Questions of Jurisdiction relating to Nationality in the case

Manuel García Armas,

Pedro García Armas,

Sebastián García Armas,

Domingo García Armas,

Manuel García Piñero,

Margaret García Piñero,

Domingo García Cámara,

Carmen García Cámara

v.

The Bolivarian Republic of Venezuela

(PCA Case No. 2016-8)

and

Luis García Armas

v.

The Bolivarian Republic of Venezuela

(ICSID Case No. ARB(AF)/16/1)

Second Legal Opinion

by

Christoph Schreuer

TABLE OF CONTENTS

1. Introduction

1. Counsel for Claimants have asked me for a second legal opinion in the present case in response to Professor Alain Pellet's Additional Expert Report of 8 March 2018 ('Pellet 2d Report'), as well as to Venezuela's Reply on Admissibility and Jurisdictional Objections (Memorial de Réplica de Admisibilidad y Objeciones a la Jurisdicción) of 12 March 2018 ('Venezuela's Reply').

2. Andrea de la Brena Meléndez, Abogada, LL.M., has assisted me in reading Venezuela's Reply in the Spanish language.

3. This second Legal Opinion does not replace but supplements my earlier Legal Opinion of 5 July 2017 (Schreuer 1st Opinion). Therefore, the two Legal Opinions should be read together.

4. There are certain points of agreement between Professor Pellet and myself. One such agreement concerns the applicability of the Vienna Convention on the Law of Treaties ('VCLT'), in particular its Articles 31 and 32. Professor Pellet misrepresents my position in that regard. He ascribes to me a position whereby 'ordinary meaning' would be "the only requirement" under Article 31 of the VCLT.[1] I neither say so nor can such a position be inferred from my Legal Opinion. Nor do I "construe the Vienna rules as imported conditions that would 'add language to the BIT, thereby changing its meaning.'"[2] As set out further below,[3] Professor Pellet's 2d Report contains a number of additional misrepresentations.

5. My approach to treaty interpretation does not exclude factors other than the text's ordinary meaning. I agree that all elements listed in Article 31 VCLT (ordinary meaning,

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[1] Pellet 2d Report, para. 11. In my 1st Opinion, at para. 49, the words "the only requirement" refer to the nationality of a Contracting State under the BIT and not to the concept of ordinary meaning under the VCLT.

[2] Pellet 2d Report, para. 16. In my 1st Opinion, at para. 50, the words "add language to the BIT, thereby changing its meaning" refer to Venezuela's and Professor Pellet's techniques of treaty interpretation and not to the Vienna rules.

[3] See paras. 36, 58, 68.

context, object and purpose) must be taken into account. My objection is not to the use of these elements but to their faulty application.

6. Another point of agreement between Professor Pellet and myself concerns the role of the intention of the parties in the interpretation of treaties. We both[4] take the following statement of the International Law Commission ('ILC') as the authoritative statement on this point:

> 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.[5]

7. It follows from this authoritative statement of the ILC, that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties. The interpretation of a treaty should proceed from the elucidation of the meaning of its text. It should not investigate *ab initio* the supposed intentions of the parties. This is precisely the position I have taken throughout my First Opinion.

8. Professor Pellet tends to use judgmental and value-laden adjectives. He describes my interpretation of the Spain-Venezuela BIT as "unnatural" and "excessively restrictive" as well as "unreasonable"[6] while describing his own reading as "natural and clear"[7] as well as "unambiguous and reasonable".[8] He describes his own arguments as "logical" without explaining the reasoning behind his logic.[9] To justify the addition of elements not reflected in the treaty's text, he describes treaty provisions as "incomplete" and "imprecise".[10] He describes a decision that contradicts his position as "hardly convincing" and "quite

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[4] Pellet 2d Report, para. 52; Schreuer 1st Opinion, para. 61.

[5] Yearbook of the International Law Commission, 1966, Vol. II, **Exhibit CS-59**, p. 223.

[6] Pellet 2d Report, paras. 10, 25.

[7] Pellet 2d Report, paras. 7, 42.

[8] Pellet 2d Report, para. 8

[9] Pellet 2d Report, paras. 25, 27.

[10] Pellet 2d Report, paras. 41, 42.

shaky".[11] I will not address these subjective evaluations since they do not represent legal categories.

2. Ordinary Meaning

9. Venezuela argues that a literal interpretation of Article I(1) of the Spain-Venezuela BIT supports its position. It relies on the definition of 'investors' as "physical persons that have the nationality of one of the Contracting Parties" ("Personas físicas que tengan la nacionalidad de una de las Partes Contratantes"). This would mean that the treaty protects investors with only one nationality of a Contracting State.[12]

10. Article I(1)a) of the BIT refers to physical persons of one Contracting Party who invest in the territory of the other Contracting Party. Where the word "one" is used in conjunction with "the other", it does not signify a singularity but is designed to establish a diversity between two entities. In the phrase "one" and "the other", the word "one" does not express a numeral but a differentiation.[13] That diversity or differentiation exists when an investor can invoke a nationality other than that of the host State irrespective of whether the investor also has the latter's nationality.

11. Therefore, Article I(1)a) of the BIT does not mean that an investor may only have one nationality. It merely states that it must possess the nationality of the Contracting Party other than the host State. Under the Spain-Venezuela BIT, this requirement is met where an investor who has Spanish nationality invests in Venezuela. Article I(1)a) does not say that the investor is not allowed to have another nationality in addition to that of Spain.

12. In *Levy v. Peru*,[14] the Article 1(2) of the BIT between France and Peru provided:

> El término **"nacionales"** designa toda persona física que posee la nacionalidad de una de las partes.

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[11] Pellet 2d Report, para. 75.

[12] Venezuela's Reply, paras. 74-75.

[13] This use is also illustrated by the sentence "the children entered the classroom one after the other". The sentence does not indicate that only two children entered the classroom.

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

13. The Tribunal rejected the idea that this means that the claimant must not have more than one nationality:

> 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**.[15]
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> [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**.]

14. To my knowledge, no tribunal has ever adopted the interpretation of clauses containing the "one" and "the other" language put forward by Venezuela. Tribunals have held consistently that dual nationals enjoyed protection under Article I(1)a) of the BIT[16] and under similar clauses in other BITs.[17]

15. Professor Pellet argues that Venezuela's interpretation is confirmed by the maxim *expressio unius est exclusio alterius*. He states that this principle means that Article I(1)a) of the Spain Venezuela BIT can only be interpreted as excluding dual nationals. He claims that the use of this principle has been endorsed by various tribunals.[18] An examination of his authorities[19] reveals that they all invoke the *expressio unius* principle in one way or another but mostly deal with matters other than dual nationality. The one pertinent case invoked by Professor Pellet is *Waste Management v. Mexico*.[20] In that case, the Tribunal stressed that it was impermissible to read into a treaty requirements that are not reflected in its text. The Tribunal said:

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[15] At para. 143. Footnote omitted. Emphasis original.

