Questions of Jurisdiction relating to Nationality in the case

Manuel García Armas,

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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. RB(AF)/16/1)

Legal Opinion

by

Christoph Schreuer

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I. INTRODUCTION

1. Counsel for Claimants have asked me for a legal opinion in the present case on the following matters:

> Whether the Venezuelan origin of the capital allegedly used by the Claimants for their investments, as argued by Venezuela, would exclude or limit the jurisdiction of the arbitral tribunal in this case.
>
> Whether the Claimants' Venezuelan-Spanish dual nationality excludes or limits the jurisdiction of the arbitral tribunal constituted under the UNCITRAL Rules pursuant to the Treaty in this case, considering also the relevance or not to this question of the customary international law doctrine of dominant and effective nationality invoked by Venezuela. In addressing this issue, you should rely on the facts provided to you by us regarding the Claimants' acquisition of Venezuelan and Spanish nationality, and you are not required to conduct an independent investigation of such facts.
>
> Whether the allegations of abuse of process and estoppel related to the nationality of the Claimants, as argued by Venezuela, would exclude or limit the jurisdiction of the arbitral tribunal in this case.

2. To this end, I have received the following documents from Counsel for Claimants:

a) Respuesta a la Notificación de Arbitraje, 1 de julio de 2015. ("Respuesta a la Notificación de Arbitraje")

b) Respuesta de los Demandantes sobre Doble Nacionalidad, 15 de abril de 2016. ("Respuesta de los Demandantes sobre Doble Nacionalidad")

c) Respuesta de la Demandada al Escrito de las Demandantes sobre Doble Nacionalidad, 30 de mayo de 2016. ("Respuesta de Venezuela sobre Doble Nacionalidad")

d) Memorial de Demanda, 23 de septiembre de 2016. ("Memorial de Demanda")

e) Solicitud de Bifurcación de la República Bolivariana de Venezuela, 28 octubre de 2016. ("Solicitud de Bifurcación")

f) Contestación de los Demandantes a la Solicitud de Bifurcación, 17 Noviembre de 2016. ("Contestación a la Solicitud de Bifurcación")

g) Memorial de Admisibilidad y Objeciones a la Jurisdicción, 27 de marzo de 2017. ("Memorial de Admisibilidad y Objeciones a la Jurisdicción")

h) Expert Report of Karl P. Sauvant, of 27 March 2017. (in English) ("Sauvant Report")

i) Expert Report of Prof. Alain Pellet, of 27 March 2017. (in English) ("Pellet Report")

j) Acuerdo para la promoción y protección recíproca de inversiones entre el Reino de España y la República de Venezuela, firmado en Caracas el 2 de noviembre de 1995. ("BIT")

k) Tratado General de Cooperación y Amistad entre el Reino de España y la República de Venezuela, firmado en Madrid el 7 de junio de 1990. ("Tratado de Amistad"), and the Acuerdo Económico entre el Reino de España y la República de Venezuela Integrante del Tratado General de Cooperación y Amistad Hispano-Venezolano firmado el 29 de junio de 1992. ("Acuerdo Económico").

3. Andrea de la Brena Meléndez, Abogada, LL.M., has assisted me in reading the documents in the Spanish language.

4. A summary statement of my qualifications is attached to this legal opinion.

II. THE INTERNATIONAL NATURE OF THE INVESTMENT

5. A recurrent theme in the pleadings of the Respondent is that the investments in question are not international since a transnational flow of capital would be required. This would follow from the BIT's object and purpose.[1] In other words, Respondent argues that the origin of the funds is relevant to determine the existence of a foreign investment.[2] This view is supported by the Expert Report of Mr Karl P. Sauvant who posits that "[f]oreign investment involves cross-border movement of capital and other resources…"[3]

6. This argument is contradicted by Claimants who point out that the 'origin of funds' argument attempts to add requirements to the notion of investment that are not contained in the BIT.[4]

7. The BIT defines "investments" in its Article I(2) in the following terms:

> Por "inversiones" se designa todo tipo de activos, invertidos por inversores de una Parte Contratante en el territorio de la otra Parte Contratante ...

8. That definition refers to investors of the other Contracting Party. In turn "investors" who are natural persons are defined in Article I(1)a) as follows:

> Personas físicas que tengan la nacionalidad de una de las Partes Contratantes con arreglo a su legislación y realicen inversiones en el territorio de la otra Parte Contratante.

9. It follows from these definitions that in order to qualify under the BIT, investors of the other Contracting State must have invested the investment. Investors are defined in terms of their nationality under the law of the State in question.

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[1] Respuesta de Venezuela sobre doble nacionalidad, paras.13-17; Memorial de Admisibilidad y Objeciones a la Jurisdicción, paras. 71-88 and 90-101.

[2] Respuesta a la Notificación de Arbitraje, paras. 32(1) and 89; Solicitud de Bifurcación, paras. 64-68 and 113; Memorial de Admisibilidad y Objeciones a la Jurisdicción, paras. 74 and 240.

[3] Sauvant Report, para. 17.

[4] Contestación a la Solicitud de Bifurcación, paras. 30-32.

10. Therefore, the origin of funds is immaterial for purposes of determining whether an investment qualifies for protection under a BIT. What matters is the nationality of the investor. This conclusion follows from the wording of the Spain-Venezuela BIT. It contains no reference to the origin of the investment. Rather, investments qualifying for protection under the BIT are consistently described by reference to the nationality of the investor.[5] For purposes of the Spain-Venezuela BIT, it follows that what matters is that the investment in Venezuela is an investment of a Spanish investor.

11. Practice confirms that the decisive criterion for the existence of a foreign investment is the nationality of the investor. An investment is a foreign investment if it is owned or controlled by a foreign investor. There is no additional requirement of foreignness for the investment in terms of its origin or in terms of the currency in which it is made.

12. The host State may impose the requirement that a certain amount of fresh capital in foreign currency be imported into the country.[6] In the absence of such a requirement, investments made by foreign investors with funds raised in the host State are to be treated in the same way as investments funded with imported capital.

13. The issue of the origin of funds played a role in the drafting of the ICSID Convention. During the Convention's preparation, an argument was made at one point that the nationality of the investment was more important than that of the investor. Since the Convention's aim was to encourage the international flow of capital, the Convention should apply to cases where the funds invested came from outside rather than from foreigners. In response, the Chairman (Mr. *Broches*) said that he did not see how one could make a distinction based on the origin of funds.[7] As a consequence, the idea of looking at the origin of funds was not pursued.

14. In 1992, the Development Committee set up by The IMF and the World Bank, received a Report on the Legal Framework for the Treatment of Foreign Investment prepared by the General Counsel of the World Bank, the International Finance Corporation and the Multilateral Investment Guarantee Agency, to accompany the Guidelines on the

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[5] BIT, articles I.(2), II.(1), III.(1), IV.(1), V.(1), VI.(1) and VIII.(1).

[6] See *Amco v. Indonesia*, Award, 20 November 1984, 1 ICSID Reports 413, 481-489, **Exhibit CS-4**.

[7] History of the Convention, Vol. II, pp. 261, 397-398, **Exhibit CS-3**.

Treatment of Foreign Direct Investment. In para. 13 the Report to the Development Committee states:

> The guidelines could in general also apply to investments made in local as well as in foreign currencies...[8]

15. The MIGA Convention in Article 12(c)(ii) includes among eligible investments:

> the use of earnings from existing investments which could otherwise be transferred outside the host country.

16. International tribunals deciding investment disputes have held in numerous cases that the origin of the capital that goes into an investment is irrelevant for the investment's international nature.[9]

17. In *Tradex* v. *Albania*[10] there was a dispute between the parties on the legal relevance of the financial sources of Tradex' alleged foreign investment in Albania. Tradex claimed that the financial sources of its investment were irrelevant. The Tribunal agreed with Tradex on this point and noted that the Law that formed the basis for jurisdiction contained a broad definition of investment that did not give room for further conditions.[11] The Tribunal said:

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[8] 7 ICSID Review-FILJ 315, 322 (1992), **Exhibit CS-5**.

[9] *Tradex v. Albania*, Award, 29 April 1999, paras. 105, 108-111, **Exhibit RLA-91**; *Wena Hotels v. Egypt*, Award, 8 December 2000, para. 126, **Exhibit CLA-173**; Decision on Annulment, 28 January 2002, para. 54, **Exhibit CLA-174**; *Olguín v. Paraguay*, Award, 26 July 2001, para. 66, FN 9, **Exhibit CLA-43**; *Tokios Tokelės v. Ukraine*, Decision on Jurisdiction, 29 April 2004, paras. 74-82, **Exhibit RLA-109**; *ADC v. Hungary*, Award, 2 October 2006, paras. 310-325, 342, 343, 346, 347, 355, 356, 358, 360, **Exhibit CLA-54**; *Siag v. Egypt*, Decision on Jurisdiction, 11 April 2007, paras. 37-40, 62-66, 86, 100, 110, 122, 208-210, **Exhibit CS-18**; *Saipem v. Bangladesh*, Decision on Jurisdiction, 21 March 2007, para. 106, **Exhibit CLA-58**; *Rompetrol v. Romania*, Decision on Jurisdiction, 18 April 2008, paras. 55-56, 71, 101, 110, **Exhibit CLA-66**; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras. 432-435, **Exhibit CLA-7**; *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, 14 January 2010, paras. 56-59, **Exhibit CLA-77**; *Mobil v. Venezuela*, Decision on Jurisdiction, 10 June 2010, para. 198, **Exhibit CLA-79**; *Paushok v. Mongolia*, Award on Jurisdiction and Liability, 28 April 2011, para. 205, **Exhibit CS-35**; *Caratube v. Kazakhstan*, Award, 5 June 2012, para. 355, **Exhibit RLA-71**; *Arif v. Moldova*, Award, 8 April 2013, para. 383, **Exhibit CLA-92**; *Urbaser v. Argentina*, Decision on Jurisdiction, 19 December 2012, para. 307, **Exhibit CLA-199**; *OI European Group B.V. v. Bolivarian Republic of Venezuela*, Award, 10 March 2015, para. 242, **Exhibit CLA-98**; *Bernhard von Pezold and Others v. Republic of Zimbabwe*, Award, 28 July 2015, para. 288, **Exhibit CLA-205**; *RREEF Infrastructure v. Spain*, Decision on Jurisdiction, 6 June 2016, para. 158, **Exhibit CS-54**; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, Award, 4 May 2017, para. 228, **Exhibit CS-58**.

[10] *Tradex v. Albania*, Award, 29 April 1999, **Exhibit RLA-91**.

[11] At paras. 105, 108-111.

> ... the Tribunal concludes here that the sources from which the investor financed the foreign investment in Albania are not relevant for the application of the 1993 Law ...[12]

18. In *Olguín* v. *Paraguay*,[13] the Respondent argued that in order to be protected, the funds invested must originate in the country of which the investor is a national. The Tribunal found that this requirement was not expressly indicated in the relevant BIT and therefore rejected this argument.[14]

19. In *Wena Hotels* v. *Egypt*, both the Tribunal and the *ad hoc* Committee found the alleged origin of the funds from other investors who were not entitled to benefit from the applicable BIT irrelevant.[15]

20. In *Tokios Tokelės* v. *Ukraine*,[16] the Claimant was a company having its registered seat in Lithuania. The Respondent argued that there was no protected investment, since the capital invested did not originate outside Ukraine. The majority of the Tribunal noted that neither the ICSID Convention nor the Ukraine-Lithuania BIT contained a requirement that capital used by an investor should originate in its State of nationality or indeed originate outside the host State.[17] The majority of the Tribunal rejected an "origin-of-capital requirement" and said:

> The Respondent alleges that the Claimant has not proved that the capital used to invest in Ukraine originated from non-Ukrainian, sources, and, thus, the Claimant has not made a direct, or cross-border, investment. Even assuming, *arguendo*, that all of the capital used by the Claimant to invest in Ukraine had its ultimate origin in Ukraine, the resulting investment would not be outside the scope of the Convention. The Claimant made an investment for the purposes of the Convention when it decided to deploy capital under its control in the territory of Ukraine instead of investing it elsewhere. The origin of the capital is not relevant to the existence of an investment. … The origin of the

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[12] At para. 111.

[13] *Olguín v. Paraguay*, Award, 26 July 2001, **Exhibit CLA-43**.

[14] At para. 66, FN 9.

[15] *Wena Hotels v. Egypt*, Award, 8 December 2000 at para. 126, Decision on Annulment, 28 January 2002, at para. 54, **Exhibits CLA-173** and **CLA-174**.

[16] *Tokios Tokelės v. Ukraine*, Decision on Jurisdiction, 29 April 2004, **Exhibit RLA-109**.

[17] At paras. 74-82.

> capital used to acquire these assets is not relevant to the question of jurisdiction under the Convention.[18]

21. In *Saipem* v. *Bangladesh*, the Claimant had entered into a contract to build a pipeline. The Respondent disputed the existence of an investment on the ground that the Claimant had not put its own money into the project.[19] The Tribunal rejected this argument and said:

> …it is true that the host State may impose a requirement that an amount of capital in foreign currency be imported into the country. However, in the absence of such a requirement, investments made by foreign investors from local funds or from loans raised in the host State are treated in the same manner as investments funded with imported capital. In other words, the origin of the funds is irrelevant.[20]

22. In *RREEF Infrastructure* v. *Spain*,[21] the Tribunal was also quite categorical in this respect. It said:

> … there is no requirement for funds to be brought into a State from overseas in order for a national of one State to have an investment in another State (for example, a national of one State who merely inherits property in another State nonetheless has an investment in that other State). It would be improper to read such criteria as those proposed by the Respondent into those international instruments.[22]

23. In a recent Award in *Eiser* v. *Spain*,[23] the Respondent contended that the funds invested did not come from the investor. The Tribunal found the origin of invested capital irrelevant:

> El Demandado insiste en que los fondos invertidos no eran propiedad de las demandantes, y provenían de los socios comanditarios (*limited partners*) de

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[18] At paras. 80, 81. But see also the reasoning to the contrary in the Dissenting Opinion by arbitrator Prosper Weil at paras. 19, 20.

[19] *Saipem v. Bangladesh*, Decision on Jurisdiction, 21 March 2007, para. 103, **Exhibit CLA-58**.

[20] At para. 106. Footnote omitted.

[21] *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, Decision on Jurisdiction, 6 June 2016, **Exhibit CS-54**.

[22] At para. 158.

[23] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, Award, 4 May 2017, **Exhibit CS-58**.

> EGIF. Sin embargo, los orígenes del capital invertido por un Inversor en una Inversión no son relevantes a los fines de la jurisdicción.[24]
>
> [Respondent urged that the funds invested were not the Claimants' own, and were derived from the limited partners in EGIF. However, the origins of capital invested by an Investor in an Investment are not relevant for purposes of jurisdiction.]

24. It follows from the above authorities that, unless specifically provided, the origin of the funds is irrelevant. Whether the investments were made from imported capital, from local funds or from funds raised locally, makes no difference. The decisive criterion for the existence of a foreign investment is the nationality of the investor. An investment is a foreign investment if it is owned or controlled by a foreign investor. There is no additional requirement of a foreign origin for the foreignness of the investment.

25. As explained above, the idea of giving relevance to the foreign origin of funds was discussed during the ICSID Convention's drafting but was dismissed as impracticable. The benefits of foreign investments accrue to host States not merely through a transfer of capital. Know-how, technology, business experience, entrepreneurship and intellectual property are non-monetary assets that are essential to investments and serve the local economy.

