

PCA Case No. 2013-34

**IN THE MATTER OF AN ARBITRATION PURSUANT TO THE AGREEMENT BETWEEN
THE GOVERNMENT OF BARBADOS AND THE REPUBLIC OF VENEZUELA FOR THE
PROMOTION AND PROTECTION OF INVESTMENTS**

-between-

VENEZUELA US, S.R.L.

(the “Claimant”)

-and-

THE BOLIVARIAN REPUBLIC OF VENEZUELA

(the “Respondent”, and together with the Claimant, the “Parties”)

**INTERIM AWARD ON JURISDICTION
(ON THE RESPONDENT’S OBJECTION TO JURISDICTION *RATIONE VOLUNTATIS*)**

**ARBITRAL TRIBUNAL:
H.E. Judge Peter Tomka (Presiding Arbitrator)
The Honourable L. Yves Fortier PC CC OQ QC
Professor Marcelo Kohen**

**SECRETARY TO THE TRIBUNAL:
Mr. Martin Doe Rodriguez**

**REGISTRY:
Permanent Court of Arbitration**

26 July 2016

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I. THE PARTIES

1. The Claimant in these proceedings is Venezuela US, SRL (the “**Claimant**”), a company organized and existing under the laws of Barbados, with its principal place of business at 1201 Lake Robbins Drive, The Woodlands, Texas 77380, USA. The Claimant is represented in this case by:

Mr. John P. Bowman
Ms. Jennifer L. Price
Mr. Louis-Alexis Bret
King & Spalding LLP

2. The Respondent in these proceedings is the Bolivarian Republic of Venezuela (the “**Respondent**” or “**Venezuela**”, and together with the Claimant, the “**Parties**”). The Respondent is represented in this case by:

Mr. Mark H. O’Donoghue
Prof. Tullio R. Treves
Mr. Renato R. Treves
Mr. Eloy Barbará de Parres
Mr. George Kahale III
Ms. Claudia Frutos-Peterson
Curtis, Mallet-Prevost, Colt & Mosle LLP

II. PROCEDURAL HISTORY

A. COMMENCEMENT OF THE ARBITRATION

3. By Notice of Arbitration dated 22 March 2013, the Claimant commenced arbitral proceedings against the Respondent under the Arbitration Rules of the United Nations Commission on International Trade Law (the “**UNCITRAL Rules**”) pursuant to Article 8 of the Agreement between the Government of Barbados and the Republic of Venezuela for the Promotion and Protection of Investments (the “**Treaty**”).¹ Article 8 of the Treaty provides, in relevant part:

ARTICLE 8

**Settlement of Disputes Between one Contracting Party
and Nationals or Companies of the other Contracting
Party**

¹ UNTS, vol. 1984, p. 169. The Treaty was signed on 15 July 1994 and it entered into force, in accordance with its Article 12, on 31 October 1995.

(1) Disputes between one Contracting Party and a national or company of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the latter shall, at the request of the national concerned, be submitted to the International Centre for Settlement of Investment Disputes for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on March 18, 1965.

(2) As long as the Republic of Venezuela has not become a Contracting State of the Convention as mentioned in paragraph 1 of this Article, disputes as referred to in that paragraph shall be submitted to the International Centre for Settlement of Investment disputes under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility Rules). If for any reason the Additional Facility is not available the investor shall have the right to submit the dispute to arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL).

(3) The arbitral award shall be limited to determining whether there is a breach by the Contracting Party concerned of its obligations under this Agreement, whether such breach of obligations has caused damages to the national concerned, and if such is the case, the amount of compensation.

(4) Each Contracting Party hereby gives its unconditional consent to the submission of disputes as referred to in paragraph 1 of this Article to international arbitration in accordance with the provisions of this Article.

4. The Claimant, a company organized under the laws of Barbados, alleges that the Respondent, through its acts and omissions, as well as those of State-owned entities acting under its direction and control, breached its obligations under Articles 2, 3 and 5 of the Treaty with respect to the Claimant's investment in the oil and gas industry in Venezuela.

B. CONSTITUTION OF THE TRIBUNAL

5. In its Notice of Arbitration, the Claimant appointed The Hon. L. Yves Fortier PC CC OQ QC as the first arbitrator.
6. By letter dated 13 June 2013, the Claimant requested that the Secretary-General of the Permanent Court of Arbitration (the "PCA") designate an appointing authority pursuant to Articles 6(1) and 6(2) of the UNCITRAL Rules (2010).

7. On 16 July 2013, the Secretary-General of the PCA designated Professor Piero Bernardini as appointing authority.
8. By letter dated 17 July 2013, the Claimant requested that Professor Bernardini appoint an arbitrator on behalf of the Respondent.
9. By e-mail of 1 August 2013, the Respondent advised that it had appointed the law firm of Curtis, Mallet-Prevost, Colt & Mosle LLP to represent it in this case and that the Parties had agreed to a two-week extension of time for the Respondent to make an appointment.
10. By letter dated 5 August 2013, the Respondent appointed Mr. Gabriel Bottini as the second arbitrator.
11. By letter dated 13 November 2013, pursuant to the agreement of the Parties, H.E. Judge Peter Tomka was appointed as the Presiding Arbitrator.

C. INITIAL PROCEDURAL STEPS

12. By letter dated 4 December 2013, the Tribunal circulated a Draft Terms of Appointment to the Parties for their comments.
13. By letter dated 13 December 2013, the Respondent submitted its comments on the Draft Terms of Appointment and asserted that the UNCITRAL Rules (1976) were applicable to the proceedings. By letter of the same date, the Claimant submitted its comments on the Draft Terms of Appointment and acknowledged that the original UNCITRAL Rules (1976) were applicable and would govern the arbitration in lieu of the revised UNCITRAL Rules (2010) under which it had commenced the arbitration.
14. By letter dated 18 December 2013, the Tribunal issued a final version of the Terms of Appointment, which were subsequently executed by the Parties and the Tribunal (the last signature being on 9 January 2014), and circulated a Draft Procedural Order No. 1 for the Parties' comments.
15. By letter dated 7 January 2014, the Claimant provided its comments on Draft Procedural Order No. 1 and proposed a procedural calendar for the initial phase of the arbitration. By e-mail dated 8 January 2014, the Respondent provided its comments on Draft Procedural Order No. 1. By letter dated 9 January 2014, the Tribunal acknowledged receipt of the Parties' comments on Draft Procedural Order No. 1 and invited the Claimant to comment on the Respondent's proposed

modifications to the draft order. By letter dated 15 January 2014, the Claimant submitted its comments on Respondent's proposed modifications to Draft Procedural Order No. 1.

16. On 17 January 2014, the Claimant submitted its Statement of Claim (the "**Statement of Claim**").
17. On 24 January 2014, the Tribunal issued Procedural Order No. 1.
18. On 3 March 2014, the Respondent submitted its Statement of Defense (the "**Statement of Defense**"), in which it raised objections to jurisdiction and requested the bifurcation of the proceedings.

D. BIFURCATION OF THE PROCEEDINGS

19. By letter dated 7 March 2014, the Tribunal invited the Parties to make submissions on whether to bifurcate the proceedings and whether to hold an in-person procedural meeting to discuss the Respondent's request for bifurcation and the timetable for the proceedings.
20. By e-mail of 11 March 2014, the Respondent conveyed a request on behalf of both Parties that the Tribunal hold a procedural meeting in person.
21. By letter of the same date, the Respondent submitted a request for bifurcation of the proceedings (the "**Request for Bifurcation**") asking the Tribunal to rule upon its first jurisdictional objection relating to the lack of jurisdiction *ratione voluntatis* as a preliminary matter.
22. By letter dated 12 March 2014, the Tribunal confirmed that a procedural meeting would be held in person on 19 March 2014 at the Peace Palace in The Hague, the Netherlands.
23. By letter dated 14 March 2014, the Claimant agreed to the bifurcation of the Respondent's first jurisdictional objection relating to the Tribunal's jurisdiction *ratione voluntatis* and proposed a timetable for bifurcated proceedings.
24. By e-mail of 14 March 2014, the Respondent notified the Tribunal and the Claimant of a challenge to Mr. Fortier under Articles 10 and 11 of the UNCITRAL Rules for lack of independence and impartiality and requested that the procedural meeting scheduled for 19 March 2014 be postponed.

25. By separate e-mail and letter dated 14 March 2014, the Claimant raised certain concerns regarding the disclosures made by Mr. Bottini with his statement of independence and impartiality, and opposed the Respondent's request to postpone the procedural meeting.
26. The Parties exchanged further correspondence on whether to postpone the procedural meeting including the Respondent's further e-mail of 14 March 2014, the Claimant's e-mail of 15 March 2014, the Respondent's e-mail of 16 March 2014, and the Claimant's e-mail of 16 March 2014.
27. By letter dated 16 March 2014, the Presiding Arbitrator acknowledged the Parties' agreement to bifurcate the Respondent's first jurisdictional objection and decided, subject to subsequent revision by the full Tribunal, to cancel the proposed procedural meeting and to establish a procedural calendar for the preliminary jurisdictional phase of the arbitration.