[16] *Serafín García Armas y Karina García Gruber v. Venezuela*, Decision on Jurisdiction, 15 December 2014, **Exhibit CS-92**.

[17] *Victor Pey Casado y Fundación Presidente Allende v. Republic of Chile*, Award, 8 May 2008, **Exhibit CS-81**, para. 415, see Article 2(2) of the Chile-Spain BIT; *Saba Fakes v. Republic of Turkey*, Award, 14 July 2010, **Exhibit CS-87**, paras. 64, 65, see Article 2(2) of the Netherlands Turkey BIT; *Renée Rose Levy de Levi v. Republic of Peru*, Award, 26 February 2014, **Exhibit CS-48**, para. 143, see Article 1(2) and 2 of the France-Peru BIT; *Dawood Rawat v. The Republic of Mauritius* (UNCITRAL), Award on Jurisdiction, 6 April 2018, **Exhibit CS-96**, paras.167-172, see Article 2 of the Mauritius France BIT.

[18] Pellet 2d Report, para. 9.

[19] Pellet 2d Report, footnote 8.

[20] *Waste Management, Inc. v. Mexico ("Número 2")*, Award, 30 April 2004, **Exhibit CS-65**.

> 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.[21]
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> [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.]

16. It follows that the *expressio unius* principle, as applied in *Waste Management*, means that it is impermissible to imply into a treaty requirements that are not reflected in its text. This means that if the Parties to the Spain-Venezuela BIT had wanted to restrict its application to investors having only one nationality of the Parties they could easily have said so. Therefore, the principle *expressio unius est exclusio alterius* means that the definition of the term 'inversores' in the Spain-Venezuela BIT is exhaustive and must not be supplemented by additional requirements, such as absence of dual nationality, which are not expressed in the treaty.

3. Context

17. Professor Pellet correctly states that in interpreting a treaty provision with the help of its context, other parts of the treaty may be taken into account.[22] However, two paragraphs later, instead of analysing other parts of the treaty, he relies on a concept of "the flow of capital into the economy of the host State" to interpret the term 'investor' in Article

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[21] At para. 85.

[22] Pellet 2d Report, para. 21.

I(1)a) of the BIT.[23] That concept is reflected nowhere in the BIT and is not part of the context. As he points out in the same paragraph, the relevant context of Article I(1)a) is another, related provision of the BIT: Article I(2). That provision starts as follows:

> Por "inversiones" se designa todo tipo de activos, invertidos por inversores de una Parte Contratante en el territorio de la otra Parte Contratante y, en particular, aunque no exclusivamente, los siguientes: ...[24]

18. As this definition of 'investment' demonstrates, what matters is not the flow of capital but the nationality of the investor.[25] Investors of Spanish nationality (including Spanish-Venezuelan dual nationality) investing in Venezuela fulfil this requirement.

19. Professor Pellet argues that several provisions of the BIT do not make sense when applied to dual nationals. For him it follows that Article I(1)a) of the BIT cannot possibly cover dual nationals.

20. He states that the definition of juridical persons and the definition of investments in the BIT "logically exclude" a linkage to both States. For "reasons of coherence", this would have to apply also to physical persons.[26] The logic behind Professor Pellet's interpretation of the BIT's provision on juridical person remains unexplained. Even if correct, differences in the definitions of physical and juridical persons in BITs are perfectly normal. The nationality of individuals is determined primarily by the law of the country whose nationality is at issue. The nationality of corporations is determined variously by such criteria as incorporation, seat, principal place of business, control and real economic activity.[27] Inevitably, these differences will lead to divergent results. To homogenize them "for reasons of coherence", when they deal with different concepts, would do violence to these definitions and is not mandated by the rules of treaty interpretation.

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[23] Pellet 2d Report, para. 23.

[24] Underlining added.

[25] Generally, on the relevance of the origin of the invested capital see Schreuer 1st Opinion, paras. 10-26.

[26] Pellet 2d Report, para. 25, first bullet point.

[27] See *R Dolzer* and *M Stevens*, Bilateral Investment Treaties (1995), **Exhibit CS-61**, pp. 31-42; *K J Vandevelde*, Bilateral Investment Treaties (2010), **Exhibit CS-84**, pp. 157-175; *R Dolzer* and *C Schreuer*, Principles of International Investment Law (2012), **Exhibit CS-88**, pp. 45-50.

21. Professor Pellet seizes upon the reference to conformity with the host State's legislation in Article II(3) of the BIT: "conforme a las disposiciones legales". For him it would be tautological to assert that this would apply to dual nationals since the legislation of a State applies to nationals of that State.[28] However, the legislation of a State applies not only to its nationals but to anyone residing or doing business in that State. Hence, if there is a tautology, that tautology exists both in relation to nationals, dual nationals, and also to investors that only have foreign nationality: all of them have to comply with domestic law in relation to their investments.

22. In fact, the reference to conformity with host State law refers to the investment's legality and not to its applicability to certain categories of investors. Tribunals have held consistently that references of this kind to the host State's domestic law mean that the investment must be legal under domestic law.[29]

23. The standards of full protection and security as well as fair and equitable treatment under the BIT are another reason why Venezuela, with the support of Professor Pellet, would exclude dual nationals possessing the nationality of the host State from the application of the treaty.[30] In his view, it is difficult to understand why international law would protect nationals and their investments within their own State.[31] However, the extension of protections under international law to nationals is a perfectly common occurrence in the field of human rights. Moreover, dual nationals are not just nationals of the host State; they also hold the other State party's nationality.

24. Other examples adduced by Professor Pellet to argue the inapplicability of substantive standards in the BIT to investors who are also local nationals include the

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[28] Pellet 2d Report, para. 25, second bullet point.

