# DUAL OR PLURAL NATIONALITY IN A BIT CONTEXT

in the case
*Manuel García Armas,*
*Pedro García Armas,*
*Sebastián García Armas,*
*Domingo García Armas,*
*Manuel García Piñero,*
*Margaret García Piñero,*
*Domingo García Cámara,*
*Carmen García Cámara*
v.
*The Bolivarian Republic of Venezuela*
(PCA Case No. 2016-8)
and
*Luis García Armas*
v.
*The Bolivarian Republic of Venezuela*
(ICSID Case No. ARB(AF)/16/1)

***García Armas* case**

## ADDITIONAL EXPERT REPORT

1. In my Expert Report on "Dual or plural nationality in a BIT context (with particular emphasis on the concept of effective and dominant nationality in relation with the 1995 Spain / Venezuela BIT) of 27 March 2017",[1] I had concluded:

> "(i) In the light of Article 31 of the 1969 Vienna Convention on the Law of Treaties, there can be *no doubt* that Article 1(1)(a) of the Spain/Venezuela BIT does not grant *jus standi* before an arbitration tribunal to a dual national whose dominant nationality is that of the Respondent State;
> (ii) Generally speaking, the concept of dominant and effective nationality applies in a BIT context not 'despite' but because its customary nature;
> (iii) This is so because the very object and purpose of investment treaties is to develop and protect *foreign*, not national, investments;
> (iv) I have no doubt that, in the instant case, the Claimants have no standing against Venezuela, of which they very evidently have the dominant nationality."[2]

2. I have been informed by Counsel from the Republic of Venezuela that the Claimants in the same case had submitted with their Counter-Memorial a Legal Opinion

[1] Hereafter: "Pellet Report".
[2] Pellet Report, para. 68.

prepared by Professor Christoph Schreuer,[3] which, to a large extent, aims at refuting my own Report. Counsel from the Republic of Venezuela also asked me to prepare a brief response report notably including the following issues:

- Application to the case of Art. 32 VCLT, especially regarding the use of the *Travaux* and the (in)applicability in this particular case of the BITs signed by Venezuela with third States;
- Interaction between articles 31 and 32 of the VCLT;
- Effects for this case of the requirement of residence contained in the *Travaux*;
- Usefulness of the rules of diplomatic protection in interpreting the BIT (reference to 31(3)(c)); and
- Supposed autonomy of law applicable to jurisdiction and nationality requirements under the BIT.

3. The present Report has been prepared in compliance with these requests, being noted that I have had only access to the *travaux préparatoires* of the BIT that were provided to me by Counsel from the Republic of Venezuela. My conclusions in this report are final based on a thorough examination of the facts put to my knowledge and the law. I will focus successively on the interpretation of the 1995 BIT in respect to the definition of a foreign investor in the light of Articles 31 and 32 VCLT (I.), then, more precisely, on the role of the rules of diplomatic protection in interpreting the BIT (II.).

## I. INTERPRETATION OF THE BIT IN LIGHT OF THE "VIENNA RULES OF INTERPRETATION"

4. The bilateral investment treaty between Spain and Venezuela (hereinafter the "BIT" or "1995 BIT") was signed on 2 November 1995. It entered into force as between them on 10 September 1997. This instrument is now at the core of a series of disputes between Venezuela and investors that have given rise to at least three arbitration proceedings currently pending in different fora.[4] One of the main issues relates to the interpretation of the BIT with respect to investors formally having the nationalities of both State parties.

[3] Christoph Schreuer, "Questions of Jurisdiction relating to Nationality", Legal Opinion, 5 July 2017 (hereafter: "Schreuer Opinion").

[4] UNCITRAL, *Serafín García Armas and Karina García Gruber v. Venezuela*, PCA Case No. 2013-3 (notice of arbitration submitted on 9 October 2012); UNCITRAL, *Manuel García Armas, Pedro García Armas, Sebastián García Armas, Domingo García Armas, Manuel García Piñero, Margaret García Piñero, Domingo García Cámara and Carmen García Cámara v. Venezuela*, PCA Case No. 2016-08 (notice of arbitration submitted on 1 June 2015); ICSID Additional Facility, *Luis García Armas v. Venezuela*, ICSID Case No. ARB(AF)/16/1 (case registered on 5 May 2016).

5. In this context, it is necessary to have a close look at the interpretation rules defined in Articles 31 and 32 of the VCLT that are widely accepted as being part of customary international law.[5] As I wrote in my previous expert report, "[the] interpretation [based on the general rule of interpretation contained in Article 31 VCLT] leaving the meaning of the disputed expression neither ambiguous nor obscure and avoiding any manifestly absurd or unreasonable result, there is no need to have recourse to supplementary means of interpretation as envisaged in Article 32"[6] (A.). However, recourse to the supplementary means is nevertheless possible for confirmatory purposes (B.).

## A. The general rule of treaty interpretation: Article 31 of the VCLT

6. As a reminder, Article 31 of the VCLT provides 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.

[5] ICJ, Judgment, 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *I.C.J. Reports 1994*, p. 21, para. 41; Preliminary Objection, Judgment, 12 December 1996, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *I.C.J. Reports 1996*, p. 812, para. 23; Judgment, 13 December 1999, *Kasikili/Sedudu Island (Botswana/Namibia)*, *I.C.J. Reports 1999*, p. 1059, para. 18; Judgment, 27 June 2001, *LaGrand (Germany v. United States of America)*, *I.C.J. Reports 2001*, p. 501, para. 99; Judgment, 17 December 2002, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *I.C.J. Reports 2002*, p. 645-646, para. 37; Judgment, 4 June 2008, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, *I.C.J. Reports 2008*, p. 222, para. 123; WTO, Report of the Appellate Body, 24 July 2001, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, case AB/2001/2, doc. WT/DS184/AB/R, para. 57; WTO, Report of the Appellate Body, 28 November 2002, *United States – Countervailing Duties on Certain Corrosion-resistant Carbon Steel Flat Products from Germany*, case AB-2002-4, doc. WT/DS213/AB/R, para. 61; WTO, Report of the Appellate Body, 7 April 2005, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, case AB/2005/1, doc. WT/DS285/AB/R, para. 160; UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, p. 24, para. 98; UNCITRAL, Award, 28 January 2008, *The Canadian Cattlemen for Fair Trade v. United States of America*, para. 46; ICSID, Decision on Jurisdiction, 9 November 2004, *Salini Costruttori S.A. and Italstrade S.A. v. Jordan*, ICSID Case No. ARB/02/13, para. 75; ICSID, Jurisdiction and Admissibility, Award, 8 February 2013, *Ambiente Ufficio S.A. and others v. Argentina*, Case No ARB/08/9, para. 600; ICSID, Award, 2 July 2013, *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, para. 6.4; ICSID, Award, 11 December 2013, *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, para. 503. See also e.g.: G. Guillaume, "The Use of Precedent by International Judges and Arbitrators", *Journal of International Dispute Settlement* (2011/1), p. 21; O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, Heidelberg, 2012), p. 524.

[6] Pellet Report, para. 36.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related
to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

7. According to Professor Schreuer, the BIT does extend protection to investors having the nationality of both contracting States.[7] In his view, the treaty established a *lex specialis* to the rules of general international law and should be interpreted as separated from such general rules. In so doing, Professor Schreuer adopts a textual or literal interpretation that (i) misreads the ordinary meaning of the terms in a way contrary to their natural and clear meaning; and (ii) isolates the ordinary meaning of the terms from other components of the general rule such as the context as well as the object and purpose of the BIT and relevant rules of international law applicable in the relations between the parties. Professor Schreuer's analysis not only overlooks part of the very text of Article I(1)(a) of the BIT but it also ignores the overall background of international law and any element of interpretation that is beyond the text. All elements from Article 31 VCLT other than the alleged ordinary meaning of the terms are discarded or unduly belittled. The correct application of the various elements of the general rule of interpretation calls for a holistic approach and results in a meaning of the notion of investor within the meaning of the 1995 BIT which is squarely opposite to that advanced by Professor Schreuer.

[7] Schreuer Opinion, paras 48-49, 92.

## 1. Ordinary meaning of the terms

8. Article I(1)(a) of the 1995 BIT defines the term "investor" as "[a]ny physical person who possesses the nationality of one Contracting Party pursuant to its legislation and makes investments in the territory of the other Contracting Party". Assessing the terms of this Article in their ordinary meaning results in a clear, unambiguous and reasonable outcome. Even when Article I(1)(a) of the 1995 BIT is isolated from its context and without taking the object and purpose of the BIT into consideration, the text of Article I(1)(a) does not lend itself in any way, in my opinion, to an interpretation in the direction foreseen by Professor Schreuer. Indeed, it provides that the investor, if a physical person, "possess[.] the nationality of one Contracting Party" ["*tenga[.] la nacionalidad de una de las Partes Contratantes*"] *but* – and this is an enormous "but", it also demands that this individual make "investments in the territory *of the other* Contracting Party" ["inversiones en el territorio *de la otra* Parte Contratante"] – *not* in the territory of the Contracting Party the nationality of which it enjoys. The ordinary meaning of the expressions "one Contracting Party […/…] the other Contracting Party" implies the mutual exclusion of these two conceptual categories.

9. This interpretation is confirmed when one resorts to the well-known principle *Expressio unius est exclusio alterius*: based on this principle, the interpretation of the terms "Any physical person who possesses the nationality of one Contracting Party pursuant to its legislation and makes investments in the territory of the other Contracting Party" can only be interpreted as excluding dual nationals. The use of this principle has been endorsed by various tribunals.[8] Other decisions declined to apply this principle, but they did so because the result

[8] See e.g.: PCIJ, Advisory Opinion of 15 October 1931, *Railway Traffic between Lithuania and Poland*, Series A/B, No. 42, p. 121; ICJ, Advisory Opinion, 28 May 1948, *Admission of a State to the United Nations (Charter, Art. 4), I.C.J. Reports 1948*, p. 62-63, and dissenting opinion by Judges Basdevant, Winiarski, Sir Arnold McNair and Read, p. 86; ICJ, Advisory Opinion (proceedings), *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Pleadings*, correspondence, vol. II, The Registrar to Professor Reisman, 6 November 1970, p. 638-639; ICSID, decision on jurisdiction, 29 April 2004, *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, para. 30; ICSID, award, 30 April 2004, *Waste Management v. Mexico*, ICSID Case N° ARB(AF)/00/3, para. 85; ICSID, Decision on jurisdiction, 16 May 2006, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17, para. 56; UNCITRAL, Decision on jurisdiction, 20 June 2006, *National Grid v. Argentina*, para. 82.

the application of the principle called for appeared inconsistent with the context or the parties' likely intentions.[9]

### 2. Relation of the ordinary meaning with the other elements of the general rule

10. In addition to suggesting an unnatural interpretation of the ordinary meaning of the terms in Article I(1)(a) Professor Schreuer's Opinion excessively restricts treaty interpretation to a literal or textual interpretation of its provisions without due regard for the other elements provided for by the Vienna rules of treaty interpretation.[10] Not only is the ordinary meaning of the terms clear, but due consideration for the Vienna general rule of interpretation taken as a whole does not leave any ambiguity either. Crucially, an assessment of the ordinary meaning of the terms is not separable from the context and from the object and purpose of the treaty.[11]

11. Contrary to Professor Schreuer's assertion, ordinary meaning is not "the only requirement"[12] of the "General rule of interpretation" enunciated in Article 31, of which the various elements form an indivisible whole. It is only a first step. As stated by the Arbitral Tribunal in the case concerning *Auditing of accounts between the Netherlands and France*:

> "The Tribunal considers that this rule should be viewed as forming an integral whole, the constituent elements of which cannot be separated. (…) All the elements of the general rule of interpretation provide the basis for establishing the common will and intention of the parties by objective and rational means."[13]

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[9] ICSID, Decision on jurisdiction, 14 January 2004, *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, para. 46; ICSID, Decision on jurisdiction, 3 August 2004, *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, para. 140.

[10] Schreuer Opinion, paras 50-53, 102.