E. JURISDICTIONAL PHASE

28. By letter dated 17 March 2014, following the Claimant's indication that it did not agree to the challenge and Mr. Fortier's refusal to withdraw, the Respondent submitted the challenge to Professor Bernardini for a decision pursuant to Article 12 of the UNCITRAL Rules.
29. By letter dated 19 March 2014, Mr. Bottini provided further clarifications regarding his declaration of impartiality and independence.
30. By letter dated 25 March 2014, Professor Bernardini resigned as appointing authority.
31. By letter dated 28 March 2014, the Claimant requested that the Secretary-General of the PCA designate a substitute appointing authority to decide the challenge to Mr. Fortier.
32. On 4 April 2014, the Secretary-General of the PCA designated Mr. Jernej Sekolec as appointing authority.
33. On 11 April 2014, the Respondent submitted its Memorial on the Objection to the Jurisdiction *Ratione Voluntatis* of the Tribunal (the "**Memorial**").
34. On 9 May 2014, the Claimant submitted its Counter-Memorial on the Respondent's Objection to the Jurisdiction *Ratione Voluntatis* of the Tribunal (the "**Counter-Memorial**").
35. On 30 May 2014, the Respondent submitted its Reply Memorial on the Objection to the Jurisdiction *Ratione Voluntatis* of the Tribunal (the "**Reply**").

36. On 2 June 2014, Mr. Sekolec issued a decision in his capacity as appointing authority rejecting the challenge to Mr. Fortier.
37. By letter dated 5 June 2014, the Tribunal scheduled a Hearing on Jurisdiction, to be held on 10 July 2014 at the Peace Palace in The Hague, the Netherlands.
38. On 20 June 2014, the Claimant submitted its Rejoinder Memorial on the Objection to the Jurisdiction *Ratione Voluntatis* of the Tribunal (the “**Rejoinder**”).
39. On 10 July 2014, the Hearing on Jurisdiction was held at the Peace Palace in The Hague, the Netherlands. The following persons were present:

Tribunal

H.E. Judge Peter Tomka (Presiding Arbitrator)
The Honourable L. Yves Fortier PC CC OQ QC
Mr. Gabriel Bottini

Claimant

Mr. John P. Bowman
Ms. Jennifer L. Price
Mr. Louis-Alexis Bret

Respondent

Mr. Mark H. O’Donoghue
Prof. Tullio R. Treves
Mr. Renato R. Treves
Mr. Eloy Barbará de Parres
Dr. Isafías Medina
Mr. Valerio Salvatori

PCA

Mr. Martin Doe Rodríguez (Secretary of the Tribunal)
Ms. Giselle Herrera Kheneyzir
Mr. José Luis Aragón Cardiel

Court Reporter

Ms. Diana Burden
Ms. Susan McIntyre

40. On 30 September 2014, the Claimant submitted its Memorial on the Merits.
41. By letter dated 30 October 2015, the Claimant notified the Tribunal and the Respondent of a challenge to Mr. Bottini under Articles 10 and 11 of the UNCITRAL Rules for lack of independence and impartiality.

42. By letter dated 23 November 2015, following the Respondent's indication that it did not agree to the challenge and Mr. Bottini's refusal to withdraw, the Claimant submitted the challenge to Mr. Sekolec for a decision pursuant to Article 12 of the UNCITRAL Rules.
43. On 22 December 2015, Mr. Sekolec issued a decision in his capacity as appointing authority sustaining the challenge against Mr. Bottini.
44. By letter dated 18 January 2016, the Respondent appointed Professor Marcelo Kohen as substitute arbitrator.

III. RELEVANT LEGAL PROVISIONS

A. THE TREATY

45. The dispute to be decided in the present phase of the proceedings concerns whether the Tribunal has jurisdiction to entertain the claims contained in the Statement of Claim. The Respondent requests the Tribunal to dismiss the claims “for lack of jurisdiction *ratione voluntatis*”.² The Claimant maintains that the Tribunal has jurisdiction to hear the case on the merits and requests the Tribunal to dismiss “[t]he Respondent’s objection to the jurisdiction of this Tribunal for lack of consent.”³ The resolution of this disagreement between the Parties depends on the proper interpretation of Article 8 of the Treaty, containing the relevant dispute settlement provisions and, depending on the conclusion the Tribunal will reach, possibly also on the application of Article 3 of the Treaty, containing a Most Favored Nation (“MFN”) clause.

46. Article 8 provides as follows:

ARTICLE 8

Settlement of Disputes Between one Contracting Party and Nationals or Companies of the other Contracting Party

(1) Disputes between one Contracting Party and a national or company of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the latter shall, at the request of the national concerned, be submitted to the International Centre for Settlement of Investment Disputes for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on March 18, 1965.

(2) As long as the Republic of Venezuela has not become a Contracting State of the Convention as mentioned in paragraph 1 of this Article, disputes as referred to in that paragraph shall be submitted to the International Centre for Settlement of Investment disputes under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility Rules). If for any reason the Additional Facility is not available the investor shall have the right to submit the dispute to arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL).

² Reply, ¶ 71.

³ Rejoinder, ¶ 49.

(3) The arbitral award shall be limited to determining whether there is a breach by the Contracting Party concerned of its obligations under this Agreement, whether such breach of obligations has caused damages to the national concerned, and if such is the case, the amount of compensation.

(4) Each Contracting Party hereby gives its unconditional consent to the submission of disputes as referred to in paragraph 1 of this Article to international arbitration in accordance with the provisions of this Article.

47. Article 3 reads as follows:

ARTICLE 3

National Treatment and Most-favoured-nation Provisions

(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

(3) The treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.

B. VIENNA CONVENTION ON THE LAW OF TREATIES

48. In addition to the relevant provisions of the Treaty, it is instructive to reproduce here the rules on the interpretation of treaties set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the “VCLT”), which both Parties acknowledge govern the interpretation of the Treaty:

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

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

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

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

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

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

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

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

49. The Tribunal notes that, while Barbados is a Party to the VCLT, having ratified it on 24 June 1971, Venezuela is not a Party to it and has not even signed it. But it is now well accepted that Articles 31 and 32 of the VCLT on interpretation of treaties codify customary rules of international law. In other words, these Articles reflect customary international law, as confirmed on various occasions by the International Court of Justice.⁴

⁴ See e.g. *LaGrand (Germany v. United States of America)*, Judgment, 27 June 2001, 2001 ICJ REPORTS 466, ¶ 99; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 ICJ REPORTS 43, ¶ 160.

IV. REQUESTS FOR RELIEF

A. RESPONDENT'S REQUEST FOR RELIEF

50. The Respondent requests the Tribunal to grant the following relief:

Respondent respectfully submits that all claims contained in the Statement of Claim should be dismissed for lack of jurisdiction *ratione voluntatis* and that this Tribunal should allocate the costs of these proceedings to Claimant.⁵

B. CLAIMANT'S REQUEST FOR RELIEF

51. The Claimant requests that the Tribunal grant the following relief:

For the reasons stated above and in Claimant's Counter-Memorial on Jurisdiction, Respondent's objection to the jurisdiction of this Tribunal for lack of consent should be dismissed, and this arbitration should proceed on the merits.⁶

V. ISSUES ON JURISDICTION

A. INTERPRETATION OF ARTICLE 8 OF THE TREATY

1. Respondent's Position

52. The Respondent objects to the jurisdiction *ratione voluntatis* of the Tribunal on the basis that Article 8 of the Treaty does not provide a valid and effective consent to arbitration under the UNCITRAL Rules in the circumstances of the present case. While the Respondent has given its "unconditional consent" to arbitration in Article 8(4) of the Treaty, it has only done so "in accordance with the provisions of this Article", which limited its consent to UNCITRAL arbitration to a specific brief period that has long passed.⁷

53. According to the Respondent, "the text and structure of Article 8(2) make it evident that the right to resort to UNCITRAL arbitration was provided only to cover a potential gap in the availability of ICSID jurisdiction under Article 8(1) that might exist '[a]s long as the Republic of Venezuela

⁵ Memorial, ¶ 35; Reply, ¶ 71.

⁶ Rejoinder, ¶ 49. See also Counter-Memorial, ¶ 66.

