urged in the Dissenting Opinion of Professor Weil in *Tokios Tokelės* (see paragraph 132 above), Longreef relies on the view of the majority in that case that Tribunals should not "impose limits on the scope of BITs not found in the text."[59] Longreef also cites the conclusion of the Tribunal in *Saluka Investments v The Czech Republic*:

> "[240] The Tribunal has some sympathy for the argument that a company which has no real connection with a State party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty. Such a possibility lends itself to abuses of the arbitral procedure, and to practices of 'treaty shopping' which can share many of the disadvantages of the widely criticised practice of 'forum shopping.'
> "[241] However that may be, the predominant factor which must guide the Tribunal's exercise of its functions is the terms in which the parties to the Treaty now in question have agreed to establish the Tribunal's jurisdiction. In the present context, that means the terms in which they have agreed upon who is an investor who may become a claimant entitled to invoke the Treaty's arbitration procedures. The parties had complete freedom of choice in this matter, and they chose to limit entitled 'investors' to those satisfying the definition set out in Article 1 of the Treaty. The Tribunal cannot in effect impose upon the parties a definition of 'investor' other than that which they themselves agreed. That agreed definition required only that the claimant-investor should be constituted under the laws of (in the present case) The Netherlands, and it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add."[60]

and that of the Tribunal in *Rompetrol:*

[59] *Tokios Tokelės, supra* note 52, paragraph 36.
[60] *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 ('*Saluka*').

> "In the Tribunal's view, the latitude granted to define nationality for purposes of Article 25 must be at its greatest in the context of corporate nationality under a BIT, where, by definition, it is the contracting Parties to the BIT themselves, having under international law the sole power to determine national status under their own law, who decide by mutual and reciprocal agreement which persons or entities will be treated as their 'nationals' for the purposes of enjoying the benefits the BIT is intended to confer."…
> "The Tribunal (which is not, of course, bound by the decisions of other ICSID tribunals) can leave aside the question what authority should be attached to a dissenting opinion in the award itself, since (as the Claimant argued) the view expressed by Professor Weil has not been widely approved in the academic and professional literature, or generally adopted by subsequent tribunals. The Tribunal would in any case have great difficulty in an approach that was tantamount to setting aside the clear language agreed upon by the treaty Parties in favour of a wide-ranging policy discussion. Such an approach could not be reconciled with Article 31 of the [VLCT] (which lays down the basic rules universally applied for the interpretation of treaties) according to which the primary element of interpretation is 'the ordinary meaning to be given to the terms of the treaty'."[61]

(6) As regards Venezuela's contention that its purposive interpretation of the BIT is supported by the statement by the Minister of Foreign Affairs to the Chamber of Deputies (see paragraph 131 above), that statement was later in date to conclusion of the BIT and does not fall within the scope of Article 31 VLCT.

138. As regards Venezuela's alternative contention for 'piercing the corporate veil' or for a finding that Longreef has 'abused' its corporate personality, Longreef advances two arguments:

139. *First*, *Barcelona Traction* cannot be applied to contradict the nationality provisions of the present BIT:

(1) The principle in *Barcelona Traction* is expressed to be a default position under international law, applicable in the absence of express treaty provisions. In *Rompetrol*,[62] it was held that the principle did not deprive Contracting Parties of the power by treaty to deem, as they had done, the place and law of incorporation to be the 'definitive element' in determining an investor's nationality.

[61] *Rompetrol, supra* note 57, paragraphs 81 and 85.
[62] *Rompetrol, supra* note 57, paragraphs 91 and 92.

(2) If (as Longreef contends) the BIT, properly construed, treats Longreef's constitution under Dutch law as the definitive element in determining its nationality, *Barcelona Traction* cannot provide a justification for ignoring that element in favour of an enquiry into Longreef's control.

(3) Venezuela cannot rely on decisions of ICSID tribunals which have considered the application of *Barcelona Traction* where the issue was whether the nationality requirement was satisfied on the basis of the second clause of Article 25(2)(b) of ICSID. That is not the basis upon which Longreef claims Dutch nationality.

140. Longreef refers to the decision in *TSA Spectrum de Argentina* where the Tribunal said that:

> "A significant difference between the two clauses of Article 25(2)(b) is that the first uses a formal legal criterion, that of nationality, whilst the second uses a material or objective criterion, that of 'foreign control' in order to pierce the corporate veil and reach for the reality behind the cover of nationality."[63]

and also to the decision in *Tokios Tokelės* where the Tribunal said that:

> "The use of a control-test to define the nationality of a corporation to *restrict* the jurisdiction of the Center would be inconsistent with the object and purpose of Article 25(2)(b)."[64]

141. *Secondly*, even if *Barcelona Traction* were capable of application in the present case, its requirements (fraud or malfeasance) would not be met:

(1) The mere fact that Longreef is owned by Venezuelan nationals could not justify a finding of fraud or malfeasance.

(2) Nor could Venezuela's allegations that Longreef 'concealed' that fact, not least in circumstances where Venezuela has not identified any obligation under Venezuelan law, nor any mechanism, to disclose it. There was no such obligation.

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[63] *TSA Spectrum de Argentina SA v Argentine Republic*, ICSID Case No. ARB/05/5, Award on Jurisdiction, 19 December 2008, paragraph 140.

[64] *Tokios Tokelės, supra* note 52, paragraph 46.

(3) Venezuela's allegations that its laws were violated in connection with Longreef's acquisition of CAFAMA provide no basis for a finding of fraud or malfeasance, these allegations being in any event jurisdictionally irrelevant and unfounded.

142. For all these reasons, Longreef contends that the fact that it is constituted under Dutch law satisfies the applicable nationality requirements under ICSID and the BIT.

G. THE PARTIES' SUBMISSIONS ON THE INVESTMENT ISSUE (THE OBJECTION *RATIONE MATERIAE*)

143. As with the Nationality Issue, it is common ground that the investment requirements under both ICSID and the BIT must be satisfied in order to establish the Tribunal's jurisdiction.

144. ICSID does not define the term '*investment*'. On the other hand, Article 1(a) of the BIT contains a broad definition ("every kind of asset") and includes "rights derived from shares" and "rights in the field of intellectual property, technical processes, goodwill and know-how." It is not disputed that Longreef's interest in CAFAMA is in the nature of such rights, and there appears to be no dispute between the parties that the *investment requirements of the BIT* are met.

145. There are essentially two issues between the parties in relation to the applicable investment requirements under the ICSID Convention:

(1) whether, in case such as the present, where the investment requirements of a BIT are satisfied, the Convention requires additional examination of the purported investment by reference to objective and material criteria, and if so which; and

(2) if so, whether Longreef's acquisition of CAFAMA satisfies the additional requirements arising under that examination.

Venezuela's submissions

146. Venezuela emphasises that the term 'investment', as used in the Convention, has an autonomous and objective meaning, independent of the meaning set out in BITs

between Contracting Parties. This objective meaning defines the 'outer limits' of the type of dispute that may be submitted to the Centre. The ICSID Report recognised that no attempt was made to define the term 'investment' given the essential requirement of consent by the parties.[65] But this does not imply that a Contracting Party has unlimited freedom to refer disputes to the Centre; rather, its freedom to do so must be exercised within the 'outer limits' set by the objective meaning, under ICSID, of the term 'investment'.