26. The BIT's object and purpose does not support the postulate of an international transfer of capital as a condition for the existence of an international investment. The BIT's Preamble speaks of the intensification of economic relations but does not mention transfer of capital among its aims. Most importantly, the BIT's definition of "investments" in Article I(2) refers to activities by investors of the other Contracting Party but says nothing about the origin of funds. The definition's demonstrative list of investments contains no reference to a need to acquire the assets listed there with funds transferred from abroad.

[24] At para. 228. Footnote omitted.

III. ARE THE RULES RELATING TO DIPLOMATIC PROTECTION RELEVANT?

27. Much of Venezuela's reasoning, especially as it relates to dual nationality and effective nationality, relies on customary international law developed in the context of diplomatic protection.[25] The same is true of Professor Pellet's Report, whose authorities are almost exclusively derived from the realm of diplomatic protection and State *v.* State proceedings.[26]

28. It is more than doubtful that the principles developed in the context of diplomatic protection, apply in contemporary international investment law. Modern investment law marks a radical departure from the traditional remedy of diplomatic protection. The most important feature of the new system is the direct access of the investor to an international remedy without the intercession of the investor's State of nationality. Another important feature of investment law is that it constitutes a separate regime mostly based on treaties. These treaties governing the regime define the parameters for its application and it is not permissible to alter them by superimposing additional conditions deriving from external sources.

29. The limited role in contemporary treaty-based investment law of the customary international law developed in the context of diplomatic protection has been aptly described in the following terms:

> In the first place, it is evident that on many issues, States have entered into investment treaties precisely in order to remedy perceived gaps or limitations in the protections afforded by customary international law in the field of the treatment of aliens. The law of diplomatic protection imposes a number of strict pre-conditions upon the exercise of an international claim. Conditions such as the requirement to exhaust local remedies, or the strict rule on nationality of claims, make good sense in the context of a remedy of last resort between sovereign States. But, as will be seen, it was part of the very object and purpose of investment treaties, with their provision for direct

[25] Respuesta de Venezuela sobre doble nacionalidad, paras. 67-72; Memorial de Admisibilidad y Objeciones a la Jurisdicción, para. 131.

[26] Pellet Report, paras. 43-53, 61.

> investor-State arbitration, to remedy the perceived shortcomings in diplomatic protection. This objective would be fundamentally undermined if restrictions of this kind were to be re-imported into investment treaties by the back door of interpretation.[27]

30. Already in the *Barcelona Traction* case,[28] the International Court of Justice described the development of a new area of the law that is distinct from the traditional law of diplomatic protection:

> States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements. Indeed, whether in the form of multilateral or bilateral treaties between States, or in that of agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments. The instruments in question contain provisions as to jurisdiction and procedure in case of disputes concerning the treatment of investing companies by the States in which they invest capital. Sometimes companies are themselves vested with a direct right to defend their interests against States through prescribed procedures. No such instrument is in force between the Parties to the present case.[29]

31. The separate nature of modern investment law was again described by the International Court of Justice in the *Diallo* case[30] in the following terms:

> The Court is bound to note that, in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the treaties for the promotion and protection of foreign investments, and the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, which created an International Centre for Settlement of Investment Disputes (ICSID), and also by contracts between States and foreign investors. In that context, the role of

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[27] C McLachlan, L Shore, M Weiniger, *International Investment Arbitration, Substantive Principles*, 2nd ed., 2017, para. 1.70, **Exhibit CS-57**.

[28] *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 3, **Exhibit CLA-13**.

[29] At p. 47, para. 90. In this sense see also *The Rompetrol Group N.V. v. Romania*, Decision on Jurisdiction, 18 April 2008, para. 91, **Exhibit CLA-66**.

[30] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 582, **Exhibit CLA-12**.

> diplomatic protection somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative.[31]

32. The International Law Commission (ILC) in its work on diplomatic protection recognized the separate development of investment law. Its Draft Articles on Diplomatic Protection of 2006[32] contain a provision that underscores the inapplicability of the principles codified there to investment arbitration:

> **Artículo 17**
>
> **Normas especiales de derecho internacional**
>
> El presente proyecto de artículos no se aplica en la medida en que sea incompatible con normas especiales de derecho internacional, tales como disposiciones de tratados relativas a la protección de las inversiones.[33]
>
> **[Article 17**
>
> **Special rules of international law**
>
> 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.]

33. Therefore, the ILC recognizes that treaty provisions dealing with investment law are (or may be) inconsistent with the rules on diplomatic protection. It follows that the draft articles and the customary rules which they codify are of limited relevance for the interpretation of treaty provisions dealing with international investment law.

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[31] At p. 614. Professor Pellet dismisses this statement by the ICJ as "judicial arrogance". See Pellet Report, para. 58.

[32] Draft Articles on Diplomatic Protection with commentaries, 2006, adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly (A/61/10). *Yearbook of the International Law Commission, 2006*, vol. II, Part Two, p. 24, **Exhibit CS-15**.

[33] At p. 51. The ILC's Commentary offers the following description of dispute settlement under the contemporary regime: "(2) Today foreign investment is largely regulated and protected by BITs. The number of BITs has grown considerably in recent years and it is today estimated that there are nearly 2,000 such agreements in existence. An important feature of the BIT is its procedure for the settlement of investment disputes. Some BITs provide for the direct settlement of the investment dispute between the investor and the host State, before either an *ad hoc* tribunal or a tribunal established by the International Centre for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Other BITs provide for the settlement of investment disputes by means of arbitration between the State of nationality of the investor (corporation or shareholder) and the host State over the interpretation or application of the relevant provision of the BIT. The dispute settlement procedures provided for in BITs and ICSID offer greater advantages to the foreign investor than the customary international law system of diplomatic protection, as they give the investor direct access to international arbitration, avoid the political uncertainty inherent in the discretionary nature of diplomatic protection and dispense with the conditions for the exercise of diplomatic protection."

34. The ILC's Commentary attached to Article 17 further specifies the inapplicability of the traditional rules addressing diplomatic protection to the special regime of contemporary investment law:

> (1) Algunos tratados, en especial los relativos a la protección de las inversiones extranjeras, enuncian normas especiales sobre la solución de controversias que excluyen las reglas que se aplican a la protección diplomática o se apartan considerablemente de ellas. Esos tratados abandonan o atenúan las condiciones relativas al ejercicio de la protección diplomática, en particular las reglas sobre la nacionalidad de la reclamación y el agotamiento de los recursos internos. Los acuerdos bilaterales sobre inversiones y el Convenio multilateral sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros Estados son los principales ejemplos de tales tratados.
>
> (3) El proyecto de artículo 17 indica claramente que el presente proyecto de artículos no se aplica al régimen especial alternativo de protección de los inversores extranjeros establecido en tratados bilaterales o multilaterales sobre inversiones. El texto de la disposición dice que el proyecto de artículos no se aplica "*en la medida en que*" sea incompatible con las disposiciones de un tratado bilateral sobre inversiones. En la medida en que el proyecto de artículos sea compatible con el tratado de que se trate, continúa aplicándose. [34]
>
> [(1) Some treaties, particularly those dealing with the protection of foreign investment, contain special rules on the settlement of disputes which exclude or depart substantially from the rules governing diplomatic protection. Such treaties abandon or relax the conditions relating to the exercise of diplomatic protection, particularly the rules relating to the nationality of claims and the exhaustion of local remedies. Bilateral investment treaties (BITs) and the multilateral Convention on the Settlement of Investment Disputes between States and Nationals of Other States are the primary examples of such treaties.
>
> (3) Draft article 17 makes it clear that the present draft articles do not apply to the alternative special regime for the protection of foreign investors provided for in bilateral and multilateral investment treaties. The provision is 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.]

[34] At p. 56.

35. Investment tribunals have also recognized the limited relevance of the customary rules governing diplomatic protection for the interpretation and application of modern treaties dealing with investment protection.[35]

36. In *Camuzzi* v. *Argentina*,[36] the Tribunal clearly distanced itself from principles governing diplomatic protection. It said:

> El Tribunal coincide con la República Argentina en cuanto a que la protección diplomática responde a conceptos y mecanismos que son muy diferentes de aquellos del sistema internacional de protección de inversiones. … Por la misma razón que la protección diplomática es improcedente bajo el sistema de los tratados bilaterales, tampoco este sistema puede descansar en los criterios derivados de ese mecanismo tradicional, [37]
>
> [The Tribunal agrees with the Argentine Republic that diplomatic protection involves concepts and mechanisms that are very different from those available in the system of international investment protection. … For the same reason that diplomatic protection is inappropriate under the bilateral treaty system, neither can this system rely on approaches arising from that traditional mechanism,]

37. In *Siag* v. *Egypt*,[38] the Tribunal made the following observation concerning the relevance of the rules on diplomatic protection in investor-State investment arbitration:

> While it may be asserted that if this were a diplomatic protection case it could be argued differently, the parties have consented to have their dispute resolved under the ICSID Convention and it sets out a particular regime for the determination of jurisdiction. Under Article 9(3) of the BIT the avenue of diplomatic protection is specifically excluded while the arbitration is in

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[35] *Eudoro Armando Olguín v. Republic of Paraguay*, Award, 26 July 2001, para. 62: "reglas internas de tal naturaleza, atinentes al otorgamiento de la protección diplomática a particulares, y por lo tanto a algo que según el derecho internacional es una prerrogativa del Estado patrial, no se podrían aplicar por analogía al caso del acceso al foro del CIADI, que tiene como uno de sus objetivos más importantes y singulares dar al propio particular el derecho de acción, excluyendo del proceso el endoso de su reclamación y toda otra iniciativa del Estado patrial,...", **Exhibit CLA-43**; *AES Corporation v. The Argentine Republic*, Decision on Jurisdiction, 26 April 2005, para. 99: "Since under the ICSID system of settlement of disputes, exercise of diplomatic protection is per *definition* put aside, it is irrelevant to compare it with a clause the rationale of which is inseparable from diplomatic protection.", **Exhibit CS-13**; *Merrill and Ring Forestry L.P. v. Canada*, Award, 31 March 2010, para. 205: "diplomatic protection gradually gave way to specialized regimes for the protection of foreign investments and other matters.", **Exhibit CS-25**.

[36] *Camuzzi International S.A. v. Republic of Argentina*, Decision on Jurisdiction, 11 May 2005, **Exhibit CLA-177**.

[37] At paras. 138, 139.

[38] *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, Decision on Jurisdiction, 11 April 2007, **Exhibit CS-18**.

> progress. Developments in international law concerning nationality of individuals in the field of diplomatic protection including, for example, greater flexibility in the requirement for the link of nationality, while of interest, must give way to the specific regime under the ICSID Convention and the terms of the BIT.[39]

38. Like in the present case, the Italy-Egypt BIT applicable in *Siag*, referred to the domestic rules on nationality of the country concerned. The Tribunal refused to apply traditional rules of international law to override that provision:

> The Tribunal finds that this case does not present a situation where there is scope for international law principles to override the operation of Egyptian domestic law as to nationality. To do so would in effect involve the illegitimate revision of the terms of the BIT and the Nationality Law by the Tribunal.[40]

39. In *Saba Fakes* v. *Turkey*,[41] the Tribunal stressed the different regimes governing diplomatic protection and investment arbitration in the following terms:

> The Tribunal notes that treaties for the promotion and protection of investments, as well as the ICSID Convention, establish a separate mechanism of direct recourse to international arbitration against the host State. ... The rules of customary international law applicable in the context of diplomatic protection do not apply as such to investor-State arbitration. As underscored by Professor Dolzer in his Expert Opinion, "*the rules of nationality in a BIT do not follow the rules of customary law as they pertain to the right of diplomatic protection between two states which have both granted nationality to the same person*."[42]

40. In *KT Asia* v. *Kazakhstan*,[43] the Tribunal was quite clear about the irrelevance of rules on diplomatic protection in cases governed by an investment treaty:

> This Tribunal sees no basis for applying a rule of diplomatic protection that would trump the specific regime created by the Treaty.[44]

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[39] At para. 198.

[40] At para. 201.

[41] *Saba Fakes v. Republic of Turkey*, Award, 14 July 2010, **Exhibit CLA-147**.

[42] At para. 69.

[43] *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, Award, 17 October 2013, **Exhibit CLA-11**.

[44] At para. 128.

41. In *Serafín García Armas* v. *Venezuela,*[45] the Tribunal had no doubts that rules governing diplomatic protection were not relevant in the context of BIT arbitration. The tribunal said:

> En especial, la existencia de un mecanismo de resolución directa de diferencias entre inversores y el Estado receptor de la inversión, retira la protección diplomática del contexto de los tratados de inversión por ser inconsistente con las reglas de los TBIs.[46]

42. It follows from the above that the rules of customary international law developed in the context of diplomatic protection are not applicable where a case is governed by a treaty that grants direct access to international arbitration to investors. In particular, it is impermissible to superimpose limitations and conditions derived from the customary international law governing diplomatic protection upon the terms of a treaty such as the Spain-Venezuela BIT.

43. Neither can restrictions developed in customary international law for purposes of diplomatic protection be imported into the BIT by way of treaty interpretation. Professor Pellet concedes the *lex specialis* nature of treaty-based investment law but posits that "derogation by a *lex specialis* from a general regime only operates where there is a contradiction between the rule pertaining to the general regime and that derived from the *lex specialis*."[47]

44. It is doubtful whether rules on dual nationals developed in the context of diplomatic protection are part of general customary international law. These rules were developed for the specific context of diplomatic protection and it is not permissible to project these rules into treaties that have created a different regime.

45. Even if it was true that investment treaties must be interpreted against the background of customary rules of diplomatic protection, the *lex specialis* must prevail in case of a conflict and must not be interpreted in a way that changes its meaning. A treaty rule that grants a right of action to a defined group of individuals changes its meaning if a

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[45] *Serafín García Armas and Karina García Gruber v. Venezuela*, Decision on Jurisdiction, 15 December 2014, **Exhibit CLA-9**.

[46] At para. 173.

[47] Pellet Report, paras. 32-35.

condition is added that is extraneous to the treaty. This is true even if the additional condition is said to reflect customary international law. There is a profound difference between a rule that states "all nationals of State A may sue State B" and a rule that states "all nationals of State A may sue State B provided they are not nationals of State B." It is impossible to say there is no contradiction between the two rules.

46. It follows that the rules concerning dual nationals and effective nationality, as they apply to diplomatic protection, do not apply in the present case.

IV. THE INTERPRETATION OF THE BIT

47. Much of the discussion concerning jurisdiction *ratione personae* in the present case turns on the proper interpretation of the relevant provision in the Spain-Venezuela BIT. Article I(1)a) defines investors who are natural persons for purposes of the BIT as follows:

> Personas físicas que tengan la nacionalidad de una de las Partes Contratantes con arreglo a su legislación y realicen inversiones en el territorio de la otra Parte Contratante.

A. ORDINARY MEANING

48. Under Article I(1)a), physical persons who possess the nationality of a Treaty Partner under its national law and make an investment in the other Treaty Partner are investors for purposes of the BIT. Notably, Article I(1)a) contains no limitation concerning dual nationals, nor does it contain any reference to an effective or dominant nationality.

49. Article I(1)a) foresees no requirements *ratione personae* except the nationality of a Contracting State in accordance with that State's legislation. Under the provision's ordinary meaning that is the only requirement.

50. Venezuela, with Professor Pellet's support, seek to insert additional requirements into that provision. They argue that these additional requirements, although not expressly mentioned, are implicit in the treaty provision. To that end, they employ various techniques of treaty interpretation, that would add language to the BIT, thereby changing its meaning.