⁷ Memorial, ¶ 4; Reply, ¶¶ 8-10. The Respondent adds that the "unconditional" formulation used in Article 8(4) was merely intended to implement the concept of "arbitration without privity". Reply, ¶ 10. See also Hearing Transcript (10 July 2014), 19:12-21:15, 99:2-21.

has not become a Contracting State of the [ICSID] Convention’ and ‘[i]f for any reason the [ICSID] Additional Facility is not available.’”⁸ The Respondent explains that “the possibility of such a gap existed in July 1994, when the Treaty was executed, because while Barbados and Venezuela had both signed the ICSID Convention, the latter had not yet become a Contracting Party which would be subject to ICSID arbitration upon entry into force of the Treaty.”⁹ Upon Venezuela’s ratification of the ICSID Convention, the above-mentioned interim period ended and Article 8(2) of the Treaty ceased to be applicable.¹⁰

54. The Respondent notes that the Parties agree that Venezuela’s denunciation of the ICSID Convention on 24 January 2012 rendered ICSID arbitration under Article 8(1) unavailable.¹¹ The Parties further agree that ICSID Additional Facility arbitration under Article 8(2) ceased to be available upon Venezuela’s ratification of the ICSID Convention in 1995.¹² The Claimant nevertheless seeks to avail itself of UNCITRAL arbitration under the second sentence of Article 8(2), which reads “[i]f for any reason the Additional Facility is not available the investor shall have the right to submit the dispute to arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL).”¹³
55. However, in the Respondent’s view, the only reasonable interpretation of Article 8(2) of the Treaty is that the entire paragraph was intended to apply only during the pre-ICSID interim period. In particular, the Respondent asserts that the specific reference to the ICSID Additional Facility in this second sentence links it to the pre-ICSID period described in the first sentence.¹⁴ According to the Respondent, there was significant uncertainty at the time that the Treaty was entered into as to whether the ICSID Additional Facility would continue or be terminated. In addition, the

⁸ Memorial, ¶ 4; Hearing Transcript (10 July 2014), 11:4-16, 13:11-16:21.

⁹ Memorial, ¶ 4; Hearing Transcript (10 July 2014), 11:17-12:8.

¹⁰ Memorial, ¶¶ 4-8. The Respondent clarifies that the potential interim period contemplated in Article 8(2) never actually came into existence, since Venezuela’s ratification of the ICSID Convention became effective (in June 1995) prior to the entry into force of the Treaty (in October 1995).

¹¹ Memorial, ¶ 10, citing Notice of Arbitration, ¶¶ 24-25; Hearing Transcript (10 July 2014), 10:25-11:3.

¹² Memorial, ¶ 11, citing Notice of Arbitration, ¶¶ 24-25.

¹³ Memorial, ¶ 12.

¹⁴ Memorial, ¶ 13; Reply, ¶¶ 12-14.

rules of the Additional Facility remained untested and subject to possible modification, the first case under those rules not having been brought until 1997.¹⁵

56. The Respondent supports its interpretation by reference to the “ordinary contextual interpretation” of treaty terms called for in Article 31(1) of the VCLT and endorsed by international courts and tribunals.¹⁶ This interpretation is also supported by the principles of integration and contemporaneity in treaty interpretation,¹⁷ as well as the object and purpose of the provision in providing an alternative arbitral forum only for the brief period before Venezuela became an ICSID

¹⁵ Memorial, ¶ 15; Reply, ¶ 21, citing Antonio R. Parra, *New Amendments of the Regulations and Rules of the International Centre for Settlement of Investment Disputes* 19(2) NEWS FROM ICSID 1, p. 10 (RLA-39).

¹⁶ Memorial, ¶¶ 18-21; Reply, ¶¶ 15-17, citing VCLT, Article 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”); Sir Humphrey Waldock, Special Rapporteur, *Third Report on the Law of Treaties*, A/CN.4/167, II YEARBOOK OF THE ILC 5 (1964), p. 54 (RLA-44); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶ 147 (RLA-43) [hereinafter “*Plama v. Bulgaria*”]; *Case Concerning the Interpretation of the Air Transport Services Agreement Between the United States of America and France, signed at Paris on 27 March 1946*, Award, 22 December 1963, XVI REPORTS OF INTERNATIONAL ARBITRAL AWARDS 11, p. 47 (RLA-45); *Case Concerning the Interpretation of the Air Transport Services Agreement Between the United States of America and Italy, signed at Rome on 6 February 1948*, Advisory Opinion, 17 July 1965, XVI REPORTS OF INTERNATIONAL ARBITRAL AWARDS 81, p. 92 (RLA-46); *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, 3 March 1950, 1950 ICJ REPORTS 4, p. 8 (RLA-47) [hereinafter “*(Second) Admissions Case*”]; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion, 8 June 1960, 1960 ICJ REPORTS 150, p. 158 (RLA-48). Hearing Transcript (10 July 2014), 12:9-13:10.

¹⁷ Memorial, ¶¶ 23-24 citing, as regards the principle of integration, *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, 19 December 2008, ¶ 96 (RLA-55) (“provisions of a treaty must be interpreted, not in isolation, but as a whole.”); Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points* 33 BRIT. Y.B. INT’L L. 203 (1957), p. 211 (RLA-56) (“[t]reaties are to be interpreted as a whole, and particular parts, chapters or sections also as a whole.”), and as regards the principle of contemporaneity, *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, ¶129 (CLA-15) (“the terms of a treaty have to be interpreted according to the meaning they possessed (and in the circumstances prevailing), at the time the treaty was concluded.”) [hereinafter “*Wintershall v. Argentina*”]; *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, UNCITRAL/PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, ¶ 289 (RLA-51) (“[I]t is appropriate and helpful to resort to the principle of contemporaneity in treaty interpretation, particularly pertinent in the case of bilateral treaties. This principle requires that the meaning and scope of this term be ascertained as of the time when the UK and Argentina negotiated their BIT.”) [hereinafter “*ICS v. Argentina*”]; *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, 13 July 2009, 2009 ICJ REPORTS 213, ¶ 63 (RLA-52) (“[T]he terms used in a treaty must be interpreted in light of what is determined to have been the parties’ common intention, which is, by definition, contemporaneous with the treaty’s conclusion.”); *Eritrea-Ethiopia Boundary Commission*, Decision regarding the delimitation of the border between Eritrea and Ethiopia, 13 April 2002, XXV REPORTS OF INTERNATIONAL ARBITRAL AWARDS 83, ¶ 3.5 (RLA-54) (“It has been argued before the Commission that in interpreting the Treaties it should apply the doctrine of ‘contemporaneity.’ By this the Commission understands that a treaty should be interpreted by reference to the circumstances prevailing when the treaty was concluded. This involves giving expressions (including names) used in the treaty the meaning that they would have possessed at that time. The Commission agrees with this approach and has borne it in mind in construing the Treaties.”).

Contracting State.¹⁸ The Respondent adds that, given that the ordinary meaning of the terms taken in context is clear, there is no need for resort to further supplementary means of interpretation.¹⁹

57. The Respondent argues that the Claimant's interpretation of Article 8(2) ignores the link between the first and second sentence of Article 8(2) and misconstrues the second sentence as a "catch-all", default arbitration provision. The Respondent contends that "[i]f the Contracting Parties to the Treaty had intended to include UNCITRAL arbitration as a 'catch-all' arbitration option for those cases in which neither ICSID nor the ICSID Additional Facility were available, they would have referred to both ICSID and the ICSID Additional Facility and would have included this option in a new Article 8(3) or otherwise separated it from the ICSID and ICSID Additional Facility provisions, as other Venezuelan BITs do."²⁰ According to the Respondent, the Claimant's interpretation implies that UNCITRAL arbitration would have become equally available alongside ICSID arbitration upon Venezuela's ratification of the ICSID Convention, which clearly was not intended.²¹ The Respondent also contrasts the instant Treaty with various other Venezuelan BITs which either (i) provide for ICSID arbitration²² (and sometimes also for ICSID Additional Facility arbitration in the interim),²³ but do not contain an alternative arbitral forum in

¹⁸ Memorial, ¶ 25; Reply, ¶ 36.

¹⁹ Memorial, ¶ 22; Reply, ¶ 17, citing *Wintershall v. Argentina*, *supra* note 17, ¶ 79 ("where the ordinary meaning of words (the text) is clear and they make sense in the context, there is no occasion at all to have recourse to other means of interpretation."); (*Second Admissions Case*, *supra* note 16, p. 8 ("If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.")).

²⁰ Memorial, ¶¶ 14-16, 23; Reply, ¶¶ 18-20; Hearing Transcript (10 July 2014), 15:17-17:25, 30:14-37:12, 89:20-90:15, 97:23-99:1.

²¹ Hearing Transcript (10 July 2014), 90:16-92:24.