[11] PCIJ, Advisory Opinion of 12 August 1922, *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, series B, No 2, p. 22; ICJ, Advisory Opinion, 3 March 1950, *Competence of the General Assembly for the Admission of a State to the United Nations*, *I.C.J. Reports 1950*, p. 8; Preliminary Objections, Judgment, 21 December 1962, *South West Africa*, *I.C.J. Reports 1962*, p. 336; Judgment, 12 November 1991, *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, *I.C.J. Reports 1991*, p. 69-70, para. 48; Iran-United States Claims Tribunal, Decision, 19 December 2000, *Federal Reserve Bank of New York v. Iran, Bank Markazi Iran*, Case A 28, 36 *Iran-US Claims Tribunal Reports* 5, para. 58; WTO, report of the Appellate Body, 21 December 2009, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, case AB-2009-3, doc. WT/DS363/AB/R, para. 399. See also: P. Daillier, M. Forteau, A. Pellet, *Droit international public*, 8th edition (L.G.D.J., Paris, 2009), p. 284, para. 169-1-b.

[12] Schreuer Opinion, para. 50 *et seq.* rejecting most elements from articles 31 and 32 as irrelevant in the instant case.

[13] PCA, award, 12 March 2004, *Case concerning the auditing of accounts between the Kingdom of the Netherlands and the French Republic pursuant to the additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine against pollution by Chlorides of 3 December 1976*, para. 62, English

12. This is reflected by the fact that all elements in Article 31, paragraph 1, are mentioned together at the same level in a single sentence. Moreover, in the course of preparing its Draft Articles that would later serve as a basis for negotiating the Vienna Convention, the International Law Commission ("ILC") insisted that the treaty should be read as a whole and that the interpretation of the text should not be reduced to a mere grammatical, syntax-oriented assessment of its terms.[14] Therefore, the various elements constituting the general rule are to be applied altogether, without exclusion or hierarchy between them. They are not to be sectioned or selected in their application, unless constituting what Professor Gardiner rightly criticizes as an "excessive molecularization" of the Vienna rules.[15]

13. In other words, the context of the terms of Article 1(1)(a) of the Spain/Venezuela BIT and the object and purpose of the Treaty are not elements supplementary to such terms that may only be used in case the ordinary meaning of the terms fails to deliver a clear interpretation.[16] Their role is not limited to clarifying an obscure or absurd meaning of the plain text (which is the role of the supplementary means of Article 32). Rather, the context as well as the object and purpose are to be applied in all cases and together with the ordinary meaning of the terms, regardless of whether the latter is clear or not. As stated previously, this is supported by the case law.[17]

14. The decision on jurisdiction of 15 December 2014 in the *Serafín García Armas* case states:

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non-official translation from the PCA, original French: "*Le Tribunal considère que cette règle doit être envisagée comme formant un tout intégré, dont les éléments constitutifs ne peuvent être séparés. (...) Tous les éléments de la règle générale de l'interprétation sont à la base d'une recherche objective et rationnelle qui permet d'établir l'intention et la volonté communes des parties*."

[14] ILC, Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, *ILC Yearbook, 1964*, vol. II, p. 55–56; observations of Mr. Amado, *ILC Yearbook, 1964*, vol. I, p. 277, para. 28. See also O. Dörr, K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, Berlin/Heidelberg, 2012), p. 543; R.K. Gardiner, *Treaty Interpretation*, 2nd edition (Oxford University Press, 2015), p. 165.

[15] R.K. Gardiner, *ibid.*, p. 161-162; see also P. Daillier, M. Forteau, A. Pellet, *Droit international public*, 8th edition (L.G.D.J., Paris, 2009), p. 284, para. 169-1: "*les différents moyens d'interprétation sont interdépendants*" ["the various means of interpretation are interdependent"].

[16] In this vein, see Paris Court of Appeal, Judgment of 25 April 2017, *Bolivarian Republic of Venezuela v. Serafin García Armas and Karina García Gruber*, Case No. 15/01040, pole 1, chamber 1, p. 6, which surprisingly seems to assimilate the provision of Article 31(3)(c) VCLT to supplementary rules of interpretation to be only resorted to when the meaning of the treaty is obscure or ambiguous. I strongly disagree with such an unusual approach to treaty interpretation.

[17] See paras 10-12 and footnotes 11 and 13 above; see also: ICJ, Judgment, 20 July 1989, *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), I.C.J. Reports 1989*, p. 42, para. 50.

> "*El breve resumen anterior respecto del origen de los TBIs permite concluir que se trata de un instrumento especial, vigente únicamente entre las partes que lo celebran, que no está sujeto a la aplicación del derecho internacional consuetudinario*" ["The brief summary above with respect to the origin of BITs allows for the conclusion that it is a special instrument, in force only between the parties that have concluded it, that it is not subject to the application of customary international law."][18]

15. In fact, this could (in part) be said of all treaties, not only BITs. However, the fact that a treaty is *lex specialis* does not preclude the application of rules of general international law together with the treaty's application and insofar as they are not inconsistent with the *lex specialis* created by the treaty.[19] The application of the Vienna rule or rules of interpretation to the interpretation of any treaty is mandated by customary international law. Therefore, the application of those rules is not contingent on a textual interpretation allegedly being unclear as this would unduly reduce the Vienna rules to the sole Article 31(1) VCLT. Instead, the application of the whole set of Vienna rules is mandated by international law (Article 31 in its entirety, and Article 32 insofar as the interpretation under Article 31 calls or allows for it).

16. It is unusual to construe the Vienna rules as imported conditions that would "add language to the BIT, thereby changing its meaning".[20] On the contrary, the provisions of a treaty are to be read in light of all the elements of the general rule contained in Article 31 (and, depending on the interpretation obtained, recourse may be had to the supplementary means contained in Article 32 as well). Therefore, a purely textual or grammatical interpretation of a provision isolated from its context and the object and purpose of the treaty and that disregards other elements of the general rule of treaty interpretation is likely to result in a much distorted meaning, and possibly an unauthorised revision of the treaty.

[18] UNCITRAL, Decision on jurisdiction, 15 December 2014, *Serafín García Armas and Karina García Gruber v. Venezuela*, PCA Case No. 2013-3, para. 154 (my translation).
[19] This is true concerning rules of general international law that relate to the *jus dispositivum*. An exception to this are rules of *jus cogens*, which may not be derogated from by way of treaty. See Article 53 VCLT, as well as the ILC's ongoing work on the topic of peremptory norms of general international law (*jus cogens*): Second Report on *jus cogens* by Dire Tladi, Special Rapporteur, 16 March 2017, A/CN.4/706, para. 60, and Interim Report of the Drafting Committee, 26 July 2017, p. 10 (draft conclusion 3). The *jus cogens* exception is not relevant in the present case.
[20] Schreuer Opinion, para. 50.

## 3. Context

17. As per Article 31, paragraphs 1 and 2, of the VCLT, the ordinary meaning of the terms is to be assessed in the context of the treaty, not in isolation.

18. The ordinary meaning of a term cannot be considered in the abstract. The ILC Special Rapporteur, Sir Humphrey Waldock, noted: "the natural and ordinary meaning of terms is not to be determined in the abstract but by reference to the context in which they occur".[21] The meaning of a word is always affected, even if sometimes slightly, by the context of the term, i.e. its position in the sentence, punctuation, grammar, syntax, and similar provisions in other articles.

19. When it comes to a word or expression that may have more than one meaning when assessed literally, an assessment of the immediate context (syntax, grammar) will usually provide a first step to clarifying the relevant meaning. The ICJ proceeded this way in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* when it stated:

> "No doubt the word 'determine' in English (and, as the Chamber is informed, the verb 'determinar' in Spanish) can be used to convey the idea of setting limits, so that, if applied directly to the 'maritime spaces' its 'ordinary meaning' might be taken to include delimitation of those spaces. But the word must be read in its context; the object of the verb 'determine' is not the maritime spaces themselves but the legal situation of these spaces. No indication of a common intention to obtain a delimitation by the Chamber can therefore be derived from this text as it stands."[22]

20. Similarly, in the case *Canada – Measures affecting the export of civilian aircraft*, the WTO Appellate Body interpreted the term 'benefit' by exploring its logical articulation with the term 'subsidy', and it resorted to logical deduction when faced with the silence of the text regarding the link between the 'cost to government' and the term 'subsidy'.[23]

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[21] *ILC Yearbook, 1964*, vol. II, p. 56.

[22] ICJ, Judgment, 11 September 1992, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), I.C.J. Reports 1992*, p. 583, para. 373. The Court extended this reasoning to the wider context including other agreements between the parties (p. 583, para. 374). See also R.K. Gardiner, *Treaty Interpretation*, 2nd edition (Oxford University Press, 2015), p. 199.

[23] WTO, report of the Appellate body, 2 August 1999, *Canada – Measures affecting the export of civilian aircraft*, case AB-1999-2, doc. WT/DS70/AB/R, paras 155-156. See also ICJ, Preliminary Objections, Judgment,

21. Taking the context into consideration, "the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create".[24] True, it is not acceptable to put forward an interpretation that does not come from the text or that is tantamount to modifying the text. Nor is it acceptable to rely on general custom, usage or accepted rules of general international law to put forward an interpretation *contra textum*. However, in order to interpret the treaty (as going beyond the text of the treaty) the meaning of a sentence may be enlightened or supported by other parts of the text, *i.e.* by the context. As recalled by the Arbitral Tribunal in the *Abyei* case,[25] interpreting a treaty provision cannot be made in isolation from the rest of the treaty which must be approached as whole.

22. This consideration is enlightening when applied to Article I(1)(a) of the BIT. The main rationale for the provision lies in the distinction between an investor *from one Contracting Party* and an investment made *in the other Contracting Party*. This dynamic relation implies a distinction in terms of categories: investor / investment, one Contracting Party / the other Contracting Party. In fact, the provision can only be effective if those four legal categories remain conceptually distinct. Any overlap between them would render the rationale of other provisions meaningless and would unduly restrict the *effet utile* of the provision, or even prevent it from producing any *effet utile*.

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22 July 1952, *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, *I.C.J. Reports 1952*, p. 104; ICJ, Preliminary Objection, Judgment, 12 December 1996, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *I.C.J. Reports 1996*, p. 815, para. 31; ICSID, Award, 22 June 2017, *Capital Financial Holding Luxembourg SA v. Cameroon*, ICSID Case No. ARB/15/18, para. 190.

[24] R.K. Gardiner, *Treaty Interpretation*, 2nd edition (Oxford University Press, 2015), p. 164.

[25] PCA, Final Award, 22 July 2009, *Arbitration regarding the delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army*, PCA Case No. 2008-07, paras 415, 495, 496 (at the level of treaty article). See also ICJ, Advisory Opinion, 3 March 1950, *Competence of the General Assembly for the Admission of a State to the United Nations*, *I.C.J. Reports 1950*, p. 8 (on the importance of the context); American–Mexican Claims Commission, *Rogerio v. Bolivia*, reported in J.H. Ralston, *The Law and Procedure of International Tribunals*, 1926, No. 88, 69: "it is not proper to divide the unity of a juridical act, sustaining the efficacy of some of its clauses and the inefficacy of others"; WTO, Report of the Panel, 20 December 2007, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, para. 6.16 (concluding that the object and purpose referred to in Article 31(1) VCLT related to that of the treaty as a whole); WTO, Report of the Appellate Body, 4 February 2009, *United States – Continued Existence and Application of Zeroing Methodology*, case AB-2008-11, doc. WT/DS350/AB/R, para. 268. See also *ILC Yearbook, 1968*, vol. II, p. 55, para. 12 (principle of integration as one of the principles of treaty interpretation articulated by Sir Gerald Fitzmaurice based on the jurisprudence of the World Court).

23. In particular, the *quid pro quo* materialized by the foreign investment (contributing to the flow of capital into the economy of the host State in exchange for a right to bring a claim against such State before an international forum and benefit from investment treaty protection) highlights the critical relationship between the terms "investment" and "investor". Article I(1)(2) of the BIT defines the term "investments" as "any kind of assets invested by investors of one Contracting Party in the territory of the other Contracting Party […]". Thus an investment is not merely an asset or interest owned by the investor of one contracting party on the territory of the host State. Rather, as the Court of Appeals of Paris highlighted in its 2017 Judgment in the *Serafin García Armas* case, an investment is *"un actif 'investi' par un investisseur de l'autre Partie contractante – ce qui renvoie nécessairement à une condition de nationalité de l'investisseur à la date de l'investissement"* ["an asset 'invested' by an investor of the other contracting Party – which necessarily refers to a condition of nationality of the investor at the date of the investment"].[26]

24. In the present case, the context also dictates that the phrases "any physical person who possesses the nationality of one Contracting Party" and "makes investments in the territory of the other Contracting Party" in Article I(1)(a) cannot be read in isolation not only from each other but also from the other provisions of the BIT so as to give each member of the sentence the maximum possible scope in accordance with the context. A purely textual interpretation of each member of the sentence individually would place these two members in direct conflict and would defeat the object and purpose of the BIT.