B. OBJECT AND PURPOSE

51. One such technique is reference to the BIT's object and purpose, which under Article 31(1) of the VCLT is part of the general rule of interpretation. Both Venezuela[48] and

[48] Respuesta de Venezuela sobre doble nacionalidad, para. 17; Solicitud de Bifurcación, paras. 82-84; Memorial de Admisibilidad y Objeciones a la Jurisdicción, paras. 49, 91-93 and 101.

Professor Pellet[49] repeatedly refer to the BIT's object and purposes, which, so they argue, would exclude investors who also hold the host State's nationality.

52. The prime source for an investigation into a treaty's object and purpose is its preamble.[50] In the instant case, the Preamble to the Spain-Venezuela BIT provides as follows:

> deseando intensificar la cooperación económica en beneficio recíproco de ambos países, proponiéndose crear condiciones favorables para las inversiones realizadas por inversores de cada una de las Partes Contratantes en el territorio de la otra,
> y
> reconociendo que la promoción y protección de las inversiones con arreglo al presente Acuerdo estimulan las iniciativas en este campo, ...

53. Therefore, the BIT's object and purpose, as set out in its Preamble, is to intensify economic cooperation and to create favourable conditions for investments of investors of one Contracting Party in the other Contracting Party. There is no reason why that purpose would not be furthered if investors of the other Party also possessed the host State's nationality. It is impossible to find support for the exclusion of dual nationals in the BIT's object and purpose as set out in the Preamble.

54. In *KT Asia* v. *Kazakhstan*,[51] the respondent tried to insert an alleged requirement of real and effective nationality into the BIT's definition of "investor" by relying on the treaty's object and purpose. The Tribunal dismissed that argument in the following terms:

> The crux of the Respondent's argument in this connection is that the fundamental object and purpose of the BIT and the ICSID Convention is to encourage and protect *foreign* investment. Although the BIT does not expressly state so, its Preamble stresses the Contracting Parties' desire to

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[49] Pellet Report, para. 60.

[50] See *Aguas del Tunari, S.A. v. Plurinational State of Bolivia*, Decision on Jurisdiction, 21 October 2005, para. 241, footnote 216: "Es una regla ampliamente aceptada que el texto del preámbulo de un tratado puede ser especialmente útil para determinar el motivo, el objeto y las circunstancias del tratado." ["It is widely accepted that the preamble language of a treaty can be particularly helpful in ascertaining the motive, object and circumstances of a treaty."], **Exhibit RLA-155**; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 198: "following the directives of Article 31(1) of the VCLT, the Tribunal must take account of the objects and purposes of the applicable BITs. Here, one must turn to the BIT preambles which express those objects and purposes.", **Exhibit CS-28**.

[51] *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, Award, 17 October 2013, **Exhibit CLA-11**.

> "extend and intensify the economic relations between them, particularly with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting Party" and their recognition that "agreement on the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties…". The BIT is thus premised on the making of investments by the nationals of one Party in the territory of the other with the consequent stimulation of the flow of capital and technology. Yet, this says nothing about the definition of nationals, which is precisely the subject of Article 1(b).[52]

55. Professor Pellet sees the object and purpose of a BIT in the disadvantaged position of foreigners who would need additional protection. In his view foreign investors who also possess the host State's nationality would not need that protection.[53]

56. It is not clear in what respect foreign investors would normally be disadvantaged vis-à-vis local nationals. Under most legal systems, they have the same access to legal remedies, although these remedies may be insufficient for nationals and foreigners alike.

57. In his book on Treaty Interpretation in Investment Arbitration, *J.R. Weeramantry* discusses various theories on the object and purpose of investment treaties developed by tribunals. He mentions economic cooperation, encouragement of foreign investment, the protection of foreign investors and their investments, increase of the well-being of the peoples of both countries, development of developing countries and putting an end to international tensions and crises leading sometimes to the use of force.[54] A suggestion that these treaties are designed to compensate for the disadvantaged legal position of foreign investors is not among the theories on the object and purpose discussed by tribunals.

58. All of these theories on the object and purpose of BITs would be compatible with giving protection to dual nationals. One may conclude that the object and purpose of the BIT does not support the proposition that dual nationals should be excluded from its application.

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[52] At para. 120. Footnote omitted. Emphasis in original.

[53] Pellet Report, para. 60.

[54] J.R. Weeramantry, *Treaty Interpretation in International Investment Arbitration*, paras. 3.70-3.88 (2012), **Exhibit CS-40**.

C. INTENTION OF THE PARTIES

59. In a similar vein, Venezuela, supported by Professor Pellet, seeks to rely on a hypothetical intention of the parties. In particular, Professor Pellet posits that "the Parties could not reasonably have intended to extend the protection offered by the BIT to investors having the dominant nationality of the host State."[55] The origin and contents of these presumptive intentions are not clarified. They are simply postulated.

60. The rules on treaty interpretation in the VCLT do not follow a subjective approach that would give paramount importance to the parties' intentions.[56] On the contrary, at the Vienna Conference it was the so-called objective approach, which eschews reliance on subjective elements, such as intention, that prevailed.

61. The International Law Commission made the following statement on the role of the parties' intention in the process of its work on what later became the VCLT:

> 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.[57]

62. Rejection of the intention of the parties as an independent element in the interpretation of treaties is apparent in the practice of investment tribunals. For instance, the Tribunal in *Wintershall* v. *Argentina* said:

> La cuidadosa redacción del Artículo 31 se basa en la opinión de que debe presumirse que el texto es la expresión auténtica de la intención de las partes. El punto de partida de toda interpretación de un tratado consiste en desentrañar el significado del texto, no en realizar una investigación independiente sobre la intención de las partes a partir de otras fuentes ...
>
> En las circunstancias del caso, el Tribunal sostiene que no hay lugar para ninguna presunta intención de las Partes Contratantes de un tratado bilateral, como base independiente de interpretación, porque ello abre la posibilidad de que un intérprete (en muchos casos, con la mejor de las intenciones) altere el

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[55] Pellet Report, para. 30. See also para. 23.

[56] See also Weeramantry, *op. cit.*, paras. 3.14-3.20 (2012), **Exhibit CS-40**.

[57] Yearbook of the International Law Commission, 1966, Vol. II, p. 223, **Exhibit CLA-167**.

texto del tratado para hacerlo coincidir mejor con lo que él (o ella) considere el "verdadero fin" del tratado.[58]

[The carefully-worded formulation in Article 31 is based on the view that the text must be presumed to be the authentic expression of the intention of the parties. The starting point of all treaty-interpretation is the elucidation of the meaning of the text, not an independent investigation into the intention of the parties from other sources …

In the circumstances, the Tribunal holds that, there is no room for any presumed intention of the Contracting Parties to a bilateral treaty, as an independent basis of interpretation; because this opens up the possibility of an interpreter (often, with the best of intentions) altering the text of the treaty in order to make it conform better with what he (or she) considers to be the treaty's "true purpose".]

63. In a similar vein, the Tribunal in *Ping An* v. *Belgium* said:

> The ordinary meaning approach has been adopted in many investor-State arbitrations to confirm that the presumed intentions of the parties should not be used to override the explicit language of a BIT (*Fraport v. Philippines* at [340]) or to override the agreed upon framework (*Daimler Financial Services v. Argentina* at [164]), or be used as an independent basis of interpretation (*Wintershall v. Argentina* at [88]).[59]

64. Another clear endorsement of the objective approach came from the Tribunal in *El Paso* v. *Argentina*:[60]

> El Tribunal considera que, de conformidad con el Artículo 31(1) de la Convención de Viena, cualquier interpretación debe comenzar con un análisis de los *términos* del tratado según su sentido ordinario. El principio es que la redacción del tratado es la manifestación de la intención común de las Partes, es lo que las Partes efectivamente acordaron, incluso si una de las Partes hubiera querido otra cosa sobre una cuestión u otra. En tanto esos deseos no se manifiesten, el contenido de las disposiciones del tratado adquiere vital importancia, y no se puede interpretar nada que no esté expresamente incluido en el texto. [61]

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[58] *Wintershall Aktiengesellschaft v. Argentine Republic*, Award, 8 December 2008, paras. 78, 88, **Exhibit CLA-186**. Emphasis in original.

[59] *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium*, Award, 30 April 2015, para. 166, **Exhibit CS-50**.

[60] *El Paso Energy International Company v. Republic of Argentina*, Award, 31 October 2011, **Exhibit CLA-87**.

[61] Para. 590. Emphasis in original.

> [The Tribunal considers that, pursuant to Article 31(1) of the Vienna Convention, any interpretation has to begin with an examination of the *terms* of the treaty taken in their ordinary meaning. The wording of the treaty is deemed to express the intention common to the Parties, and what the Parties effectively agreed to, even though a Party might have wished otherwise on one or another point. As long as such wishes are not expressed, the content of the treaty's provisions is paramount, and what is not there cannot be read into them.]

65. The Tribunal in *ST-AD* v. *Bulgaria*, relied on an article by Sir Gerald Fitzmaurice to underpin the objective approach to treaty interpretation:

> As required by the rules of interpretation of international treaties, the Tribunal starts with a reading of the ordinary meaning of the text, which is deemed to express the common will of the Parties. As Sir Gerald Fitzmaurice observed:
>
> > … the treaty was, after all, drafted precisely to give expression to the intentions of the parties, and must be presumed to do so. Accordingly, this intention is, *prima facie*, to be found in the text itself, and therefore the primary question is not what the parties intended by the text, but what the text itself means: whatever it clearly means on an ordinary and natural construction of its terms, such will be deemed to be what the parties intended.[Quoting Sir Gerald Fitzmaurice, "The Treaty and Procedures of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points" (1957) 33 Brit. Y.B. Int'l L. 203 at 205.][62]

66. In *Al Warraq* v. *Indonesia*, the Tribunal expressed the same principle with respect to a multilateral treaty, the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference (OIC):

> … the VCLT requires interpretation of the *mens legis*, not the *mens legislatoris*. … what is relevant is not the intention of any one or more Members of the OIC, but what the language used in the OIC means on an interpretation of the words used.[63]

67. It follows from the above, 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.

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[62] *ST-AD GmbH v. Republic of Bulgaria*, Award on Jurisdiction, 18 July 2013, para. 393, **Exhibit CS-45**.

[63] *Hesham T. M. Al Warraq v. Republic of Indonesia*, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims, 21 June 2012, para. 81, **Exhibit CLA-151**.

D. CONTEXT

68. Venezuela relies on Article 31(3)(c) of the VCLT for the interpretation of the BIT's definition of "investor". That provision states that together with the context there shall be taken into account "any relevant rules of international law applicable in the relations between the parties." In Venezuela's view, the principle of effective nationality originated in the context of diplomatic protection but nowadays is recognized in doctrine and case law, as a principle of international law and should therefore be applied in the present case.[64]

69. Professor Pellet supports this proposition[65] and argues that Article 31(3)(c) of the VCLT should lead to the application of the rules of customary international law and in particular Article 7 of the ILC's Draft Article on Diplomatic Protection[66] in the present case. Professor Pellet argues that the BIT's definition of "investors" must be "enlightened and complemented" by these rules.[67]

70. Article 31(3)(c) of the VCLT refers to "any relevant rules of international law applicable in the relations between the parties." As explained above, the body of rules developed in the context of diplomatic protection is of limited relevance in the context of contemporary investment law.

71. As set out in Section III of this legal opinion, it is highly doubtful whether the rules on dual nationals developed in the context of diplomatic protection represent general customary international law that would be relevant for purposes of Article 31(3)(c) of the VCLT. Moreover, interpreting a treaty provision in the light of other rules of international law must not amount to changing its meaning. Complementing a treaty rule by adding a condition that is not reflected in its text is not to interpret it but to change it. It follows that

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[64] Respuesta de Venezuela sobre doble nacionalidad, paras. 28-32; Memorial de Admisibilidad y Objeciones a la Jurisdicción, paras. 125-139.

[65] Pellet Report, para. 31.

[66] Article 7 of the ILC's Draft articles on Diplomatic Protection provides: "A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.", **Exhibit CS-15**.

[67] Pellet Report, para. 62.

any rule on dominant nationality derived from the area of diplomatic protection would not be a relevant rule in the sense of Article 31(3)(c) of the VCLT.

72. In *KT Asia* v. *Kazakhstan*,[68] the Tribunal rejected an attempt to rely on Article 31(3)(c) of the VCLT to superimpose a requirement of real and effective nationality upon a definition of "investor" that did not reflect that requirement:

> The Respondent seeks to rely on Article 31(3)(c) of the VCLT, arguing that the principle of real and effective nationality forms part of the "relevant rules of international law applicable in the relations between the parties" (MoJ, § 268). The Tribunal cannot share this view.[69]

73. The Tribunal proceeded to point out that the principle of real and effective nationality derived from customary international law rules governing diplomatic protection was not relevant for the interpretation of the pertinent treaty provision.[70] It said:

> This Tribunal sees no basis for applying a rule of diplomatic protection that would trump the specific regime created by the Treaty.[71]

74. Another argument derived from the BIT's context concerns the alleged inapplicability of some of the treaty's provisions to dual nationals. Professor Pellet argues that certain of the BIT's substantive standards would not be effective for foreign investors who also possess the host State's nationality. This would be the case for the national treatment standard contained in Article IV(2) and for the guarantee of free transfer of payments in Article VII.[72]

75. It is doubtful whether these guarantees are inoperative for investors who possess dual nationality including that of the host State. The national treatment standard assures the dual national that he will not suffer discrimination on account of the fact that he possesses a second nationality. The guarantee of free transfer of payments is an important element in the efficient management of an investment. It is not clear why a foreign investor, who also possesses the host State's nationality, should be deprived of that guarantee. The obligation

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[68] *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, Award, 17 October 2013, **Exhibit CLA-11**.

[69] At para. 125.

[70] At paras. 126-128.

[71] At para. 128.

[72] Pellet Report, paras. 26-28.

to pay taxes applies to foreign and local investors alike and is unaffected by a right to make payments abroad.

76. Even if it was true that some of the BIT's protections are not operative vis-à-vis investors who also possess the host State's nationality, this is not a convincing reason to deny the application of the entire treaty to them. In view of the variety of investments and the wide range of protections contained in BITs, it would be highly unusual if all provisions of a treaty were to be pertinent for every investment and to every investor.

77. Professor Pellet's problems concerning the duplication of protection under domestic and international law and a blatant discrimination in favour of bi-nationals,[73] seem to be premised on the assumption that normally foreign investors do not have access to domestic remedies. However, international remedies, such as investor-State arbitration, are not designed to offset the lack of access to local justice but to remedy its shortcomings, real or perceived.

78. As for discrimination, a privileged position for foreign investors is inherent in treaties for the promotion and protection of investments. As the Preamble to the BIT indicates, it is designed to create favorable conditions for investments of investors of the respective other Party. These privileges are designed to attract investments and are ultimately in the interest of the host States.

E. SUPPLEMENTARY MEANS OF INTERPRETATION

79. Article 32 of the VCLT provides for supplementary means of interpretation in order to confirm the meaning resulting from the application of the general rule of interpretation set out in Article 31. Other treaties of the contracting States concerned may serve as such a supplementary means of interpretation.

80. In *KT Asia* v. *Kazakhstan*,[74] the Tribunal said:

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[73] Pellet Report, para. 29.

[74] *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, Award, 17 October 2013, **Exhibit CLA-11**.