[29] See *e.g*. *Salini v. Morocco*, Decision on Jurisdiction, 23 July 2001, **Exhibit CS-63**, para. 46; *LESI-DIPENTA v. Algeria,* Award, 10 January 2005, **Exhibit CS-67**, para. II. 24(iii); *Gas Natural v. Argentina,* Decision on Jurisdiction, 17 June 2005, **Exhibit CS-69**, paras. 33, 34; *Aguas del Tunari v. Bolivia,* Decision on Jurisdiction, 21 October 2005, **Exhibit CS-71**, paras. 139-155; *Bayindir v. Pakistan,* Decision on Jurisdiction, 14 November 2005, **Exhibit CS-72**, paras. 105-110; *Saipem v. Bangladesh,* Decision on Jurisdiction, 21 March 2007, **Exhibit CS-77**, paras. 79-82, 120-124; *SGS v. Paraguay*, Decision on Jurisdiction, 12 February 2010, **Exhibit CS-85**, paras. 118-123; *Railroad Development Corp*. *v. Guatemala*, 2nd Decision on Jurisdiction, 18 May 2010, **Exhibit CS-26**, para. 140.

[30] Venezuela's Reply, paras. 77-79.

[31] Pellet 2d Report, para. 25, third bullet point.

granting of permits, national treatment and MFN status, transfers, and more favourable treatment under domestic or international law.[32] Significantly, Professor Pellet discusses the applicability of these standards in terms of local nationals only. His entire argument is focused on the Claimants' Venezuelan nationality without ever mentioning that they are also Spanish nationals. The same applies to his point on direct access to an international judicial remedy.[33]

25. There is no inherent reason why host States should not offer these incentives to foreign nationals who also possess their nationality. The guarantees offered in BITs serve the purpose of attracting or maintaining investments also in relation to investors who possess dual nationality including that of the host State. Even the national treatment standard when applied to dual nationals is not "useless or tautological".[34] It offers a guarantee that the investor does not suffer discrimination because he possesses a second nationality.

26. Even if it were true that some of the BIT's provisions are inapplicable to foreign investors who possess also the host State's nationality, which in any case is not readily apparent, this would not render them "redundant or useless".[35] It would only mean that certain of the BIT's standards are inoperative vis-à-vis certain investors – a perfectly normal state of affairs. For instance, the fact that a State has not made any undertakings vis-à-vis an investor would not make an umbrella clause or observance of undertakings clause in a BIT "redundant or useless". An inapplicability of certain provisions of the treaty to dual nationals (even if it existed) is no good reason to deny the applicability of the entire treaty.

27. Professor Pellet bemoans the discrimination resulting from the fact that dual nationals have access to international remedies while sole nationals of the host State do not.[36] However, his suggested interpretation leads to a result that is equally discriminating: the exclusion of dual nationals from BIT protection leads to a discrimination among foreign

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[32] Pellet 2d Report, para. 25, fourth to ninth bullet point.

[33] Pellet 2d Report, para. 25, tenth bullet point.

[34] Pellet 2d Report, para. 26.

[35] Pellet 2d Report, para. 26.

[36] Pellet 2d Report, paras. 26, 34.

nationals. Those who only have a foreign nationality would enjoy BIT protection while those with dual nationality would not. Moreover, distinctions among different groups of investors are inherent in a treaty-based system of investment protection. Distinguishing between nationals and dual nationals is no worse than distinguishing between nationals and foreigners.

28. Professor Pellet also seeks to rely on the word "reciprocal" in the BIT's title (promoción y protección recíproca de inversiones) stating that this "indicates a symmetrical and mutual exchange of similar actions." In his view, this would exclude investments made in a Party to the BIT by a national of that Party.[37] The reference to reciprocity in the BIT's title, as well as in its Preamble, means that it is designed to promote and protect investments of Spanish investors in Venezuela and investments of Venezuelan investors in Spain. Venezuelan investors in Spain are protected even if they also have Spanish nationality thus preserving reciprocity.

4. Object and Purpose

29. Venezuela and Professor Pellet state that the object and purpose of investment treaties is to develop and protect foreign investment through an international flow of capital.[38] However, the BIT's Preamble does not mention flow of capital among its object and purpose. Under the BIT's clear terms, the foreignness of the investment is determined not by the origin of capital but by the investor's nationality. Article I(1)a) and Article I(2) relate to the investor's nationality of the other Contracting State as well as to investors of one Contracting Party investing in the other Contracting Party. Under the BIT, the investor's nationality is the only criterion for protection. As set out in some detail in my first opinion, the origin of the capital is not an independent factor to determine the international nature of the investment.[39]

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[37] Pellet 2d Report, para. 28. The reference to the Treaty of Amity between the two States and the principle of legal equality of States in that treaty's preamble is enigmatic.

[38] Venezuela's Reply, paras. 81-87, 123.

[39] See Schreuer 1st Opinion, paras. 5-26.

30. Professor Pellet proceeds from the unexplained assumption that the foreignness would be absent if the investor, in addition to his Spanish nationality had the nationality of Venezuela. He discusses dual nationals as if they were only domestic nationals. For him, the mutual benefit invoked by the BIT's preamble would require an external element. The "international element would be nullified should the investor have the nationality of the host State."[40]

31. In the present case, the foreignness of the investment and the international element demanded by Professor Pellet are provided by the fact that claimants are nationals of Spain. This is the decisive criterion foreseen by the BIT and is also in accord with the practice of investment tribunals in other cases.[41] An investment is a foreign investment if it is made by a foreign investor. There is no indication in the BIT or elsewhere that other elements such as the origin of the invested capital or an additional nationality of the investor would detract from its quality as a foreign investment.

32. It is entirely possible for the Parties to a BIT explicitly to exclude dual nationals, who possess the host State's nationality, from its protection. In fact, some of the BITs of Spain and of Venezuela contain the added requirement that the foreign investor is not a national of the host State (see below paras. 48-51). The Spain-Venezuela BIT does not contain this added requirement. In the absence of such a clause, it is not permissible to read it into the BIT. As set out in my first Opinion, 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 treaties.[42]

33. Professor Pellet insists that the aim of BIT protection is "to compensate for the comparative disadvantage of foreigners as to the legal protection and judicial remedies they would enjoy without the existence of the BIT in comparison with nationals of the host State."[43] As pointed out in my first Opinion,[44] under most legal systems, foreigners have the

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[40] Pellet 2d Report, para. 33.

[41] See Schreuer 1st Opinion, paras. 16-26.

[42] Schreuer 1st Opinion, paras. 102-112.

[43] Pellet 2d Report, para. 34.

[44] Schreuer 1st Opinion, paras. 55-57, 77-78.

same access to legal remedies, although these remedies may be insufficient for nationals and foreigners alike. International standards and remedies are not designed to offset lack of access to local justice for foreign investors but to remedy its shortcomings.