²² E.g. Venezuela-Chile BIT, Article 8(2) (RLA-64):

Should an amicable solution not be reached, the investor may submit the dispute to the national jurisdiction of the Contracting Party in whose territory the investment was made, or to international arbitration. In the latter case, the dispute shall be submitted to the International Center for Settlement of Investment Disputes (I.C.S.I.D.), created by the Washington Convention of March 18, 1965, concerning the Settlement of Investment Disputes between States and Nationals of Other States.

See also Venezuela-France BIT, Article 8(2) (RLA-65); Venezuela-Germany BIT, Article 10(2) (RLA-67).

²³ E.g. Venezuela-Netherlands BIT, Article 9 (RLA-66):

1) Disputes between one Contracting Party and a national of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the latter, shall at the request of the national concerned be submitted to the International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March 1965.

2) As long as the Republic of Venezuela has not become a Contracting State of the Convention as mentioned in Paragraph 1 of this Article, disputes as referred to in that paragraph shall be submitted to the International Centre for Settlement of Investment Disputes under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility Rules).

the event that one of the contracting parties withdraws from ICSID,²⁴ or (ii) clearly include UNCITRAL arbitration as a default, catch-all option in a separate subsection or paragraph.²⁵ A number of authorities, the Respondent submits, endorse the comparison of similar treaties concluded by the Contracting Parties as a useful supplementary means to clarify a treaty text.²⁶

58. The Respondent notes that, under its interpretation, the investor no longer has access to international arbitration, but retains recourse under Article 23 of the Venezuelan Investment Law, which provides for investment disputes to be submitted to the Venezuelan courts or to domestic

²⁴ Memorial, ¶¶ 28-29; Reply, ¶¶ 31-32; Hearing Transcript (10 July 2014), 30:14-37:12, also citing similar examples among Barbados' BITs: Barbados-Switzerland BIT, Article 9(2) (RLA-67); Barbados-United Kingdom BIT, Article 8(1) (RLA-68).

²⁵ Memorial, ¶¶ 30-32; Reply, ¶¶ 31-32; Hearing Transcript (10 July 2014), 30:14-37:12, citing Canada-Venezuela BIT, Article XII(4) (RLA-33):

The dispute may, by the investor concerned, be submitted to arbitration under:

(a) The International Centre for the Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington 18 March, 1965 (ICSID Convention), provided that both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention; or

(b) the Additional Facility Rules of ICSID, provided that either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a party to the ICSID Convention; or

In case neither of the procedures mentioned above is available, the investor may submit the dispute to an international arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

Czech Republic-Venezuela BIT, Article 8 (RLA-34):

2. If any dispute between an investor of one Contracting Party and the other Contracting Party cannot be thus settled within a period of six months, and unless the parties to the dispute agree on another procedure, the investor shall be entitled to submit the case to the International Centre for Settlement of Investment Disputes (ICSID) having regard to the applicable provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington D.C. on 18 March, 1965, in the event both Contracting Parties shall have become a party to this Convention, or, if only one of the Contracting Parties is a party to the Convention, to the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings of ICSID (Additional Facility).

3. If for any reason neither ICSID nor the Additional Facility are available and unless the parties to the dispute agree on another procedure, the investor may submit the dispute to an arbitrator or international ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The parties to the dispute may agree in writing to modify these rules. The arbitral awards shall be final and binding on both Parties to the dispute.

See also Costa Rica-Venezuela BIT (RLA-32), Article XI(2); Ecuador-Venezuela BIT, Article IX(3) (RLA-35); Lithuania-Venezuela BIT, Article 7 (RLA-36); Portugal-Venezuela BIT, Article 8(2) (RLA-37); Uruguay-Venezuela BIT, Article 9 (RLA-38). The Respondent specifically cites the Costa Rica-Venezuela BIT as an example of a treaty expressly contemplating the availability of other arbitral fora in the event of withdrawal from ICSID by one or both of the contracting parties. See Hearing Transcript (10 July 2014), 30:14-31:5.

²⁶ Reply, ¶¶ 28-30, citing *Asian Agricultural Products LTD (A.A.P.L.) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, 6(2) ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 526 (1991), ¶ 40, “Rule (F)” (RLA-63); *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 359 (RLA-62); *Plama v. Bulgaria*, *supra* note 16, ¶ 195; R. Jennings & A. Watts, *OPPENHEIM’S INTERNATIONAL LAW*, 9TH ED. (1992), Volume I, p. 1274, n. 18 (RLA-42). See also Hearing Transcript (10 July 2014), 32:6-34:20.

arbitration.²⁷ The Respondent adds that denunciation of the ICSID Convention cannot be construed as an act of bad faith, and that “Venezuela did not denounce the convention for the purpose of frustrating the present Claimant’s possibility to submit its disputes to arbitration.”²⁸

59. In any event, relying on the ICJ’s findings in the *Interpretation of Peace Treaties* case, the Respondent stresses that, even if the lack of an international arbitral forum for investment disputes arising under the Treaty were viewed as an undesirable result, “arguments based on policy considerations cannot justify attributing a meaning to a treaty provision that is contrary to the letter and spirit of that provision.”²⁹ Nor can the Treaty’s object and purpose, the principle of *effet utile*, or good faith be used as “a source of obligation where none would otherwise exist” in an attempt to rectify the fact that the Contracting Parties did not provide for the possibility of Venezuela’s denunciation of the ICSID Convention.³⁰

²⁷ Memorial, ¶ 29 citing Decreto con Rango y Fuerza de Ley de Promoción y Protección de Inversiones (Decree No. 356 with Rank and Force of Law on the Promotion and Protection of Investments), Official Gazette No. 5.390 (Extraordinary), published 22 October 1999, Article 23 (RLA-83).

²⁸ Hearing Transcript (10 July 2014), 24:1-21, 96:23-97:21.

²⁹ Memorial, ¶¶ 33-34; Reply, ¶ 41, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)*, Advisory Opinion, 18 July 1950, 1950 ICJ REPORTS 221, p. 229 (RLA-70) (“The failure of machinery for settling disputes by reason of the practical impossibility of creating the Commission provided for in the Treaties is one thing; international responsibility is another. The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties. It is the duty of the Court to interpret the Treaties, not to revise them.”); *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, ¶ 95 (RLA-84); *Wintershall v. Argentina*, *supra* note 17, ¶¶ 82, 88. See also Hearing Transcript (10 July 2014), 107:15-108:13.

³⁰ Reply, ¶¶ 23-26, 33-46, citing, as regards good faith, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, 11 June 1998, 1998 ICJ REPORTS 275, ¶¶ 39, 59 (RLA-91); Robert Kolb, *LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC (GOOD FAITH IN PUBLIC INTERNATIONAL LAW)* (2000), p. 277 (RLA-92) (“The interpretation should not be made exclusively with the aim of reaching a preconceived outcome; good faith prohibits it.”); *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, 20 December 1988, 1988 ICJ REPORTS 69, ¶ 94 (RLA-93) (“The principle of good faith [...] is not in itself a source of obligation where none would otherwise exist.”), as regards object and purpose, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶ 147 (RLA-103); *United States v. Iran*, Decision No. 130-A28-FT, 19 December 2000, 36 IRAN-US CLAIMS TRIBUNAL REPORTS 5, ¶ 58 (RLA-105) (“The object and purpose is not to be considered in isolation from the terms of the treaty; it is intrinsic to its text. It follows that, under Article 31 of the Vienna Convention, a treaty’s object and purpose is to be used only to clarify the text, not to provide independent sources of meaning that contradict the clear text.”), and, as regards *effet utile*, International Law Commission, *Draft Articles on the Law of Treaties with Commentaries* (1966), p. 219 (CLA-9) (“Properly limited and applied, the maxim does not call for an extensive’ or ‘liberal’ interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty. Accordingly, it did not seem to the Commission that there was any need to include a separate provision on this point. Moreover, to do so might encourage attempts to extend the meaning of treaties illegitimately on the basis of the so-called principle of ‘effective interpretation’.”); *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, ¶ 114 (RLA-111); Sir Gerald Fitzmaurice, *Vae Victis or Woe to the Negotiators! Your Treaty or Our “Interpretation” of It*, 65 AM. J. INT’L L. 358 (1971), p. 373 (RLA-112) (“[T]he maxim *ut magis* is all too frequently misunderstood as denoting that

60. The Respondent distinguishes the cases cited by the Claimant to the contrary. The Respondent asserts that, unlike *BG v. Argentina*, it is not trying to frustrate access to an international arbitral forum that would otherwise be available to the Claimant.³¹ In addition, the Respondent argues that *Lemire v. Ukraine* merely concerned an imprecise description of the agreed dispute settlement mechanism which was resolved by reference to explicit language elsewhere in the arbitration clause, unlike the situation faced with regard to UNCITRAL arbitration under Article 8 of the present Treaty.³² Lastly, the Respondent considers that the result in *Murphy v. Ecuador II* is either based on an unduly broad application of the *effet utile* principle or is restricted to the unique facts of that case.³³