> Pursuant to Article 32 of the VCLT, supplementary means of interpretation can be used in particular to confirm the meaning resulting from the application of Article 31. These include treaties which one of the Contracting States entered into with third states if they deal with the same subject matter.[75]

81. It is possible for the States parties to an investment treaty to subject the nationality of individual investors who are dual nationals to a requirement of dominant and effective nationality. However, such a requirement would have to be spelt out specifically in the treaty.

82. For instance, in *Al Tamimi* v. *Oman*,[76] the applicable US-Oman FTA contained the following Article 10.27:

> **investor of a Party** means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.[77]

83. The Tribunal pointed out that this provision did not apply if the claimant had two nationalities of States other than the host State. It only applied to situations where the dominant and effective nationality was that of the host State.[78]

84. The need for a provision of this type is strong evidence that in its absence there is no requirement of dominant and effective nationality.

85. In *Serafín García Armas* v. *Venezuela*,[79] the Tribunal undertook a detailed examination of the treaty practice of Venezuela and Spain.[80] It determined that of 27 BITs of Venezuela that it examined, only three excluded dual nationals who also possessed the host State's nationality. Of 42 BITs of Spain, examined for this purpose, only one withheld the treaty's benefits from dual nationals possessing the host State's nationality.

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[75] At para. 122. Footnote omitted. The Tribunal refers to A. Aust, *Modern Treaty Law and Practice* (2007), p. 248, **Exhibit CS-17**.

[76] *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, Award, 3 November 2015, **Exhibit CS-51**.

[77] At para. 266. Emphasis in original.

[78] At para. 274.

[79] *Serafín García Armas and Karina García Gruber v. Venezuela*, Decision on Jurisdiction, 15 December 2014, **Exhibit CLA-9**.

[80] At paras. 176-181.

86. This treaty practice led the Tribunal to the conclusion that an exclusion of dual nationals who possessed the host State's nationality from the BIT's protection would have to be explicit and could hence not be assumed. The Tribunal said:

> El hecho de que Venezuela haya firmado TBIs con ciertos Estados en los cuales excluyó de su aplicación a los nacionales de ambos países signatarios y otros en los cuales no lo hizo, evidencia que la excepción a su aplicación fue siempre efectuada en forma expresa y en tanto no fuera parte de compromisos recíprocos de los signatarios de los respectivos TBIs.
>
> Por la misma razón, la circunstancia de que en la gran mayoría de los TBIs firmados por España (incluido el APPRI) en el período 1990 - 2000 no se hubiese exceptuado la protección a los dobles nacionales (salvo en un tratado en el cual no se adoptó esa solución), evidencia que la denegación del beneficio del Tratado debe ser consignada expresamente en el texto del mismo para que prevalezca su aplicación como parte de los compromisos recíprocos asumidos por los Estados signatarios del APPRI.[81]

87. Venezuela seeks to rely on the Tratado de Amistad and on the Acuerdo Económico to argue that these two treaties between Spain and Venezuela would exclude dual nationals from seeking protection against one of their States of nationality. This would follow from the principle of equality of States that is set out in the preambles of the two treaties. The argument is based on Article XI(4) of the BIT which sets out the law applicable in investor-State arbitration and includes other treaties between the two States.[82]

88. As set out below in Section V of this legal opinion, Article XI(4) of the BIT determines the law applicable to the merits of the case but does not govern questions of jurisdiction.

89. The sources adduced by Venezuela in this context refer to situations of diplomatic protection. As explained in Section III of this legal opinion, the rules developed in the context of diplomatic protection are of limited relevance in the context of treaty-based international investment law.

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[81] At paras. 180-181.

[82] Memorial de Admisibilidad y Objeciones a la Jurisdicción, paras. 103-114. See also Pellet Report, para. 17.

90. The article by *Brownlie*, upon which Venezuela relies does refer to "the principle of equality" on the page indicated by Venezuela.[83] However, Brownlie uses that term in relation to nationals of the two States. Brownlie, does not discuss sovereign equality.

91. It is unclear how sovereign equality, which is uncontested in principle, would advance Venezuela's argument on dual nationality. The rule on the nationality of investors, set out in Article I(1) of the BIT applies equally to both treaty partners. Nor does an interpretation of that provision that follows its ordinary meaning in any way affect sovereign equality. The two parties to the BIT agreed on its terms in the exercise of their sovereignty.

F. CONCLUSIONS ON THE BIT'S INTERPRETATION

92. Under the rules of treaty interpretation, Article I(1) of he BIT, defining the concept of "investor", must be accepted at face value. None of the purported rules of interpretation adduced by Venezuela justifies an interpretation other than that appearing from the treaty's ordinary meaning. Article I(1)a) defines investors as physical persons who possess the nationality of one of the Contracting parties and invest in the other Contracting Party. Claimants fulfil these requirements. The introduction of additional requirements, not reflected in the Treaty's text, would not accord with the rules of treaty interpretation.

[83] I. Brownlie, The Relations of Nationality in Public International Law, 39 BYIL 331 (1963), **Exhibit CS-2**.

V. THE LAW GOVERNING JURISDICTION

93. Venezuela seeks to justify its attempts to import elements extraneous to the BIT into the definition of "investor" by relying on its Article XI(4). That provision deals with the law to be applied by the Tribunal and provides:

> El arbitraje se basará en:
> a) Las disposiciones del presente Acuerdo y las de otros acuerdos concluidos entre las Partes Contratantes;
> b) Las reglas y principios de Derecho Internacional;
> c) EI derecho nacional de la Parte Contratante en cuyo territorio se ha realizado la inversión, incluidas las reglas relativas a los conflictos de Ley.

94. That provision determines the law applicable to the merits of the case. It does not govern questions of jurisdiction including jurisdiction *ratione personae*. It is an established principle that questions of jurisdiction are determined by the instrument containing the parties' consent to jurisdiction. Therefore, in most cases the law governing jurisdiction is determined by the treaty containing the offer of consent to arbitration (and Article 25 of the ICSID Convention where applicable).[84]

95. This holds true irrespective of what law governs the merits of any given case. Tribunals have confirmed that the law governing jurisdiction differs from the law applicable to the merits of the dispute. Questions of jurisdiction are governed by their own system, which is defined by the instruments containing the parties' consent to jurisdiction. Numerous tribunals have confirmed that the law applicable to the tribunal's jurisdiction must be sought in the provisions of the treaties containing consent. [85]

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[84] More generally see C. Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration*, McGill Journal of Dispute Resolution, Vol. 1:1 pp. 1-25 (2014), **Exhibit CS-46**.

[85] *CSOB v. Slovakia*, Decision on Jurisdiction, 24 May 1999, para. 35, **Exhibit RLA-210**; *Enron v. Argentina*, Decision on Jurisdiction, 14 January 2004, para. 38, **Exhibit CS-10**; *Noble Energy & Machalapower v. Ecuador*, Decision on Jurisdiction, 5 March 2008, paras. 56-57, **Exhibit CS-20**; *CMS v. Argentina*, Decision on Jurisdiction, 17 July 2003, paras. 42, 88, **Exhibit CLA-175**; *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, paras. 29-31, **Exhibit CS-12**; *Azurix v. Argentina*, Decision on Jurisdiction, 8 December 2003, paras. 48-50, **Exhibit CS-9**; *Camuzzi International S.A. v. Argentina*, Decision on Jurisdiction, 11 May 2005, paras. 15-17, 57, **Exhibit CLA-177**; *Sempra v. Argentina*, Decision on Jurisdiction, 11 May 2005, paras. 25-28, **Exhibit CS-14**; *AES Corp. v. Argentina*, Decision on Jurisdiction, 26 April 2005, paras. 34-39, **Exhibit CS-13**; *Berschader v. Russian Federation*, Award, 21 April 2006, paras. 93-

96. In *CMS* v. *Argentina*,[86] the Tribunal expressed this principle succinctly in the following terms:

> … jurisdiction [is] governed solely by Article 25 of the [ICSID] Convention and those other provisions of the consent instrument which might be applicable, in the instant case the Treaty provisions.[87]

97. The Tribunal in *Daimler* v. *Argentina*[88] aptly summarized the issue of the law applicable to jurisdiction in the following terms:

> 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.[89]

98. Therefore, it is clear that jurisdictional issues, including the existence of an eligible investor and the parties' consent to arbitration, must be determined by reference to the legal instruments establishing jurisdiction.

97, **Exhibit CS-16**; *Jan de Nul N.V., Dredging Intl. N.V. v. Egypt*, Decision on Jurisdiction, 16 June 2006, paras. 65-68, **Exhibit RLA-125**; *Saipem v. Bangladesh*, Decision on Jurisdiction, 21 March 2007, paras. 68-70, 78-82, **Exhibit CLA-58**; *BG. Group v. Argentina*, Final Award, 24 December 2007, para. 204, **Exhibit CLA-63**; *Inmaris Perestroika v. Ukraine*, Decision on Jurisdiction, 8 March 2010, para. 54, **Exhibit CS-23**; *Burlington v. Ecuador*, Decision on Jurisdiction, 2 June 2010, paras. 101-103, **Exhibit CS-27**; *Railroad Development Corp. v. Guatemala*, 2nd Decision on Jurisdiction, 18 May 2010, para. 111, **Exhibit CS-26**; *Mobil v. Venezuela*, Decision on Jurisdiction, 10 June 2010, paras. 71-85, **Exhibit CLA-79**; *Alpha v. Ukraine*, Award, 8 November 2010, paras. 225-227, **Exhibit CS-29**; *Cemex v. Venezuela*, Decision on Jurisdiction, 30 December 2010, paras. 67-139, **Exhibit CS-31**; *Duke Energy v. Peru*, Decision on Annulment, 1 March 2011, paras. 125-144, **Exhibit CS-32**; *AFT v. Slovakia*, Award, 5 March 2011, paras. 193-199, **Exhibit CS-33**; *Meerapfel v. Central African Republic*, Award, 12 May 2011, paras. 139-147, **Exhibit CS-38**; *Abaclat et al. v. Argentina*, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 430, **Exhibit CS-37**; *Daimler v. Argentina*, Award, 22 August 2012, paras. 45-50, 136-138, **Exhibit RLA-156**; *Quiborax v. Bolivia*, Decision on Jurisdiction, 27 September 2012, paras. 47-52, **Exhibit CLA-195**; *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.17, **Exhibit CS-42**; *Teinver v. Argentina*, Decision on Jurisdiction, 21 December 2012, paras. 227-228, **Exhibit CLA-200**; *Ambiente Ufficio et al v. Argentina*, Decision on Jurisdiction and Admissibility, 8 February 2013, paras. 134, 153, 233-246, 257, 514-515, **Exhibit RLA-92**; *Burimi SRL and Eagle Games SH.A v. Albania*, Award, 29 May 2013, paras. 92 *et seq*., **Exhibit CS-43**; *Philip Morris v. Uruguay*, Decision on Jurisdiction, 2 July 2013, para. 30, **Exhibit CS-44**; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, Award, 17 October 2013, para. 85, **Exhibit CLA-11**; *Churchill Mining v. Indonesia, Planet Mining v. Indonesia*, Decision on Jurisdiction, 24 February 2014, para. 86, **Exhibit CS-48**; *Pac Rim Cayman v. El Salvador*, Award, 14 October 2016, paras. 5.68, 5.71, **Exhibit CS-56**.

[86] *CMS Gas Transmission Company v. Argentine Republic*, Decision on Jurisdiction, 17 July 2003, **Exhibit CLA-175**.

[87] At para. 88.

[88] *Daimler Financial Services v. Argentina*, Award, 22 August 2012, **Exhibit RLA-156**.

[89] At para. 50.

99. A limited exception to this rule concerns cases in which the treaty controlling the jurisdiction refers to domestic law. This is the case where, as in the present case, the BIT in defining a natural person's nationality refers to domestic law. In this situation the nationality of a natural person is determined primarily by the law of the State whose nationality is claimed.[90]

100. In *Soufraki* v. *UAE*[91] the Tribunal reaffirmed the primary relevance of national law to questions of nationality. The Tribunal also emphasized that it had jurisdiction to scrutinise whether the nationality requirements under domestic law were fulfilled:

> It is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality. … But it is no less accepted that when, in international arbitral or judicial proceedings, the nationality of a person is challenged, the international tribunal is competent to pass upon that challenge.[92]

101. It follows that Article XI(4) of the BIT deals with the law applicable to the merits of the dispute but does not govern matters of jurisdiction. Therefore, Article XI(4) cannot serve as a justification for importing elements into the BIT's definition of "investors" that are not contained in the definition of Article I(1)a). Jurisdiction *ratione personae* is governed exclusively by the BIT's definition and the domestic law to which that definition refers.

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[90] *Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt*, Decision on Jurisdiction, 21 October 2003, sec. 3.4.1, **Exhibit CS-8**; *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, Decision on Jurisdiction, 11 April 2007, paras. 195-201, **Exhibit CS-18**; *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*, Decision on Jurisdiction, 24 September 2008, paras. 86, 101, **Exhibit CLA-6**.

[91] *Hussein Nuaman Soufraki v. The United Arab Emirates*, Award, 7 July 2004, **Exhibit RLA-86**.

[92] At para. 55.

VI. THE AUTONOMY OF TREATY PROVISIONS REGARDING NATIONALITY

102. Investment tribunals have consistently held that it is not permissible to add conditions and limitations to jurisdictional clauses, that are not spelled out in the respective investment treaties. What matters is the text, as adopted by the Contracting Parties, without resort to extraneous elements that may appear appropriate or desirable to a particular interpreter. Therefore, Professor Pellet's suggestion that the BIT's definition of "investors" must be "enlightened and complemented"[93] finds no support in tribunal practice.

103. In *Waste Management* v. *Mexico*,[94] the Tribunal rejected an argument to the effect that the NAFTA did not protect investments held indirectly through a national of a third State. The Tribunal found that it was impermissible to imply additional requirements not reflected in the treaty's text:

> Cuando un tratado consigna en detalle y con precisión los requisitos necesarios para hacer una reclamación, no cabe la implicación de que el tratado incorpora otros requisitos, ya sea con base en supuestos requisitos de derecho internacional general en el campo de la protección diplomática o de otro tipo. Si las Partes del TLCAN hubiesen deseado restringir sus obligaciones en materia de conducta a empresas o inversiones que tuviesen la nacionalidad de una de las otras Partes, habrían podido hacerlo. De igual modo, habrían podido restringir las reclamaciones sobre daños o pérdidas haciendo referencia a la nacionalidad de la empresa que sufrió el perjuicio directo. En el texto no existen restricciones de tal naturaleza.[95]
>
> [Where a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise. If the NAFTA Parties had wished to limit their obligations of conduct to enterprises or investments having the nationality of one of the other Parties they could have done so. Similarly they could have restricted claims of loss or damage by reference to the nationality of the corporation which itself suffered direct injury. No such restrictions appear in the text.]

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[93] Pellet Report, para. 62.

[94] *Waste Management, Inc. v. Mexico ("Número 2")*, Award, 30 April 2004, **Exhibit CLA-48**.

[95] At para. 85.