147. In support of these submissions, Venezuela cites decisions of ICSID tribunals, including in particular those applying or referring to the so-called '*Salini test*' to determine, by objective and material factors, the existence of an investment for the purposes of ICSID.[66] Venezuela also refers to commentary.[67]

148. Venezuela relies at the outset on the decision in *CSOB v Slovak Republic*:

> "The concept of an investment as spelled out in [Article 25] is objective in nature in that the parties may agree on a more precise or restrictive definition of their acceptance of the Centre's jurisdiction, but they may not choose to submit disputes to the Centre that are not related to an investment. A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties' consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT."[68]

and also on the decision in *Malicorp v Egypt*:

> "There must be '*active*' economic contributions, as is confirmed by the etymology of the word *invest,*" but such contributions must '*passively*' have generated the

[65] *ICSID Report*, paragraph 27.
[66] *Salini Costruttori SpA v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 ('*Salini*'), paragraph 44; *Ceskoslovenska Obchodni Banka AS v Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999 ('*CSOB*'), paragraph 68; *Aguas del Tunari, supra* note 56, paragraph 278; *Tokios Tokelės, supra* note 52, paragraph 19; *Patrick Mitchell v Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006 ('*Patrick Mitchell*'), paragraph 25; *Joy Mining Machinery Limited v Arab Republic of Egypt*, Award on Jurisdiction, 6 August 2004 ('*Joy Mining*'), paragraph 50; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, paragraph 90; *Phoenix Action Ltd v Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 ('*Phoenix Action*'), paragraph 74; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, paragraphs 78-79; *Toto Costruzioni Generali SpA v Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009 ('*Toto Costruzioni*'), paragraph 88; *Malicorp Limited v Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011 ('*Malicorp*'), paragraph 107.
[67] Dugan, Wallace, Rubins & Sabahi, *Investor-State Arbitration,* page 256 ff.; Schreuer *Commentary,* page 112 ff.
[68] *CSOB, supra* note 66, paragraph 68.

economic assets the instruments are designed to protect. …
… It can be inferred from this that assets cannot be protected unless they result from contributions …"[69]

149. Venezuela submits that, in order to qualify as an 'investment' under ICSID, Tribunals have recognised that each of the following criteria (the '*Salini* criteria') must be satisfied:

that the purported investment:

(i) is a substantial contribution of money or in other assets;

(ii) for a certain duration;

(iii) with an element of risk;

(iv) which makes a contribution to the economic development of the host State;[70]

and also, that

(v) it is in accordance with host state laws; [71]and

(vi) it is made in good faith.[72]

150. Venezuela acknowledges that the application of the *Salini* criteria was criticised by ICSID tribunals in *Malaysian Historical Salvors v Malaysia*[73] and in *Biwater v Tanzania*.[74] However, Venezuela submits that those decisions – in each of which there was no difficulty identifying, on an objective basis, an 'investment' - are distinguishable from the present case.

151. Further, Venezuela notes that the tribunals in those cases, whilst deprecating a rigid application of the *Salini* criteria, nonetheless recognised that they stated (at least) relevant factors of which account may be taken by a tribunal when determining whether the investment requirements of ICSID are met. Indeed, Venezuela's position is that "whether the Tribunal views the *Salini* criteria as typical characteristics [of

[69] *Malicorp, supra* note 66, paragraph 110.
[70] *Salini, supra* note 66, paragraph 52.
[71] *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006 ('*Inceysa*'), paragraphs 248-9; *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007 ('*Fraport*'), paragraph 396 *ff*.
[72] *Inceysa, supra* note 71, paragraph 231; *Phoenix Action, supra* note 66, paragraph 143.
[73] *Malaysian Historical Salvors v Malaysia*, ICSID Case No. ARB/05/10, Award, 17 May 2007, UNCTAD, *IIA Issues Note No. 1 (2010) – Latest Developments in Investor-State Dispute Settlements*, TDM, Vol 8 issue 1, February 2011, ('*Malaysian Historical Salvors v Malaysia*'), Legal Authority **CL-15**.
[74] *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ('*Biwater*'), Legal Authority **CL-11**.

investments] or as jurisdictional requirements, the result [in the present case] is the same under both approaches".

Longreef's submissions

152. Longreef contends that the *Salini* criteria are not jurisdictional requirements, and they cannot impose limits not provided for under ICSID or the BIT. In the present case, they provide no basis for finding that Longreef's shareholding in CAFAMA is not an 'investment'.

153. Longreef accepts that certain ICSID tribunals have considered, and some have applied, the *Salini* criteria (or certain of them). However, even among those tribunals there is considerable disagreement with respect to which individual criteria this test comprises, and their application as jurisdictional *requirements* has been rejected by a majority of ICSID tribunals and commentators.[75]

154. Longreef relies in particular on the observation of Professor Schreuer that

> "These features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention."[76]

and also those of the Tribunal in *Abaclat v Argentina*:

> "If Claimants' contributions were to fail the Salini test, those contributions — according to the followers of this test — would not qualify as investment under Article 25 ICSID Convention, which would in turn mean that Claimants' contributions would not be given the procedural protection afforded by the ICSID Convention. The Tribunal finds that such a result would be contradictory to the ICSID Convention's aim, which is to encourage private investment while giving the Parties the tools to further define what kind of investment they want to promote. It would further make no sense in view of Argentina's and Italy's express agreement to protect the value generated by these kinds of contributions. In other words — and from the value perspective — there would be an investment, which Argentina and Italy wanted to protect and to submit to ICSID arbitration, but it could not be

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[75] *Malaysian Historical Salvors v Malaysia*, *supra* note 73; *Biwater, supra* note 74, paragraph 312; *Electrabel SA v Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, 30 November 2012, paragraph 5.43; *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 ('*Abaclat*'), paragraph 364; *Saba Fakes v Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 ('*Saba Fakes*'), paragraphs 101-102; Krishnan, "A Notion of ICSID Investment" in *Transnational Dispute Management*, Vol. 6, Issue 1 (March 2009); and Gaillard "Identify or Define? Reflections on the Concept of Investment in ICSID Practice" in *International Investment Law for the 21st Century*, Chapter 22.

[76] Schreuer *Commentary*, paragraph 153.

given any protection because — from the perspective of the contribution — the investment does not meet certain criteria. Considering that these criteria were never included in the ICSID Convention, while being controversial and having been applied by tribunals in varying manners and degrees, the Tribunal does not see any merit in following and copying the Salini criteria. The Salini criteria may be useful to further describe what characteristics contributions may or should have. They should, however, not serve to create a limit, which the Convention itself nor the Contracting Parties to a specific BIT intended to create." [77]

155. Longreef points out that both ICSID tribunals[78] and commentators[79] have proceeded on the basis that it suffices, for purposes of ICSID jurisdiction, that the investment requirements under the relevant BIT are satisfied (as they are in the present case). Shareholdings have repeatedly been recognised as 'investments' under ICSID;[80] and, Venezuela has identified no case in which they have been denied recognition as such.

156. In the event that the Tribunal were to apply, or have regard to, the *Salini* criteria, Longreef accepts that these criteria include the first four of those identified at paragraph 149 above, (albeit that, as set out below, it disputes Venezuela's interpretation of them). Longreef does not accept that illegality and fraud in relation to a purported investment are part of the *Salini* criteria, pointing out that, of the authorities cited by Venezuela, only *Phoenix v Czech Republic* provides support for this approach and that *Quiborax v Bolivia* contradicts it.[81]

Application of the Salini Criteria to the present case

157. Venezuela's case is that Longreef's acquisition of CAFAMA failed to meet the *Salini* criteria because it did not involve a substantial contribution of money or other assets, it did not contribute to Venezuela's economic development, it was in violation of Venezuelan law, and it was made in bad faith. Longreef disputes every part of that case.

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[77] *Abaclat*, *supra* note 75, paragraph 364.
[78] *MCI Power Group, LC and New Turbine Inc v Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, paragraph 165; *CMS Gas Transmission Co v Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment, 25 September 2007 ('*CMS*'), paragraph 71*ff*; *Malaysian Historical Salvors v Malaysia, supra* note 73, paragraph 312.
[79] Gaillard, *supra* note 75.
[80] *CMS, supra* note 78, paragraphs 48-51; *Phoenix Action, supra* note 66, paragraphs 122-123.
[81] *Phoenix Action*, *supra* note 66; and *Quiborax SA and Non-Metallic Minerals SA v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 ('*Quiborax*'), paragraph 226.