2. Claimant's Position

61. The Claimant argues that Venezuela has provided, in Article 8(4) of the Treaty, its “express, irrevocable, and unconditional consent” to arbitrate disputes arising under the Treaty.³⁴ This essential consent to arbitration, the Claimant asserts, cannot be negated by any uncertainty regarding the subsidiary procedural question of which forum and rules apply to a particular dispute.³⁵ In any event, the Claimant submits that the text and structure of Article 8 of the Treaty demonstrates that Venezuela consented to submit disputes to UNCITRAL arbitration. According to the Claimant, if the Respondent’s interpretation were adopted, it would render the whole of

agreements should always be given their maximum possible effect, whereas its real object is merely (*‘quam pereat’*) to prevent them failing altogether.”). See also Hearing Transcript (10 July 2014), 23:10-30:13, 99:22-101:13, 102:25-108:13 (“Venezuela does not deny that article 8 is part of the package negotiated and accepted by Barbados and Venezuela. But this does not mean that arbitration in whatever circumstances and at whatever moment is part of the object and purpose of the Treaty. [...] There is nothing meaningless in an interpretation according to which the parties agreed upon the jurisdiction of an Arbitral Tribunal under the ICSID Convention while making sure that in the time before Venezuela’s becoming a party, other fora would be available. The parties were keen on the ICSID arbitration, not on any kind of arbitration in case one of them were to denounce ICSID.”), citing *ICS v. Argentina*, *supra* note 17, ¶ 289; *Murphy Exploration & Production Company – International v. Republic of Ecuador*, UNCITRAL/PCA Case No. AA434, Separate Opinion by Abi Saab, 13 November 2013, ¶¶ 16-17 (RLA-129) [hereinafter “*Murphy v. Ecuador II (Separate Opinion)*”].

³¹ Reply, ¶ 47, referring to Counter-Memorial, ¶ 46; *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶ 147 (CLA-7) [hereinafter “*BG Group v. Argentina*”].

³² Reply, ¶ 48, referring to Counter-Memorial, ¶¶ 47-50; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (CLA-2) [hereinafter “*Lemire v. Ukraine*”].

³³ Hearing Transcript (10 July 2014), 28:23-29:21, 140:6-142:2, citing *Murphy v. Ecuador II (Separate Opinion)*, *supra* note 30.

³⁴ Counter-Memorial, ¶¶ 9-11; Rejoinder, ¶¶ 12-13.

³⁵ Rejoinder, ¶ 10, citing *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, ¶¶ 21-23, 75 (CLA-1) [hereinafter “*Garanti Koza v. Turkmenistan*”].

Article 8 ineffective, contrary to the Contracting Parties' intent and the object and purpose of the Treaty. As such, the Claimant contends that it cannot be accepted as a good faith interpretation of the Treaty.³⁶

62. Instead, the Claimant asserts that Articles 8(1) and 8(2) of the Treaty establish a hierarchy of arbitral fora. In accordance with Article 8(1), ICSID arbitration is the applicable dispute settlement mechanism as long as both Parties are Contracting States to the ICSID Convention. Article 8(2) provides that, for the initial period until Venezuela became an ICSID Contracting State, disputes would be submitted to the ICSID Additional Facility. Finally, Article 8(2) also provides that “[i]f for any reason the Additional Facility is not available the investor shall have the right to submit the dispute to arbitration under the [UNCITRAL] rules”. In this case, given Venezuela’s ratification (in 1995) and subsequent denunciation of the ICSID Convention (in 2012), arbitration under both the ICSID Convention and Additional Facility Rules is unavailable. As such, in the Claimant’s view, investors have the right to submit their disputes to UNCITRAL arbitration.³⁷ The Claimant stresses that, unlike the claimant in *Nova Scotia Power v. Venezuela* or the other cases on which Venezuela relies, this is not a case where the Claimant has failed to observe the hierarchy of arbitral fora or failed to comply with mandatory pre-conditions to arbitration.³⁸
63. The Claimant contends that its interpretation is supported by the ordinary meaning of the terms used in Article 8. The terms “unconditional consent” in Article 8(4), and “for any reason” and “shall have the right” in Article 8(2), clearly establish that UNCITRAL arbitration is a comprehensive and mandatory fall-back option which “is not conditioned or limited by whether Venezuela ratified or withdrew from the ICSID Convention.”³⁹ In particular, the Claimant points out that the Contracting Parties added the otherwise superfluous phrase “for any reason” into the

³⁶ Counter-Memorial, ¶¶ 8, 12-13; Rejoinder, ¶¶ 1-2, 7-13; Hearing Transcript (10 July 2014), 49:2-54:10, 122:16-124:6.

³⁷ Counter-Memorial, ¶¶ 2-6, 14-17; Rejoinder, ¶ 15; Hearing Transcript (10 July 2014), 54:11-57:10.

³⁸ Counter-Memorial, ¶¶ 17-18, referring to *Nova Scotia Power Inc. v. Bolivarian Republic of Venezuela*, UNCITRAL/PCA Case No. 2009-14, Award on Jurisdiction, 22 April 2010 (RLA-25).

³⁹ Counter-Memorial, ¶¶ 23-29; Rejoinder ¶¶ 14-17 citing *Garanti Koza v. Turkmenistan*, *supra* note 35, ¶ 28; *Wintershall v. Argentina*, *supra* note 17, ¶ 119. See also Hearing Transcript (10 July 2014), 57:11-63:21. According to the Claimant, the phrase “in accordance with the provisions of this article” included in Article 8(4) merely refers to (i) the types of disputes that can be settled through arbitration as defined in Article 8(1); (ii) the procedural rules which will govern such arbitrations as referred to in Article 8(1) and (2), and (iii) the permitted scope of the arbitral award as set forth in Article 8(3). The Claimants therefore assert that Article 8(4) cannot be construed as imposing conditions that eliminate the right to international arbitration as a whole. Hearing Transcript (10 July 2014), 61:5-63:21, 118:19-119:19.

phrase “if for any reason the Additional Facility is not available” (emphasis added).⁴⁰ By contrast, in the Claimant’s view, the Respondent’s interpretation “improperly conflates the two separate sentences of Article 8.2 to import a temporal limitation from the first sentence as a condition on the effect of the second”, leaving the phrases “for any reason” and “shall have the right”, as well as the rest of the context of the provision, without meaning or effect.⁴¹

64. The Claimant disputes the relevance of the Respondent’s comparison of Article 8 of the Treaty with the dispute resolution provisions of other Venezuelan BITs, stating that “[c]omparing the text of one treaty to another between different parties is not a method of interpretation specified by the Vienna Convention, nor is it a favoured interpretive method of arbitral tribunals.”⁴² The Claimant insists that the Barbados-Venezuela BIT is a standalone agreement negotiated by two sovereign states whose meaning “cannot be determined in light of unrelated agreements concluded between different parties at different times and in the context of different bilateral relations.”⁴³
65. Moreover, the Claimant argues that there is no consistent use of language or structure among the Venezuelan BITs cited by the Respondent. For example, the Claimant states that the Portugal-Venezuela BIT’s article on investor-State dispute settlement does not contain an express statement of the States’ consent to arbitration and includes all of the provisions for submission to ICSID, ICSID Additional Facility, and – if these are unavailable – UNCITRAL arbitration in the same sub-paragraph.⁴⁴ Article 8 of the Czech Republic-Venezuela BIT includes a provision for

⁴⁰ Counter-Memorial, ¶ 25; Hearing Transcript (10 July 2014), 54:11-57:10, 61:5-63:21

⁴¹ Counter-Memorial, ¶ 28; Rejoinder, ¶ 18, citing *Murphy Exploration & Production Company – International v. Republic of Ecuador*, UNCITRAL/PCA Case No. AA434, Partial Award on Jurisdiction, 13 November 2013, ¶ 178 (CLA-18) [hereinafter “*Murphy v. Ecuador II*”] (“[one] cannot read a limitation into a provision that does not have a limitation.”). See also Hearing Transcript (10 July 2014), 49:14-54:10, 60:16-61:4, 109:22-122:15, 132:23-140:5, 144:5-146:2.

⁴² Counter-Memorial, ¶ 33; Rejoinder, ¶¶ 25-26, citing *Daimler Financial Services AG v. The Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶¶ 161-164 (CLA-16) [hereinafter “*Daimler v. Argentina*”]; *Garanti Koza v. Turkmenistan*, *supra* note 35, ¶ 16.

⁴³ Counter-Memorial, ¶ 34; Hearing Transcript (10 July 2014), 66:15-69:5.