104. In *Saluka* v. *Czech Republic*,[96] the Respondent argued that the claimant's Netherlands nationality was not real and effective. The Tribunal rejected that argument and said:

> The Tribunal cannot in effect impose upon the parties a definition of "investor" other than that which they themselves agreed. That agreed definition required only that the claimant-investor should be constituted under the laws of (in the present case) The Netherlands, and it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add.[97]

105. In *ADC* v. *Hungary*,[98] the respondent sought to challenge the claimant's Cypriot nationality by arguing that the source of the funds and the control of claimants rested with Canadian entities. The Tribunal rejected this argument and pointed out that what mattered was the BIT's definition of "investor". It said:

> In this respect the BIT is governing, and in its Article 1(3)(b) Cyprus and Hungary have agreed that a Cypriot "*investor*" protected by that treaty includes a "*legal person constituted or incorporated in compliance with the law*" of Cyprus, which each Claimant is conceded to be. Nothing in Article 25(2)(b) of the ICSID Convention militates otherwise, as it grants standing to "*any juridical person which had the nationality*" of Cyprus as of the time the Parties consented to this arbitration. As the matter of nationality is settled unambiguously by the Convention and the BIT, there is no scope for consideration of customary law principles of nationality, as reflected in Barcelona Traction, which in any event are no different. In either case inquiry stops upon establishment of the State of incorporation, and considerations of whence comes the company's capital and whose nationals, if not Cypriot, control it are irrelevant.[99]

106. *Siag* v. *Egypt*,[100] the BIT referred to the law of the relevant state for purposes of determining the nationality of natural persons.[101] The respondent sought to rely on a

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[96] *Saluka Investments B.V. v. The Czech Republic*, Partial Award, 17 March 2006, **Exhibit CLA-8**.

[97] At para. 241.

[98] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, Award, 2 October 2006, **Exhibit CLA-54**.

[99] At para. 357.

[100] *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, Decision on Jurisdiction, 11 April 2007, **Exhibit CS-18**.

[101] At para. 22.

principle of effectiveness to contest the claimant's nationality. The Tribunal rejected that argument and said:

> The Tribunal finds that this case does not present a situation where there is scope for international law principles to override the operation of Egyptian domestic law as to nationality. To do so would in effect involve the illegitimate revision of the terms of the BIT and the Nationality Law by the Tribunal.[102]

107. In *Micula* v. *Romania*,[103] the respondent sought to challenge claimants' Swedish nationality by invoking the absence of a genuine link. The Tribunal rejected that argument noting that the BIT did not spell out such a requirement. It said:

> It is also doubtful whether the genuine link test would apply pursuant to the BIT. The Contracting Parties to the BIT are free to agree whether any additional standards must be applied to the determination of nationality. Sweden and Romania agreed in the BIT that the Swedish nationality of an individual would be determined under Swedish law and included no additional requirements for the determination of Swedish nationality. The Tribunal concurs with the *Siag* tribunal that the clear definition and the specific regime established by the terms of the BIT should prevail and that to hold otherwise would result in an illegitimate revision of the BIT.[104]

108. In *Tza Yap Shum* v. *The Republic of Peru*,[105] the Respondent argued that the Peru-China BIT did not apply to residents to Hong Kong. In the absence of such an exception in the treaty's text, the Tribunal refused to accept that objection. It said:

> Aun si se hubiese demostrado que esa era la intención de las Partes al APPRI, era necesario que dicha excepción a la regla (i.e. nacionales chinos) constara explícitamente en el Tratado.[106]

109. In *Saba Fakes* v. *Turkey*,[107] the Respondent tried to read the BIT's rule on the nationality of natural persons subject to a requirement of effectiveness. The Tribunal squarely rejected this attempt and said:

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[102] At para. 201.

[103] *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*, Decision on Jurisdiction, 24 September 2008, **Exhibit CLA-6**.

[104] At para. 101. Footnote omitted.

[105] *Tza Yap Shum v. La República del Perú*, Decision on Jurisdiction, 19 June 2009, **Exhibit CS-21**.

[106] At para. 74.

> … the text of the BIT leaves no room as to the question of whether the Contracting Parties intended such effectiveness test to be applied in the context of the BIT. Pursuant to Article 1(a)(i) of the Netherlands-Turkey BIT, for the purposes of this BIT "'*investor' means: (i) a natural person who is a national of a Contracting Party under its applicable law*." It clearly results from this definition that the Netherlands-Turkey BIT does not require an investor's nationality to be effective for him or her to bring a claim against the host State on the basis of the BIT.[108]

110. *Serafín García Armas* v. *Venezuela*,[109] concerned the same BIT that is before this Tribunal. The Tribunal refused to read non-existing conditions into the Treaty and rejected a suggestion that the definition of "investors" in Article I(1)a) excluded investors who also held the host State's nationality. The Tribunal said:

> ... el texto literal del artículo 1(a) incluye a los nacionales de una parte, pero sin excluirlos en el caso de que fuesen simultáneamente nacionales de la otra parte. De conformidad con las reglas internacionales que se aplican a la interpretación de los tratados, el Tribunal concluye que no puede adicionarse al APPRI una condición no existente en cuanto a la restricción de la nacionalidad de los inversores protegidos por ese Tratado.[110]
>
> La conclusión a que ha arribado este Tribunal en el sentido de que no puede adicionarse al APPRI una condición inexistente en él sobre la nacionalidad de los inversores protegidos por ese Tratado es consistente con las conclusiones a las que han arribado otros tribunales arbitrales que han estudiado estas cuestiones.[111]

111. A recent Award in *Eiser* v. *Spain*,[112] reiterated the principle that a tribunal was not permitted to read hidden exclusions and conditions into a treaty's text:

> Es una regla fundamental del derecho internacional que los tratados sean interpretados de buena fe. Como corolario, se debe entender que los redactores de tratados llevan a cabo su función de buena fe, y que no

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[107] *Saba Fakes v. Republic of Turkey*, Award, 14 July 2010, **Exhibit CLA-147**.

[108] At para. 64. The Tribunal quoted approvingly from the decision in *Micula*, loc. cit.

[109] *Serafín García Armas y Karina García Gruber v. Venezuela*, Decision on Jurisdiction, 15 December 2014, **Exhibit CLA-9**.

[110] At para. 199.

[111] At para. 206.

[112] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, Award, 4 May 2017, **Exhibit CS-58**.

> establecen trampas para los incautos con significados ocultos y exclusiones implícitas de amplio alcance.[113]
>
> [It is a fundamental rule of international law that treaties are to be interpreted in good faith. As a corollary, treaty makers should be understood to carry out their function in good faith, and not to lay traps for the unwary with hidden meanings and sweeping implied exclusions.]

112. This long and consistent line of authorities establishes the principle that provisions in investment treaties must be read at face value and that in the process of their interpretation it is not permissible to add hypothetical conditions and limitations that are not reflected in their text. In particular, treaty provisions on the nationality of investors exhaustively circumscribe the conditions for jurisdiction *ratione personae.*

[113] At para. 186.

VII. THE ICSID CONVENTION'S NEGATIVE NATIONALITY REQUIREMENT

113. The ICSID Convention contains a clear rule excluding individual claimants from party status who also possesses the host State's nationality. That rule is also referred to as the negative nationality rule. Article 25(2)(a) states explicitly that a "national of another Contracting State" who is entitled to proceed under the ICSID Convention

> does not include any person who on either date also had the nationality of the Contracting State party to the dispute;

114. Therefore, under the ICSID Convention the exclusion of nationals of the respondent State is absolute and operates regardless of the possession of another nationality or nationalities. It also operates regardless of whether the host State's nationality is dominant or not. In this respect, the ICSID Convention is stricter than the rules on diplomatic protection, which do not absolutely exclude a claim against a State of which the protected person possesses nationality.[114]

115. The Tribunal in *Burimi* v. *Albania*,[115] found that

> The ICSID Convention makes it very clear that a dual national may not invoke one of his two nationalities to establish jurisdiction over a claim brought in his own name under Article 25(2)(a).[116]

116. In *Champion Trading* v. *Egypt*,[117] the Tribunal rejected claimants' argument that their Egyptian nationality was not real and effective. It rejected resort to doctrines of dominant nationality that are not reflected in the Convention's text and said:

> According to the ordinary meaning of the terms of the Convention (Article 25 (2)(a)) dual nationals are excluded from invoking the protection under the

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[114] See Draft Articles on Diplomatic Protection with commentaries, 2006, Article 7, **Exhibit CS-15**.

[115] *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, Award, 29 May 2013, **Exhibit CS-43**.

[116] At para. 120. Footnote omitted.

[117] *Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt*, Decision on Jurisdiction, 21 October 2003, **Exhibit CS-8**.

> Convention against the host country of the investment of which they are also a national.[118]

117. Professor Pellet relies heavily on the negative nationality rule in the ICSID Convention to argue that Claimants in the present case cannot proceed against Venezuela because they possess Venezuelan nationality.[119] The simple answer to this argument is that the present proceeding takes place not under the ICSID Convention but under the UNCITRAL Rules and the BIT. Neither the UNCITRAL Rules nor the BIT contains a rule reflecting the ICSID Convention's negative nationality rule. Rules and principles established in a treaty do not apply outside the purview of that treaty.

118. Professor Pellet states that the reference to ICSID in Article XI(2)(b) of the BIT "provides greater pervasiveness to ICSID principles and case-law." In his view it would be "absurd to admit that the provisions of the BIT could have different meanings and interpretations based on whether a dispute would be referred to arbitration under the ICSID system or to another dispute settlement option available under Article XI."[120]

119. That argument overlooks the fact that the application of the negative nationality rule is not a matter of the BIT's interpretation but follows from the application of Article 25(2)(a) of the ICSID Convention. In an ICSID case, based on consent in a BIT, the jurisdictional requirements of both treaties must be fulfilled. The prohibition of host State nationality comes autonomously from the ICSID system. If the ICSID Convention does not apply, its requirements, including its negative nationality rule, do not apply. The BIT's interpretation remains the same whether the proceedings take place under the ICSID Convention or not.

120. The fact that the BIT's Article XI(2) foresees ICSID arbitration as one of several options for investor-State dispute settlement is no reason to transpose the rules of the ICSID Convention to other mechanisms listed there. UNCITRAL proceedings take place under the UNCITRAL Rules and not under an amalgam of UNCITRAL and ICSID rules. Article XI(2) also foresee proceedings before the host State's courts. It is not plausible that

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[118] At sec. 3.4.1., p.16.

[119] Pellet Report, paras. 5, 13, 14.

[120] Pellet Report, para. 14.

domestic courts would apply the ICSID rules just because they are listed as alternatives in the BIT.

121. Professor Pellet describes the *travaux préparatoires* leading to the negative nationality rule in the ICSID Convention at some length.[121] He correctly mentions that the rule excluding host State nationals was not contained in the early drafts but only emerged after intensive debate. That fact alone, demonstrates that the negative nationality rule is not a generally accepted rule but is the result of a policy decision that emerged from the negotiations leading to the ICSID Convention.

122. Thus, it is not permissible to transpose the rule excluding nationals of the host State from access to ICSID arbitration to non-ICSID proceedings. The negative nationality rule was designed for purposes of the ICSID Convention and has no currency outside its area of application. It is reflected neither in the BIT nor in the UNCITRAL Rules. To make it applicable outside the ICSID Convention would require a specific provision to that effect.[122]

123. This point was made succinctly by the Tribunal in *Pey Casado* v. *Chile*.[123] The Tribunal found that, unlike the ICSID Convention, the Spain-Chile BIT (the APPI[124]) did not exclude dual nationals who also possessed the nationality of the respondent State. The Tribunal said:

> el tratamiento bajo el APPI de los dobles nacionales es diferente del previsto en el Convenio CIADI en cuanto a su ámbito de aplicación y a su contenido. Para cumplir la condición de la nacionalidad de acuerdo al APPI, basta con que la parte demandante demuestre que tiene la nacionalidad del otro Estado contratante. A diferencia de lo que sostiene la Demandada, el hecho de que la Demandante posea doble nacionalidad, que comprende la nacionalidad de la Demandada, no la excluye del ámbito de aplicación del APPI.[125]

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[121] Pellet Report, paras. 6-11.

[122] See chapter IV.E. above.

[123] *Victor Pey Casado y Fundación Presidente Allende v. Republic of Chile*, Award, 8 May 2008, **Exhibit CLA-10**.

[124] Acuerdo entre el Reino de España y la República de Chile para la Protección y Fomento Recíprocos de Inversiones, signed on 2 october 1991, **Exhibit C-84**.

[125] At para. 415. Footnote omitted.

124. Therefore, the ICSID rule that the individual investor, to be eligible for party status, must not be a national of the host State, finds no application outside the ambit of the ICSID Convention. Jurisdictional provisions in treaties must be accepted at face value without the insertion of rules from other treaties that are not applicable in the particular case.

VIII. THE RELEVANCE OF REAL AND EFFECTIVE NATIONALITY

125. Venezuela, with the support of Professor Pellet, offers an alternative argument to the absolute exclusion of host State nationals as mandated by the ICSID Convention. They state that, even if dual nationals possessing the host State's nationality were to have standing to proceed in investment arbitration, this would not be the case if the host State's nationality is dominant or effective.[126] In fact, towards the end of his Report Professor Pellet comes to the conclusion that "a double national may lodge an application against a State of which it enjoys the nationality *provided his or her dominant nationality is not the one of the State in question*".[127]

A. IS *NOTTEBOHM* STILL RELEVANT?

126. In this context, Venezuela[128] and Professor Pellet[129] put much emphasis on the *Nottebohm* case decided by the International Court of Justice.[130]

127. However, that case is not relevant to the present proceedings. *Nottebohm* was a case of diplomatic protection and did not concern investor-State arbitration. The issue in the case was whether it was possible to rely on a nationality acquired under dubious circumstances vis-à-vis the State of the individual's residence.[131] The questions addressed there do not resemble the issues to be decided in the present case.

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[126] Memorial de Admisibilidad y Objeciones a la Jurisdicción, paras. 141, 155; Pellet Report, paras. 37-59.

[127] Pellet Report, para. 56, Italics in original. See also para. 54.

[128] Respuesta de Venezuela sobre doble nacionalidad, paras. 67-72.

[129] Pellet Report, paras. 44-49.

[130] *Nottebohm Case* (second phase), Judgment of 6 April 1955, I.C.J. Reports 1955, p. 4, **Exhibit CS-1**.

[131] See also *Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt*, Decision on Jurisdiction, 21 October 2003, sec. 3.4.1, **Exhibit CS-8**.

128. For many years *Nottebohm* has exerted a strong influence on the discussion concerning the nationality of individuals.[132] The more recent practice, set out below, demonstrates that the doctrine of a genuine link, spelled out by the ICJ in 1955, is not relevant in contemporary investment law.[133]

129. Several investment tribunals in investor-State arbitrations have dismissed reliance on the *Nottebohm* case explicitly.[134] In Saba *Fakes* v. *Turkey*,[135] the Tribunal said:

> First, while the *Nottebohm* case set forth a requirement of a "genuine link" *with the State of nationality*, that requirement was applied in the context of diplomatic protection of nationals by way of claims filed by the State whose nationality they hold. The issue in that case was not one of dual *nationality* and its consequences, if any, on an individual's right to bring a direct claim against a third State, but whether a State could exercise diplomatic protection *on behalf of* an individual who had no "genuine link" with that State.[136]

130. In *Rompetrol* v. *Romania*,[137] the Tribunal said in a similar vein:

> … neither the *Nottebohm* nor the *Barcelona Traction* cases has direct relevance to a dispute such as the present, brought before it within a treaty framework.[138]

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[132] The first edition of *C. Schreuer*, The ICSID Convention: A Commentary, published in 2001, **Exhibit CS-6**, and reflecting case law as it stood in June 2000, still contained the following statement: "Situations where nationality provisions of national law may be disregarded include cases of ineffective nationality lacking a genuine link between the state and the individual." At p. 267, **Exhibit CS-6**.