34. As stated in my first Opinion,[45] 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.

35. A recent award in *Rawat v. Mauritius,* makes the same point. In that case, the Tribunal found that the object and purpose of the France-Mauritius BIT supported the inclusion of dual nationals who had the host State's nationality among protected investors. The Tribunal said:

> the object and purpose of the France-Mauritius BIT would also point to the outcome of including, rather than excluding, dual nationals as protected "ressortissants" within the ambit of the BIT. The Preamble highlights the goal of the treaty to "protect and stimulate" investment, and the BIT does not distinguish between the possible sources of the investments sought. Other investment treaty tribunals have reached the same conclusion, for example in the cases of *Pey Casado v Chile* and in *Garcia Armas v Venezuela*, as cited by Rawat.[46]

5. Relevant Rules of International Law

36. Professor Pellet correctly observes that under Article 31(3)(c) VCLT, treaty interpretation shall take into account, together with the context "any relevant rules of international law applicable in the relations between the parties."[47] However, in discussing this provision he again misrepresents my Opinion. I never say or imply that "[t]he effect of

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[45] Schreuer 1st Opinion, para. 53.

[46] *Dawood Rawat v. The Republic of Mauritius* (UNCITRAL), Award on Jurisdiction, 6 April 2018, **Exhibit CS-96**, para. 172.

[47] Pellet 2d Report, para. 40.

this provision is … to alter the text of the treaty"[48]. Nor do I say that resorting to customary international law in the context of treaty interpretation amounts to an unauthorized modification of the treaty.[49] What I do say is that it is not permissible to complement a treaty rule by adding a condition that is not reflected in its text.[50] This is precisely what the Tribunal in *Waste Management* said (see para. 15 above).

37. It is perfectly legitimate, in principle, to take relevant rules of general international law into account when interpreting a treaty.[51] However, Article 31(3)(c) of the VCLT contains three conditions for its application: it requires that the extraneous material must amount to rules of international law, that the rules must be relevant and that the relevant rules must be applicable in the relations between the parties.

38. The rules postulated by Venezuela, with Professor Pellet's support, may be rules of international law in certain limited contexts such as diplomatic protection. However, as demonstrated by ample case law, and as illustrated at some length in my first Opinion,[52] the purported rules on dual nationality and on effective or dominant nationality are not relevant in investor-State arbitration and are not applicable in the relations to the parties to the dispute, host States and investors.

39. The Tribunal in *KT Asia v. Kazakhstan*[53] 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

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[48] Pellet 2d Report, para. 41. The reference is to para. 50 of my Opinion which does not address this issue. The intended reference is probably para. 71.

[49] Pellet 2d Report, para. 41.

[50] Schreuer 1st Opinion, para. 71.

[51] See ILC, Report of a study group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (13 April 2006) UN Doc A/CN.4/L.682, **Exhibit CS-75**, paras. 410-480. See also *C McLachlan*, The Principle of Systemic Integration and Article 31(1)(c) of the Vienna Convention 54 Intl & Comparative LQ (2005), **Exhibit CS-66**, para. 290.

[52] Schreuer 1st Opinion, paras. 27-46.

[53] *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, Award, 17 October 2013, **Exhibit CS-90**.

> of international law applicable in the relations between the parties" (…). The Tribunal cannot share this view.[54]

40. The Tribunal added that for purposes of Article 31(3)(c) of the VCLT the principle of real and effective nationality was not relevant for the interpretation of the pertinent treaty provision.[55] It pointed out that there was no basis for applying a rule derived from diplomatic protection to trump the treaty's specific regime. [56]

41. The International Court of Justice[57] as well as investment tribunals[58] have stressed that contemporary investment law is governed by a special regime of investment treaties leaving little or no room for the application of rules derived from diplomatic protection.

42. The non-application of principles developed in other areas of international law to investment law is not a peculiarity of dual nationality and effective or dominant nationality issues. Other examples are the non-application of the requirement to exhaust local remedies[59] and the standing of shareholders.[60] In these areas too, investment law has gone

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[54] At para. 125.

[55] At paras. 126-128.

[56] At para. 128.

[57] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* Preliminary Objections, Judgment, I.C.J. Reports 2007, **Exhibit CS-78**, para. 90: "various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal régimes governing investment protection".

[58] *Camuzzi International S.A. v. Republic of Argentina*, Decision on Jurisdiction, 11 May 2005, **Exhibit CS-68**, para. 139: "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". *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, Decision on Jurisdiction, 11 April 2007, **Exhibit CS-18**, para. 198: "Developments in international law concerning nationality of individuals in the field of diplomatic protection … must give way to the specific regime under the ICSID Convention and the terms of the BIT." *Saba Fakes v. Republic of Turkey*, Award, 14 July 2010, **Exhibit CS-87**, para. 69: "The rules of customary international law applicable in the context of diplomatic protection do not apply as such to investor-State arbitration."

[59] *Nycomb Synergetics Technology v. Republic of Latvia*, Arbitral Award, 16 December 2003, **Exhibit CS-64**, sec. 2.4b): "no such general obligation to exhaust local remedies can be derived from the Treaty or international law in general." *MNSS B.V. and Recupero Credito Acciaio v. Montenegro*, Award, 4 May 2016, **Exhibit CS-94**, para. 216: "The Respondent has advanced no argument to justify an interpretation of the BIT by the Tribunal that would incorporate the requirement of exhaustion of local remedies before the investor would have access to arbitration." *Valores Mundiales y Consorcio Andino v. Venezuela*, Laudo, 25 July 2017, **Exhibit CS-95**, para. 576: "el Tratado no impone al inversor la obligación de agotar recursos internos antes de acudir a un tribunal internacional para dirimir sus controversias con el Estado."

[60] *Continental Casualty Co. v. Argentina,* Decision on Jurisdiction, 22 February 2006, **Exhibit CS-73**, para. 79: "the treaty protection is not limited to the free enjoyment of the shares, … It also extends to the standards of protection spelled out in the BIT with regard to the operation of the local company that represents the

its own ways and has departed from principles developed in the context of diplomatic protection.

6. Effet utile

43. Professor Pellet invokes the principle of *effet utile* which means that preference must be given to an interpretation that gives a term some meaning rather than none.[61] It is indeed an established principle of treaty interpretation that each provision of a treaty must be given meaning and effect. This means that tribunals are to adopt an interpretation that gives to every treaty provision an *effet utile*, or useful effect.[62] The principle of good faith requires that treaties are interpreted so as to give them full effect "in such a way that a reason and a meaning can be attributed to every part of the text."[63]

44. Professor Pellet's attempt to apply that principle to the BIT is less than clear. He postulates that Article I(1)a) of the BIT, and other provisions of the BIT, would not be effective if construed to include dual nationals from both Contracting Sates.[64] Here too, the problem seems to lie in the fact that he sees them only as local nationals ignoring their foreign (here Spanish) nationality. As explained above (paras. 21-25) no provision of the BIT is 'tautological', or deprived of *effet utile*, when applied to dual nationals.