25. Several elements of the context of Article I(1)(a) in the BIT indicate that including dual nationals having the nationality of the State of investment in the ambit of the protection offered by the treaty would be unreasonable or inconsistent with other provisions:

- For example, the definition of an investor as a legal person (Article 1(b)) and the definition of investments (Article 2) logically exclude that the defined term be linked to both State parties. These contextual elements would suggest that the same should follow for the definition of investor as a physical person (Article I(1)(a)) for reasons of

[26] Paris Court of Appeal, Judgment of 25 April 2017, *Bolivarian Republic of Venezuela v. Serafin García Armas and Karina García Gruber*, Case No. 15/01040, pole 1, chamber 1, p. 8. I however disagree with the Court's general approach to treaty interpretation in this judgment, which tends to share the Claimants' and Professor Schreuer's litteral interpretation without due regard for the relevant Vienna rules.

coherence since both categories of investor (physical persons and legal persons) are subject to common legal provisions under the BIT.

- As another example, Article II(3) provides that "[t]his Agreement shall also apply to investments made before its entry into force by investors of one Contracting Party in accordance with the legislation of the other Contracting Party in the territory of the latter Party. It shall not apply to disputes in connection with events occurring before its entry into force." It is difficult to grasp why the parties would include such a provision (and which effect this provision would have) if it is assumed that the BIT applies to dual nationals as well, because it is tautological to assert that the legislation of a State applies to nationals of that State.
- Similarly, Article III(1) provides that "[e]ach Contracting Party shall provide full protection and security in accordance with International law to investments made in its territory by investors of the other Contracting Party". Again, it is difficult to understand why international law (as opposed to domestic law) should provide the basis for the protection by a State of the investments made by a national of that State within that State. The same goes for Article IV(1).
- Further, the rationale for including Article III(3) in the BIT ("Each Contracting Party shall also endeavour, whenever necessary, to grant the requisite permits in connection with the activities of consultants or experts engaged by investors of the other Contracting Party") is difficult to grasp in case the investor is a national of the State of investment. Other such examples include:
- Article IV(2) (on treatment of investment) : is tautological when applied to nationals of the State of investment.
- Article VI (compensation for losses): is tautological when applied to nationals of the State of investment.
- Article VII(1)(a): if applied to nationals of the State of investment, this provision could potentially amount to authorizing tax evasion (unless specific conventional regimes are in place, but then one would expect that such exceptional situation be at least mentioned, which is not the case).
- Article VII(5), *Idem*. In general, authorizing transfers of investment income out of the State of investment seems difficult to envisage when the investor is a national of the State of investment (at least without additional, specific protective clauses).

- Article VIII (on more favourable terms): the rationale for such clause would seem unclear when it comes to individuals having the nationality of the State of investment because these individuals are precisely subject to the domestic law of the State of investment.
- Article XI (Disputes between a Contracting Party and investors of the other Contracting Party): does not provide for the exhaustion of domestic judicial remedies, which allows the investor to go for arbitration without any procedural prerequisite other than provided for in the BIT. Here the recourse to domestic jurisdictions follows negotiation and is only one possibility that is alternative to international arbitration. By contrast, nationals of a State are under an obligation to exhaust domestic judicial remedies and do not have standing to sue their own State before an international judicial body.

26. Expanding on one of these elements, and despite Professor Schreuer's criticism relating to Article IV of the 1995 BIT on national treatment,[27] the reasons why such provision could not possibly apply to investors having the nationality of the State of investment together with another nationality is that they already benefit from national treatment as per the laws of the State. Therefore, such clause would be useless or tautological when the investor has the nationality of the State of investment. A clause should not be construed as to render its meaning redundant or useless.[28] Contrary to what Professor Schreuer assumes, the discrimination in terms of legal remedies is not "premised on the assumption that normally foreign investors do not have access to domestic Remedies".[29] Instead, the reason is that "both domestic and international fora would be open to [some nationals of a State of investment], when [other nationals of that State] could only have recourse to domestic fora when it comes to investment dispute settlement".[30]

27. Risks of inconsistency between words or provisions within the treaty might provide useful tools of interpretation as part of the context. In the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* the ICJ resorted to the contrast between the terms "delimit" and "determine" in the treaty at stake as well as in a

[27] Schreuer Opinion, paras 74-75.
[28] Pellet Report, paras 26-28; see also paras 22 and 25 above, and 43 to 46 below.
[29] Schreuer Opinion, para. 77.
[30] Pellet Report, para. 29.

related agreement in order to clarify meaning.[31] This approach is helpful in the present case to clarify the relation between the group of words "[a]ny physical person who possesses the nationality of one Contracting Party" and "makes investments in the territory of the other Contracting Party" (Article I(1)(a) of the BIT). Textual logic here is important as a way to give a coherent meaning to the sentence as a whole.[32]

28. As an additional element of the context the very title of the BIT emphasizes the object and purpose of the treaty which is about the "*reciprocal* promotion and protection of investments" between the two State parties. In the *Oil Platforms* case, the ICJ relied on the title of the 1955 Treaty in order to help to clarify the scope of the Treaty and of some of its provisions.[33] Similarly, in the present case, the term "reciprocal" indicates a symmetrical and mutual exchange of similar actions. Such emphasis on mutual benefit is also apparent in the Treaty of Amity concluded in 1990 between the Parties (Articles 3(d), 7(a), 8, etc.), which also recalls the "legal equality of States" in its preamble.[34] This excludes investments made in a Contracting Party by a national of such Contracting Party.

29. It goes without saying that the above considerations are all the more compelling when the dominant nationality of the investor is that of the host State.[35] In such a case, indeed, such physical person is, for all purposes and before anything else, a citizen of the host State.

### 4. Object and purpose of the Treaty

30. As I recalled in my previous report, "the very object and purpose of investment treaties is to develop and protect foreign, not national, investments".[36] Professor Schreuer does not seem to disagree with this,[37] which is confirmed by various sources.

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[31] ICJ, Judgment, 11 September 1992, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), I.C.J. Reports 1992*, p. 583, para. 374.
[32] ICJ, Judgment, 13 July 2009, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), I.C.J. Reports 2009*, p. 238, para. 52, also cited in O. Dörr, K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, Berlin/Heidelberg, 2012), p. 544-545.
[33] ICJ, Preliminary Objection, Judgment, 12 December 1996, *Oil Platforms (Islamic Republic of Iran v. United States of America), I.C.J. Reports 1996*, p. 819, para. 47.
[34] General Treaty on Cooperation and Friendship between the Kingdom of Spain and the Republic of Venezuela of 7 June 1990, preamble, *U.N.T.S.*, vol. 1686 (1992), p. 126.
[35] On the matter of dominant nationality see, para. 70 *et seq*. below.
[36] Pellet Report, para. 68.

31. As Mr Karl Sauvant stated in his expert report of 27 March 2017 submitted in this case:

> "From the perspective of host States, therefore (in this particular instance, Venezuela), the single most important reason for protecting incoming investment through the conclusion of BITs was and is to attract such investment from abroad into their economies, to help them advance their economic growth and development. In doing so, BITs complement the national efforts of States (especially through their IPAs [investment promotion agencies]) to attract investment, as well as the efforts of international organization that assist national institutions in this regard – they are an additional tool to encourage the cross-border flow of resources into host economies."[38]

32. Similarly, in *Capital Financial Holding Luxembourg SA v. Cameroon*, the arbitral Tribunal held:

> "*[l]e but du traité comme celui de la Convention CIRDI et, plus largement, du droit international de l'investissement est en effet d'assurer la promotion et la protection des investissements* étrangers" ["[t]he purpose of the treaty as well as that of the ICSID Convention and, more generally, of international investment law is indeed to ensure the promotion and protection of *foreign* investments."][39]

33. And indeed, the protection of *foreign* investments *is* the object and purpose of the 1995 BIT. I agree with Professor Schreuer that the preamble of the BIT may provide useful indications on the object and purpose of the treaty. However, it is not the only nor the "prime source" to be taken into account.[40] Anyway, in the instant case, the preamble of the BIT provides in its second paragraph: "[d]esiring to intensify their economic cooperation for the mutual benefit of both countries". The emphasis is placed on the *mutual* benefit of the Parties. Such mutual benefit would be meaningless in case the investments in a country by the nationals of that country were to be taken into account. Mutual benefit is only possible subject to a relation with an external element between a State and the investors investing in it. Such international element would be nullified should the investor have the nationality of the host State. Therefore, the protection of foreign investors and investments clearly appears as being

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[37] Schreuer Opinion, para. 57.
[38] Expert Report of Karl P. Sauvant, 27 March 2017, para. 15.
[39] ICSID, Award, 22 June 2017, *Capital Financial Holding Luxembourg SA v. Cameroon*, ICSID Case No. ARB/15/18, para. 195 (my translation – emphasis in the original text).
[40] Schreuer Opinion, para. 52, relying on arbitral decisions that do not support this claim.

incompatible with the extension of BIT protection to dual nationals having the nationality of the host State (and certainly so when such nationality is dominant).[41]

34. Applying the BIT to domestic investments would affect the very object of any BIT and of international investment law generally. It would put the host state at a comparative disadvantage and would also create a form of discrimination against domestic, non-dual national investors. The aim of protecting foreign investment, through a BIT for example, is to compensate for the comparative disadvantage of foreigners as to the legal protection and judicial remedies they would enjoy without the existence of the BIT in comparison with nationals of the host State. This will be particularly the case when national laws and regulations set restrictive conditions for foreigners as is quite common, even on the part of liberal Governments. In such cases, the promotion and creation of favourable conditions for, foreign investment means alleviating such possible obstacles that do not exist for nationals of the host State.

35. The BIT also protects the ability of foreign investors to export the profits and proceeds of their investment that might otherwise be arbitrarily impeded by the host State (this forms part of the principles of investment protection alongside others such as just and equitable treatment principle).[42] Therefore the protection offered by the BIT becomes pointless if applied to investors who have the nationality (and even more clearly the dominant nationality) of the host State.

36. The *raison d'être* of any BIT (to protect *foreign* investments) as well as the wording of Articles I(1)(a) and I(2) and other articles detailed above[43] suggest that the silence of the BIT on the treatment of dual nationals does not amount to an assumption of their protection by the BIT – clearly the opposite.[44]

[41] Professor Schreuer disagrees with this approach: see Schreuer Opinion, paras 55-58.
[42] P. Daillier, M. Forteau, A. Pellet, *Droit international public*, 8th edition (L.G.D.J., Paris, 2009), p. 1216, para. 643.
[43] See para. 25 above.
[44] See Pellet Report, Part I, para. 4 *et seq*.

37. As suggested by the case law[45] and as I show further below,[46] a possible exception to the non-protection of dual nationals under BITs from the perspective of the treaty's object and purpose could be where the investor as a dual national has the nationality of the State of investment but that nationality is not dominant. As Professor Douglas rightly points:

> "A great deal of investment in the emerging economies of developing countries is made by individuals who are immigrants from those countries and have acquired their wealth elsewhere. Such individuals often retain the nationality of their country of birth in addition to the nationality of their adopted country. So long as the nationality of the adopted country is the dominant of the two in the sense that the individual maintains stronger personal links to that country rather than to the country of birth, then there is no overriding consideration of principle that should prevent such an individual from investing in the country of birth with reliance upon a relevant investment treaty."[47]

38. In the present case however, according at least Venezuela's Written Statement,[48] this is obviously not the case.[49] The investors' dominant nationality, that of Venezuela, is the nationality of the State of investment. Therefore, one can say with the greatest certainty that they cannot benefit from BIT protection. Concluding otherwise would be inconsistent with the object and purpose of BITs in general, and of the 1995 BIT in particular.