Criterion (i): Substantial contribution of money or other assets

158. ***Venezuela*** contends that the 'contribution' criterion is not satisfied for two reasons:

(1) because the funds of the loan that were capitalised in CAFAMA did not originate from Longreef or from the Netherlands (Aruba); and

(2) because the loan was a mere accounting device used to fund the financial arrangements between members of the Gonzáles family.

159. In order to qualify as an 'investment', the contribution must have been made 'by the investor'.[82] The Tribunal in *Toto v Lebanon* held that:

> "the underlying concept of investment, which is economical in nature, implies an economical operation initiated and conducted by an entrepreneur using its own financial means and at its own financial risk, with the objective of making a profit within a given period of time."[83]

160. The *purpose* of ICSID and the BIT (to be taken into account under Article 31 VLCT) is to promote transfers of economic value from one Contracting State to another.[84] According to Professor Weil,

> "The ICSID mechanism and remedy are not meant for investments made in a State by its own citizens with domestic capital through the channel of a foreign entity, whether pre-existent or created for that purpose … When it comes to ascertaining the *international* character of an investment, the origin of the capital *is* relevant, and even decisive."[85]

This point of view is supported by observations of the Tribunals in *Toto v Lebanon*[86] and *Malicorp v Egypt*.[87]

161. ***Longreef***, in response, emphasises that it is not seriously disputed that Longreef paid, from its own account, USD 10.6 million to CAFAMA, receiving its principal shareholding in return. This suffices to show a substantial contribution of money or

[82] Dolzer & Schreuer, *Principles of International Investment Law*, page 68; Schreuer *Commentary,* paragraph 155.
[83] *Toto Costruzioni, supra* note 66, paragraph 84.
[84] ICSID Report of the Executive Directors, paragraph 9; Preamble to the BIT.
[85] *Tokios Tokelès*, *supra* note 52, Dissenting Opinion on Jurisdiction, 29 April 2004, paragraphs 19-20.
[86] *Toto Costruzioni, supra* note 66, paragraphs 84-86.
[87] *Malicorp*, *supra* note 66, paragraph 113.

other assets. It is jurisdictionally irrelevant to enquire into the original source of sums paid under the Longreef Loan, or into what CAFAMA did with those sums when transferred to it.

162. Professor Weil's dissenting opinion in *Tokios Tokelės* is not reflected elsewhere in ICSID jurisprudence; rather, ICSID tribunals have accepted that the relevant investment and nationality requirements are satisfied even where investment capital originated in the host state.[88] The Tribunal in *Mobil v Venezuela* said that the Netherlands-Venezuela BIT "contains no requirement that the origin of the capital be foreign. Nor does general international law provide a basis for imposing such a requirement."[89] The Tribunals in *Toto v Lebanon* and *Malicorp v Egypt* did not address, still less impose, the type of 'foreign origin of capital' requirement for which Venezuela contends.

163. Longreef's investment in CAFAMA was not a "mere accounting device". CAFAMA had the funds to pay the relevant dividends and redemption independently of the Longreef Loan, and that CAFAMA continued, after its acquisition by Longreef, to flourish in the coffee trade. A very large amount of foreign investment is undertaken through the medium of holding companies including the investments discussed in *Tokios Tokelės, Rompetrol, ADC, Mobil v Venezuela, and Saluka.*

Criterion (iv): contribution to Venezuela's economic development

164. ***Venezuela*** contends that it is relevant to the issue of jurisdiction to enquire whether the transactions involved in Longreef's acquisition of CAFAMA contributed to Venezuela's economic development:

(1) The purpose and goals of ICSID clearly encompass Contracting Parties' economic development,[90] which is also a purpose of the BIT.[91]

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[88] *Tokios Tokelès, supra* note 52, paragraph 77; *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, paragraph 106; *Rompetrol, supra* note 57, paragraph 110; *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007, paragraph 210.
[89] *Mobil v Venezuela, supra* note 58, paragraph 198.
[90] ICSID Preamble, §1; ICSID Report, §9 and §12.
[91] Letter from the Minister of Foreign Affairs of Venezuela to the President of the Chambers of Representatives dated 24 November 1992, Exhibit **R-57**, page 4.

(2) ICSID tribunals have found that transactions which do not contribute to a host State's economic development do not satisfy the investment requirements of ICSID.[92]

165. Venezuela submits that, in addition to examining the individual transactions involved in Longreef's acquisition of CAFAMA, the Tribunal should also examine whether the overall operation contributed to Venezuela's economic development since "what matters is to assess the operation globally or as a whole".[93] Neither the individual transactions involved in Longreef's acquisition of CAFAMA, nor an overall assessment of the operation, reveals a sufficient contribution to Venezuela's economic development:

(1) The Longreef Loan was effected by payment of sums to CAFAMA's account outside Venezuela (i.e. its Citibank Account in New York).

(2) CAFAMA used such sums in part to fund a dividend to preference shareholders, thereafter to fund an interest-free loan to an offshore company, Pontic, before finally returning it (via the Pontic Loan) to Longreef.

(3) Longreef was part of a scheme of offshore companies used to circumvent Venezuelan tax law.

166. For all these reasons, Venezuela contends that Longreef's acquisition of CAFAMA fails to satisfy the relevant requirement, and so does not constitute an 'investment' for the purposes of ICSID.

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[92] *Patrick Mitchell, supra* note 66, paragraphs 28-67; *Malaysian Historical Salvors v Malaysia, supra* note 73, paragraphs 123-138; *Joy Mining, supra* note 66, paragraph 54; *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, paragraph 99; *Ceskoslovenska Obchodni Banka AS v Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, paragraphs 64 and 88; *Consortium RFCC v Kingdom of Morocco,* ICSID Case No. ARB/00/6, Decision on Jurisdiction, 16 July 2001, paragraph 60; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, paragraph 91; *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No. ARB 05/19, Decision on Objection to Jurisdiction, 17 October 2006, paragraph 77; *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, paragraph 99; *Ioannis Kardassopoulos v Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, paragraphs 116-117.

[93] *Joy Mining, supra* note 66, paragraph 54.

167. ***Longreef*** does not accept that an 'investment' must contribute to the host State's economic development. Longreef refers to the view of the Tribunal in *Phoenix Action* that "the contribution of an international investment to the *development* of the host State is impossible to ascertain – the more so as there are highly diverging views on what constitutes development".[94] Longreef also cites the decision in *Electrabel v Hungary*, which recognised that

> "contribution to the host State's economy is amongst the objectives of ICSID, and a desirable consequence of a particular investment, but it is not necessarily an element of an investment".[95]

and the decision in *Quiborax v Bolivia* where the Tribunal said:

> "The Tribunal appreciates that the element of contribution to the development of the host State is generally regarded as part of the well-known four-prong *Salini* test. Yet such contribution may well be the consequence of a successful investment; it does not appear as a requirement. If the investment fails, it may end up having made no contribution to the host State development. This does not mean that it is not an investment."[96]

168. In any case, Longreef contends that any requirement of a contribution to Venezuela's economy is satisfied in the present case, where:

a) it is not disputed that CAFAMA made an important and active contribution to the Venezuelan economy whilst owned and managed by Longreef;

b) it is not disputed that Longreef reinvested certain of CAFAMA's profits, and sufficiently did so to enable CAFAMA's considerable growth since 1997;

c) it is irrelevant whether the capitalized loan which Longreef used to purchase CAFAMA benefitted CAFAMA or its Venezuelan subsidiaries; acquisition of

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[94] *Phoenix Action*, *supra* note 66, paragraph 85.
[95] *Electrabel v Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, 30 November 2012, paragraph 5.43, citing *Saba Fakes, supra* note 75, paragraphs 101-102.
[96] *Quiborax, supra* note 81, paragraph 220.

control over a local asset by a foreign investor is sufficient to constitute an investment for ICSID purposes ;[97]

d) it is also irrelevant that Longreef did not (indeed as a corporation could not) directly manage CAFAMA's business, because Longreef controlled CAFAMA's management as controlling shareholder; minority shareholdings may qualify as 'investments' for ICSID purposes[98]

169. For all these reasons, Longreef contends that if and insofar as there is a jurisdictional requirement that its acquisition and ownership of CAFAMA contribute to Venezuela's economy, it plainly did so.