45. Applied to the case at hand, the principle of *effet utile* means that treaty provisions in other BITs, that address the issue of dual nationality, must have some useful meaning.

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investment."; *Bernhard von Pezold and Others v. Republic of Zimbabwe*, Award, 28 July 2015, **Exhibit CS-93**, para. 326: "The von Pezold Claimants' ownership and control of the Zimbabwean Properties (and related assets) through an indirect corporate holding structure presents no bar to their claims for restitution and/or compensation for the loss suffered to those investments."

[61] Pellet 2d Report, paras. 43-45.

[62] See *e.g., Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, Award, 27 June 1990, **Exhibit CS-60**, para. 40: "Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning."; *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, **Exhibit CS-70**, para. 248: "It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless."; *Sanum Investment Ltd. v. Laos*, Award on Jurisdiction, 13 December 2013, **Exhibit CS-91**, para. 333: "The task of the Tribunal is to interpret the Treaty in such a way that all the provisions of the Treaty have effect even if specific provisions do not refer to each other."

[63] *R. Gardiner*, Treaty Interpretation (OUP, 2008), **Exhibit CS-79**, pp. 149, 159-161, relying on the *travaux* to the Vienna Convention on the Law of Treaties.

[64] Pellet 2d Report, para. 46.

Treaty provisions that merely restate the obvious are without effect. Therefore, it is implausible that a treaty provision adds nothing to existing customary international law. If it were a general rule of international law that dual nationals who possess the host State's nationality may not benefit from a BIT, treaty provisions in other BITs that say so explicitly would be without useful effect or *effet utile*. The same applies to treaty provisions that exclude protection to investors who have the host State's dominant nationality. It follows that provisions in treaties other that the Spain-Venezuela BIT that explicitly exclude dual nationals from protection are a strong indication that there is no general rule of international law to that effect. In other words, the difference between Article I(1)a) of the BIT, which does not address dual nationality, and provisions in other BITs that do, must mean something.

46. The United States Model BIT of 2012 in Article 1, contains the following definition:

> **"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.

47. The second sentence, starting with "provided", reflects Venezuela's default argument (see para. 66 below) based on dominant nationality. If Venezuela's (and Professor Pellet's) argument concerning a general rule on dominant and effective nationality of dual nationals were correct, this provision would be without *effet utile*. Its inclusion in the US Model BIT is a strong indication that there is no such general rule.

48. A look at treaties of Venezuela and of Spain further supports the absence of a general rule as postulated by Venezuela and Professor Pellet. Some of these treaties specifically exclude treaty protection to dual nationals.

49. The Canada-Venezuela BIT of 1996 in Article 1, excludes dual national in the following terms:

> (g) "investor" means
>
> in the case of Canada:
>
> (i) any natural person possessing the citizenship of Canada in accordance with its laws; …
>
> who makes the investment in the territory of Venezuela and who does not possess the citizenship of Venezuela; and

in the case of Venezuela:

(i) any natural person possessing the citizenship of Venezuela in accordance with its laws; …

who makes the investment in the territory of Canada and who does not possess the citizenship of Canada;

50. The Iran-Venezuela BIT of 2005 in its Article 1(2) excludes dual nationals by defining "nationals" in the following terms:

> (a) Personas naturales, que conforme a las leyes de cualquiera de las Partes Contratantes, sean consideradas sus nacionales y no posean la nacionalidad de la Parte Contratante Receptora.

51. The BIT between Spain and Uruguay of 1992 excludes the application of the treaty to dual nationals in the following terms:

> (c) in the case of dual nationality, each Contracting Party shall apply its own domestic laws to the investor and to the investments he or she makes in its territory;
>
> [(c) en el caso de doble nacionalidad, cada Parte Contratante aplicará al inversor y a las inversiones que éste realice en su territorio su propia legislación interna;]

52. These provisions in treaties of Venezuela and Spain would be meaningless and without useful effect if a general rule existed that excludes dual nationals from protection under BITs. Further, if a clause like Article I(1)a) of the BIT had the same meaning as provisions in other BITs, which expressly exclude dual nationals from protection, differences in drafting would also be meaningless. The principle of *effet utile* makes it impermissible to project limitations contained in some treaties into other treaties that do not contain these limitations under the pretext that these limitations are part of general international law.

53. The fact that some other treaties of Spain and Venezuela contained explicit provisions excluding dual nationals led the Tribunal in *Serafín García Armas v. Venezuela*,[65] to the conclusion that it was impermissible to read such a provision into the Spain-Venezuela BIT. The Tribunal said:

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[65] *Serafín García Armas y Karina García Gruber v. Venezuela*, Decision on Jurisdiction, 15 December 2014, **Exhibit CS-92**.

> 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.[66]

54. In the recent Award in *Rawat v. Mauritius*,[67] the Tribunal reached the same conclusion. The BIT between France and Mauritius, like the BIT in the present case, does not contain an exclusion of dual nationals. The Tribunal noted the presence of provisions excluding dual nationals in other treaties of the two States and found that it was impermissible to transfer these provisions to the treaty before it. The Tribunal said:

> The Tribunal accepts, as argued by Rawat, that we are not to add conditions to the BIT, as drafted and ratified by France and Mauritius. There is no express exclusion of dual nationals from protections under the BIT, unlike other investment treaties entered into by both Mauritius and France (…). This would seem to point to the inclusion, rather than the exclusion, of dual nationals within the scope of the France-Mauritius BIT.[68]

7. Travaux Préparatoires

55. Venezuela, with Professor Pellet's support, seeks to rely on the BIT's *travaux préparatoires* to advance the argument that the BIT would exclude Spanish nationals residing in Venezuela.[69] They refer to negotiating notes dating back to January 1990.[70] These negotiating notes demonstrate that Venezuela asked whether the BIT would protect

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[66] At paras. 180-181.

[67] *Dawood Rawat v. The Republic of Mauritius* (UNCITRAL), Award on Jurisdiction, 6 April 2018, **Exhibit CS-96**.

[68] At para. 170.

[69] Venezuela's Reply, paras. 89-106.