39. To sum up, in light of the object and purpose of the 1995 BIT, the only reasonable conclusion is that the provision in Article I(1)(a) should be interpreted, in the absence of explicit language to that effect, as excluding dual nationals and, at least, in case of dual nationals, physical persons having the dominant nationality of the State of investment.

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[45] Italian-United States Conciliation Commission, *Florence Strusky-Mergé* case – Decision No. 55, 10 June 1955 (United States v. Italy), *R.I.A.A.*, vol. XIV, p. 236; Iran-United States Claims Tribunal, Decision, 29 March 1983, *Nasser Esphahanian v. Bank Tejarat*, case No. 31-157-2, 2 *Iran-U.S. C.T.R.* 157, p. 166; Decision, 29 March 1983, *Ataollah Golpira v. Iran*, case No. 32-211-2, 2 *Iran-U.S. C.T.R.* 171; Decision, 29 March 1983, *Paridokht Kohan Haroonian v. Iran*, case No. 33-418-2, 2 *Iran-U.S. C.T.R.* 226; Decision, 6 April 1984, Case No. *A/18* (Iran v. United States), 5 *Iran-U.S. C.T.R.* 251; interlocutory award No. ITL 68-193-3, 23 June 1988, *Reza Said Malek v. Iran*, Case No. 193, 19 *Iran-U.S. C.T.R.* 48; Award No. 474-268-1, 14 March 1990, *Schott v. Iran*, 24 *Iran-U.S. C.T.R.* 203, p. 218.

[46] See paras 70-73 below.

[47] Z. Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), p. 321-322 (commentary to Rule 37).

[48] See e.g. Written Statement of Venezuela, 30 May 2016, para. 74.

[49] My understanding is however that Luis García Armas, the only claimant in the ICSID Additional Facility case, has never been a national of Venezuela. The argument on jurisdiction *ratione personae* in the *Luis García Armas* case is not based on dual nationality but on estoppel since Luis García Armas was registered (upon his request) as a Venezuelan national investor in the SIEX files, which is the agency that regulates and control foreign investment.

## 5. Article 31(3)(c)

40. Besides the context, Article 31(3) VCLT provides for further elements to be taken into account when applying the general rule of interpretation. In particular, Article 31(3)(c) provides for "any relevant rules of international law applicable in the relations between the parties". As Professor Sands observed, this provision "appears to be the only tool available under international law to construct a general international law by reconciling norms arising in treaty and custom across different subject matter areas".[50] This provision was invoked by the Respondent in the *Serafín García Armas* case[51] but it was not accepted as relevant by the Arbitral Tribunal which did not substantially examine the relevance of Article 31(3)(c) and dismissed the argument by holding summarily that:

> "*si bien el APPRI dispone en su artículo XI(4) que deberán aplicarse al procedimiento: '*b) Las reglas y principios de Derecho Internacional*', sus términos son específicos y se convierten en la fuente primaria de su interpretación. Es necesario recurrir al derecho internacional únicamente cuando la letra del Tratado no es suficientemente clara para su interpretación*" ["Although the BIT provided in its Article XI(4) that: 'b) The rules and principles of international law' should be applied to the [interpretation] process, its terms are specific and provide the primary source of its interpretation. It is necessary to resort to international law only when the wording of the Treaty is not sufficiently clear for its interpretation."][52]

41. Nevertheless, despite the fact that it is rarely invoked, this means of interpretation forms a full part of the general rule and may prove as a useful tool in resolving interpretation issues such as the one arising in this case. From my point of view, Professor Schreuer's Opinion suggests a misunderstanding of this provision.[53] The effect of this provision is not to alter the text of the treaty but to reconcile its meaning with principles of general international law. To that end, a treaty provision shall not be interpreted in isolation from other rules of general international law.[54] This rule of interpretation shall be disregarded only if the treaty provision cannot be reconciled with the rule of general international law. In

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[50] P. Sands, 'Treaty, Custom and the Cross-fertilization of International Law', 1(1) *Yale Human Rights and Development Journal* (1998), p. 87.
[51] UNCITRAL, Decision on jurisdiction, 15 December 2014, *Serafín García Armas and Karina García Gruber v. Venezuela*, PCA Case No. 2013-3, para. 107.
[52] *Ibid*., para. 157.
[53] Schreuer Opinion, para. 50.
[54] ICJ, judgment, 6 November 2003, *Oil Platforms (Islamic Republic of Iran v. United States of America), I.C.J. Reports 2003*, p. 181-183, paras 39-42.

this context, it is difficult to assert, as Professor Schreuer does,[55] that resorting to customary international law in interpreting incomplete provisions or silences in a treaty amounts to unauthorized modification of such treaty.

42. According to R. Dolzer and M. Stevens, in the absence of treaty regulation, general principles and rules of international law would apply, according to which the "effective" nationality of the individual would govern.[56] In this context, general principles and rules of international law must be taken into consideration for interpreting imprecise provisions, as demanded by Article 31(3)(c) of the VCLT. However, in the *Waste Management* case the arbitral Tribunal held that restrictions spelled out in the text "with precision and in details" may not be overridden by importing rules of international law external to the treaty.[57] But this is not so in the present case, where Article 1(1)(a) of the BIT is general in nature and does not envisage the situation of dual nationals. In such a case, one must turn to international law which confirms the most natural reading of the terms employed in the provision.[58]

### 6. Principle of effectiveness ("*effet utile*")

43. The general rule of interpretation of Article 31 VCLT does not exclude resorting to various maxims of interpretation, among which the Latin maxim *ut res magis valeat quam pereat* (or principle of effective interpretation) plays a predominant role and is accepted as one of the core principles of treaty interpretation.[59] According to this principle,

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[55] Schreuer Opinion, para. 71.

[56] R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers, The Hague, 1995), at 34 (cited in *International Investment Law: Understanding Concepts and Tracking Innovations*, OECD, 2008, p. 14).

[57] ICSID, award, 30 April 2004, *Waste Management v. Mexico*, ICSID Case No. ARB(AF)/00/3, para. 85.

[58] See Part II, para. 67 *et seq*. below.

[59] PCIJ, Order of 19 August 1929, *Free Zones of Upper Savoy and the District of Gex*, Series A, No. 22, p. 13; ICJ, Merits, Judgment, 9 April 1949, *Corfu Channel (United Kingdom v. Albania), I.C.J. Reports 1949*, p. 24; Advisory Opinion, 18 July 1950, *Interpretation of Peace Treaties (second phase), I.C.J. Reports 1950*, p. 229; Judgment, 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya/Chad), I.C.J. Reports 1994*, p. 25, para. 51. See also PCIJ, Judgment, 30 August 1924, *Mavrommatis Palestine Concessions*, Series A, No. 2, p. 34; ICJ, Preliminary Objections, Judgment, 22 July 1952, *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), I.C.J. Reports 1952*, p. 105; Advisory Opinion, 8 June 1960, *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, I.C.J. Reports 1960*, p. 160; Merits, Judgment, 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya/Chad), I.C.J. Reports 1994*, p. 23, para. 47; Jurisdiction of the Court, Judgment, 4 December 1998, *Fisheries Jurisdiction (Spain v. Canada), I.C.J. Reports 1998*, p. 455, para. 52; Preliminary Objections, Judgment, 1 April 2011, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), I.C.J.*

preference must be given to "an interpretation which gives a term some meaning rather than none".[60] This principle was understood by the ILC as being implicit in the good faith interpretation principle, hence its absence from the final text of the VCLT.[61]

44. The aim of the principle of effectiveness is to ensure the realization of the object and the purpose of the treaty.[62] As enlighteningly put by the ICJ in the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*,

> "it stands to reason that if, as a matter of fact, a dispute had been settled, it is no longer a dispute. Therefore, if the phrase 'which is not settled' is to be interpreted as requiring only that the dispute referred to the Court must in fact exist, that phrase would have no usefulness. Similarly, the express choice of two modes of dispute settlement, namely, negotiations or resort to the special procedures under CERD, suggests an affirmative duty to resort to them prior to the seisin of the Court. Their introduction into the text of Article 22 would otherwise be meaningless and no legal consequences would be drawn from them contrary to the principle that words should be given appropriate effect whenever possible."[63]

45. In the case of *United States – Standards for Reformulated and Conventional Gasoline*, the Appellate Body of the World Trade Organization held: "[a]n interpreter is not

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*Reports 2011*, p. 125-126, paras 133-134; WTO, Report of the Appellate Body, 4 October 1996, *Japan – Taxes on Alcoholic Beverages*, case AB-1996–2, doc. WT/DS8, 10 &11/AB/R, p. 12; WTO, Report of the Appellate Body, 14 December 1999, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, case AB-1999–8, doc. WT/DS98/AB/R, p 24, paras 80-81 ; WTO, Report of the Appellate Body, 14 December 1999, *Argentina – Safeguard Measures on Imports of Footwear*, case AB-1999–7, doc. WT/DS121/AB/R, p. 27, para. 88; Award, 17 July 1986, *Filleting within the Gulf of St. Lawrence between Canada and France, R.I.A.A.*, vol. XIX, p. 243, para. 30; Decision, 21 October 1994, *Case Concerning a Boundary Dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy, R.I.A.A.*, vol. XXII, p. 25, para. 72; ICSID, Final Award, 27 June 1990, *Asian Agricultural Products LTD. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, para. 40 (Rule E). See also *ILC Yearbook, 1966*, vol. II, p. 218-219.

[60] R.K. Gardiner, *Treaty Interpretation*, 2nd edition (Oxford University Press, 2015), p. 179.

[61] ILC, Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, *ILC Yearbook, 1964*, vol. II, p. 60, para. 27, and p. 61, para. 29, where the Special Rapporteur advances reasons for hesitating to include the principle of "effective" interpretation among the general rules; debate on the Commission on the issue: *ILC Yearbook, 1964*, vol. I, p. 290, para. 106; *ILC Yearbook, 1966*, vol. II, p. 219. See also : R.K. Gardiner, *Treaty Interpretation*, 2nd edition (Oxford University Press, 2015), p. 168-172 and 179.

[62] See e.g. ICJ, Merits, Judgment, 9 April 1949, *Corfu Channel Case (United Kingdom v. Albania), I.C.J. Reports 1949*, p. 24; WTO, report of the Appellate Body, 13 October 1999, *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103-DS/113/AB/R, para. 133; ICSID, award, 27 June 1990, *Asian Agricultural Products Ltd v. Sri Lanka*, ARB/87/3, para. 40 (rule E); ICSID, award, 12 October 2005, *Noble Ventures, Inc. v. Romania*, ARB/01/11, para. 50. See Also: R.K. Gardiner, *Treaty Interpretation*, 2nd edition (Oxford University Press, 2015), p. 221.

[63] ICJ, Preliminary Objections, Judgment, 1 April 2011, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), I.C.J. Reports 2011*, p. 126, para. 134.

free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[64]

46. In the present case, Article I(1)(a) of the 1995 BIT would not be effective if it were construed as including dual nationals from both Contracting States. In particular, to use the terms in Article I(1)(a), a dual national could not "make[.] investments in the territory *of the other* Contracting Party" because the investor would in fact be making investment *in his own* State. Moreover, as observed elsewhere in this report,[65] interpreting Article I(1)(a) as including dual nationals with the dominant nationality of the State of investment would also deprive other BIT provisions from effect, in adamant contradiction with the principle of effectiveness.

### B. Supplementary means of interpretation (Article 32 VCLT)

47. As I recalled above,[66] the conclusion in my previous Expert Report was that the interpretation of the 1995 BIT regarding the dual nationality issue under the general rule of treaty interpretation embodied in Article 31 VCLT provided for a clear and unambiguous meaning, and that resorting to the supplementary means under Article 32 VCLT was not necessary. However, in such circumstances, Article 32 may still be resorted to as a means to confirm the meaning obtained using the general rule.[67]

48. Article 32 of the VCLT provides:

"*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

[64] WTO, report of the Appellate Body, 29 April 1996, *United States – Standards for Reformulated and Conventional Gasoline*, case AB-1996-1, doc. WT/DS2/AB/R, p. 23. See also report of the Panel, 3 May 2002, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, para. 7.71.
[65] See para. 25 above.
[66] See para. 5 above.
[67] See also ICJ, judgment, 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya/Chad), I.C.J. Reports 1994*, p. 27-28, para. 55.