Criterion (v): Compliance with the law of the host State

170. As noted above (see paragraphs 53 *et seq.*) Venezuela alleges violations of its company and tax law in connection with Longreef's acquisition of CAFAMA. Three issues arise in relation to these allegations: *first*, whether they are relevant to the Tribunal's jurisdiction; *secondly*, if so, whether Venezuela is estopped from relying on them; and *thirdly*, if not, whether they are well-founded. The submissions on the third issue have been set out above.

Compliance with the law of the host State as a relevant element in jurisdiction

171. ***Venezuela*** contends that where an 'investment' is not made in accordance with the host State's laws, disputes regarding that investment fall outside the Centre's jurisdiction. ICSID tribunals have held that violations of host State laws in connection with purported investments may constitute grounds for denying jurisdiction.[99]

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[97] *LG&E Energy Corp and others v Argentine Republic*, ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction, 30 April 2004 ('*LG&E*'), paragraph 48 *ff.*, citing *CMS, supra* note 78; and Vandevelde *The Economics of Bilateral Investment Treaties,* 41 Harvard International Law Journal, Spring 2000, 469.

[98] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No. ARB/01/03, Decision on Jurisdiction, 22 May 2007, paragraph 44; *LG&E*, *supra* note 97; *Camuzzi International SA v Argentine Republic*, ICSID Case No. ARB/03/7, Decision of the Arbitral Tribunal on Objections to Jurisdiction, 10 June 2005; *Compañia de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No. ARB/97/3, paragraphs 90-94.

[99] *Phoenix Action*, *supra* note 66, paragraphs 101-105; *Fraport, supra* note 71, paragraph 306; *Inceysa, supra* note 71, paragraph 250.

172. Article 2 of the BIT reflects the intention of the Contracting Parties to protect and admit only investments which comply with local laws.:

> "Either Contracting Party shall, *within the framework of its laws and regulations*, promote economic cooperation through the protection in its territory of investments of nationals of the other Contracting Party. *Subject to its right to exercise powers conferred by its laws or regulations*, each Contracting party shall admit such investments"(emphasis added)

Considering the similarly worded provision in the Czech-Netherlands BIT, the Tribunal in *Saluka Investments* said that "it is necessarily implicit in Article 2 of the [BIT] that an investment must have been made in accordance with the provisions of the host state's laws". [100]

173. Contrary to Longreef's contention, the requirement of compliance with local laws is not limited to specific laws on the admission of investments. ICSID tribunals have formulated the requirement in general terms.[101] In none of the ICSID tribunal decisions to which Longreef refers[102] was such a limitation adopted.

174. Again contrary to Longreef's contention, the alleged violations for which Venezuela contends do not relate to "the management of the investment vehicle"; rather, they relate to Longreef's acquisition of CAFAMA and the transactions which this involved.

175. ***Longreef*** contends that the violations alleged by Venezuela are irrelevant to the issue of jurisdiction. None of them relates to the validity of Longreef's investment, i.e. its acquisition of shares in CAFAMA, nor that of Longreef's status as a foreign corporation, nor to Venezuela's allegation that Longreef's ownership was concealed. Indeed, it is not alleged that Longreef itself committed any violation. Rather, the violations relate to the manner in which CAFAMA shareholders redeemed their shares.

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[100] *Saluka*, *supra* note 60, paragraph 204.

[101] *Gustav FW Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, paragraphs 123-124; *Jan Oostergetel and Theodora Laurentius v Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, paragraph 176; *Phoenix Action*, *supra* note 66, paragraph 100.

[102] *Saluka*, *supra* note 60, paragraph 204; *Fraport, supra* note 71, paragraph 343; *Inceysa, supra* note 71, paragraphs 203 and 246.

176. So, even if the violations were to be established (which Longreef contests), Longreef's purchase of CAFAMA would not be rendered invalid, nor would Longreef or CAFAMA be liable to sanction.

177. The ICSID tribunals which have held that violation of the host State's law deprives an investment of protection have done so where there was a violation of specific legal requirements relative to the foreign investment in issue.[103] Venezuela's reliance on *dicta* in those decisions to support a broader principle than what was applied in them is misplaced.

Estoppel

178. ***Longreef*** contends that Venezuela is, in any case, estopped from relying on the violations alleged on the basis of the statement of principle by the ICSID tribunal in *Fraport v Philippines*:

> "Principles of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law" [104]

179. Longreef contends that the principle should apply in the present case, where:

(1) Venezuela did not, prior to this arbitration (including during the expropriation process) complain of the transactions by which Longreef acquired CAFAMA.

(2) That was so notwithstanding, that the relevant details of those transactions were at all material times publicly available in the Commercial Register.

(3) In 2003, Venezuela, through SIEX, formally recognised Longreef as a foreign investor (see paragraph 44(4) above).

180. ***Venezuela*** denies that it is estopped from relying on the violations of Venezuelan law which it alleges because:

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[103] *Saluka, supra* note 60, *Fraport, supra* note 71 and *Inceysa, supra* note 71.
[104] *Fraport, supra* note 71, paragraph 346.

(1) ICSID tribunals, when applying estoppel principles in this context, have asked whether the State, at the material time, had actual knowledge of, and knowingly overlooked, the violations later invoked to resist jurisdiction.[105] In the present case, Venezuela did not have such knowledge since:

a) Longreef's acquisition of CAFAMA was "the result of a series of fraudulent operations which were designed precisely to hide [the] illegalities [now relied on]"; and

b) None of the publicly available material to which Longreef refers suggests that Venezuela could, or should, have known about those illegalities at the time.

(2) There is no obligation on a State to discover, and there can be no estoppel barring its reliance on, illegalities perpetrated pursuant to a covert scheme.[106]

Criterion (vi): Obligation of good faith

181. Venezuela contends that Longreef's purported investment falls outside the ICSID concept of an '*investment*' because it was not entered into in good faith. Longreef disputes this.

182. ***Venezuela*** contends that the Tribunal should have regard to a wide range of factors pertaining to the purported investment, including not only its timing relative to the investor's claim, but also the substance of the purported investment, and its true nature. Venezuela sums up its position thus:

> "Longreef has performed no economic activity as an investor, and has acted, over the years, only as a mere holder of shares. The only purpose of the different corporate transactions carried out during the years was to conceal CAFAMA's true owners since the alleged investment was nothing more than a rearrangement of assets within the Gonzalez family to hide their shares in CAFAMA. This was made through a series of dubious corporate transactions, in circumvention of Venezuelan law. Furthermore, the Respondent has demonstrated that Longreef's investment never contributed in any way to the growth of CAFAMA. Accordingly, in light of the 'substance of the transaction' and the 'true nature of the operation', Longreef's alleged investment cannot be considered as a good faith investment deserving

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[105] *Fraport, supra* note 71; and *World Duty Free Company Limited v Republic of Kenya,* ICSID Case No. ARB/00/7, Award, 4 October 2006, paragraph 184.

[106] *Fraport, supra* note 71, paragraph 347.

protection under the ICSID system."[107]

183. ***Longreef*** contends that Venezuela significantly overstates the principle of good faith. Relying on Professor Gaillard's commentary on the Decision in *Phoenix Action*, Longreef contends that:

(1) "A distinction must be made between a restructuring of an investment taking into consideration existing BITs, which is 'perfectly legal' and comparable to restructuring to minimize tax consequences on the one hand, and on the other hand a situation where the investor resorts to restructuring once the dispute has arisen. [Professor Gaillard] points out that two cumulative conditions must be met in order for the theory of fraud or abuse of the treaty to be fulfilled: (1) the restructuring must have been for the sole purpose of gaining access to the treaty; and (2) the dispute must have arisen before the restructuring". Neither is alleged - much less present - in this case."