⁴⁴ Portugal-Venezuela BIT, Article 8(2) (RLA-37):

If the dispute cannot be resolved through amicable means within a term of six months, counted from the beginning of these consultations, it may be submitted, at the choice of the investor:

- a) To the local courts of the Contracting Party in whose territory the investment was made; or
- b) To the arbitration of the International Center for Settlement of Investment Disputes (ICSID), established by the Washington Convention of March 18, 1965, in the event that both Contracting Parties are members of the same, or, if such is the case, to the rules governing the additional facility for the administration of reconciliation, arbitration and fact-finding proceedings by the Secretariat of ICSID.

negotiation, a reference to ICSID arbitration and a secondary reference to the Additional Facility in a single paragraph rather than in separate paragraphs.⁴⁵ The dispute settlement clause of the Canada-Venezuela BIT sets out very detailed limitations, conditions, and procedural prerequisites restricting the States' consent to arbitration and omits the Barbados-Venezuela's wording of "for any reason" and "shall have the right" or any equivalent broad language.⁴⁶ These examples, according to the Claimant, contradict the Respondent's assertions that, where an UNCITRAL fall-back option is included, it is always set out in a separate section or paragraph, that the inclusion of the "for any reason" and "shall have the right" language is not significant, and that statements of unconditional consent to arbitration are included as a matter of course.⁴⁷

66. The Claimant also rejects the Respondent's explanation of the reasons for including the UNCITRAL option. The ICSID Administrative Council decided to continue the ICSID Additional Facility indefinitely in 1984, over a decade before the conclusion of the Treaty.⁴⁸ The Claimant further posits that "Venezuela's scenario suggests that Barbados and Venezuela were concerned enough about the possibility that an investor might be left without an arbitral forum during the interim period between when Venezuela signed the BIT and when it became an ICSID

If, for whatever reason, neither ICSID nor the additional facility is available, the arbitration shall be governed by the rules of arbitration of the United Nations Commission on International Trade Law (UNCITRAL).

⁴⁵ Czech Republic-Venezuela BIT, Article 8 (RLA-34):

2. If any dispute between an investor of one Contracting Party and the other Contracting Party cannot be thus settled within a period of six months, and unless the parties to the dispute agree on another procedure, the investor shall be entitled to submit the case to the International Centre for Settlement of Investment Disputes (ICSID) having regard to the applicable provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington D.C. on 18 March, 1965, in the event both Contracting Parties shall have become a party to this Convention, or, if only one of the Contracting Parties is a party to the Convention, to the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings of ICSID (Additional Facility).

3. If for any reason neither ICSID nor the Additional Facility are available and unless the parties to the dispute agree on another procedure, the investor may submit the dispute to an arbitrator or international ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The parties to the dispute may agree in writing to modify these rules. The arbitral awards shall be final and binding on both Parties to the dispute.

⁴⁶ Canada-Venezuela BIT, Article XII(4) (RLA-33).

⁴⁷ Rejoinder, ¶ 27. The Claimant also points to various additional differences in these and other Venezuelan BITs cited by the Respondent. See Ecuador-Venezuela BIT, Article IX(3) (RLA-35); Lithuania-Venezuela BIT, Article 7 (RLA-36); Uruguay-Venezuela BIT, Article 9 (RLA-38); Iran-Venezuela BIT, Article 11(2) (RLA-26); Russia-Venezuela BIT (RLA-27), Article 9(2); Venezuela-Belarus BIT, Article 8(2) (C-37); Venezuela-Cuba BIT, Article 9(3) (C-38); Venezuela-Vietnam BIT, Article 8(2) (C-39).

⁴⁸ Counter-Memorial, ¶ 31; Rejoinder, ¶ 23. The Claimant adds that the Additional Facility is not a separate entity within ICSID, but is instead an alternative set of rules "authorizing the ICSID Secretariat to administer certain types of proceedings between States and foreign nationals which fall outside the scope of the Convention." ICSID website: <http://icsid.worldbank.org/> "About ICSID, Dispute Settlement Facilities" (last visited June 16, 2014).

Contracting State that they not only included the Additional Facility as a temporary, conditional alternative forum to ICSID, but also included UNCITRAL as a conditional, temporary, fall-back alternative to the alternative of the Additional Facility. And yet, under this scenario, the Contracting Parties were ostensibly not concerned with the possibility that at some time during the minimum ten-year term of the BIT, ICSID might not be available, leaving investors without any arbitral forum and Article 8 a nullity.⁴⁹ The Claimant asserts that it is far more likely that the Contracting Parties intended the UNCITRAL option as a comprehensive default arbitral forum.⁵⁰

67. Additionally, in the Claimant's view, the Respondent's construction of Article 8 also runs counter to the requirements of good faith interpretation under Article 31 of the VCLT. The provision of a direct right of investors to arbitrate against the host State is, according to the Claimant, one of the main aims of the Treaty, and of BITs in general. However, seeing as Venezuela's withdrawal from the ICSID Convention has foreclosed the option of ICSID arbitration, the Respondent's interpretation would deprive Barbadian investors of any arbitral forum whatsoever in which to seek to enforce the Treaty's substantive provisions. This would, the Claimant asserts, defeat the Treaty's object and purpose⁵¹ and render the whole of Article 8 a dead letter, in violation of the interpretive principle of *ut res magis valeat quam pereat* (alternatively known as *effet utile*) embodied in Article 31(1) of the VCLT.⁵² It would also be an absurd and unreasonable result contrary to Article 32 of the VCLT.⁵³ Moreover, the Claimant argues that "a State should not be allowed to frustrate the investor's access to arbitration to redress treaty violations through a restrictive construction of the consent to arbitration provisions and its own acts in hindrance of

⁴⁹ Counter-Memorial, ¶ 32; Rejoinder, ¶ 24.

⁵⁰ Counter-Memorial, ¶ 32; Hearing Transcript (10 July 2014) 65:14-66:14.

⁵¹ Hearing Transcript (10 July 2014), 69:10-74:9, 124:7-125:8.

⁵² Counter-Memorial, ¶¶ 4-5, 20-22, 37-43; Rejoinder, ¶¶ 19-22, 28-38, citing *Murphy v. Ecuador II*, *supra* note 41, ¶ 171, citing in turn Richard Gardiner, TREATY INTERPRETATION (2008), p. 64 ("The Tribunal shall also be guided by the principle of *effet utile*, which requires tribunals to interpret treaty provisions 'so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text.'"); International Law Commission, *Draft Articles On the Law of Treaties with Commentaries* (1966), p. 219 (CLA-9) ("The Commission, however, took the view that [...] the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation [...] embodied in article 27, paragraph 1, which requires that a treaty shall be interpreted in *good faith* in accordance with the ordinary meaning to be given to its terms in the context of the treaty *and in the light of its object and purpose*.").

⁵³ Counter-Memorial, ¶¶ 45-52; Rejoinder, ¶¶ 25, 36, citing *Murphy v. Ecuador II*, *supra* note 41, ¶ 197 ("Under the circumstances of this case, Respondent's interpretation of Article VI(3)(a) entirely forecloses Claimant's access to international arbitration. The Tribunal considers such a result to run counter to the object and purpose of the BIT and to be 'manifestly absurd and unreasonable' under the meaning of Article 32 of the Vienna Convention."); *BG Group v. Argentina*, *supra* note 31, ¶ 147.

that access.”⁵⁴ The Claimant also points to the case of *Lemire v. Ukraine* as a prime example of a tribunal not allowing supervening legal developments to defeat the true intent of Contracting Parties, notwithstanding an imprecise arbitration clause.⁵⁵ The Claimant stresses the seriousness of the present dispute and argues that Venezuela should similarly not be allowed to advance opportunistic interpretations of the Treaty in order to deny the Claimant a right to international arbitration and evade its substantive obligations under the Treaty, as it has systematically done with other foreign investors as well.⁵⁶

3. Tribunal’s Analysis

68. The Claimant invokes Article 8 of the Treaty as the basis for the jurisdiction of this Tribunal. It contends that Venezuela, through Article 8 of the Treaty, “irrevocably consented to arbitration of disputes between it and nationals or companies of Barbados who invested in Venezuela”.⁵⁷
69. Meanwhile, the Respondent disputes the Tribunal’s jurisdiction to hear the merits of the case, as in the Respondent’s view, its consent to arbitration under the UNCITRAL Rules ceased to be applicable.
70. To resolve the dispute on jurisdiction, the Tribunal has to interpret Article 8 of the BIT, the full text of which is reproduced above.⁵⁸ It consists of four paragraphs. The Parties’ arguments addressed in particular three of them, namely paragraphs 1, 2 and 4. It seems that paragraph 3 of Article 8, describing what the Tribunal has to determine in its award, is, except insofar as it provides relevant context for the interpretation of the other three paragraphs of the article, of no particular relevance for the task of the Tribunal at the present stage of the proceedings.
71. The Tribunal will therefore focus its attention on paragraphs 1, 2 and 4 in order to determine whether they provide a basis for its jurisdiction to hear and adjudicate the Claimant’s claim.
72. The consent of Venezuela and Barbados to the submission of investment disputes by nationals of the other Party to international arbitration is expressed in Article 8(4) which reads as follows:

⁵⁴ Counter-Memorial, ¶ 46; Rejoinder, ¶ 10, citing *BG Group v. Argentina*, *supra* note 31, ¶ 147.