[70] Records of the negotiations of the Spain-Venezuela BIT, Notes of the Negotiations with the Kingdom of Spain in Madrid, 30 and 31 January 1990, **Exhibit R-52**.

Spanish investors residing in Venezuela, to which Spain responded: "no, no son cubiertos porque no están residenciados en España."[71] From this exchange, Professor Pellet seeks to derive that "the key element is in fact residence" and that this is "tantamount to endorsing the effective and dominant nationality principle".[72]

56. Selective portions from a treaty's *travaux préparatoires* are of limited value. This is all the more so when these fragments antedate the finalization of the treaty's text by many years.[73] Most importantly, the sentiments expressed in the excerpt of the treaty's *travaux préparatoires*, upon which Venezuela now seeks to rely, are in no way reflected in the treaty's final text. It appears that Spain's answer was based on the first draft of the treaty that Spain presented to Venezuela, which indeed incorporated the concept of residence rather than nationality to define the natural persons that would be protected by the BIT. However, the BIT, as eventually signed, speaks of "Personas físicas que tengan la nacionalidad de una de las Partes Contratantes". Thus the treaty, as eventually adopted, does not address dual nationals, does not use the concept of residence in its definition of investors and does not speak of effective and dominant nationality. All this demonstrates that, whatever the meaning of Spain's response was in January 1990, it did not find entry into the BIT. In fact, the absence of any reference in a treaty's text to propositions made during the treaty's negotiations suggests that they were discarded in the course of the negotiation process.

8. The Law Governing Jurisdiction

57. Professor Pellet insists that Article XI(4) of the BIT, which circumscribes the governing law, applies not merely to the merits of the dispute but also to questions of jurisdiction.[74] In my first Opinion I have explained that Article XI(4) determines the law

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[71] At p. 5.

[72] Pellet 2d Report, para. 56.

[73] The negotiating notes are dated 30 and 31 January 1990. The BIT was eventually signed on 2 November 1995.

[74] Pellet 2d Report, paras. 58-65.

applicable to the merits of the case. It does not govern questions of jurisdiction including jurisdiction *ratione personae*.[75]

58. Once again, Professor Pellet misrepresents my views by asserting that my position implies "that the rules and principles of international law and other treaties between the parties are not relevant when it comes to jurisdictional matters."[76] I neither say so nor can such a position be implied from my first Opinion. Of course the BIT, as an instrument of international law is to be interpreted in the framework of international law notably under the rules of interpretation contained in the VCLT.

59. Few things are better established in international arbitration than the distinction between the substance of a dispute and questions of jurisdiction when it comes to applicable law. Questions of jurisdiction are governed by their own system, which is defined by the instruments containing the parties' consent to jurisdiction.

60. Professor Pellet goes to great pains to distinguish the case law that I use to illustrate the difference between substantive law and jurisdiction for purposes of the applicable law.[77] He points out that much of that case law deals with jurisdictional matters other than dual nationality. However, the distinction between the law governing the substance and the law governing jurisdiction is quite general and not restricted to certain issues of jurisdiction. It applies to nationality just like to other matters affecting the Tribunal's jurisdiction.

61. Professor Pellet is under the misconception that I deny the applicability of international law to questions of jurisdiction. As pointed out above (para. 58) this is not so.

62. Professor Pellet seeks to introduce a distinction between ICSID and non-ICSID arbitration for purposes of the law applicable to jurisdiction. He states that the present case is different since it is an UNCITRAL case and an ICSID Additional Facility case.[78] In fact, both the UNCITRAL Rules and the ICSID Additional Facility Rules explicitly adopt the

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[75] Schreuer 1st Opinion, paras. 93-101.

[76] Pellet 2d Report, para. 59.

[77] Pellet 2d Report, para. 63.

[78] Pellet 2d Report, para. 63.

distinction between the law applicable to the substance of the case and questions of jurisdiction. The UNCITRAL Arbitration Rules 2010 state in Article 35(1):

> 1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. …[79]

By contrast, Article 23(1) of the UNCITRAL Rules states:

> The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. …[80]

63. The limitation of a choice of law clause to the substance of the dispute is also reflected in the ICSID Additional Facility Rules. Article 54(1) of these Rules provides:

> The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. …[81]

By contrast, Article 45(1) of the ICSID Additional Facility Rules states:

> The Tribunal shall have the power to rule on its competence. For the purposes of this Article, an agreement providing for arbitration under the Additional Facility shall be separable from the other terms of the contract in which it may have been included.

64. Therefore, the separate treatment of the law applicable to substance and to jurisdiction is not a peculiarity of the ICSID Convention. It is a principle that is reflected also in the UNCITRAL and ICSID Additional Facility Rules applicable in the present case. Article XI(4) of the BIT represents the rules of law designated by the parties. Under the applicable UNCITRAL and ICSID Additional Facility Rules these rules of law apply to the substance of the dispute.

65. As described in my first Opinion at some length, tribunals have found consistently that matters of jurisdiction are not governed by the law applicable to the substance of the dispute but by their own rules.[82]

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[79] Underlining added. The UNCITRAL Arbitration Rules of 1976 contained an identical provision in Article 33.

[80] The UNCITRAL Arbitration Rules of 1976 contained a similar provision in Article 21(2).

[81] Underlining added.

9. Is there a Rule of Effective or Dominant Nationality?

66. Venezuela, supported by Professor Pellet, puts much effort into asserting that investors possessing two nationalities, including that of the host State, fall outside the BIT's protection. In the end, Venezuela does not seem to be entirely convinced of that argument. As a second line of defence, it develops a default argument to the effect that a dual national possessing the host State's nationality may be covered by the BIT unless the host State's nationality is dominant.[83]

67. Professor Pellet is also not sure of his argument that dual nationals possessing the host State's nationality are generally outside the BIT's protection. In his first Report he states that the BIT "includes dual Spanish/Venezuelan nationals on the condition that their dominant nationality is *not* that of the Respondent State" and 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*;"[84] In his second Report, Professor Pellet writes more cautiously that "a possible exception to the non-protection of dual nationals … could be where the investor as a dual national has the nationality of the State of investment but that nationality is not dominant."[85]

68. Unfortunately, Professor Pellet's discussion of the effective or dominant nationality principle contains additional misrepresentations of my Opinion. He writes that "[i]n his [i.e. Schreuer's] view, when States wish to exclude the application of the criterion of effective or dominant nationality they must include a clause to this effect in the BIT."[86] My Opinion says nothing of the sort. On the contrary, I state that "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."[87] Professor Pellet also imputes to me that I deny the

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[82] Schreuer 1st Opinion, paras. 93-101.