(b) Leads to a result which is manifestly absurd or unreasonable."

49. Supplementary means mentioned in this provision reflect the necessary link between the treaty (as an expression of the will of the parties) and the circumstances of its conclusion (the fact that a treaty develops in a social environment).[68] Supplementary means of interpretation include the *travaux préparatoires* as well as, more widely, the circumstances of conclusion.[69] Their use is only open to the interpreter (i) in order to confirm the interpretation obtained by applying the general rule; or (ii) when the application of the general rule leads to an ambiguous or manifestly absurd or unreasonable outcome.

50. Professor Schreuer attempts to minimize the relevance of the parties' intention by classifying this element as part of a "subjective approach" that would be opposed to an "objective approach".[70] This way of presenting things masks the real role of intention in treaty interpretation. Assessing the parties' intention is not an imported method or an "independent element"[71] completely disconnected from the text of the treaty. On the contrary, assessing the parties' intention, including by using the *travaux préparatoires*, is at the core of Article 32 VCLT and supplements the general rule contained in Article 31. In other words, both provisions go hand in hand.

51. Although Professor Schreuer states that "reference to the purported intention of the parties to the BIT, derived from sources extraneous to the Treaty's text, is not in line with the accepted canons of treaty interpretation",[72] he must admit that looking at the ordinary meaning of the terms is only the first step of the interpretation process.[73] Intention must indeed be addressed in light of Article 31 (terms, object and purpose of the treaty). It may also be confirmed or clarified in light of Article 32 (*travaux préparatoires*).

[68] P. Daillier, M. Forteau, A. Pellet, *Droit international public*, 8th edition (L.G.D.J., Paris, 2009), p. 286, para. 169-1-c.
[69] Article 32 VCLT; ICJ, judgment, 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *I.C.J. Reports 1994*, p. 22, para. 41; R.K. Gardiner, *Treaty Interpretation*, 2nd edition (Oxford University Press, 2015), p. 347 *et seq*.
[70] Schreuer Opinion, para. 60.
[71] *Ibid.*, para. 62.
[72] *Ibid.*, para. 67.
[73] *Ibid.*, para. 64.

52. The ILC statement and the case law advanced by Professor Schreuer in order to dismiss the relevance to the intention of the parties[74] do not support his position since they are wrongly presented as excluding any consideration of the parties' intention, whereas what they only say is that intention should not serve as an excuse to override or disregard the text of a treaty, which is quite different. It is sufficient to quote the ILC statement on the role of the parties' intention that is relied on by Professor Schreuer itself to understand that the Commission was in no way opposed to taking into account the intention of the parties, which was even the primary objective of any interpretation:

> "the Commission's approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression *of the intentions of the parties*, and that the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation."[75]

53. The ILC was only warning against a hazardous exploration of the parties' intention as a substitute for the text as the basis (i.e. starting point) of interpretation. Indeed, it further stated:

> "Nevertheless, it felt that it would be unrealistic and inappropriate to lay down in the draft articles that no recourse whatever may be had to extrinsic means of interpretation, such as *travaux préparatoires*, until after the application of the rules contained in article 27 [31 in the text of the Convention] has disclosed no clear or reasonable meaning."[76]

54. Despite the physical separation of Articles 31 and 32, the ILC Special Rapporteur on the Law of Treaties, Sir Humphrey Waldock, considered it quite normal to have recourse to the supplementary means of interpretation. As noted in his Third Report on the topic:

> "There is, however, a difference between examining and basing a finding upon *travaux préparatoires,* and the Court itself has more than once referred to them as confirming an interpretation otherwise arrived at from a study of the text. Moreover, it is the constant practice of States and tribunals to examine any relevant *travaux préparatoires* for such

[74] *Ibid.*, paras 61-66.
[75] *ILC Yearbook, 1966*, vol. II, p. 223 – italics added.
[76] *Ibid.*, adding that "international tribunals, as well as States and international organizations, have recourse to subsidiary means of interpretation, more especially *travaux préparatoires*". The Commission also stated in the same vein: "the provisions of article [32 in the Convention] by no means have the effect of drawing a rigid line between the 'supplementary' means of interpretation and the means included in article [31]. The fact that article [32] admits recourse to the supplementary means for the purpose of 'confirming' the meaning resulting from the application of article [31] establishes a general link between the two articles and maintains the unity of the process of interpretation.", *ibid.*, p. 220, para. 10.

> light as they may throw upon the treaty. It would therefore be unrealistic to suggest, even by implication, that there is any actual bar upon mere reference to *travaux préparatoires* whenever the meaning of the terms is clear".[77]

In the ICJ practice, complete exclusion of the *travaux préparatoires* when the text of the treaty is clear receded over time.[78] Thus, for example, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the ICJ interpreted provisions of the Fourth Geneva Convention, in particular its Article 2, in light of its object and the parties' intention, which resulted in a clear meaning. Despite this result, the Court then held that "[t]hat interpretation is confirmed by the Convention's *travaux préparatoires*."[79]

55. In the present case, the *travaux préparatoires* reveal that Spain did communicate to Venezuela its view on the role of residence, and that such view could therefore not be ignored by Venezuela as the negotiations went forward and the BIT was eventually signed.

56. Spain expressed its view on the importance of residence as an eligibility criterion for investors to BIT protection as early as a meeting held in Madrid on 30 and 31 January 1991. On this occasion, the two delegations discussed a draft put forward by Spain which insisted on the importance of residence. The summary of the discussed points indicated in respect to Article 1(1): "*Aclarar el concepto de residente y sus implicaciones para España*" ["Clarify the concept of resident and its implications for Spain"].[80] The negotiation records

[77] *ILC Yearbook, 1964*, vol. II, p. 58, para. 20 (footnotes omitted).
[78] Statement of Shabtai Rosenne, *ILC Yearbook, 1964*, vol. I, p. 283, para. 17 (also quoted in R.K. Gardiner, *Treaty Interpretation*, 2nd edition (Oxford University Press, 2015), p. 392). See also in this sense P. Daillier, M. Forteau, A. Pellet, *Droit international public*, 8th edition (L.G.D.J., Paris, 2009), p. 286, para. 169-1-d; Arbitral award, 17 July 1986 on *Filleting within the Gulf of St. Lawrence between Canada and France*, *R.I.A.A.*, vol. XIX, p. 260-261, para. 57-58; CIJ, Judgment, 20 December 1988, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *I.C.J. Reports 1988*, p. 85, para. 37 and p. 89, para. 46; Preliminary Objections, Judgment, 26 June 1992, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *I.C.J. reports 1992*, p. 247 *et seq*., para. 15 *et seq*.; Judgment, 13 December 1999, *Kasikili/Sedudu Island (Botswana/Namibia)*, *I.C.J. Reports 1999*, p. 1074-1075, para. 46.
[79] ICJ, Advisory Opinion, 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *I.C.J. Reports 2004*, p. 175, para. 95. See also UNCITRAL, Partial Award, 23 May 2011, *HICEE v. Slovak Republic*, PCA Case No. 2009-11, para. 138. Admittedly, in the latter case the Explanatory Notes were not part of the *travaux préparatoires*. Nevertheless they helped cast a light on the positions expressed by the parties during the *travaux préparatoires*.
[80] Negociacion del Acuerdo para la promocion y proteccion de las inversiones extranejas entre Venezuela y el Reino de España (basado en la propuesta de España), resumen de los puntos discutidos, 6 February 1991 (summary of the points discussed at the Madrid meeting held on 30 and 31 January 1991).

detail the discussion of this item between the delegations.[81] The discussion shows that Spain's conception of foreign investment was being linked to residence more than to nationality, thus showing that, in Spain's view, although nationality has its importance in assessing the definition of investor and investment, the key element is in fact residence. It is then apparent that Spain's insistence on residence is tantamount to endorsing the effective and dominant nationality principle because precisely residence is generally accepted as one of the main criteria that make a nationality effective or dominant.[82] Based on the exchange on this point between Spain and Venezuela as part of the *travaux préparatoires*, when it comes to natural persons it appears that Spain was minded to limit BIT protection to those persons who reside in one Contracting Party, of which they are nationals, and make an investment on the territory of the other Contracting Party. In case of dual nationals, this position in fact equates to applying the principle of effective and dominant nationality.

57. I have not been provided with more detailed records of the *travaux préparatoires*, nor have I any access to them by any other means, which makes it impossible to ascertain whether a more detailed discussion took place on the issue. In my opinion what is essential however is that the negotiations went forward successfully and that the BIT was in fact concluded with Venezuela being well aware of Spain's position regarding the weight of the criterion of residence. This suggests that the intention of the Parties was to deny the extension of the BIT protection to dual nationals whose dominant nationality is that of the

[81] Notas de la negociacion realizada con el Reino de España (Madrid, 30 and 31 January 1991). The importance of the residence issue for Spain is confirmed in the text of several BITs Spain concluded with other States: see e.g. Agreement on the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Tunisian Republic (28 May 1991), Article 1(a); Agreement between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments (3 October 1991), Article I(1)(a); Agreement on the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Arab Republic of Egypt (3 November 1992), Article I(1)(a); Agreement on the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Republic of Paraguay (11 October 1993), Article I(1)(a); Agreement on the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Republic of the Philippines (19 October 1993), Article 1(3)(a); Agreement on the Reciprocal Protection and Promotion of Investments between Spain and the Dominican Republic (16 March 1995), Article I(1)(a); Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Republic of South Africa (30 September 1998), Protocol.

[82] Mixed Claims Commission Great Britain-Venezuela, *Mathison* case (on the merits), 1903, *R.I.A.A.*, vol. IX, p. 485; ICJ, Judgment, 6 April 1955, *Nottebohm (Liechtenstein v. Guatemala), I.C.J. Reports 1955*, p. 22; Italian-United States Conciliation Commission, *Florence Strusky-Mergé* case – Decision No. 55, 10 June 1955 (United States v. Italy), *R.I.A.A.*, vol. XIV, p. 244 (citing the *Nottebohm dictum*) and p. 247, paras 6 and 7; *Spaulding* case – Decision No 148, 21 December 1956 (United States v. Italy), *R.I.A.A.*, vol. XIV, p. 293; Iran-United States Claims Tribunal, Decision, 6 April 1984, Case No. *A/18* (Iran v. United States), 5 *Iran-U.S. C.T.R.*, p. 263 (citing the *Nottebohm dictum*), p. 265; Iran-United States Claims Tribunal, Interlocutory Award, 1 December 1989, *Katrin Zohrabegian Abrahamian v. Iran*, Case No. 77, 23 *Iran-U.S. C.T.R.* p. 285; United States Court Of Appeals, Seventh Circuit, 19 February 1980, *Al Sadat v. Mertes et alii*, 615 F.2d 1176, 54 A.L.R. Fed. 401, 1980 U.S. App. Decision, F.2d 1187.

State of investment, in which they do reside, which seems clearly to be the case in the present case since all investors lived in Venezuela at the relevant times.

### C. The law governing jurisdiction and nationality requirements under the BIT

58. The ultimate basis for arbitration's legitimacy and for the adjudicating body's jurisdiction is the consent of State parties to the BIT. Such consent, and the extent thereof, is to be found within the instrument containing it.[83] This will typically be the BIT, as well as the ICSID Convention or UNCITRAL rules where relevant.[84] Although the treaty establishes a *lex specialis* regime, the rules and principles of international law are still relevant in a complementary way: it is a generally accepted principle that no treaty is concluded and applied in a legal vacuum or in clinical isolation.[85] Moreover, were there still be any doubts as to the applicability of rules and principles of international law, the 1995 BIT expressly incorporates them (as well as other elements) by reference as part of the agreed applicable law in Article XI(4).

59. Professor Schreuer objects that Article XI(4) provides for the law applicable to the merits only,[86] and implies therefore that the rules and principles of international law and other treaties between the parties are not relevant when it comes to jurisdictional matters. I am sorry to say that I deem this *petitio principii* plainly wrong.