[133] The second edition of the ICSID Commentary, published in 2009, **Exhibit RLA-56**, contains the following statement: "Parties have argued repeatedly that nationality provisions of national law may be disregarded in case of ineffective nationality lacking a genuine link between the State and the individual. There is no published decision upholding this doctrine." At p. 266.

[134] See also *Marvin Roy Feldman Karpa v. United Mexican States*, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, para. 32: "Por iguales motivos, la opinión *Nottebohm* de la Corte Internacional de Justicia (Liechtenstein c. Guatemala, [1995] I.C.J. Reports 4), que se ha mencionado reiteradamente no es precisamente relevante. En *Nottebohm* la cuestión era si la nacionalidad de Liechtenstein otorgada a Nottebohm "en circunstancias excepcionales de celeridad y gracia", y sin ningún vínculo sustancial, podría prevalecer contra Guatemala, país con el cual Nottebohm tenía un estrecho vínculo de larga data, como justificación del procedimiento entablado por Liechtenstein ante la Corte Internacional de Justicia. En cambio, aquí no hay duda alguna acerca del otorgamiento genuino y ordinario por nacimiento de la ciudadanía estadounidense al demandante.", **Exhibit CLA-172**.

[135] *Saba Fakes v. Republic of Turkey*, Award, 14 July 2010, **Exhibit CLA-147**.

[136] At para. 68. Emphasis in original.

[137] *The Rompetrol Group N.V. v. Romania*, Decision on Jurisdiction, 18 April 2008, **Exhibit CLA-66**.

[138] At para. 101.

131. In *Micula* v. *Romania*,[139] the Tribunal noted that the requirement of a genuine link did not even enjoy general support in the field of diplomatic protection. The Tribunal said:

> The Tribunal notes that the role of a genuine or effective link with the state of nationality is disputable in public international law, and is indeed disputed, particularly in the case of a single nationality. It seems clear that, as put by the Special Rapporteur of the ILC on Diplomatic Protection in his first report, "*the Nottebohm requirement of a 'genuine link' should be confined to peculiar facts of the case and not seen as a general principle applicable to all cases of diplomatic protection*".[140]

132. Venezuela also relies on the practice of the Iran-US Claims Tribunal, especially its Decision *A/18*. Decision *A/18* is a State *v.* State case which was brought by Iran against the US to clarify the issue of dual nationality cases.[141] The IUSCT relied on the *Nottebohm* case and the rule of real and effective nationality but added that the rule was applicable "unless an exception is clearly stated".[142]

133. Tribunals have found that the rule as enunciated in *Nottebohm* and in *A/18* did not apply in the face of contrary treaty provisions. Therefore, the ICSID Convention's negative nationality rule was not subject to a rule of real and effective nationality.[143] The Tribunal in *Saba Fakes* v. *Turkey*[144] said in this respect:

> … the effective nationality test in *Nottebohm* and in Decision A/18 of the Iran-US Claims Tribunal cannot supersede the clear language of Article 1(a)(i) of the Netherlands-Turkey BIT.[145]

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[139] *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*, Decision on Jurisdiction and Admissibility, 24 September 2008, **Exhibit CLA-6**.

[140] At para. 99. Footnote omitted. Italics in original.

[141] Decision No. Dec 32-A18-FT dated 6 April 1984, reprinted in (1984) 5 Iran-US C.T.R. 251, **Exhibit RLA-177**. The IUSCT has pursuant to para. 17 of the Algiers Declaration the jurisdiction to decide all questions concerning the interpretation or application of the Algiers Declaration. In this decision, the Tribunal gave a general ruling on dual nationality cases and the issue of effective nationality.

[142] At p. 265.

[143] *Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt*, Decision on Jurisdiction, 21 October 2003, sec. 3.4.1., **Exhibit CS-8**; *Saba Fakes v. Republic of Turkey*, Award, 14 July 2010, paras. 68-81, **Exhibit CLA-147**.

[144] *Saba Fakes v. Republic of Turkey*, Award, 14 July 2010, **Exhibit CLA-147**.

[145] At para. 70.

> … when previous ICSID tribunals made references to the *Nottebohm* case or to Decision A/18, it was to rule that those decisions found no application in the context of the ICSID Convention.[146]

134. It follows that *Nottebohm* and *A/18* do not support Venezuela's position. The two cases are State *v.* State cases that have not been followed in the recent practice of investment tribunals. The Algiers Declaration setting up the Iran-US Claims Tribunal established a special regime that cannot be transferred to investment arbitration. Even if Decision *A/18* were applicable, the clear definition of "investor" in the BIT would constitute a clearly stated exception.

B. EFFECTIVE NATIONALITY OF INDIVIDUALS

135. The case law relating to the nationality of claimants in investment cases demonstrates that tribunals have consistently rejected reliance on a purported principle of dominant or effective nationality. In a number of cases respondents sought to challenge the claimants' sole nationality on the ground that it was not sufficiently effective and that the claimants had closer genuine connections to the respondent States.

136. In *Feldman Karpa* v. *Mexico*,[147] the claimant was a US citizen and possessed no other nationality. However, he had made Mexico the center of his business activity and place of permanent residence. The Tribunal rejected the respondent's attempt to rely on that fact and said:

> ... el demandante en este caso, que es ciudadano de los Estados Unidos de América y únicamente de los Estados Unidos de América, y a pesar de su residencia permanente (calidad de *inmigrado*) en México, está legitimado para entablar una acción legal en el presente arbitraje de conformidad con lo dispuesto en el Capítulo XI del TLCAN. En efecto, el demandante, en su calidad de ciudadano de los Estados Unidos de América no debe ser excluido de la protección dispuesta por el Capítulo XI por el sólo hecho de que también es un residente permanente en México.[148]

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[146] At para. 73.

[147] *Marvin Roy Feldman Karpa v. United Mexican States*, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, **Exhibit CLA-172**.

[148] At para. 36. Emphasis in original.

> [the Claimant in this case, being a citizen of the United States and of the United States only, and despite his permanent residence (*inmigrado* status) in Mexico, has standing to sue in the present arbitration under Chapter Eleven of NAFTA. Indeed, the Claimant as a citizen of the United States should not be barred from the protection provided by Chapter Eleven just because he is also a permanent resident of Mexico.]

137. In *Siag* v. *Egypt*,[149] the Tribunal found in its decision on jurisdiction that Mr Siag was an Italian national and did not have Egyptian nationality. However, the respondent asserted that all of the claimant's connections were with Egypt.[150] The Tribunal said:

> The Tribunal concurs with the finding of the ICSID Tribunal in the *Champion Trading* case that the regime established under Article 25 of the ICSID Tribunal does not leave room for a test of dominant or effective nationality. The BIT contains a clear definition of who is to be considered a national.[151]

138. In its subsequent Award, the Tribunal confirmed that there was no room for a test of effective nationality.[152]

139. In *Micula* v. *Romania*,[153] the two primary claimants had acquired Swedish nationality and had lost their previous Romanian nationality in the process. Respondent challenged their Swedish nationality arguing that there was no genuine link to Sweden. The Tribunal, after stating that the ICSID Convention did not leave room for a test of dominant or effective nationality, added with respect to the Sweden-Romania BIT:

> It is also doubtful whether the genuine link test would apply pursuant to the BIT. The Contracting Parties to the BIT are free to agree whether any additional standards must be applied to the determination of nationality. Sweden and Romania agreed in the BIT that the Swedish nationality of an individual would be determined under Swedish law and included no additional requirements for the determination of Swedish nationality. The Tribunal concurs with the *Siag* tribunal that the clear definition and the

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[149] *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, Decision on Jurisdiction, 11 April 2007, **Exhibit CS-18**.

[150] At paras. 173, 196.

[151] At para. 198.

[152] *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, Award, 1 June 2009, para. 473, **Exhibit CS-18**.

[153] *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*, Decision on Jurisdiction and Admissibility, 24 September 2008, **Exhibit CLA-6**.

> specific regime established by the terms of the BIT should prevail and that to hold otherwise would result in an illegitimate revision of the BIT.[154]

140. In *Oostergetel* v. *Slovakia*,[155] the respondent questioned the effectiveness of the claimant's Netherlands nationality. The Tribunal rejected the argument based on the nationality's effectiveness and said:

> The Tribunal further observes that the BIT merely requires an investor to have "nationality of one of the Contracting Parties", which is moreover conferred upon such investor in accordance with the Contracting Party's national law. The BIT does not require such nationality to be "effective" or imposes any further conditions such as the existence of a genuine link to the respective Contracting Party. Nor, as a matter of fact, does the BIT require that the investor hold only one nationality.[156]

141. The situation in *Arif* v. *Moldova*[157] was similar. The Tribunal rejected a challenge to the claimant's nationality based on lack of effectiveness. It said:

> Respondent further alleges that even if Claimant is deemed to have acquired French nationality legally, he has not established effective links with France. The Tribunal notes that neither Article 25 of the ICSID Convention, nor the BIT require the application of the effective nationality principle.[158]

142. These cases demonstrate that where individuals met the conditions for jurisdiction *ratione personae* under the respective treaties, tribunals refused to examine whether a proven nationality was effective or dominant.

C. EFFECTIVE NATIONALITY OF JURIDICAL PERSONS

143. Tribunals have applied the same principle with respect to juridical persons.

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[154] At para. 101. Footnote omitted.

[155] *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, Decision on Jurisdiction, 30 April 2010, **Exhibit CLA-191**.

[156] At para. 130.

[157] *Mr. Franck Charles Arif v. Republic of Moldova*, Award, 8 April 2013, **Exhibit CLA-92**.

[158] At para. 359.

144. In In *Saluka* v. *Czech Republic*,[159] the respondent argued that the Netherlands-registered claimant did not have *bona fide* real and continuous links to The Netherlands.[160] The Tribunal noted that such a requirement was not contained in the definition of "investor" in the Netherlands-Slovakia BIT and said:

> The Tribunal cannot in effect impose upon the parties a definition of "investor" other than that which they themselves agreed.[161]

145. In *ADC* v. *Hungary*,[162] the claimant fulfilled the requirement in the Cyprus-Hungary BIT of a "legal person constituted or incorporated in compliance with the law" of Cyprus.[163] The Tribunal rejected Hungary's argument that the claimant did not have a genuine link to Cyprus. It said:

> The Tribunal cannot find a "*genuine link*" requirement in the Cyprus-Hungary BIT either. While the Tribunal acknowledges that such requirement has been applied to some preceding international law cases, it concludes that such a requirement does not exist in the current case. When negotiating the BIT, the Government of Hungary could have inserted this requirement as it did in other BITs concluded both before and after the conclusion of the BIT in this case. However, it did not do so. Thus such a requirement is absent in this case. The Tribunal cannot read more into the BIT than one can discern from its plain text.[164]

146. In *Rompetrol* v. *Romania*,[165] the respondent conceded that the claimant met the formal requirements for nationality under the BIT. Nevertheless, respondent argued that claimant did not qualify since its real and effective nationality was that of the respondent State.[166] The Tribunal was categorical in rejecting that argument. After dismissing the relevance of the *Nottebohm* and *Barcelona Traction* cases it said:

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[159] *Saluka Investments B.V. v. The Czech Republic*, Partial Award, 17 March 2006, **Exhibit CLA-8**.

[160] At para. 239.

[161] At para. 241.

[162] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, Award, 2 October 2006, **Exhibit CLA-54**.

[163] At para. 357.

[164] At para. 359. Emphasis in original.

[165] *The Rompetrol Group N.V. v. Romania*, Decision on Jurisdiction, 18 April 2008, **Exhibit CLA-66**.

[166] At paras. 78, 84, 100.

> The Tribunal cannot therefore accept the Respondent's argument to the effect that there is, in international law, a general rule of 'real and effective nationality' for determining the status of corporate entities. … In the light of these conclusions, the Tribunal is clear in its mind that there is simply no room for an argument that a supposed rule of 'real and effective nationality' should override either the permissive terms of Article 25 of the ICSID Convention or the prescriptive definitions incorporated in the BIT.[167]
>
> The Tribunal accordingly finds that neither corporate control, effective seat, nor origin of capital has any part to play in the ascertainment of nationality under The Netherlands-Romania BIT, and that the Claimant qualifies as an investor entitled to invoke the jurisdiction of this Tribunal by virtue of Article 1(b)(ii) of the BIT.[168]

147. In *KT Asia* v. *Kazakhstan*[169] too, the Tribunal refused to apply a principle of real and effective nationality to a definition of corporate nationality in a BIT. The Tribunal said:

> The principle of real and effective nationality is applied in the context of diplomatic protection of claimants who hold dual nationality. … This Tribunal sees no basis for applying a rule of diplomatic protection that would trump the specific regime created by the Treaty.[170]

148. These cases demonstrate that where juridical persons met the conditions for jurisdiction *ratione personae* under the respective treaties, tribunals refused to examine whether a proven nationality was effective or dominant.

D. EFFECTIVENESS AND DUAL NATIONALITY

149. The rejection of a principle of real and effective nationality extends to cases involving dual nationals.

150. In *Saba Fakes* v. *Turkey*,[171] the claimant was a Dutch and a Jordanian national who sought to rely on the BIT between The Netherlands and Turkey. The respondent accepted that the claimant held both these nationalities but contended, relying on *Nottebohm*, that in

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[167] At paras. 92-93.

[168] At para. 110. Footnote omitted.

[169] *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, Award, 17 October 2013, **Exhibit CLA-11**.

[170] At paras. 127, 128.

[171] *Saba Fakes v. Republic of Turkey*, Award, 14 July 2010, **Exhibit CLA-147**.

order to proceed under the BIT his Dutch nationality had to be effective. The Tribunal rejected that argument and said:

> … the Tribunal considers that the effective nationality test in *Nottebohm* and in Decision A/18 of the Iran-US Claims Tribunal cannot supersede the clear language of Article 1(a)(i) of the Netherlands-Turkey BIT. This Article is the only relevant provision in the BIT that deals with the issue of nationality. Had the Contracting Parties intended to set additional limitations as regards jurisdiction *ratione personae*, no doubt they would have expressly stated such limitations in the text of the BIT.[172]
>
> … the Tribunal notes that previous ICSID decisions and awards specifically excluded the application of the effective nationality test in the context of investor-State arbitration. Indeed, when previous ICSID tribunals made references to the *Nottebohm* case or to Decision A/18, it was to rule that those decisions found no application in the context of the ICSID Convention.[173]
>
> … the effectiveness of the Claimant's Dutch nationality is irrelevant for the purposes of determining the Tribunal's jurisdiction.[174]

151. In *Levy* v. *Peru*,[175] the claimant's French nationality was uncontested. However, the respondent questioned her reliance on the France-Peru BIT (APPRI) in view of the fact that she possessed also other nationalities. The Tribunal rejected that argument and said:

> A juicio del Tribunal, la **Demandante** acreditó su nacionalidad francesa y, contrariamente a lo alegado por la **Demandada**, el hecho de que la **Demandante** tenga otras nacionalidades no le impide reclamar la protección del **APPRI**.[176]
>
> [In the opinion of the Tribunal, the **Claimant** substantiated her French nationality and, contrary to the allegation of the **Respondent,** the fact that she has other nationalities does not prevent her from claiming protection under the **APPRI**.]

152. Of course most relevant to the present case are decisions that address the role of effectiveness in the case of dual nationals who possess the nationality of the host State.

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[172] At para. 70.

[173] At para. 73. The Tribunal cited the *Siag* and *Champion Trading* cases.

[174] At para. 79.

[175] *Renée Rose Levy de Levi v. Republic of Peru*, Award, 26 February 2014, **Exhibit CS-48**.

[176] At para. 143. Footnote omitted. Emphasis in original.