[83] Venezuela's Reply, paras. 134-139.

[84] Pellet, 1st Report, paras. 54-56. Italics original.

[85] Pellet 2d Report, para. 37.

[86] Pellet 2d Report, para. 67.

[87] Schreuer 1st Opinion, para. 155.

applicability of principles and rules of general international law to investment treaty interpretation.[88] That statement too is an invention.[89]

69. In my first Legal Opinion I demonstrate that an alleged rule of dominant or effective nationality has been consistently eschewed by investment tribunals.[90] Professor Pellet seeks to distinguish these cases either because the decisions concerned dual nationals having the nationality of a third State or were rendered under the ICSID Convention.[91] He prefers to rely on older non-investment cases involving mostly disputes between States.[92]

70. Professor Pellet's distinction, based on the ICSID Convention, is less than clear. The ICSID Convention in Article 25(2)(a) contains an explicit exclusion of host State nationals but it says nothing about dominant or effective nationality. Therefore, ICSID tribunals will dismiss a case involving a host State national without ever reaching the issue of dominant nationality. This does not mean that ICSID decisions addressing questions of effective and dominant nationality are irrelevant. ICSID tribunals have dismissed reliance on a purported rule of dominant or effective nationality in a number of contexts other than the host State's nationality thereby casting doubt upon the existence of such a rule.

71. Professor Pellet states that the principle of effective and dominant nationality has developed in the context of diplomatic protection "but it may also be relevant in other contexts" and has "acquired conceptual autonomy as part of customary international law."[93]

72. The case law of investment tribunals does not support Professor Pellet's suggestion that a rule of dominant or effective nationality has acquired conceptual autonomy as part of customary international law. On the contrary, investment tribunals have dismissed reliance on such an ostensible rule whenever it was argued before them. They did so either because

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[88] Pellet 2d Report, para. 67.

[89] In para. 77 of his 2d Report, Professor Pellet quotes Dolzer/Schreuer, Principles of International Investment Law (2008), **Exhibit RLA-302**, p. 48 to the effect that "[n]ationals of the host state are generally excluded from international protection even if they also hold the nationality of another state." Professor Pellet does not mention that the quoted statement relates to Article to Article 25(2)(a) of the ICSID Convention, which contains an explicit exclusion to that effect.

[90] Schreuer 1st Opinion, paras. 125-155.

[91] Pellet 2d Report, para. 68.

[92] Pellet 2d Report, paras. 70-73

[93] Pellet 2d Report, para. 80.

they doubted the existence of such a rule of customary international law in the first place, or because the applicable treaty described nationality in terms that did not leave room for the purported rule's application.

73. Tribunals have dismissed an alleged rule of effective or dominant nationality in a number of contexts. These contexts included but were not limited to cases of dual nationality including that of the host State. Tribunals have stated that the existence of a test of genuine and effective nationality in international law is disputable[94] and that an effective nationality test cannot supersede the treaty's language.[95] Tribunals have rejected an ostensible rule of dominant or effective nationality in cases not involving the host State's nationality.[96] They have also rejected a purported rule of dominant or effective nationality for juridical persons.[97] Most importantly, tribunals have rejected arguments based on real and effective nationality in cases involving dual nationals.[98]

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[94] *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 CS-82**, para. 99: "the role of a genuine or effective link with the state of nationality is disputable in public international law", para. 101: "It is also doubtful whether the genuine link test would apply pursuant to the BIT."

[95] *Saba Fakes v. Republic of Turkey*, Award, 14 July 2010, **Exhibit CS-87**, para. 70: "the effective nationality test … cannot supersede the clear language of [the BIT]."

[96] *Marvin Roy Feldman Karpa v. United Mexican States*, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, **Exhibit CS-62**, para. 36; *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, Decision on Jurisdiction, 11 April 2007, **Exhibit CS-18**, para. 198: "Article 25 of the ICSID Tribunal does not leave room for a test of dominant or effective nationality." *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, Award, 1 June 2009, **Exhibit CS-83**, para. 473: "there was no room for a test of effective nationality in terms of ICSID jurisdiction"; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, Decision on Jurisdiction, 30 April 2010, **Exhibit CS-86**, para. 130: "The BIT does not require such nationality to be "effective" or imposes any further conditions such as the existence of a genuine link"; *Mr. Franck Charles Arif v. Republic of Moldova*, Award, 8 April 2013, **Exhibit CS-89**, para. 359: "neither Article 25 of the ICSID Convention, nor the BIT require the application of the effective nationality principle."

[97] *Saluka Investments B.V. v. The Czech Republic*, Partial Award, 17 March 2006, **Exhibit CS-74**, para. 241; *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, Award, 2 October 2006, **Exhibit CS-76**, para. 359: "The Tribunal cannot find a "*genuine link*" requirement in the Cyprus-Hungary BIT"; *The Rompetrol Group N.V. v. Romania*, Decision on Jurisdiction, 18 April 2008, **Exhibit CS-80**, para. 92: "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'"; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, Award, 17 October 2013, **Exhibit CS-90**, para. 128: "This Tribunal sees no basis for applying a rule of diplomatic protection [i.e. real and effective nationality] that would trump the specific regime created by the Treaty."

[98] *Saba Fakes v. Republic of Turkey*, Award, 14 July 2010, **Exhibit CS-87**, para. 73: "previous ICSID decisions and awards specifically excluded the application of the effective nationality test", para. 79: "the effectiveness of the Claimant's Dutch nationality is irrelevant"; *Renée Rose Levy de Levi v. Republic of Peru*, Award, 26 February 2014, **Exhibit CS-48**, para. 143.

74. The rejection of an ostensible rule that would give decisive effect to dominant nationality extends to cases involving the host State's nationality. In *Pey Casado v. Chile*[99] the Tribunal found that dual nationals possessing the host State's nationality were protected even if the host State's nationality was dominant. The Tribunal said:

> En segundo lugar, 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 (contrariamente a lo mantenido por el Profesor Dolzer en su informe experto, presentado por la Demandada). 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. Tal y como indica el Profesor Dolzer, el APPI concede su protección a los *"inversionistas de la otra Parte"* o *"de una parte contratante en el territorio de la otra"* (*véase*, por ejemplo, los artículos 2.1, 2.2, 3.1, 4.1, 5, 6, 7.1, 8.1 y 10.1 del APPI). El APPI no aborda expresamente la cuestión de si los dobles nacionales hispano-chilenos quedan cobijados o no bajo su ámbito de aplicación. En opinión del Tribunal de arbitraje, no estaría justificado (basándose en unas pretendidas normas de derecho internacional consuetudinario) añadir un requisito de aplicación que no se desprenda ni su letra o ni su espíritu.[100]

75. Adapted to the present case, *Pey Casado* indicates that it is enough for the Claimants to demonstrate that they possess Spanish nationality. The fact that the Claimants also possess the nationality of Venezuela, does not exclude them from the BIT's ambit of application. There is no condition of effective or dominant nationality for dual nationals. A dual national is not excluded from the BIT's application just because its effective and dominant nationality is that of the host State. It would not be justified to add a requirement

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[99] *Victor Pey Casado y Fundación Presidente Allende v. Republic of Chile*, Award, 8 May 2008, **Exhibit CS-81**.