⁵⁵ Counter-Memorial, ¶¶ 47-50, citing *Lemire v. Ukraine*, *supra* note 32.

⁵⁶ Hearing Transcript (10 July 2014), 45:18-48:1.

⁵⁷ Statement of Claim, ¶ 22.

⁵⁸ See *supra* “The Treaty”, Section III.A, ¶ 45.

Each Contracting Party hereby gives its unconditional consent to the submission of disputes as referred to in paragraph 1 of this Article to international arbitration in accordance with the provisions of this Article.

73. This paragraph refers to the other provisions of the same Article as regards the category of disputes which may be submitted to international arbitrations, as well as the available arbitral fora.

74. Paragraph 1 defines the disputes as the ones between a Contracting Party and a national or a company of the other Party concerning the investment. It envisages ICSID as the appropriate arbitral forum for resolution of such disputes. It is useful to quote paragraph 1 again. It reads as follows:

Disputes between one Contracting Party and a national or company of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the latter shall, at the request of the national concerned, be submitted to the International Centre for Settlement of Investment Disputes for settlement by arbitration or conciliation under the [ICSID] Convention.

75. For the Centre to have jurisdiction under Article 25 of the ICSID Convention, the State which is a party to the dispute and the State whose national is a party to the dispute, must both be Contracting States to the ICSID Convention. As long as this condition is not fulfilled, the Centre has no jurisdiction, even if the applicable BIT in force provides for resolution of investment disputes before a Tribunal to be constituted under the ICSID Convention.

76. Barbados signed the ICSID Convention on 13 May 1981, ratified it on 1 November 1983, and it entered into force in relation to this State on 1 December 1983. Since then Barbados has been a Contracting State to the ICSID Convention. Venezuela signed the ICSID Convention on 18 August 1993, deposited its instrument of ratification on 2 May 1995, and it entered into force for Venezuela on 1 June 1995. On 24 January 2012, Venezuela notified the depositary of the denunciation of the ICSID Convention. This denunciation took effect, in accordance with Article 71 of the ICSID Convention, on 25 July 2012.

77. The Parties are in agreement that arbitration under the ICSID Convention was not available before Venezuela became bound by the ICSID Convention on 1 June 1995 and is no longer available after Venezuela ceased to be bound by it on 25 July 2012.

78. Barbados and Venezuela negotiated the Treaty in the early nineties and signed it on 15 July 1994, which is after Venezuela signed the ICSID Convention, but before it deposited its instrument of ratification in May 1995. This explains the inclusion of paragraph 2 in Article 8. That paragraph reads as follows:

As long as the Republic of Venezuela has not become a Contracting State of the Convention as mentioned in paragraph 1 of this Article, disputes as referred to in that paragraph shall be submitted to the International Centre for Settlement of Investment disputes under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility Rules). If for any reason the Additional Facility is not available the investor shall have the right to submit the dispute to arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL).

79. The insertion of this paragraph into Article 8 shows, in the view of the Tribunal, that the Parties wished to have an arbitral forum available immediately from the moment of the BIT's entry into force even if the ICSID Convention did not yet bind Venezuela.
80. The Parties differ on the interpretation and import of this paragraph.
81. Venezuela contends that paragraph 2 is limited to the temporary period before it became Party ("a Contracting State") to the ICSID Convention. Only for that period, the argument goes, did it consent to the settlement of a dispute between it and a Barbadian investor through a tribunal established and acting under the Rules Governing the Additional Facility. And only if the Additional Facility, during that pre-ICSID period for Venezuela, was not available for any reason, had Venezuela – according to its interpretation of the provision – consented to the submission of the dispute to arbitration under the UNCITRAL rules. Venezuela denies that the provision expresses its consent to have recourse to arbitration under the UNCITRAL Rules in the period after it denounced the ICSID Convention in 2012.
82. In the Claimant's view, UNCITRAL arbitration was not only available in the pre-ICSID period, but is also available now, in the post-ICSID period, after Venezuela withdrew from the ICSID Convention. In support of its interpretation, the Claimant invokes the purposes of the BIT, one of which – in its contention – is to provide access to international arbitration. Further support is sought by the Claimant in paragraph 4 of Article 8 of the Treaty, according to which "[e]ach Contracting Party hereby gives its unconditional consent to the submission of disputes as referred to in paragraph 1 of this Article to international arbitration in accordance with the provisions of this Article".

83. In the Tribunal's view, effect should be given to the text of paragraph 2 in its totality, in the context in which it is placed within Article 8. The text is supposed to express the intention of the Contracting Parties when they agreed on it. The introductory words of paragraph 2 clearly describe the timeframe of its applicability. The words "[a]s long as the Republic of Venezuela has not become a Contracting State of the [ICSID] Convention" leave no doubt that the Parties had in mind the period prior to Venezuela becoming a Party to the ICSID Convention. The fact that only Venezuela, and not Barbados, is expressly mentioned in this paragraph, clearly reveals that this provision contemplated the pre-ICSID period. There is nothing in the formula used by the Parties which would suggest that this provision was meant to also deal with the scenario in which one of the Parties were to denounce the Convention and cease to be bound by it (as Venezuela did in 2012). Had this been their intention, they could have easily used the formula "as long as one of the Parties is not a Contracting State of the Convention". It may be, and it is rather very likely, that they had not even considered such a scenario, although under Article 71 of the ICSID Convention any Contracting State has the right to denounce the Convention by written notice. But it is not the task of the Tribunal to speculate, nor to read into the text what it does not say.
84. The key issue in the context of paragraph 2 is the link between the first sentence and the second one. The first provides for arbitration under the Additional Facility Rules "as long as the Republic of Venezuela has not become a Contracting State of the Convention". The second specifies that "if for any reason the Additional Facility is not available the investor shall have the right to submit the dispute to arbitration under the [UNCITRAL] rules". The second sentence, in the view of the Tribunal, has to be read in relation to the first one. It does not constitute a self-standing provision. The temporal limitation provided for in the first sentence of paragraph 2 thus also applies to the second sentence.
85. The Additional Facility was an option in the pre-ICSID period. And only if "for any reason" during this period it was not available did arbitration under the UNCITRAL Rules provide a substitute arbitral forum.
86. The Claimant accepts that it cannot submit the dispute to arbitration under the Additional Facility Rules because the BIT only provides for arbitration under these rules during the time period prior to Venezuela becoming a Contracting State to the Convention, not after Venezuela denounced it.
87. The Claimant nevertheless maintains that UNCITRAL arbitration is available in view of the fact that the Additional Facility is no longer available. It emphasizes the words "if for any reason the

Additional Facility is not available”, arguing that in that case, it has the right to submit the dispute to arbitration under the UNCITRAL Rules. In support of its position, it invokes paragraph 4 of Article 8, emphasizing that each Contracting Party has given its unconditional consent to arbitration.

88. In the view of the Tribunal, paragraph 4 does not strengthen the Claimant’s position. The unconditional consent given by the Contracting Parties to the BIT is the consent to submit disputes referred to in paragraph 1 of Article 8 to international arbitration “in accordance with the provisions of this Article”. Although consent to international arbitration is expressed in Article 8(4) and is still valid, in order to generate legal consequences in relation to different arbitral fora, the conditions specified in paragraphs 1 and 2 of Article 8 have to be met. Paragraph 1 envisages ICSID arbitration, which at present is not available as Venezuela ceased to be bound by the ICSID Convention on 25 July 2012. The continued validity of Venezuela’s consent to arbitration under Article 8(4) as long as it is a Contracting Party to the BIT would provide for ICSID jurisdiction in the future if Venezuela one day decides to accede once again to the ICSID Convention. Paragraph 2, in the Tribunal’s interpretation, envisages situations which might have arisen before Venezuela became a Contracting State to the ICSID Convention.
89. In view of the above, the Tribunal has to conclude that Article 8 alone does not provide a basis for its jurisdiction in the case at hand as arbitration under the UNCITRAL Rules was contemplated by the BIT’s Contracting Parties for the period during which Venezuela had not yet become a Contracting State of the ICSID Convention. The present arbitral proceedings were not instituted before Venezuela became a Contracting State to the ICSID Convention, but only after it had ceased to be one, following its denunciation of the Convention.
90. The Tribunal’s analysis, however, cannot stop here as the Claimant also relies on Article 3 of the BIT, containing the MFN clause, as support for its contention that this Tribunal has jurisdiction to hear the case. It is this issue to which the Tribunal now turns its attention.