153. In *Pey Casado* v. *Chile*[177] the Tribunal found not only that the Spain-Chile BIT (the APPI[178]) allowed dual nationals who also possessed the nationality of the respondent State to proceed. It also found that these dual nationals were not excluded if their effective and dominant nationality was that of the host State. The Tribunal said:

> ... el tratamiento bajo el APPI de los dobles nacionales es diferente del previsto en el Convenio CIADI en cuanto a su ámbito de aplicación y a su contenido. Para cumplir la condición de la nacionalidad de acuerdo al APPI, basta con que la parte demandante demuestre que tiene la nacionalidad del otro Estado contratante. A diferencia de lo que sostiene la Demandada, el hecho de que la Demandante posea doble nacionalidad, que comprende la nacionalidad de la Demandada, no la excluye del ámbito de aplicación del APPI. En opinión del Tribunal de arbitraje, en este contexto no existe la condición de nacionalidad *"efectiva y dominante"* de los dobles nacionales. Un doble nacional no queda excluido del campo de aplicación del APPI aunque su nacionalidad *"efectiva y dominante"* sea la del Estado en el que se realiza la inversión (...). Al contrario, la consideración del objetivo mismo del APPI y su redacción excluyen la idea de que exista un requisito de nacionalidad efectiva y dominante.[179]

154. In *Serafín García Armas* v. *Venezuela*,[180] the claimants were dual Spanish and Venezuelan nationals. The Tribunal found that the applicable BIT (APPRI) did not exclude dual Spanish and Venezuelan nationals from its protection. After stressing the irrelevance of rules borrowed from the law of diplomatic protection,[181] the Tribunal dismissed the application of a principle of effective and dominant nationality. The Tribunal said:

> Con base en ese razonamiento, el 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.
>
> Como consecuencia de lo indicado, el Tribunal no considera necesario profundizar en el análisis de los vínculos que unen al señor García Armas y la

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[177] *Victor Pey Casado y Fundación Presidente Allende v. Republic of Chile*, Award, 8 May 2008, **Exhibit CLA-10**.

[178] Acuerdo entre el Reino de España y la República de Chile para la Protección y Fomento Recíprocos de Inversiones, signed on 2 October 1991, **Exhibit C-84**.

[179] At para. 415.

[180] *Serafín García Armas y Karina García Gruber v. Venezuela*, Decision on Jurisdiction, 15 December 2014, **Exhibit CLA-9**.

[181] At paras.167-173.

> señora García Gruber con Venezuela a fin de determinar su nacionalidad prevaleciente.[182]

155. The authorities presented in this section demonstrate that, where a nationality is defined in a treaty, it is not permissible to subject that definition to the added condition of the nationality's effectiveness or dominance. This holds true for individual claimants who seek to rely on their single nationality. It also holds true for claimants that meet the treaty's definition of corporate nationality. Most importantly, in cases of dual nationality the criterion of effective or dominant nationality will not be applied unless this is expressly provided for in the applicable treaty. Even in cases of dual nationality, including that of the host state, tribunals have held that they will limit their analysis to the treaty's definition of nationality without applying a test of dominant or effective nationality.

[182] At paras.174-175. Footnote omitted.

IX. VENEZUELA'S ADDITIONAL ARGUMENTS

A. ABUSE OF PROCESS

156. Venezuela argues that allowing domestic investors to raise a claim against their own State would constitute an abuse of the investment arbitration system.[183]

157. It is difficult to see how the present case could be described an abuse of right. As described in the previous sections, the BIT offers access to arbitration to nationals of the Contracting States without any limiting reference to dual nationals. The observations below on the application of the concept of abuse of right in investment arbitration are without prejudice to the inherent implausibility of the argument in the present case.

158. A survey of tribunal practice demonstrates that tribunals will find an abuse of process only in exceptional circumstances and that the standard of proof that must be met by a party making a charge of this kind is high.[184]

159. In *Chevron & Texaco* v. *Ecuador*[185] the Tribunal found that the burden of proof for the existence of abuse of right lies with the party making the allegation:

> A claimant is not required to prove that its claim is asserted in a non-abusive manner; it is for the respondent to raise and prove an abuse as a defense.[186]

160. The same Tribunal also cautioned against an uninhibited use of the term abuse of rights:

> … in all legal systems, the doctrines of abuse of rights, estoppel and waiver are subject to a high threshold. Any right leads normally and automatically to a claim for its holder. It is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim. The high threshold also results from the seriousness of a charge of bad faith

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[183] Respuesta de Venezuela sobre doble nacionalidad, paras. 8, 35; Solicitud de Bifurcación, paras. 63, 71-72; Memorial de Admisibilidad y Objeciones a la Jurisdicción, paras. 165-168.

[184] For detailed discussion see J.P. Gaffney, "Abuse of Process" in Investment Treaty Arbitration, 11 The Journal of World Investment and Trade 515 (2010), **Exhibit CS-22**.

[185] *Chevron & Texaco v. Ecuador*, Interim Award, 1 December 2008, **Exhibit CLA-185**.

[186] At para. 139.

> amounting to abuse of process. … The threshold must be particularly high in the context of a *prima facie* examination where the Claimants' submissions are to be presumed true. This Tribunal could only dismiss the Claimants' claims at the jurisdictional stage if it concluded that the Respondent's submissions and evidence are sufficient to cross the high threshold for the exceptions invoked to such an extent that the Claimants have not even shown a *prima facie* justification for the claims they have raised.[187]

161. In a subsequent decision[188] the Tribunal confirmed its view of a high burden of proof and the presumption in favour of the right to pursue a BIT claim:

> As for the allegations of bad faith and abuse of process, the Tribunal … finds that Respondent has not fulfilled its burden of proof to show that the Claimants did not have a legitimate interest in instituting proceedings pursuant to the BIT. In particular, given the high standard of proof and the insufficient evidence produced by the Respondent, the Tribunal is not convinced by the Respondent's allegations that the present case is brought solely in support of a larger litigation strategy by the Claimants. Therefore, the Respondent has not overcome the presumption in favour of the Claimants' right to bring their claims under the BIT.[189]

162. In *Rompetrol* v. *Romania,*[190] the respondent argued that the claimant's action was an abuse of process since the claimant's 'real and effective nationality' was that of the respondent State.[191] The Tribunal rejected that argument:

> As to the "abuse of the ICSID mechanism", the Respondent relies primarily on the dissenting Opinion by Professor Prosper Weil in *Tokios Tokelés*. ... the view expressed by Prof. Weil has not been widely approved in the academic and professional literature, or generally adopted by subsequent tribunals. The Tribunal would in any case have great difficulty in an approach that was tantamount to setting aside the clear language agreed upon by the treaty Parties in favour of a wide-ranging policy discussion. Such an approach could not be reconciled with Article 31 of the Vienna Convention on the Law of Treaties (which lays down the basic rules universally applied for the interpretation of treaties), according to which the primary element of

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[187] At paras. 143, 144.

[188] *Chevron & Texaco v. Ecuador*, Partial Award on the Merits, 30 March 2010, **Exhibit CS-24**.

[189] At para. 354.

[190] *The Rompetrol Group N.V. v. Romania*, Decision on Jurisdiction, 18 April 2008, **Exhibit CLA-66**.

[191] At para. 84.

> interpretation is "the ordinary meaning to be given to the terms of the treaty".[192]

163. *Quasar de Valores*[193] (formerly *Renta 4*) offers another example for an unsuccessful attempt to invoke abuse of process in investment arbitration. In that case, the complaint was that Claimants were operating with third party funding and were hence not the true parties in interest. The Tribunal dismissed the charge of abuse of process:

> The Tribunal does not see any element of abuse in this respect. … there is no reason of principle why they were not entitled to pursue rights available to them under the BIT, and to accept the assistance of a third party, whose motives are irrelevant as between the disputants in this case.[194]

164. A number of cases have involved nationality planning on the part of claimants. In these cases, the respondents alleged that corporate restructuring by the claimants served the purpose of obtaining access to international arbitration and that the proceedings instituted on that basis were abusive. Tribunals have found that it is permissible and to be expected that investors will structure their investments in order to avail themselves of treaty protection including access to international arbitration.[195]

165. In *Aguas del Tunari* v. *Bolivia*[196] the Tribunal found that it was neither illegal nor uncommon for investors to locate their operations in a jurisdiction that offers a beneficial legal environment in terms of taxation or the availability of a BIT. The Tribunal said:

> … it is not uncommon in practice, and – absent a particular limitation – not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory environment in terms, for examples, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.[197]

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[192] At para. 85. Footnotes omitted.

[193] *Quasar de Valores v. Russian Federation*, Award, 20 July 2012, **Exhibit CS-39**.

[194] At para. 33.

[195] *HICEE v. Slovakia*, Partial Award, 23 May 2011, para. 103, **Exhibit CS-36**; *Tokios Tokelės v. Ukraine*, Decision on Jurisdiction, 29 April 2004, paras. 24-56, **Exhibit RLA-109**; *Saluka v. Czech Republic*, Partial Award, 17 March 2006, paras. 73, 183-186, 197, 240-241, **Exhibit CLA-8**; *MNSS v. Montenegro*, Award, 4 May 2016, paras. 180-183, **Exhibit CLA-208**.

[196] *Aguas del Tunari v. Bolivia*, Decision on Jurisdiction, 21 October 2005, **Exhibit RLA-155**.

[197] At para. 330.

> The language of the definition of national in many BITs evidences that such national routing of investments is entirely in keeping with the purpose of the instruments and the motivations of the state parties.[198]

166. On the other hand, nationality planning was held to be abusive if it was undertaken after the dispute had started or was at least reasonably foreseeable with a view to obtain a nationality that would enable the claimant to proceed under a pertinent treaty.[199]

167. In *Pac Rim Cayman* v. *El Salvador*[200] the Tribunal described the dividing line between legitimate nationality planning and an abuse of process in the following terms:

> In the Tribunal's view, the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy. In the Tribunal's view, before that dividing-line is reached, there will be ordinarily no abuse of process; but after that dividing-line is passed, there ordinarily will be. The answer in each case will, however, depend upon its particular facts and circumstances,[201] … In particular, abuse of process must preclude unacceptable manipulations by a claimant acting in bad faith and fully aware of an existing or future dispute, …[202]

168. In the present case, Venezuela argues that some of the transfers of shares between the members of the family was an abuse of process because they were carried out to obtain

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[198] At para. 332.

[199] See *Société Générale v. Dominican Republic*, Decision on Jurisdiction, 19 September 2008, **Exhibit CLA-184**, para. 110; *Phoenix Action v. Czech Republic*, Award, 15 April 2009, paras. 88-99, 106-113, 135-144, **Exhibit RLA-111**; *Cementownia "Nowa Huta"'S.A. v. Republic of Turkey*, Award, 17 September 2009, para. 156, **Exhibit CLA-145**; *Mobil v. Venezuela*, Decision on Jurisdiction, 10 June 2010, paras. 167-206, **Exhibit CLA-79**; *Pac Rim Cayman v. El Salvador*, Decision on Jurisdiction, 1 June 2012, paras. 2.1-2.111, **Exhibit RLA-145**; *Tidewater v. Venezuela*, Decision on Jurisdiction, 8 February 2013, paras. 142-198, **Exhibit RLA-148**; *ST-AD GmbH v. Republic of Bulgaria*, Award on Jurisdiction, 18 July 2013, paras. 404-423, **Exhibit CS-45**; *Conoco Phillips v. Venezuela*, Decision on Jurisdiction and the Merits, 3 September 2013, paras. 273-275, **Exhibit CLA-129**; *Lao Holdings N.V. v. The Lao People's Democratic Republic*, Decision on Jurisdiction, 21 February 2014, paras. 68-83, **Exhibit RLA-159**; *Renée Rose Levy de Levi v. Republic of Peru*, Award, 26 February 2014, para. 153, **Exhibit CS-46**; *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, Award, 9 January 2015, paras. 174-195, **Exhibit RLA-150**; *Philip Morris v. Australia*, Award, 17 December 2015, paras. 535-588, **Exhibit CS-52**; *Transglobal v. Panama*, Award, 2 June 2016, paras. 85, 100-118, **Exhibit CS-53**; *Flemingo v. Poland*, Award, 12 August 2016, paras. 343-348, **Exhibit CS-55**; *Pac Rim Cayman v. El Salvador*, Award, 14 October 2016, paras. 5.52-5.57, **Exhibit CS-56**.

[200] *Pac Rim Cayman LLC v. The Republic of El Salvador*, Decision on Jurisdiction, 1 June 2012, **Exhibit RLA-145**.

[201] At para. 2.99.

[202] At para. 2.100.

jurisdiction under the BIT.[203] However, in these transactions both sellers and buyers were dual nationals. Therefore, the transactions did not create jurisdiction in relation to assets which would otherwise have fallen outside the Tribunal's jurisdiction.

169. Some cases, in which tribunals found that there was an abuse of process, involved serious wrongdoing and fraud. In these cases the term abuse of right or abuse of process implied severe censure and wrongdoing .[204] In the present case, Venezuela has not raised allegations of this kind. Nor is there any trace of fraud that would constitute abuse of process.

170. It follows from the above that pursuit of a claim by a dual national, in accordance with the BIT, cannot be classified as abuse of process.

B. ESTOPPEL

171. Venezuela relies on the principle of estoppel or *venire contra factum proprium* to contest claimants' Spanish nationality. In Venezuela's view, the claimants have recognized their Venezuelan nationality, have created and conducted their activities in Venezuela and have presented themselves as Venezuelan nationals.[205]

172. The Encyclopedia of Public International Law[206] describes the concept of estoppel in the following terms:

> In public international law, the doctrine of estoppel protects legitimate expectations of States induced by the conduct of another State. The term stems from common and Anglo-American law, without being identical with the different forms found in domestic law. It is supported by the protection of *good faith* (*bona fide*) in the traditions of civil law. Despite varying perceptions and definitions in doctrine and practice, the following features and essential components of estoppel in public international law are generally

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[203] Memorial de Admisibilidad y Objeciones a la Jurisdicción, paras. 171-193.

[204] *Inceysa v. El Salvador*, Award, 2 August 2006, paras. 230-257, **Exhibit RLA-123**; *Europe Cement v. Turkey*, Award, 13 August 2009, paras. 147-180, **Exhibit RLA-136**; *Cementownia "Nowa Huta" v. Turkey*, Award, 17 September 2009, paras. 108-159, **Exhibit CLA-145**; *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, Award, 6 December 2016, paras. 507-515, 527-531, **Exhibit RLA-135**.

[205] Respuesta de Venezuela sobre doble nacionalidad, para. 34; Solicitud de Bifurcación, paras. 88-96; Memorial de Admisibilidad y Objeciones a la Jurisdicción, paras. 198-223.

[206] *Max Planck Encyclopedia of Public International Law*, Vol. III, p. 672 (2012), **Exhibit CS-39**.