[100] At para. 415. Footnotes omitted. Inexplicably, Professor Pellet seems to suggest that this case does not deal with the host State's nationality. See Pellet 2d Report, para. 68 *in fine*.

to the BIT's application that results neither from its letter nor spirit, on the basis of pretended norms of customary international law.

76. *Serafín García Armas v. Venezuela*,[101] concerned the same BIT that is at issue in the present case. The claimants were dual Spanish and Venezuelan nationals. The Tribunal found not only that the applicable BIT (APPRI) protected dual Spanish and Venezuelan nationals. It also dismissed the application of a principle of effective and dominant nationality in this context. It stressed the irrelevance of rules borrowed from the law of diplomatic protection[102] and 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 señora García Gruber con Venezuela a fin de determinar su nacionalidad prevaleciente.[103]

77. In a recently decided case, *Rawat v. Mauritius*[104] the claimant was a national of France and Mauritius and relied on the BIT between those two States. The Tribunal noted that the BIT contained no express exclusion of dual nationals and found that it was not to add conditions not contained in the treaty.[105] Also, the object and purpose of the BIT pointed to the inclusion rather than the exclusion of dual nationals.[106] The Tribunal found the fact that the claimant was dominantly and effectively Mauritian immaterial:

> It is undisputed that Rawat is also a Mauritian national, and has been since his birth in Mauritius in 1944. The Tribunal notes that, if we had to determine Rawat's dominant and effective nationality, the basic facts of his connections to Mauritius recited in the Factual Background readily show that he is

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[101] *Serafín García Armas y Karina García Gruber v. Venezuela*, Decision on Jurisdiction, 15 December 2014, **Exhibit CS-92**.

[102] At paras.167-173.

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

[104] *Dawood Rawat v. The Republic of Mauritius* (UNCITRAL), Award on Jurisdiction, 6 April 2018, **Exhibit CS-96**.

[105] At para. 170.

[106] At para. 172.

> dominantly and effectively Mauritian. As will be clear from the analysis to follow, such a determination is immaterial to resolution of the present dispute.[107]

78. In the end, the case was dismissed for a reason unrelated to the claimant's dominant nationality. The BIT contained an obligation for the Contracting States to include an ICSID arbitration clause in investment contracts. The Tribunal concluded that the mandatory reference to the ICSID Convention in the BIT created a 'strict and conventional alignment' to Article 25(2)(a) of the ICSID Convention, which excludes French-Mauritian dual nationals.[108]

79. The Tribunal stressed that it did not disagree with the decisions in *Pey Casado* and *Serafín García Armas*. It found that the context in the Spain-Chile BIT and in the Spain-Venezuela BIT was different. The decisive difference was that the France-Mauritius BIT, unlike those two BITs, made it an obligation for investors to resort to ICSID.[109]

10. Conclusions

80. The reference in the BIT's definition of 'investors' to the nationality of one of the Contracting Parties does not mean that an investor, in order to be protected, may only have one nationality. Rather the word 'one' is used to contrast the investor from 'the other' Contracting Party.

81. The maxim *expressio unius est exclusio alterius* means that the definition of the term 'inversores' in the Spain-Venezuela BIT is exhaustive and must not be modified by additional requirements.

82. The BIT's definition of 'investments' demonstrates that the decisive element is the nationality of the investor. The definition of corporate investors does not affect the interpretation of the definition of individual investors.

83. The BIT's reference to conformity with the host State's legislation expresses the requirement that the investment is legal. It offers no indication of the investor's nationality.

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[107] At para. 166.

[108] At paras. 174-179.

[109] At para. 172, footnote 150.

84. The BIT's substantive standards are applicable to investors who possess dual nationality. Even if it were true that some of the BIT's standards are inapplicable to certain investors this would not affect the BIT's applicability as a whole. Enjoyment by dual nationals of rights under the BIT does not lead to undue discrimination.

85. Under the terms of the BIT, the foreignness of an investment is determined not by the origin of the invested capital but by the investor's nationality. The BIT's object and purpose is served also by the protection of dual nationals.

86. Treaty interpretation under Article 31(3)(c) of the VCLT requires that the rules of international law that are to be taken into account are relevant and applicable. There is ample authority to demonstrate that the rules on dual nationality and on effective or dominant nationality are neither relevant nor applicable in the context of investment law. These purported rules and other rules developed in the context of diplomatic protection cannot be transposed to international investment law.

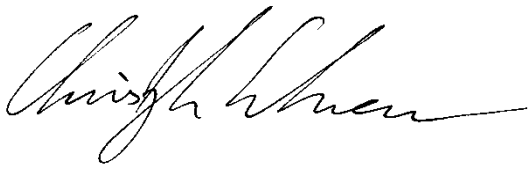
87. The principle of *effet utile* requires that treaty provisions in other BITs that exclude dual nationals or investors who have the host State's dominant nationality, must have some meaning. If it were true that there is a general rule excluding these investors, these treaty provisions would be without useful effect. The principle of *effet utile* makes it impermissible to project limitations contained in some treaties into other treaties that do not contain these limitations.

88. Selective excerpts from the *travaux préparatoires*, not reflected in the treaty's final text, do not provide guidance on the meaning of the treaty's terms.

89. The distinction between the law governing the substance of a case and the law governing jurisdiction is well established and is also reflected in the UNCITRAL Arbitration Rules and the ICSID Arbitration Rules applicable in the case at hand.

90. Reliance on an alleged rule of dominant or effective nationality has been consistently dismissed by investment tribunals. The rejection of an ostensible rule that would give decisive effect to dominant nationality extends to cases involving the host State's nationality. A dual national is not excluded from the BIT's application just because its effective and dominant nationality is that of the host State.

Vienna, 31 May 2018



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