60. When determining the law applicable to the disputes between a Contracting Party and investors of the other Contracting Party, Article XI(4) of the 1995 BIT makes no

[83] Z. Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), p. 75, para. 126.
[84] ICSID, Decision on Jurisdiction (unpublished), 12 May 1974, *Holiday Inns S.A. and others v. Morocco*, ICSID Case No ARB/72/1; ICSID, Award, 4 October 2006, *World Duty Free Company v. Kenya*, ICSID Case No. ARB/00/7; ICSID, Decision on Jurisdiction, 8 March 2010, *Inmaris Perestroika v. Ukraine*, ICSID Case No. ARB/08/8, para. 54; ICSID, Award, 22 August 2012, *Daimler Financial Services v. Argentina*, ICSID Case No. ARB/05/1, para. 50. See also M. Waibel, 'Investment Arbitration: Jurisdiction and Admissibility', Legal Studies Research Paper Series, paper No 9/2014, Cambridge University Press, p. 2.
[85] WTO, Report of the Appellate Body, 29 April 1996, *United States - Standards for Reformulated and Conventional Gasoline*, case AB-1996-1, WT/DS2/AB/R, p. 17. See also ICJ, Judgment, 20 July 1989, *Elettronica Sicula Spa – ELSI (United States v. Italy), I.C.J. Reports 1989*, p. 42, para. 50; Judgment, 6 November 2003, *Oil Platforms (Islamic Republic of Iran v. United States of America), I.C.J. Reports 2003*, p. 181-183, para. 39-42; ICSID, Decision on Jurisdiction and Admissibility, 8 February 2013, *Ambiente Ufficio S.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, paras 599-600; see also article 31(3)(c) of VCLT accepted as customary international law.
[86] Schreuer Opinion, paras 88, 94, 100.

difference between the jurisdictional (or procedural) matters on the one hand and substantial issues on the other hand:

> "4. The arbitration shall be based on:
> […]
> (b) The rules and principles of international law;…"

61. Professor Schreuer refers to one of his own articles on the matter ("Jurisdiction and Applicable Law in Investment Treaty Arbitration").[87] However, the article concerned seems more nuanced: it acknowledges that the rules relevant to jurisdiction are not necessarily confined to the provisions of the instrument containing consent but may also extend, at least, to the domestic law of the host State and applicable rules of international law.[88]

62. It can also be noted that Article XI(4)(c) on relevant domestic law necessary applies to jurisdiction matters, for instance when assessing issues of nationality and legality of the investment.[89] Referring to domestic law, Professor Schreuer himself admits that incorporation by reference is a valid way of fixing applicable law to jurisdiction in the instrument containing consent.[90] I do not see any justification why sub-paragraph (b) and (c) of Article XI(4) should be differently interpreted and it would be highly unusual to conclude that the rules referred to in Article XI(4) of the BIT only apply to adjudication on the merits.[91]

63. Most of the case law referred to by Professor Schreuer in support of his view is ICSID case law or based on BITs which do not always detail the applicable law, by contrast to the 1995 BIT. Other decisions deal with issues that are not of concern here, for example determining the relevance of domestic law in assessing the validity of consent of the respondent State to investment. The present case is different: it is an UNCITRAL case and an ICSID Additional Facility case, and the relevant BIT contains a detailed clause on applicable

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[87] 1(1) *McGill journal of Dispute Resolution* (2014), p. 1-25.
[88] *Ibid.*, p. 5-6, 17 (regarding domestic law) and p. 16-17 (regarding applicable rules of international law), concluding in particular at p. 24: "Questions of jurisdiction are not governed by the law applicable to the merits of a case but must be determined by reference to the legal instruments establishing jurisdiction *and by general international law*." (emphasis added).
[89] This is acknowledged *ibid*., p. 2.
[90] *Ibid*., p. 4.
[91] *Contra*: ICSID, Award, 6 November 2008, *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, para. 135; UNCITRAL, First Partial Award, 10 December 2008, *Nordzucker AG v. Poland*, at paras 107, 108, 110 and 118. But the issue at stake in these cases was to establish the consent of the Respondent to arbitration under the relevant BIT, not to make an exhaustive assessment of the law applicable to jurisdiction.

law. In any event, the case law invoked refers to treaties containing consent but does not deny the applicability of rules of general international law at the jurisdictional stage, in particular when interpreting such conventional instruments. Below are several representative examples of the non-relevance of several cases relied on by Professor Schreuer:

- *ICSID*, Decision on Jurisdiction, 24 May 1999, *Ceskoslovenska Obchodni Banka AS v. Slovakia*, ICSID Case No. ARB/97/4, para. 35: "The question of whether the parties have effectively expressed their consent to ICSID jurisdiction is not to be answered by reference to national law. It is governed by international law as set out in Article 25(1) of the ICSID Convention": this decision is not relevant because it only refers to consent, not to other issues of jurisdiction.
- *ICSID*, Decision on Jurisdiction, 17 July 2003, *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, para. 42 and in particular para. 88: "Article 42 [of the ICSID Convention] is mainly designed for the resolution of disputes on the merits and, as such, it is in principle independent from the decisions on jurisdiction, governed solely by Article 25 of the Convention and those other provisions of the consent instrument which might be applicable": not relevant in this case because issues of jurisdiction and merits are addressed separately in Articles 41 and 42 of the ICSID Convention, respectively, which is not the case in the 1995 BIT. The same goes for *Noble Energy Inc v. Ecuador, ICSID*, Decision on Jurisdiction, 5 March 2008, ICSID Case No. ARB/05/12, paras 56-57. It should be observed that Article 25 is not the only provision of the Convention dealing with issues related to jurisdiction. Whereas Article 25 deals with the jurisdiction of the Centre, Article 41 addresses the related issue of competence of the Tribunal. It is interesting that Article 41 on competence and Article 42 on the applicable law on the merits are regrouped under the same section 3 entitled "Powers and Functions of the Tribunal". Moreover, Article 41(2) specifies that in certain cases the Tribunal may decide to join issues on jurisdiction and/or competence to the phase on the merits. This shows the interrelation that may exist between these issues in some cases. Therefore, a strict separation between the law applicable to jurisdiction and the law applicable to the merits is not warranted.
- *ICSID*, Award, 22 August 2012, *Daimler Financial Services v. Argentina*, ICSID Case No. ARB/05/1, para. 50: "For purposes of the Tribunal's jurisdiction […] the proper law to be applied is the German-Argentine BIT itself, in concert with the ICSID

Convention, as interpreted in the light of general principles of international law". The same goes for example for another case invoked by Professor Schreuer: *ICSID*, Decision on Jurisdiction, 8 March 2010, *Inmaris Perestroika v. Ukraine*, ICSID Case No. ARB/08/8, para. 54. Professor Schreuer himself admits that "jurisdictional issues, including the existence of an investment, the presence of an eligible investor and the parties' consent to arbitration, must be determined by reference to the legal instruments establishing jurisdiction *and by general international law*."[92]

- Award, 21 April 2006, *Berschader v. Russian Federation*, SCC Case No. 080/2004, para. 95, Arbitration Institute of the Stockholm Chamber of Commerce, ORIL IIC 314: the tribunal accepts the applicability of the relevant rules of international law applicable in relations between the parties in addition to treaty provisions as part of the relevant law on jurisdiction, and "insofar as the terms of the Treaty are unclear or require interpretation or supplementation".
- *ICSID*, Award, 12 May 2011, *Meerapfel v. Central African Republic*, ICSID Case No. ARB/07/10, paras 139-147: this award is not relevant because the Tribunal addressed an objection by the State relating to the validity of its consent to arbitration based on an alleged violation of domestic law by a provision of the treaty containing consent.
- *ICSID*, Decision on jurisdiction, 3 August 2004, *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, paras 29-31: the parties agreed on the applicability of general rules and principles of international law at the jurisdictional phase. As expected, the Tribunal relied on Article 25 of the ICSID Convention and the relevant article of the BIT containing consent.
- *ICSID*, Decision on Jurisdiction, 8 December 2003, *Azurix v. Argentina*, ICSID Case No. ARB/01/12, paras 48-50: the discussion by the Tribunal concerned the distinction between the law applicable to jurisdiction and the law applicable to the merits under the ICSID Convention, such distinction being embodied in two separate articles (Articles 41 and 42). In the present case, the ICSID Convention is not applicable and the 1995 BIT does not make such a distinction.
- *ICSID*, Decision on Jurisdiction, 21 March 2007, *Saipem v. Bangladesh*, ICSID Case No. ARB/05/07, paras 68-70 and 78-82: discussing issues of jurisdiction within the

[92] C. Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration', 1(1) *McGill journal of Dispute Resolution* (2014), p. 4 – emphasis added.

ICSID Convention and the relevant treaty, the Tribunal accepted these instruments should be interpreted in light of international law (para. 78).[93]

64. As has been seen above, at least rules and principles of international law (Article XI(4)(b)) as well as domestic law of the host State[94] (Article XI(4)(c)) remain relevant to issues of jurisdiction in a BIT context. Their incorporation in the BIT by reference makes their relevance even clearer. As Professor Zachary Douglas makes clear, "[t]he law applicable to an issue relating to the jurisdiction of the tribunal and admissibility of claims and counterclaims is the investment treaty".[95] Nothing in the BIT supports the position that Article XI(4), which contains the law agreed by State parties as applicable to the resolution of disputes between State parties and investors under the BIT, does not apply to issues of jurisdiction as well. In any case, the rules and principles of (general) international law would apply to the interpretation of a treaty under Article 31(3)(c) VCLT, no matter whether the interpretation takes place for jurisdictional matters or concerning the merits.

65. Elements of applicable law listed in Article XI(4) of the 1995 BIT point to an absence of jurisdiction in cases of dual nationals (at least when the dominant nationality is that of the host State) for the following reasons:

- Concerning Article XI(4)(a): other relevant agreements concluded between the parties (Treaty of Amity of 1990 and Economic Agreement of 1992) form part of the circumstances of the conclusion of the BIT and aim at facilitating transnational exchanges and the protection of *foreign* investment;

- Concerning Article XI(4)(b): rules and principles of international law (customary international law) apply as a complementary legal framework to the treaty and this

[93] Among the case-law referred to by Professor Schreuer (footnote 85 of his Opinion), only one decision seems to partly confirm his position: in the case of *Enron v. Argentina* the Arbitral Tribunal considered "the applicable provisions in respect of jurisdiction and admissibility are *only* those of the ICSID Convention and the Bilateral Investment Treaty" (without mentioning applicable rules of international law – emphasis added) (ICSID, Decision on jurisdiction, 14 January 2004, *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, para. 38); however, the Decision refers to "provisions" (therefore necessarily limiting its focus on written instruments), addresses a specific argument limited to issue of the relevance of domestic law, and does not expressly exclude the application of general international law.

[94] See also Z. Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), p. 77-78, para. 133.

[95] *Ibid*., p. 74 (Rule 6).

indeed does not amount to "changing its meaning":[96] the principle of effective and dominant nationality as a rule of customary international law not limited to diplomatic protection contexts, is applicable.

66. Even admitting that Article XI(4) states the law applicable to the merits only, it has been widely accepted by the above-mentioned case law that rules and principles of international law are part of the applicable law at the jurisdictional stage (as complementing the treaty provisions).[97] The principle of effective and dominant nationality has developed into such a principle of general international law relevant in various areas, including international investment law.[98] Therefore, this principle applies to the interpretation of the BIT provisions including at the stage of jurisdiction. As the Claimants' dominant nationality is that of Venezuela (with the exception of Luis García Armas who is exclusively Spanish), they cannot qualify as investors as per Article I(1)(a) and, therefore, the Arbitral Tribunal lacks jurisdiction on the basis of the BIT.