(2) Longreef acquired CAFAMA more than ten years before the present dispute arose;

(3) It has since engaged, through CAFAMA, in significant economic activity in Venezuela;

(4) The primary motivation for incorporating Longreef, and using it to invest in CAFAMA, was to obtain legitimate tax advantages (not to obtain BIT jurisdiction over an existing dispute);

(5) Many ICSID tribunals have accepted the propriety of an investor structuring his investment to obtain such tax advantages;[108]

(6) Use of a holding company cannot be said to constitute *per se* evidence of bad faith.

(7) Above all, none of the alleged violations of Venezuelan law, if established, would affect the validity of Longreef's acquisition, ownership, and control of CAFAMA.

184. For all these reasons, Longreef contends that there is no basis for a finding of lack of good faith, even if the principle has as broad an application as Venezuela contends.

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[107] Reply, paragraph 192, referring in particular to: *Phoenix Action*, *supra* note 66, paragraphs 100, 107, 135-136, 138-139, 140-143; also *Inceysa, supra* note 71, paragraphs 230-239; *Mobil v Venezuela*, *supra* note 58, paragraphs 183-185.

[108] *Aguas del Tunari, supra* note 56, paragraph 245.

H. THE TRIBUNAL'S ASSESSMENT AND CONCLUSIONS

185. In this case, it is clearly established or accepted that:

     (1) Longreef is a legal person constituted under the law of the Netherlands;

     (2) From 1997 Longreef was the majority shareholder, and from 2001 the sole shareholder, of CAFAMA, a company incorporated according to the law of Venezuela;

     (3) In July 2009, Venezuela began to take measures which, according to Longreef (although denied by Venezuela), amounted to an unlawful expropriation of Longreef's interest in CAFAMA and, indirectly, of Longreef's interest in CAFAMA's subsidiaries FAMASA and Coffee Trade.

186. Against that background, and interpreting the BIT in accordance with the ordinary meaning to be given to its terms, the Tribunal finds that jurisdiction is established on the following basis:

     (1) Contrary to Venezuela's contentions, its offer to arbitrate under the BIT was not withdrawn by its notice of termination of the BIT, and was accepted by Longreef's Request for Arbitration;

     (2) Longreef is a 'national' of the Netherlands within the meaning of Article 1(b)(ii) of the BIT;

     (3) Longreef's interest in CAFAMA was a 'right derived from shares', and was an 'investment' within the meaning of Article 1(a)(ii) of the BIT and of Article 25(1) of ICSID;

     (4) Venezuela did not establish contraventions of the Venezuelan Commercial and Tax Codes such as to disentitle Longreef to the protection afforded to its investment by the BIT;

(5) Longreef's allegations as to expropriation would amount, if proved, to a breach of Venezuela's obligations under Article 6 of the BIT, which provides protection against expropriation;[109]

(6) Venezuela does not deny that, *if* there was an 'investment', there is a 'dispute' between Venezuela and Longreef 'in relation to an investment of the latter' within the meaning of Article 9(1) of the BIT;

(7) Article 9 of the BIT provides that such a dispute "shall at the request of the national concerned be submitted [to the Centre] for settlement by arbitration", and Longreef has made such a request;

(8) Article 25(1) of the ICSID Convention provides that

> "The Jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."

The consent/termination issue

187. Reference to arbitration under ICSID requires the consent of both parties. The requisite consent, in a case such as the present, is manifested (i) by the Contracting State's offer to submit to arbitration in a clause such as Article 9 of the BIT, and (ii) by the investor's acceptance of that offer by submitting a request for arbitration.

188. Venezuela contends that its offer to arbitrate, inherent in Article 9, was withdrawn by termination of the BIT (with due notice) with effect from 1 November 2008. Longreef's Request for Arbitration was submitted on 14 January 2011, after the offer had been withdrawn. Consequently there is no consent.

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[109] As to the application of a *prima facie* test on this aspect of jurisdiction, see, for example, *Telefónica SA v Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, paragraph 197, Legal Authority **CL-84**; *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005.

189. Longreef, on the other hand, contends that Venezuela's offer remained open for acceptance by Longreef's Request for Arbitration after termination of the BIT by virtue of the 'survival clause' in Article 14 of the BIT.

190. The terms of the survival clause, Article 14 (3), are explicit:

> "In respect of investments made before the date of the termination of the present Agreement *the foregoing Articles thereof* shall continue to be effective for a further period of fifteen years from that date. …" (emphasis added)

Since Article 9 precedes Article 14, the Tribunal considers that it falls plainly within the scope of "the foregoing articles".

191. Venezuela contends, however, that, in spite of the plain terms of Article 14, Article 9 did not "continue to be effective", but ceased to be so, with effect from the date of termination.

192. Professor Reinisch, on whose opinion Venezuela relies, considers that the State's obligation to submit to arbitration under Article 9 was merely 'contingent', 'potential', 'procedural' or 'executory' until its offer was accepted. When the BIT was terminated on the expiry of six months from Venezuela's notice of termination, the offer was thereby withdrawn and was no longer open for acceptance – or, to put the matter another way, there was no 'executed' or 'substantive' obligation incumbent on Venezuela. By contrast, Professor Reinisch accepts that Venezuela's substantive obligations under Article 6 of the BIT did survive with respect to investments made before the date of termination.

193. Professor Reinisch, in his first Opinion, said that "To date the effect of so-called survival or sunset clauses in BITs is largely untested" and cited the views of commentators on either side of the issue. At the hearing he accepted that a consequence of his approach would be that, on termination of the BIT (and in the absence of any obligation arising out of a separate contract between the investor and the host State), the only options available to the investor, in the event of a dispute, would be either to seek a remedy in the national courts of the host State or to invoke diplomatic protection from the State of which it was a national. In the latter event, the

States concerned might agree to refer the matter to arbitration, but that would not be within the power of the investor.

194. In the opinion of the Tribunal, the distinction drawn by Professor Reinisch between executory or procedural obligations and executed or substantive obligations, however appropriate it may be in other contexts, does not provide a basis in law for disregarding the plain terms of the BIT. If the Contracting Parties had wished to exclude Article 9 from the survival clause, it would have been easy for them to do so.

195. Professor Reinisch laid stress on the 'object and purpose' of the BIT. The Tribunal doubts that it is appropriate or necessary to look further for the 'object and purpose' of an agreement such as the BIT where its terms are clear and explicit and can be applied directly to the circumstances of the case in hand.

196. In any event, the Tribunal sees no reason why the 'procedural' protection afforded to investors by Article 9 should be regarded as being any less within the object and purpose of the BIT - or any less important to the Contracting Parties - than the protection afforded by Article 4 in respect of taxation, Article 5 in respect of transfer of payments or Article 6 in respect of expropriation. The Tribunal finds no basis in this case for drawing a distinction, as far as the object, purpose or effects of the sunset clause are concerned, between 'executory' and 'procedural' obligations.

197. The Tribunal therefore rejects Venezuela's objection to jurisdiction on the ground that the Request for Arbitration was submitted after Venezuela's notice of termination took effect. It should be stressed that the Request for Arbitration was submitted before Venezuela gave notice of its intention to denounce the ICSID Convention, and no question arises in this case as to the effect of that denunciation.

The nationality issue

198. There is no dispute that Longreef is a legal person validly constituted under the law of the Netherlands, nor that, if that is the sole criterion of nationality for the purposes of ICSID, then the nationality requirement is satisfied.