> accepted today, as stated by Judge Spender in the *Temple of Preah Vihear Case*, the principle operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself. (*Case concerning the Temple of Preah Vihear [Cambodia v Thailand] [Merits] [Dissenting Opinion of Sir Percy Spender]* 143–44;)

173. A number of tribunals have described the doctrine of estoppel in general terms. In *Pope & Talbot* v. *Canada*,[207] Canada argued that the investor was estopped from bringing its claim as a consequence of conduct and representations of the investor. The Tribunal summarized the requirements for the existence of estoppel as follows:

> In international law it has been stated that the essentials of estoppel are (1) a statement of fact which is clear and unambiguous; (2) this statement must be voluntary, unconditional, and authorised; and (3) there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement. That statement is cited without disapproval by Professor Brownlie in *Public International Law* 5th Ed. 646. At the same place Brownlie suggests that the essence of estoppel is the element of conduct which causes the other party in reliance on such conduct detrimentally to change its position or to suffer some prejudice.[208]

174. In *Canfor* v. *United States*,[209] the Consolidation Tribunal, before denying any misrepresentation on the part of the United States, made the following general statement:

> The Tribunal accepts that, …, estoppel is a recognized general principle of law that has been applied by many international tribunals. Of the essence to the principle of estoppel is detrimental reliance by one party on statements of another party, so that reversal of the position previously taken by the second party would cause serious injustice to the first party.[210]

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[207] *Pope & Talbot Inc. v. The Government of Canada*, Interim Award, 26 June 2000, **Exhibit RLA-209**.

[208] At para. 111. Footnotes omitted.

[209] *Canfor Corporation v. United States of America*; *Terminal Forest Products Ltd. v. United States of America*, Order of the Consolidation Tribunal, 7 September 2005, **Exhibit RLA-206**.

[210] At para. 168. Footnote omitted. For an identical description see *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, Decision on Preliminary Objections, 27 July 2006, para. 159, **Exhibit RLA-202**.

175. In *Cambodia Power* v. *Cambodia,*[211] the Tribunal described the requirements for the application of the principle of estoppel in the following terms:

> Both Parties accepted that an estoppel could apply if the necessary elements were met. Both Parties agreed on Sir Derek Bowett's statement of the principles involved (D.W. Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, 33 Brit. Y.B. Int'L L. 176, 183-184); namely that there has to be :
> (a) a clear and unequivocal statement or conduct;
> (b) reliance on that statement or conduct by one party; and
> (c) detriment to the party invoking the estoppel or an advantage to the party who made the statement.[212]

The application of these principles led the Tribunal to the conclusion that these requirements had not been met in the particular case.[213]

176. It follows that not every change of position is sanctioned by the doctrine of estoppel. Essential prerequisites for its application are that there has been a representation and that the other party has relied on that representation and, as a consequence, has been prejudiced.

177. Investment tribunals have generally accepted the existence of estoppel in principle.[214] However, they have frequently rejected its application on the particular facts of

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[211] *Cambodia Power Company v. Kingdom of Cambodia Electricité du Cambodge*, Decision on Jurisdiction, 22 March 2011, **Exhibit CS-34**.

[212] At para. 261.

[213] At paras. 260-268.

[214] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, paras. 122, 175-177, **Exhibit CS-7**; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para. 109, **Exhibit CS-11**; *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, Award, 2 October 2006, para. 475, **Exhibit CLA-54**; *Ioannis Kardassopoulos v. The Republic of Georgia*, Decision on Jurisdiction, 6 July 2007, para. 194, **Exhibit CS-19**; *Fraport* AG *Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, Award, 16 August 2007, paras. 346, 347, **Exhibit RLA-108***; Desert Line Projects* LLC *v. The Republic of Yemen*, Award. 6 February 2008, para. 207, **Exhibit CLA-183***; Duke Energy Intl. Peru Investments No. 1 Ltd v. Republic of Peru*, Award, 18 August 2008, paras. 231-251, **Exhibit RLA-213**; *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, Award, 1 June 2009, paras. 113, 205, 387, 398, 418, 424, 481-483, **Exhibit CLA-74**; *Balkan Energy v. Ghana*, Interim Awards, 22 December 2010, paras. 162-165, **Exhibit CS-30**; *Quiborax S.A., Non Metallic Minerals* S.A. *and Allan Fosk Kaplún v. Plurinational State of Bolivia*, Decision on Jurisdiction, 27 September 2012, paras. 257, 258, **Exhibit CLA-195**; *Urbaser* S.A. *and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, Decision on Jurisdiction, 19 December 2012, para. 109, **Exhibit CLA-199**; *David Minnotte* & *Robert Lewis v. Republic of Poland*, Award, 16 May 2014, para. 211, **Exhibit CS-49**.

the case, either because there was no clear representation or because detrimental reliance could not be proved.

178. In a number of cases tribunals have refused to accept claims based on estoppel because the element of detrimental reliance was missing. In *CSOB* v. *Slovakia*,[215] the claimant sought to counter Slovakia's argument that the BIT between the Czech Republic and Slovakia had never entered into force by relying on estoppel. The claimant relied on the fact that a Notice had been promulgated in Slovakia's Official Gazette indicating the entry into force of the BIT. The Tribunal rejected this argument and said:

> The Tribunal must now turn to the question whether the Slovak State is estopped because of the Notice from denying that it is bound by the arbitration offer under the BIT. An essential element of estoppel is that "there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement". Claimant nowhere alleges that it was misled by Respondent or that it relied on any allegedly misleading statements by Respondent and that it was prejudiced as a consequence of such reliance.[216]

179. In *Yukos* v. *Russia*,[217] the Tribunal embraced a description of estoppel developed by the International Court of Justice. But it found that the facts in the case before it fell short of the requirements spelled out there. The Tribunal said:

> Respondent referred the Tribunal to the following passage from the judgment of the International Court of Justice ("**ICJ**") in the *North Sea Continental Shelf Cases*:
>
> > [I]t appears to the court that only the existence of a situation of estoppel could suffice to lend substance to [the contention that the Federal Republic was bound by the Geneva Convention on the Continental Shelf] [. . .], – that is to say if the Federal Republic were now precluded from denying the applicability of the conventional régime, by reason of past conduct, declarations, etc., which not only clearly and consistently evidence acceptance of that régime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice.51
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> > *51North Sea Continental Shelf Cases* (*Germany v. Denmark* / *Germany v. Netherlands*), ICJ Judgment of 20 February 1969, ICJ Reports 1969, p.3, p.26, para. 30.

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[215] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, **Exhibit RLA-210**.

[216] At para. 47. Footnote omitted.

[217] *Yukos Universal Ltd. (Isle of Man) v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, 30 November 2009, **Exhibit CLA-7**.

[emphasis added]

> Applying the standard thus established by the ICJ, the Tribunal concludes that the present case does not satisfy the conditions for the existence of a situation of estoppel.[218]

180. In *Chevron/Texaco* v. *Ecuador* there was an extended discussion of estoppel arising from the claimants' assertions before US courts that they would be able to receive fair treatment before the courts of Ecuador.[219] The Tribunal described the test for estoppel in the following terms:

> The Tribunal also notes that it is the rules and principles of international law that govern the application of estoppel and abuse of rights in the present proceedings. In a dissent to the *Case Concerning the Temple of Preah Vihear* cited by the Claimants, Judge Spender described the test for estoppel in international law in the following terms:
>
> > [T]he principle [of estoppel] operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result the other State has been prejudiced or the State making it has secured some benefit or advantage for itself.
>
> The Tribunal agrees with this formulation of the elements necessary for the application of estoppel, which have been reiterated in the subsequent jurisprudence of the ICJ.[115] Accordingly, the representation upon which the estoppel is based has to be "clear and unequivocal" and there must be actual, justified reliance by the other party.
>
> 115 *See* Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.), Application to Intervene, Judgment, 1990 I.C.J. p. 92, p.118 (Sept. 13) ("essential elements required by estoppel: a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it."); North Sea Continental Shelf 1969 I.C.J. p. 3, p. 26 (Feb. 20); *accord* Gulf of Maine (Can. v. U.S.) 1984 I.C.J p. 246, p. 309 (Oct. 12).[220]

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[218] At paras. 287, 288.

[219] *Chevron and Texaco v. Ecuador*, Interim Award, 1 December 2008, paras. 77, 91, 125-134, 141, 143, **Exhibit CLA-185**; Partial Award on the Merits, 30 March 2010, paras. 266, 334-344, 349-353, **Exhibit CS-24**; Third Interim Award, 27 February 2012, paras. 3.176-3.177, 3.241, 3.250, **Exhibit CLA-124**.

[220] Partial Award on the Merits, 30 March 2010, paras. 350, 351.

181. In applying these principles, the Tribunal concluded that the conditions for the application of the principle in the case before it were not met since there was neither an unequivocal representation nor evidence of reliance:

> In the present case, the Respondent has not provided positive evidence of any clear and unequivocal representations made by the Claimants since many years prior to the commencement of this arbitration. Nor has the Respondent shown that it has undertaken any actions in reliance on these statements. Therefore, the Tribunal concludes that the Claimants are not estopped from pursuing their claims.[221]

182. In *Mamidoil* v. *Albania*,[222] the claimant invoked estoppel to argue that the respondent had acknowledged the legality of its investment. The Tribunal said:

> The Tribunal shares the opinion that the principle of estoppel is embedded in international law. It is a principle where for reasons of material justice a person is hindered from exercising an existing right. It is apparent that such a consequence must be restricted to exceptional circumstances. Estoppel may be found when a party demonstrates by its conduct that it will not exercise a right and a counter-party legitimately relies on this conduct.[223]

The Tribunal found that the statements in question were insufficient to qualify as exceptional circumstances.[224]

183. In *Pac Rim Cayman* v. *El Salvador*,[225] the claimant relied on the doctrine of estoppel in connection with certain assurances they had allegedly received from the respondent. The Tribunal, quoting Brownlie, said:

> … dos elementos esenciales del impedimento en virtud del derecho internacional son, primero, "una declaración de hecho que sea inequívoca y clara" y, segundo, confianza "de buena fe" del receptor de dicha declaración. El Tribunal se limita a añadir, a modo de explicación, que la confianza de buena fe incluye la razonabilidad…[226]

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[221] Partial Award on the Merits, 30 March 2010, para. 353.

[222] *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, Award, 30 March 2015, **Exhibit RLA-124**.

[223] At para. 469.

[224] At para. 477.

[225] *Pac Rim Cayman v. El Salvador*, Award, 14 October 2016, **Exhibit CS-56**.

[226] At para. 8.47.

> […] two essential elements of estoppel under international law include, first, "a statement of fact which is clear and unambiguous" and, second, reliance "in good faith" by the representee. The Tribunal would only add, by way of explanation, that reliance in good faith includes reasonableness…]

The Tribunal reached the conclusion that there was no clear and unambiguous representation.[227]

184. These authorities demonstrate that clear representation as well as proof of detrimental reliance are essential elements of the doctrine of estoppel.

185. Claimants' reliance on their Spanish nationality in the present proceedings does not appear to constitute a change of position over an earlier representation. Venezuela does not seem to argue or prove that they have ever denied the existence of their Spanish nationality. It is inherent in the concept of dual nationality that reliance on one nationality does not imply a denial of the other.

186. Moreover, Venezuela does not demonstrate how it has relied on Claimants' assertion of their Venezuelan nationality to its detriment nor how it would have behaved differently had it been aware of Claimants' Spanish nationality.

[227] At para. 8.51.

X. SUMMARY AND CONCLUSIONS

187. The origin of funds is irrelevant for the international nature of an investment. The decisive criterion for the existence of a foreign investment is the nationality of the investor. An investment is a foreign investment if it is owned or controlled by a foreign investor.

188. The rules of customary international law, developed in the context of diplomatic protection, are of limited relevance in cases governed by treaties that grant investors direct access to international arbitration. The rules concerning dual nationals and effective nationality, as they apply to diplomatic protection, do not apply in the present case.

189. Under the rules of treaty interpretation, enshrined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, Article I(1) of he BIT, defining the concept of "investor", must be accepted at face value. None of the purported rules of interpretation adduced by Venezuela justifies an interpretation other than that appearing from the treaty's text. Article I(1)a) defines investors as physical persons who possess the nationality of one of the Contracting Parties and invest in the other Contracting Party. Claimants fulfil these requirements. The introduction of additional requirements, not reflected in the Treaty's text, would not accord with the rules of treaty interpretation.

190. Article XI(4) of the BIT deals with the law applicable to the merits of the dispute but does not govern matters of jurisdiction. Therefore, Article XI(4) cannot serve as a justification for importing elements into the BIT's definition of "investors" that are not contained in the definition of Article I(1)a). Jurisdiction *ratione personae* is governed exclusively by the BIT's definition and the domestic law to which that definition refers.

191. It is not permissible to add conditions and limitations to jurisdictional clauses that are not spelled out in the respective investment treaties. What matters is the text, as adopted by the Contracting Parties, without resort to extraneous elements that may appear appropriate or desirable to a particular interpreter. In particular, treaty provisions on the nationality of investors exhaustively circumscribe the conditions for jurisdiction *ratione personae*.

192. The rule, contained in the ICSID Convention, that the individual investor, to be eligible for party status, must not be a national of the host State, finds no application outside

the ambit of the Convention. The present proceeding takes place not under the ICSID Convention but under the UNCITRAL Rules and the BIT.

193. Where, as in the present case, nationality is defined in a treaty, it is not permissible to subject that definition to the added condition of the nationality's effectiveness or dominance. In cases of dual nationality the criterion of effective or dominant nationality does not apply unless this is expressly provided for in the applicable treaty. Even in cases of dual nationality including that of the host State, tribunals limit their analysis to the treaty's definition of nationality without applying a test of dominant or effective nationality.

194. The present case does not constitute an abuse of process. Abuse of process presupposes bad faith. Venezuela does not provide evidence denying that, in the matters examined in this opinion, the Claimants have at all times proceeded in good faith and honesty.

195. The doctrine of estoppel is inapplicable in the present case. Estoppel requires a clear representation as well as detrimental reliance. In the present case there is no showing of a relevant representation nor of detrimental reliance.

Vienna, 5 July 2017

(Christoph Schreuer)

STATEMENT OF QUALIFICATIONS

Christoph Schreuer

October 2009 to present	Legal expert and arbitrator.
October 2000 – September 2009	University of Vienna, School of Law, Department of International Law and International Relations: Professor of Law.
July 1992 – June 2000	School of Advanced International Studies, The Johns Hopkins University: Edward B. Burling Professor of International Law and Organization; Director: International Law and Institutions.
September 1970 – September 2000	University of Salzburg, School of Law, Department of International Law: Professor of Law (January 1978-Sept. 2000); Head of Department (October 1982 – June 1986); Universitätsdozent (Associate Professor) (June 1976 – January 1978); Universitätsassistent (Assistant Professor) (September 1970 – May 1976).

- Member, Permanent Court of Arbitration (2008-2014)
- Member, ICSID Panel of Conciliators and Arbitrators
- Chairman, ILA Committee on the Law of Foreign Investment (2003-2008)
- Member, International Arbitration Institute
- Arbitrator in ICSID and UNCITRAL arbitrations
- Numerous legal opinions in ICSID and non-ICSID investment arbitrations
- Designated as appointing authority by the Secretary-General of the Permanent Court of Arbitration in an UNCITRAL arbitration

PRINCIPAL PUBLICATIONS

- Die Behandlung internationaler Organakte durch staatliche Gerichte 381 pp. (Duncker & Humblot, 1977).
- Decisions of International Institutions before Domestic Courts 407 pp. (Oceana 1981).
- State Immunity. Some Recent Developments, 200 pp. (Grotius, 1988).
- Principles of International Investment Law (with R. Dolzer) 433 pp. (Oxford University Press, 2d ed. 2012).
- The ICSID Convention: A Commentary, 1466 pp. (Cambridge University Press, 2001). Second Edition with Loretta Malintoppi, August Reinisch & Anthony Sinclair, 1524 pp. (Cambridge University Press, 2009).
- Over 100 articles on a variety of subjects of international law.
- Numerous articles on international investment law.
- Numerous unpublished legal opinions.