## II. THE ROLE OF DIPLOMATIC PROTECTION RULES IN BIT INTERPRETATION

67. As per Professor Schreuer's Legal Opinion, the BIT does extend protection to investors having the nationality of both contracting States.[99] In his view, when States wish to exclude the application of the criterion of effective or dominant nationality they must include a clause to this effect in the BIT.[100] The applicability of principles and rules of general international law to investment treaty interpretation is denied, including the principle of effective and dominant nationality which Professor Schreuer seeks to attach exclusively to the rules of diplomatic protection.[101]

68. It should be noted that the *Serafín García Armas* decision on jurisdiction of 15 December 2014 is among the rare non-ICSID arbitral decisions dealing with the situation of

[96] Schreuer Opinion, para. 71.
[97] See para. 58 and footnote 85 above.
[98] As developed paras 67-73 and 80 below.
[99] Schreuer Opinion, paras 48-49, 92.
[100] *Ibid*., paras 50, 150, 155 and 193.
[101] *Ibid*., paras 27-28, 68-73 *inter alia*.

investors as physical persons having the nationality of both contracting States. Most previous decisions were either concerned with dual nationals having the nationality of a third State[102], or based on the ICSID system[103] (and therefore subject to Article 25 of the ICSID Convention), or both.[104] In particular, the case law relied upon by Professor Schreuer does not support his position because it fall into these categories. For instance, the case of *Saba Fakes v. Turkey*[105] Professor Schreuer relies on is irrelevant not only because it is an ICSID case, thus subject to Article 25 of the ICSID Convention which is *lex specialis vis-à-vis* rules of general international law, but also because the case was about a dual national not having the nationality of the respondent State, in which case the test of effective and dominant nationality typically does not find application. The same observations may be made regarding the case of *Levy v. Peru* also relied upon by Professor Schreuer, since the claimant, although having multiple nationalities, does not seem to have had the Peruvian nationality.[106] The same goes for *Pey Casado v. Chile*, another ICSID case relied upon by Professor Schreuer.[107]

69. Other cases similar to the *Serafín García Armas* case have been lodged since the 2014 decision on jurisdiction in this case, but these proceedings are still at an early stage.[108]

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[102] See e.g. Italian-United States Conciliation Commission, *Flegenheimer Case – Decision No 182*, 20 September 1958, *R.I.A.A.*, vol. XIV, p. 327-390; UNCITRAL, Decision on Jurisdiction, 30 April 2010, *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, para. 129.

[103] See e.g. ICSID, Decision on Jurisdiction, 21 February 2003, *Champion Trading Company Ameritrade International Inc., James T. Wahba, John B. Wahba, Timothy T. Wahba v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9; ICSID, Decision on jurisdiction, 11 April 2007, *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15; ICSID, Award, 8 May 2008, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2 (where Mr. Pey Casado, a dual national of Chile and Spain, had first to relinquish his Chilean nationality before engaging proceedings against Chile based on the Chile-Spain BIT); ICSID, Award of 11 December 2013, *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20.

[104] ICSID, Award, 26 July 2001, *Mr. Eudoro Armando Olguín v. Republic of Paraguay*, ICSID Case No ARB/98/5; ICSID, Award, 7 July 2004, *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7; ICSID, Award, 14 July 2010, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20.

[105] ICSID, Award, 14 July 2010, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, paras 70, 73, 79; Schreuer Opinion, para. 150.

[106] ICSID, Award, 26 February 2014, *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, para. 143; Schreuer Opinion, para. 151.

[107] ICSID, Award, 8 May 2008, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, para. 415; Schreuer Opinion, para. 153.

[108] UNCITRAL, *Michael Ballantine & Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17 (initiated in 2014); *Sergei Viktorovich Pugachev v. Russian Federation* (initiated in 2015); *Manuel García Armas et alii v. Venezuela* case, PCA Case No. 2016-08 (initiated in 2015); *Dawood Rawat v. Mauritius*, PCA Case No. 2016-20 (initiated in 2015).

70. It is in order to recall that, while the requirement for an effective nationality based on a "genuine link" had been traditionally used a long time ago within the framework of diplomatic protection[109] and was vividly confirmed by the Court in the *Nottebohm* case,[110] the concept of "dominant" nationality has been enshrined in the investment litigation framework. In this respect, the *A/18* case decided by the Iran/US Arbitral Tribunal is a milestone in the development of the concept of dominant nationality[111] and concerns an investment, not a diplomatic protection, case. It is only later on that it was expanded in the field of diplomatic protection.

71. Indeed the principle of dominant nationality in investment contexts has crystallized through a series of judicial decisions, of which the *A/18* case is but one (admittedly crucial) step. In the *Mergé* case, although the claimant was a national of both States members of the Conciliation Commission (Italy and the USA) the claim did not relate to an investment. Further, the claimant was represented in the proceedings by Italy, by contrast with investor-State arbitration.[112] The Commission nevertheless applied the principle of dominant nationality.[113] As the ILC observes regarding the opinion of the Conciliation Commission in this decision, "the principle of effective nationality and the concept of dominant nationality were simply two sides of the same coin."[114] This rule was then applied by the Commission in about 50 cases involving similar circumstances with dual nationals.[115]

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[109] See Pellet Report, footnote 53.

[110] ICJ, Judgment, 6 April 1955, *Nottebohm (Liechtenstein v. Guatemala), I.C.J. Reports 1955*, p. 22; see Pellet Report, para. 49. Precedents include Mixed Claims Commission Great Britain-Venezuela, *Mathison* case (on the merits), 1903, *R.I.A.A.*, vol. IX, p. 485; PCA, Decision of 3 May 1912, *Canevaro* (Italy/Peru), *R.I.A.A.*, vol. XI, p. 397; French-German Mixed Arbitral Tribunal, decision, 10 July, 1926, *Barthez de Montfort v. Treuhander Hauptverwaltung* (France v. Germany), *ILR*, vol. 3, p. 279, *inter alia*. See also *Annuaire de l'Institut de Droit International*, vol. 10, 1888-1889 (12th session, Lausanne), p. 3, 25.

[111] This Decision was preceded by others in the same vein: see Iran-United States Claims Tribunal, Decision, 29 March 1983, *Nasser Esphahanian v. Bank Tejarat*, case No. 31-157-2, 2 *Iran-U.S. C.T.R.* 157; Decision, 29 March 1983, *Ataollah Golpira v. Iran*, case No. 32-211-2, 2 *Iran-U.S. C.T.R.* 171; Decision, 29 March 1983, *Paridokht Kohan Haroonian v. Iran*, case No. 33-418-2, 2 *Iran-U.S. C.T.R.* 226. See paras 71 *et seq*. below. See also Pellet Report, paras 50-51.

[112] Italian-United States Conciliation Commission, *Florence Strusky-Mergé* case – Decision No. 55, 10 June 1955 (United States v. Italy), *R.I.A.A.*, vol. XIV, p. 236.

[113] *Ibid.*, p. 246-247. See also Pellet Report, para. 53.

[114] *ILC Yearbook, 2006*, vol. II(2), p. 35.

[115] See, for example, *Spaulding* case – Decision No. 148, 21 December 1956 (United States v. Italy), *R.I.A.A.*, vol. XIV, p. 292; *Zangrilli* case – Decision No. 149, 21 December 1956, *R.I.A.A.*, vol. XIV, p. 294; *Cestra* case – Decision No. 165, 28 February 1957, *R.I.A.A.*, vol. XIV, p. 307; *Salvoni* case – Decision No. 169, 9 May 1957, *R.I.A.A.*, vol. XIV, p. 311; *Ruspoli-Droutzkoy* case – Decision No. 170, 15 May 1957, *R.I.A.A.*, vol. XIV, p. 314; *Puccini* case – Decision No. 173, 17 May 1957, *R.I.A.A.*, vol. XIV, p. 323; *Graniero* case – Decision No. 186, 20 January 1959, *R.I.A.A.*, vol. XIV, p. 393; *Ganapini* case – Decision No. 196, 30 April 1959, *R.I.A.A.*, vol. XIV, p. 400; *Turri* case – Decision No. 209, 14 June 1960, *ILR*, vol. 30 (1966), p. 371; *Di Cicio* case – Decision No. 226, 9 November 1962, *ILR*, vol. 40 (1970), p. 148.

Later, in a series of decisions, the Iran-United States Claims Tribunal confirmed this approach by applying it in investments context. The first of these decisions was made in the case of *Nasser Esphahanian v. Bank Tejarat*. This case was related to an investment and the claimant was the investor. In its decision the Tribunal held:

> "[T]his Tribunal has jurisdiction (a) over claims against Iran by dual Iran-United States nationals when the dominant and effective nationality of the Claimant is that of the United States and (b) over claims against the United States by dual Iran-United States nationals when the dominant and effective nationality of the Claimant is that of Iran."[116]

72. A year later, the Tribunal's decision in the case *A/18* confirmed this approach.[117] In this case, the Tribunal applied the effective and dominant nationality doctrine although the issue clearly was not a diplomatic protection exercise. It might be useful to recall the Tribunal's consideration of the matter:

> "If customary international law is to be applied, the Tribunal should, in each case involving a dual national, resolve the issue by determining the dominant and effective nationality of the dual national claimant. The principle of effective nationality has long been applied to resolve conflicts of nationality in international arbitration."[118]

73. The Tribunal applied again this approach in *Reza Said Malek v. Iran* a few years later where it observed: "[T]he dominant and effective nationality of the Claimant Reza Said Malek was, for the purpose of this Tribunal's jurisdiction, that of the United States of America as from 5 November 1980 to 19 January 1981."[119]

74. Contrasting with this trend, the 2014 Decision on jurisdiction in the *Serafín García Armas* case deserves further attention.[120] There the Tribunal held that a dual national with the nationality of both State parties to the BIT did qualify as an investor under the BIT

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[116] Iran-United States Claims Tribunal, Decision, 29 March 1983, *Nasser Esphahanian v. Bank Tejarat,* case No. 31-157-2, 2 *Iran-U.S. C.T.R.* 157, p. 166. See also Decision, 29 March 1983, *Ataollah Golpira v. Iran*, case No. 32-211-2, 2 *Iran-U.S. C.T.R.* 171; Decision, 29 March 1983, *Paridokht Kohan Haroonian v. Iran*, case No. 33-418-2, 2 *Iran-U.S. C.T.R.* 226.

[117] Iran-United States Claims Tribunal, Decision, 6 April 1984, Case No. *A/18* (Iran v. United States), 5 *Iran-U.S. C.T.R.* 251.

[118] *Ibid*., p. 259. See also Pellet Report, paras 50-52.

[119] Iran-United States Claims Tribunal, interlocutory award No. ITL 68-193-3, 23 June 1988, *Reza Said Malek v. Iran*, Case No. 193, 19 *Iran-U.S. C.T.R*. 48. See also Iran-United States Claims Tribunal, Award No. 474-268-1, 14 March 1990, *Schott v. Iran*, 24 *Iran-U.S. C.T.R*. 203, p. 218.

[120] UNCITRAL, Decision on jurisdiction, 15 December 2014, *Serafín García Armas and Karina García Gruber v. Venezuela,* PCA Case No. 2013-3.

and that the doctrine of effective and dominant nationality was not applicable to investment cases. In this regard, the Tribunal put forward a literal interpretation of BIT provisions and held that: "*no puede adicionarse al APPRI una condición inexistente en él sobre la nacionalidad de los inversores protegidos por ese Tratado*" ["it is not permissible to add to the BIT a condition that does not exist in it on the nationality of the protected investors under this Treaty"].[121]

75. In reaching this conclusion, the Tribunal relied on several arbitral decisions none of which appears to be relevant.[122] Out of four decisions relied upon by the Tribunal, two[123] are irrelevant with regard to the general dual nationality issue because they are ICSID cases, and therefore subject to the negative nationality condition under Article 25 of the ICSID Convention. The other two cases relied upon by the Tribunal are hardly convincing. In the *Oostergetel and Laurentius v. Slovakia* case,[124] the issue was whether one of the Claimants had the nationality of a contracting party to the BIT or had also or only the nationality of a third State. Interestingly, this decision seems to accept the application of the principle of effective and dominant nationality in investment contexts when it states, referring to the *Champion Trading et alii v. Egypt* case: "in that case the claimants had two nationalities and hence the Tribunal applied the effective nationality principle in order to determine which one of the two was the claimant's dominant nationality".[125] In the case of *Saluka v. Czech Republic*,[126] the issue was whether the claimant was the genuine party to the claim or was acting as a proxy for another company of the claimant's group that was registered in a third State and therefore was not itself eligible to BIT protection. Therefore the basis for the position on dual nationality held in the Tribunal's 2014 decision on jurisdiction in the *Serafín García Armas* case is quite shaky.