199. Venezuela's first ground of objection to jurisdiction under this head is essentially that although Longreef is *in form* a company constituted under Dutch law, it is *in reality* a 'shell' entity wholly owned and controlled by Venezuelan nationals. It is contrary to the object and purpose of ICSID and the BIT to give protection to nationals of one of the Contracting States against the State of which they are nationals, by hiding behind the corporate *persona* of a company incorporated in the other Contracting State.

200. Venezuela's second ground of objection under this head, and also in relation to the investment issue, is essentially that Longreef's claims are not made in good faith and amount to an abuse of right, with the consequence that Longreef is not entitled to the protection afforded by the BIT to nationals of the Netherlands.

Corporate form and reality

201. The Tribunal accepts that it is not the intention of ICSID or the BIT to give protection to nationals of one of the Contracting Parties against the State of which they are nationals. Venezuela's contention is essentially that the Tribunal should disregard the nationality of Longreef and look rather at the nationality of its controlling shareholders.

202. The Tribunal rejects this contention. As regards the principle to be applied, the Tribunal agrees with the tribunal in *Rompetrol* in holding that:

> "As ICSID tribunals and commentators have regularly observed, the drafters of the Convention abandoned efforts to define 'nationality' for the purposes of Article 25, and instead left the States Parties wide latitude to agree on the criteria by which nationality would be determined. " …
>
> "…[The] latitude granted to define nationality for purposes of Article 25 must be at its greatest in the context of corporate nationality under a BIT, where, by definition, it is the Contracting Parties to the BIT themselves, having under international law the sole power to determine national status under their own law, who decide by mutual and reciprocal agreement which persons or entities will be treated as their 'nationals' for the purposes of enjoying the benefits the BIT is intended to confer." [110]

[110] *Rompetrol, supra* note 57, paragraphs 80 and 81.

203. In the present case, the term 'national' is defined in the BIT as including "legal persons constituted according to the law [of one of the Contracting Parties]". Whether an legal person is "duly constituted according to the law of the Netherlands" is therefore a matter to be determined exclusively by reference to the law of the Netherlands.

204. The BIT provides for no further restriction concerning the nationality of the investor: it suffices that it be a national of one of the Contracting Parties. In particular, there is no 'denial of benefits clause'. If the Contracting Parties had wished to exclude from the protection of the BIT legal persons which, although constituted under the law of one of them, was owned and controlled by nationals of the other, this could easily have been stated.

205. In this connection, the Tribunal echoes the view of the tribunal in *Saluka Investments* (cited above, paragraph 137(5)):

> "The parties had complete freedom of choice in this matter, and they chose to limit entitled 'investors' to those satisfying the definition set out in Article 1 of the Treaty. The Tribunal cannot in effect impose upon the parties a definition of 'investor' other than that which they themselves agreed. That agreed definition required only that the claimant-investor should be constituted under the laws of (in the present case) the Netherlands, and it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add."

206. In this case, there is no dispute between the parties that Longreef was validly constituted according to the law of the Netherlands. Longreef is unquestionably a national of the Netherlands, and its ownership and control by Venezuelan nationals do not alter that fact.

207. Longreef was duly constituted as a corporate *persona* under the law of the Netherlands long before the events giving rise to these proceedings. So it cannot be contended that the incorporation of Longreef as a national of the Netherlands was a fraudulent attempt to gain the advantage of the protection afforded by the BIT for the purpose of

the present proceedings. In that respect, this case is clearly distinguishable from *Phoenix*,[111] on which Venezuela relied (see paragraph 245 below).

208. There is no suggestion that, *as far as the law of the Netherlands is concerned*, the incorporation of Longreef was in any other way tainted with fraud. Indeed, the legal personality and foreign nationality of Longreef was recognised by SIEX, the competent authority of Venezuela, when it acknowledged Longreef as the sole (foreign) owner of the entirety of CAFAMA's stock in the *Constancia de Calificación* issued to CAFAMA on 9 June 2003 (see paragraph 44(4) above).

209. Nevertheless, Venezuela submits that in the circumstances of this case, the corporate veil should be lifted in order to discover the true nature of Longreef. Venezuela relies in particular on the Judgment of the International Court of Justice in *Barcelona Traction*.

210. In the opinion of the Tribunal, the *dicta* of the ICJ in *Barcelona Traction*[112] must be read in context, and the relevant passage should be cited in full:

> "56. For the same reasons as before, the Court must here refer to municipal law. Forms of incorporation and their legal personality have sometimes not been employed for the sole purposes they were originally intended to serve; sometimes the corporate entity has been unable to protect the rights of those who entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of 'lifting the corporate veil' or 'disregarding the legal entity' has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations. "

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[111] *Phoenix Action*, *supra* note 66.
[112] *Barcelona Traction, supra* note 54.

> "57. Hence the lifting of the veil is more frequently employed from without, in the interest of those dealing with the corporate entity. However, it has also been operated from within, in the interest of others—the shareholders, but only in exceptional circumstances.
>
> "58. In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders."

211. The Tribunal notes that the process of lifting the veil is said by the Court to be "an exceptional one" to be applied "in exceptional circumstances".

212. In the present case, there is no question, in the words of the Court, of "lifting the corporate veil from within" since there is no suggestion of prejudice or damage to the interests of shareholders. Nor, as regards "lifting the veil from without", is there any suggestion of prejudice or damage to the interests of "third persons such as creditors or purchasers".

213. The basis upon which Venezuela contends that the present case falls within the scope of the *Barcelona Traction* exception is that there was "evasion of legal requirements or of obligations" and, at certain points in its submissions, that there was "fraud or misfeasance".

214. The Tribunal notes, however, that, applying the reasoning in *Barcelona Traction,* the relevant question here is not whether there has, in some general sense, been an evasion of legal requirements or obligations, but whether Longreef was incorporated under Netherlands law to circumvent the legal requirements or obligations that would have been incumbent under Venezuelan law on a Venezuelan company limited by shares, and whether, in consequence, it is necessary to lift the corporate veil in order to prevent the evasion of *those* legal requirements or obligations.

215. The Tribunal finds no evidence that Longreef was created with a view to evading any 'legal requirements or obligations' under Venezuelan law. Had that been the case, the Venezuelan competent authorities would surely have pursued such breaches long

before this arbitration was started. Nor, as already noted (paragraphs 207-8 above), is there any evidence that Longreef was incorporated with a view to 'treaty-shopping' or that its incorporation was otherwise tainted with fraud.

Alleged violations of the Venezuelan Commercial and Tax Codes

216. As a further reason for lifting the veil, and also in support of its submissions on the investment issue, Venezuela alleges various contraventions of the Venezuelan Commercial Code in the transactions leading to the acquisition of CAFAMA by Longreef. In brief, Venezuela contends that the acquisition of CAFAMA by Longreef contravened the applicable Venezuelan laws and regulations with the consequence that neither the nationality nor the investment requirement is satisfied as a basis for jurisdiction.

217. While there was some difference of opinion as to whether there were any contraventions as alleged, the legal experts called by both parties agreed that, in so far as there may have been contraventions, they were challengeable only by dissentient shareholders (of which in this case there were none) or by third parties adversely affected, such as creditors (of which again there appear to have been none). No such challenge was in fact made by shareholders or by any third party. Any such challenge would in any event have been subject to a limitation (or prescriptive) period which had expired well before the events giving rise to the present case. Indeed, the competent Venezuelan authorities never alleged, far less challenged, any such contraventions before bringing them forward as a ground for denying jurisdiction in these proceedings.

218. Moreover, even if such a challenge had been made and had been successful, Venezuela has not shown that, under Venezuelan law, the acquisition of CAFAMA by Longreef would have been a nullity, or that Longreef would have been disentitled to protection under the BIT.

219. Venezuela also alleges violations of the Venezuelan Tax Code. Professor Mizrachi said that the structure of the transaction by which

"the shareholders who 'redeemed' their shares and ceased to be shareholders of the company in exchange for the received dividends, avoid[ed] payment of the income tax that would have accrued in case the shares had been sold. … Had they conducted a normal transaction in order to dispose of their shares in CAFAMA –the sale of shares-, the benefit received – the price of the sale minus the cost of the acquisition – would have been subject to taxes, and the seller would have been required to pay income tax, in accordance with the Income Tax Law of 1995. By contrast, the dividends were not subject to taxes at the time they were distributed pursuant to that law. … The series of transactions … that led to the exit of certain shareholders and the entry of LONGREEF into CAFAMA's capital constituted at the time a 'fraud', as established by Article 93 of the Venezuelan Tax Code in force at the relevant time."[113]

The Tribunal interprets Professor Mizrachi as saying that, in so far as there was avoidance of potential tax liabilities, the liabilities in question were potentially those of the shareholders whose holdings were redeemed and (impliedly) were not tax liabilities of Longreef or of CAFAMA.

220. Professor Morles did not agree with Professor Mizrachi's analysis of the transaction since he regarded it as a legitimate 'accordion transaction' and Professor Weffe regarded it as a case of 'economy of option' for the purpose of avoiding, but not evading, tax liability. Professor Weffe also insisted that 'tax evasion' can occur only where a taxpayer evades payment of tax that is due.

221. Consequently, even if there were violations of Venezuelan tax law, it has not been shown that the sanctions available would, under Venezuelan law, have entailed non-tax consequences such as, in particular, the non-recognition or annulment of the transfer of share-ownership.

222. The Tribunal therefore finds that Venezuela has failed to establish exceptional circumstances such as to justify lifting the corporate veil of Longreef in order to prevent evasion of legal requirements or obligations. No shareholder, creditor or other third party has been shown, even *prima facie*, to have been adversely affected by the transaction or transactions leading to the acquisition of Longreef's interest in

[113] See paragraph 66 above.

CAFAMA. Nor has it been shown that any person evaded payment of any tax that was due.

Abuse of right and absence of good faith

223. There is no doubt – and it was not denied – that the acquisition by Longreef of the share capital of CAFAMA was made for tax purposes. The use of 'special purpose vehicles' ("SPV") incorporated in offshore jurisdictions such as Aruba as a means of avoiding or minimising tax liability is of relatively long standing. The use of such an SPV is not in itself contrary to international law, nor does it, by itself, constitute an "evasion of legal requirements or obligations" or an "abuse of right" such as would require the Tribunal to hold that Longreef is not entitled to the protection of the BIT.

224. In *Mobil v Venezuela*, the tribunal held, after a detailed examination of the case law, that:

> "Under general international law as well as under ICSID case law, abuse of right is to be determined in each case, taking into account all the circumstances of the case."

The tribunal further observed, in relation to corporate restructuring, that:

> "[It] could be 'legitimate corporate planning' as contended by the Claimants or an 'abuse of rights' as contended by the Respondents. It depends on the circumstances in which it happened." [114]

225. In *Conoco Phillips v. Venezuela* the tribunal noted "how rarely courts and tribunals have held that a good faith or other related standard is breached. The standard is a high one".[115]

226. A number of decisions have dealt with some of the circumstances that should be considered in determining the existence of abuse of right.[116] The issues that are most relevant to this case are:

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[114] *Mobil v Venezuela*, *supra* note 58, paragraphs 177 and 191.

[115] *ConocoPhillips Petrozuata BV and others v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, 3 September 2013 ('*ConocoPhillips*'), paragraph 275.

[116] See, for example, *Mobil v Venezuela, supra* note 58*; ConocoPhillips, supra* note 115*; and Tidewater Investment SRL and others v Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013.

(1) whether the restructuring occurred before nationalization or expropriation measures were taken;

(2) whether the restructuring was executed as a defense strategy before an existent or foreseeable dispute;

(3) whether, after the restructuring, the company continued substantial involvement in the development and operation of the business;

(4) whether the operation was concealed from the government.

227. Applying these criteria to the present case, the Tribunal finds that:

(1) the incorporation of Longreef, and the transactions by which Longreef became the sole shareholder of CAFAMA, occurred many years before the expropriation measures were taken;

(2) it is not even suggested that the present dispute existed or that it was foreseeable at the time of those transactions;

(3) SIEX, the competent authority of Venezuela, expressly acknowledged Longreef as the sole (foreign) owner of the entirety of CAFAMA's stock in the *Constancia de Calificacíon* which SIEX issued to CAFAMA on 9 June 2003;

(4) during the period between the time when Longreef became sole owner of CAFAMA and its subsidiaries, CAFAMA continued to trade and was indeed considered to be one of the most prominent coffee roasters in Venezuela.

228. In the opinion of the Tribunal these facts and circumstances clearly differentiate this case from cases where there was found to be absence of good faith or an abuse of rights.

229. The Tribunal therefore concludes that Longreef, as a Netherlands national, is entitled to the protection of the BIT, and that Venezuela's challenge to jurisdiction under this head fails.

The investment issue

The criteria to be applied

230. As noted above, Longreef's interest in CAFAMA, being a 'right derived from shares', is an 'investment' within the meaning of Article 1(a)(ii) of the BIT. Venezuela does not dispute this, but contends that, *for the purposes of ICSID*, the term 'investment' has an autonomous objective meaning (independent of the BIT) which defines the 'outer limits' of the type of dispute that may be submitted to the Centre. In order to qualify as an 'investment' for the purposes of the ICSID Convention, Longreef's interest in CAFAMA must, according to Venezuela, also satisfy a number of objective criteria.

231. In support of its contention, Venezuela cites a large number of ICSID and other arbitral decisions, and relies in particular on the *Salini* criteria as setting the dividing line between what is, and what is not, an 'investment' falling within the scope of ICSID jurisdiction. Applying the *Salini* criteria, as well as two additional criteria, Venezuela contends that Longreef's interest in CAFAMA does not fall within the 'outer limits' of the type of dispute that may be submitted to the Centre.

232. Longreef does not dispute that, in order to found jurisdiction, the investment must benefit from the protection of both the ICSID Convention and the BIT. Rather, it disputes Venezuela's contention that the scope of the term 'investment' in Article 25 of the Convention is to be defined by a number of criteria, which are cumulative, in order for the economic activity at stake to be qualified as an 'investment' for the purposes of jurisdiction.

233. Consequently, the issue in this case is not whether jurisdiction should be determined both by reference to the definition contained in the BIT and by reference to an 'objective standard' under article 25 of the Convention. There is no dispute between the Parties that Longreef's acquisition of CAFAMA's shares must, objectively, constitute an 'investment'. The issue is as to the relevant criteria to be applied in order to make that determination.

234. Both Parties have concentrated their arguments on whether the *Salini* criteria are the appropriate benchmark to assess whether Longreef's shareholding in CAFAMA is an

'investment' for the purposes of Article 25 of the ICSID Convention. Venezuela goes further and contends that the *Salini* criteria should be complemented by others, drawn in particular from the tribunal's decision in *Phoenix*.

235. In approaching this issue, the Tribunal notes that there has been a significant divergence of opinion and approach on the part of previous tribunals. The Tribunal takes as its starting point the Report of the Executive Directors:

> "23. Consent of the parties is the cornerstone of the jurisdiction of the Centre.
> […]
> "27. No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4))."

236. Thus, the drafting history of the ICSID Convention tends to confirm that no strict criteria were envisaged by the drafters. This militates in favour of a flexible approach to defining the characteristics of an economic activity in order to qualify it as an investment.