[121] *Ibid*., para. 206 (my translation).
[122] *Ibid*., paras 201-206.
[123] ICSID, Award, 8 May 2008, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, para. 415; ICSID, Decision on Jurisdiction, 24 September 2008, *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, para. 101.
[124] UNCITRAL, Decision on Jurisdiction, 30 April 2010, *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, para. 130.
[125] *Ibid*., para. 129. The Tribunal's reasoning in para. 130 (which clearly is *contra textum*) seems to relate to the case the Tribunal was handling (i.e. the existence and effect of the nationality of a third State relating to the claimant), not to the considerations of the previous paragraph.
[126] UNCITRAL, Partial Award, 17 March 2006, *Saluka Investments B.V. v. The Czech Republic*, para. 229.

76. In addition to the case law, writings have ventured into exploring this issue as well. They generally confirm that rules of general international law, including the principle of effective and dominant nationality, provide for the inseparable environment in which a treaty is concluded and serve as a complementary element for the interpretation and clarification of treaty rules. As stated by Professor Zachary Douglas,

> "Where an individual claimant with the nationality of one contracting state also has the nationality of the host contracting state party, the tribunal's jurisdiction *ratione personae* extends to such an individual only if the former nationality is the dominant of the two, subject to a contrary provision of an investment treaty or the application of Article 25 of the ICSID Convention."[127]

77. In contrast with the position he has taken more recently, including in his Legal Opinion in this case, Professor Schreuer himself, in a book he co-authored in 2008 with Professor Dolzer, held that "[n]ationals of the host state are generally excluded from international protection even if they also hold the nationality of another state."[128]

78. As might be expected with writings generally, the doctrine is not unanimous.[129] Nevertheless, Professor Douglas's above formula was quoted in the 2014 Decision on jurisdiction in the *Serafín García Armas* case as part of the arguments relied upon by the defendant[130] even though it was finally dismissed by the Tribunal without a much detailed analysis. In that case, the Tribunal stood by the following line of reasoning: (i) the principle of effective and dominant nationality only applies to cases of diplomatic protection as one of the basic rules of diplomatic protection; (ii) diplomatic protection rules do not apply to investment issues.[131] The Tribunal then flatly concluded: "*Con base en ese razonamiento, el*

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[127] Z. Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), p. 321 (Rule 37) (footnotes omitted). See also D.J. Bederman, C. Keitner, *International Law Frameworks*, 4th edition (LEG, Saint Paul, 2016), p. 102-103; A.U. Kannof, 'Dueling Nationalities: Dual Citizenship, Dominant and Effective Nationality, and the Case of Anwar al-Aulaqi', 25(3) *Emory International Law Review* (2011), p. 1371 *et seq*. See also Pellet Report, paras 13, 48-49, 54, 58, 60 and 68.

[128] R. Dolzer, C. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008), p. 48.

[129] See e.g. C. Schreuer, "Nationality of Investors: Legitimate Restrictions vs. Business Interests", 24(2) *ICSID Review – Foreign Investment Law Journal* (2009), p. 522; J.E. Anzola, 'Dual Nationality in Investment Arbitration: The Case of Venezuela', 2 *Transnational Dispute Management* (2016). Other commentators seem to adopt a more nuanced view: see e.g. M. Casas, 'Nationalities of Convenience, Personal Jurisdiction, and Access to Investor-State Dispute Settlement', 49(1) *Journal of International Law and Politics* (2016), p. 92-96, 105-106; E. Paloma-Treves, 'Investment Treaty Arbitration: Dual Nationals are Now Welcome: A Way Out of ICSID's Dual Nationality Exclusion', 49(2) *Journal of International Law and Politics* (2017), p. 617-618.

[130] UNCITRAL, Decision on jurisdiction, 15 December 2014, *Serafín García Armas and Karina García Gruber v. Venezuela*, PCA Case No. 2013-3, para. 117.

[131] *Ibid*., paras 167-173.

*Tribunal desestimará el argumento de la Demandada sobre la aplicación del principio de nacionalidad efectiva y dominante en la interpretación y aplicación de los TBIs en general y, particularmente, del APPRI*" ["Based on this reasoning, the Tribunal disregards the Respondent's argument on the application of the principle of the dominant and effective nationality in the interpretation and application of BITs in general and of the [1995 BIT] in particular"].[132]

79. Professor Schreuer suggests that the reasoning of my previous report is almost exclusively based on authorities relating to diplomatic protection and State v. State proceedings.[133] This assumption seems to be based on a misunderstanding of the positions and reasoning I developed.[134] I have in no way argued that the rules of diplomatic protection apply to investment contexts. What I stated is that the "effective nationality" principle as defined in the *Nottebohm* decision was influential in the subsequent development of the "dominant nationality" principle in an investment context.[135] The distinction is made clear at para. 56 of my previous report which expressly distinguishes between diplomatic protection cases and international investment context.

80. Indeed, as the above analysis of the case law confirms, the principle of effective and dominant nationality is not necessarily confined to diplomatic protection contexts. It has developed in this context, but it may also be relevant in other contexts (including investment contexts) as it has overtime acquired conceptual autonomy as part of customary international law.[136]

81. The ILC 2006 Draft articles on diplomatic protection clarify the articulation between diplomatic protection rules and international investment law and confirm that they are not mutually exclusive. Draft article 17 (Special rules of international law) reads: "The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments".[137] However, paragraph 3 of the commentary to draft conclusion 17 clarifies that "[t]he provision is

[132] *Ibid*., para. 174 (my translation).
[133] Schreuer Opinion, paras 27-28.
[134] Pellet Report, paras 43-53 and 61 *inter alia*.
[135] *Ibid*., paras 48-49.
[136] Professor Schreuer adopted the opposite view: see Schreuer Opinion, para. 44.
[137] *ILC Yearbook, 2006*, vol. II(2), p. 51.

formulated so that the draft articles do not apply '*to the extent that*' they are inconsistent with the provisions of a BIT. To the extent that the draft articles remain consistent with the BIT in question, they continue to apply."[138] Therefore, the application of rules initially developed in the context of diplomatic protection does not amount to the introduction of the diplomatic protection regime in international investment law through the back door of treaty interpretation. Such rules initially developed in the context of diplomatic protection shall be discarded only to the extent they are in contradiction with relevant provisions of the BIT. Contrary to Professor Schreuer's view,[139] there is no exclusive alternative between the two regimes, but instead a subsidiarity/complementarity relation between them. Right to the contrary, interpreting *in light of* when the ordinary meaning of the terms is not unambiguous does not amount to *changing the meaning of*.

82. All cases referred to by Professor Schreuer[140] that contrast the two systems of investment law v. diplomatic protection rules seem to do so from the perspective of direct recourse by the investor v. interstate nature of diplomatic protection. These cases did not involve dual-national investors having the nationality of the respondent State.

83. To sum up, the fact that the principle of effective and dominant nationality is part of rules on diplomatic protection does not mean that it cannot be applied in other areas of international law. Its primary relevance in the field of diplomatic protection does not bar its potential relevance in other fields.[141] In this respect, the commentary to draft article 7 of the ILC 2006 Draft articles on diplomatic protection rightly refers to the Iran-US Claims Tribunal as contributing to consolidating the rule:[142] this is evidence that it is not limited to cases of diplomatic protection.

84. In cases of dual nationality when the claimant does not have the nationality of the defendant State, the test of effective nationality might be sufficient. By contrast, in a case where the claimant has the nationality of both States parties to a BIT the jurisdiction of the

[138] *Ibid.*, p. 52.
[139] See Schreuer Opinion, paras 34 or 43-45. See also UNCITRAL, decision on jurisdiction, 15 December 2014, *Serafin García Armas and Karina García Gruber v. Venezuela*, case PCA No. 2013-3, para. 173.
[140] Schreuer Opinion, paras 35-41.
[141] Professor Schreuer adopts the opposite view: see Schreuer Opinion, para. 71 *et seq*.
[142] *ILC Yearbook, 2006*, vol. II(2), p. 35 (para. 3 of the commentary to draft conclusion 7).

tribunal is excluded – and certainly so when the dominant nationality of the investor is that of the host State of the investment.

85. In the present case, even though most Claimants did possess Spanish nationality at the relevant times (when they alleged that a treaty breach occurred in 2010, when the application was made in 2012, but also at the time when at least part of the investment was made starting in the 1970's) such nationality was not effective, let alone dominant. With the exception of Mr Luis García Armas – who nevertheless lived in Venezuela at the relevant times –, the investors had Venezuelan nationality at the relevant times, had been living in Venezuela since before the investment started and had made the investment using their Venezuelan nationalities over the years. Therefore, their Spanish nationality has no material link nor relevance with the investment whatsoever. In that sense, their reliance on their nominal Spanish nationality amounts to an abuse of rights and of procedure.

## CONCLUSION

86. It is clear from the above and from my previous report[143] that the interpretation of the definition of investor under Article I(1)(a) of the 1995 BIT necessarily excludes dual nationals in general[144] – and even more certainly dual nationals having the dominant nationality of the State of investment. This is the unavoidable conclusion to be reached when one duly follows the Vienna rules of treaty interpretation, as mandated by international law. The Vienna rules should be applied as a whole (with the "general rule of interpretation" of Article 31 as a first step), meaning that each and every component must find an application, excluding any "cherry-picking" approaches.

87. The exclusion of dual nationals having the dominant nationality of the State of investment stems from a good faith interpretation of the terms of Article I(1)(a) of the BIT, according to their ordinary meaning, appraised in their context and in light of the object and purpose of the BIT. It is also called for when taking into account the rules contained in Article 31(3) of the VCLT, including relevant rules of international law applicable in the relations between the parties. As a rule of customary international law, the principle of effective and dominant nationality forms part of such rules.

88. Although the application of the general rule results in a clear, unambiguous meaning and does not lead to a manifestly absurd or unreasonable result, the supplementary means of Article 32 VCLT may still (but do not have to) be applied for the sake of confirming the meaning found by applying the general rule. In this case, the *travaux préparatoires* as well as the circumstances of conclusion of the BIT confirm the meaning obtained by applying the general rule.

89. Whereas the principle of effective and dominant nationality developed in the context of diplomatic protection and forms part of its basic elements, it is nowadays undoubtedly part of customary international law and may have a wider application, including

[143] Pellet Report, para. 68.

[144] I have doubts that, more generally, dual nationals, in a case like the present one, have standing to sue one of their States of nationality but, except concerning Mr Luis García Armas, the question is immaterial in the instant case.

in other contexts such as international investment law. To sum up, in cases of dual nationality when the claimant does not have the nationality of the defendant State, the test of effective nationality might be sufficient.[145] By contrast, in a case where the claimant has the nationality of both States parties to a BIT the jurisdiction of the tribunal is excluded – and certainly so when the dominant nationality of the investor is that of the host State of the investment.

90. This being established, the principle of effective and dominant nationality applies in this case in two respects.

91. First, this customary principle applies to the interpretation of the 1995 BIT as part of the relevant rules of international law applicable in the relations between the parties under Article 31(3)(c) VCLT, as seen above. In this context, the principle applies to the interpretation of the definition of investor under Article I(1)(a) with the effect of excluding from BIT protection those dual nationals having the dominant nationality of the State of investment.

92. Second, the principle forms part of the law applicable to the resolution of disputes arising from the BIT. Article XI(4)(b) of the 1995 BIT, referring to "the rules and principles of international law" as part of the law applicable to the arbitration, has the effect of incorporating the principle of effective and dominant nationality by reference. Indeed, there is no reason to restrict the application of Article XI(4) to the merits phase. It may also be added that, as a rule of customary international law, the principle of effective and dominant nationality continues to apply to the relations between the parties together with the treaty, as long as it is not expressly derogated from by such treaty. Therefore, as the 1995 BIT does not expressly provide otherwise, the interpretation and application of Article I(1)(a) must be reconciled with the customary principle of effective and dominant nationality.

[145] ICSID, award, 26 July 2001, *Olguín v. Paraguay*, where the Tribunal required that the investor's nationality of the home State be effective and admitted that both his nationalities were effective (para. 61); See also R. Wisner, N. Gallus, 'Nationality Requirements in Investor-State Arbitration', 5 *The Journal of World Investment & Trade*, (2004), p. 932.

Done in Paris on 8 March 2018,

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