237. As explained by the tribunal in *Malicorp*, the *Salini* criteria "are not at all absolute and must be regarded as attempts to pin down the notion". The BIT and the ICSID Convention serve complementary purposes - on the one hand, the promotion of investments, by creating the conditions that will encourage foreign nationals to make contributions and provide services in the host country, and on the other hand, the protection of investments as the fruits of such contributions and services.[117]

238. So, as the tribunal in *Biwater Gauff* indicated:

> "A more flexible and pragmatic approach to the meaning of 'investment' is appropriate, which takes into account the features identified in *Salini*, but along with all the circumstances of the case, including the nature of the instrument containing the relevant consent to ICSID." [118]

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[117] *Malicorp, supra* note 66, paragraphs 109-110.
[118] *Biwater, supra* note 74, paragraph 316.

239. The Tribunal attaches particular importance to the reasoning of the tribunal in *Abaclat*:

> If Claimants' contributions were to fail the *Salini* test, those contributions - according to the followers of this test – would not qualify as investment under Article 25 ICSID Convention, which would in turn mean that Claimants' contributions would not be given the procedural protection afforded by the ICSID Convention. The Tribunal finds that such a result would be contradictory to the ICSID Convention's aim, which is to encourage private investment while giving the Parties the tools to further define what kind of investment they want to promote. The *Salini* criteria may be useful to further describe what characteristics contributions may or should have. They should, however, not serve to create a limit, which the Convention itself nor the Contracting Parties to a specific BIT intended to create"[119]

240. It follows that both the promotional and protective aspects of the BIT and the Convention must be taken into account without introducing into the interpretation of the Convention inflexible criteria that are not warranted by its drafting history. On that approach, the question whether, in a particular case, an operation or transaction is an 'investment' for the purposes of the ICSID Convention should be assessed in the light of the facts of that case, albeit it may be helpful to do so by reference to a list of possible characteristics.

241. The tribunal in *Saba Fakes* tribunal has suggested that:

> "the criteria of '(i) a contribution, (ii) a certain duration, and (iii) an element of risk' are both necessary and sufficient to define an investment within the framework of the ICSID Convention",[120]

while a more synthetic formula is offered by Zachary Douglas:

> "The economic materialization of an investment requires the commitment of resources to the economy of the host state by the claimant entailing the assumption of risk in expectation of a commercial return".[121]

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[119] *Abaclat, supra* note 75, paragraph 364.

[120] *Saba Fakes, supra* note 75, paragraph 110.

[121] Douglas, *The International Law of Investment Claims* (2009) at page 190, quoted by the sole arbitrator in *Pantechniki SA Contractors & Engineers (Greece) v Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, paragraph 36.

242. In the present case, the Tribunal considers it unnecessary to opt for either formulation since, in the Tribunal's opinion, there is no doubt that the operation in dispute qualifies as an 'investment' under the ICSID Convention.

243. It should be added, however, that the Tribunal does not accept that an 'investment' must, *in addition to all other characteristics,* make a contribution to the economic development of the host state. The Tribunal agrees in this respect with the reasoning of the tribunal in *Saba Fakes:*

> "The promotion and protection of investments in host States is expected to contribute to their economic development. Such development is an expected consequence, not a separate requirement, of the investment projects carried out by a number of investors in the aggregate. Taken in isolation, certain individual investments might be useful to the State and to the investor itself; certain might not. Certain investments expected to be fruitful may turn out to be economic disasters. They do not fall, for that reason alone, outside the ambit of the concept of investment.[122]

244. As regards the additional criteria proposed by Venezuela that an 'investment' must be made in accordance with host state laws and be made in good faith, these are not, in the opinion of the Tribunal, jurisdictional requirements, but rather considerations relevant to the decision whether a claim is admissible or well-founded. Again, the Tribunal agrees with the tribunal in *Saba Fakes* that

> "the principles of good faith and legality cannot be incorporated into the definition of article 25(1) of the ICSID Convention without doing violence to the language of the ICSID Convention: an 'investment might be 'legal' or 'illegal', made in 'good faith' or not, it nonetheless remains an investment"[123].

Application of the criteria to the present case

245. There can be no serious doubt that, in the ordinary use of language, the acquisition of a majority shareholding in a company - *a fortiori* a 100% shareholding - is an 'investment'.

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[122] *Saba Fakes, supra* note 75, paragraph 111. See also, to the same effect, *Quiborax, supra* note 81, paragraph 220.
[123] *Saba Fakes, supra* note 75, paragraph 112.

246. The Tribunal notes that, with the exception of the *Phoenix* decision, none of the decisions cited by Venezuela were concerned with a situation where the 'investment' in question was such a shareholding. In each of those cases it was open to argument whether the character of the interest for which protection was sought could properly be regarded as that of an 'investment'.

247. The circumstances of the *Phoenix* decision were indeed exceptional. The tribunal concluded that:

> "The unique goal of the 'investment' was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty."[124]

In the recent decision in *KT Asia Investment Group,* where the facts were characterised by the tribunal as 'unusual', the transfer of shares to the Claimant was avowedly on a short term basis with a view to sale to a third party.[125]

248. Both cases are clearly distinguishable from the present case. As noted above (paragraph 207), Longreef was duly constituted as a corporate *persona* under the law of the Netherlands long before the events giving rise to these proceedings, and its incorporation was not a fraudulent attempt to gain the advantage of the protection afforded by the BIT for the purpose of the present proceedings.

249. In this case, the purchase of CAFAMA's shares by Longreef involved the payment of a substantial sum of money and was clearly a 'contribution' by Longreef. The source of the funds necessary to make that payment is in this respect irrelevant in the absence of proof of fraud. There is no suggestion that the price paid by Longreef did not properly reflect the underlying value of the company, which in turn reflected the investments made in CAFAMA by its successive shareholders, enabling it to become one of the most prominent coffee companies in Venezuela.

250. For the reasons given above (paragraph 243), the Tribunal cannot accept the hypothesis, which appears to underlie Venezuela's contentions in this respect, that

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[124] *Phoenix Action, supra* note 66, paragraphs 142 and 144.

[125] *KT Asia Investment Group BV v Republic of Kazakhstan,* ICSID Case No. ARB/09/8, Award, 17 October 2013, paragraph 213.

where a foreign national purchases the shareholding of a company, that person has not made an 'investment' for the purposes of Article 25 of the ICSID Convention unless that person has transferred *additional* funds to the host country over and above the value of the shareholding.

251. In this case, Venezuela does not contend that the elements of duration and risk were not present. It is in any event sufficient, as regards duration, to refer to the findings in paragraph 227(1) and (4) above. As regards risk, the Tribunal considers it to be self-evident that the purchase of a trading company such as CAFAMA with its existing liabilities and potential risks satisfies this criterion.

252. Finally, even if an additional requirement of 'a contribution to the economic development of the host State' were to be appropriate (as to which see paragraph 243) above), the Tribunal considers that the acquisition *and continued holding over a period of years* of the shares of a successful trading company such as CAFAMA, must be regarded as making a contribution to the economic development of the host country.

253. As regards the additional criteria proposed by Venezuela, that an 'investment' must be made in accordance with host state laws and be made in good faith, the Tribunal holds (see paragraph 244 above) that these are not relevant to the question whether there is an 'investment' for the purposes of jurisdiction. But. in any event, the Tribunal considers that there is no evidence in this case that the investment was not made in good faith or that it should be considered as a nullity under the laws of the host state, so as to be deprived of the protection granted by the BIT (see paragraphs 216-229 above).

254. The Tribunal therefore concludes that Longreef's interest in the shares of CAFAMA must be held to be an 'investment', not only within the meaning of Article 1(a)(ii) of the BIT, but also within the meaning of Article 25(1) of the ICSID Convention. Venezuela's challenge under this head also fails.

DECISION

For the reasons set out above, the Tribunal finds that the dispute brought by the Claimant before the Centre is within the jurisdiction of the Centre and the competence of the Tribunal.

Mr. Enrique Gómez-Pinzón
Arbitrator

Mr. Alexis Mourre
Arbitrator

Sir David A.O. Edward
President of the Tribunal