B. THE APPLICATION OF THE MFN CLAUSE TO THE DISPUTE RESOLUTION PROVISIONS IN ARTICLE 8

1. Claimant’s Position

91. Even if the Tribunal were to adopt the Respondent’s interpretation of Article 8, the Claimant argues that the MFN clause contained in Article 3 of the Treaty allows the Claimant to take advantage of the dispute settlement provisions of other BITs to which Venezuela is a party,

including those which provide for an unrestricted choice of UNCITRAL arbitration or those which the Respondent itself acknowledges provide for UNCITRAL arbitration as a catch-all default dispute resolution option.⁵⁹ The provisions of these BITs are, according to the Claimant, more favorable because they provide investors with a choice of dispute resolution fora.⁶⁰

92. The Claimant notes that Article 3(3) of the Treaty expressly states that the MFN clause applies to the dispute resolution provisions under the Treaty. According to the Claimant, the present situation and Treaty are equivalent to those examined in *Garanti Koza v. Turkmenistan*, where the tribunal found that it did not need to grapple with the debate over whether MFN clauses apply to dispute settlement provisions generally, because the language of Article 3(3) required it to apply MFN treatment to the dispute resolution provisions.⁶¹ The *Garanti Koza* tribunal further found that, even if it were not possible to import consent to arbitration into a BIT that did not provide for arbitration, “the essential consent of the State – the consent to resolve disputes with U.K. investors by means of international arbitration – does not in this case need to be imported by operation of the MFN clause, because that consent is contained in Article 8(1) of the BIT”, just as it is, the Claimant contends, in Article 8(4) of the Barbados-Venezuela BIT.⁶²
93. The Claimant notes that there is no general rule against importing consent to arbitration through an MFN clause.⁶³ Even if there were such a rule, however, the Claimant emphasizes the

⁵⁹ Counter-Memorial, ¶ 63, citing Memorial, ¶ 30; Counter-Memorial, ¶¶ 54-55; Rejoinder, ¶¶ 38-39 Hearing Transcript (10 July 2014), 77:9-78:19, citing Canada-Venezuela BIT, Article XII(4) (RLA-33); Czech Republic-Venezuela BIT, Article 8 (RLA-34); Ecuador-Venezuela BIT, Article IX(3) (RLA-35); Lithuania-Venezuela BIT, Article 7 (RLA-36); Portugal-Venezuela BIT, Article 8(2) (RLA-37); Uruguay-Venezuela BIT, Article 9 (RLA-38); Iran-Venezuela BIT, Article 11(2) (RLA-26); Venezuela-Belarus BIT, Article 8(2) (C-37); Venezuela-Cuba BIT, Article 9(3) and Protocol, Article 3 (C-38); Venezuela-Vietnam BIT, Article 8(2) (C-39); Russia-Venezuela BIT (RLA-27), Article 9(2). The Claimant adds that UNCITRAL arbitration appears to be Venezuela’s preferred forum for arbitration under its most recent BITs, most of which do not even provide for ICSID as an option. Rejoinder, ¶ 48.

⁶⁰ Rejoinder, ¶ 40; Hearing Transcript (10 July 2014), 80:4-16, citing *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, ¶ 101 (CLA-19) (“a system that gives a choice is more favorable to the investor than a system that gives no choice.”) [hereinafter “*Impregilo v. Argentina*”]; *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, ¶¶ 59-75 (RLA-123) (“whatever the substantive merits of litigation and of arbitration, it is always more favourable to have the choice as to which to employ than it is not to have that choice.”) [hereinafter “*Hochtief v. Argentina*”].

⁶¹ Counter-Memorial, ¶¶ 56-63, citing *Garanti Koza v. Turkmenistan*, *supra* note 35, ¶¶ 40-42 and *Agreement between the United Kingdom of Great Britain and Northern Ireland and the Government of Turkmenistan for the Promotion and Protection of Investments*, signed on 9 February 1995 (C-36). Hearing Transcript (10 July 2014), 75:16-77-8, 130:15-131:12.

⁶² Counter-Memorial, ¶ 60; Rejoinder, ¶¶ 42-47, citing *Garanti Koza v. Turkmenistan*, *supra* note 35, ¶ 75. Hearing Transcript (10 July 2014), 125:11-127:3.

⁶³ Hearing Transcript (10 July 2014), 80:21-82:3, 130:13-132:20

distinction between consent to arbitration and the kind of arbitration or the conditions under which the investor may submit the dispute to UNCITRAL arbitration, the latter being questions of admissibility or procedure rather than consent.⁶⁴ Tribunals which have found the MFN clause under a BIT to apply to the BIT's dispute resolution provisions have, the Claimant submits, consistently held that MFN treatment allows an investor to avoid restrictive conditions on an investor's right to submit disputes to arbitration.⁶⁵ In the Claimant's view, the only effect of MFN treatment in this case would be to remove the temporal condition on the availability of UNCITRAL arbitration, rather than to import a different "system of arbitration".⁶⁶ Regardless, the Claimant argues that Venezuela "clearly has no objection on principle or in practice to UNCITRAL arbitration", and cites the *Renta 4 v. Russia* tribunal's rejection of similar arguments:

[D]ispute resolution mechanisms accepted by a State in various international instruments are all legitimate in the eyes of that State. Some may be inherently more efficient. Others may be more reliable in a particular context. Having options may be thought to be more "favoured" for MFN purposes than not having them. It is not convincing for a State to argue in general terms that it accepted a particular "system of arbitration" with respect to the nationals of one country but did not so consent with respect to the nationals of another. The extension of commitments is in the very nature of MFN clauses.⁶⁷

2. Respondent's Position

94. The Respondent insists that the lack of consent to UNCITRAL arbitration in Article 8 of the Treaty cannot be remedied by resort to the MFN clause in Article 3 of the Treaty. In the Respondent's view, the Claimant relies on a single decision, *Garanti Koza v. Turkmenistan*, which

⁶⁴ Counter-Memorial, ¶¶ 56, 60; Rejoinder, ¶ 42; Hearing Transcript (10 July 2014), 81:7-83:22, 127:24-130:12.

⁶⁵ Rejoinder, ¶¶ 43-44, citing, *inter alia*, *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objection to Jurisdiction, 25 January 2000, ¶¶ 54-64 (CLA-21/RLA-119) [hereinafter "*Maffezini v. Spain*"]; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/07, Award, 25 May 2004, ¶¶ 100-104 (CLA-22); *National Grid plc v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, ¶¶ 79-94 (CLA-6); *Suez Sociedad General de Aguas de Barcelona S.A. y Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group Ltd v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 3 August 2006, ¶¶ 52-68; *Impregilo v. Argentina*, *supra* note 60, ¶¶ 95-108; *Hochtief v. Argentina*, *supra* note 60, ¶¶ 59-75; *Teinver S.A., Transportes de Cercanías S.A., and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/01, Decision on Jurisdiction, 21 December 2012, ¶¶ 159-186 (CLA-8).

⁶⁶ Rejoinder, ¶ 47; Hearing Transcript (10 July 2014), 82:4-83:22.

⁶⁷ Rejoinder, ¶ 48; Hearing Transcript (10 July 2014), 83:23-85:15, 127:4-23, citing *Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation*, SCC No. 24/2007, Award on Preliminary Objections, 20 March 2009, ¶ 92 (CLA-20).

was recently rendered by a majority of an ICSID tribunal over the strong dissent of one of the arbitrators, and which is both incorrect and distinguishable from the present case.

95. The Respondent agrees with the Claimant that the question of the applicability of the MFN standard to dispute settlement is resolved by Article 3(3) of the Treaty, which clarifies that the MFN standards set forth in paragraphs 1 and 2 of Article 3 extend to the dispute settlement provisions in Article 8. However, the Respondent asserts that “even when the MFN standard applies to dispute settlement generally, the system of dispute settlement carefully negotiated by the Contracting Parties cannot be replaced by another, neither negotiated, nor agreed, through the mere invocation of the MFN clause.”⁶⁸
96. According to the Respondent, the Claimant seeks to impermissibly replace the specific “system of arbitration” set forth in Article 8—where UNCITRAL arbitration was only contemplated for a specific contingency—with “an entirely different mechanism” set forth in other Venezuelan BITs.⁶⁹ The Respondent argues that the present situation must be distinguished from cases where a claimant is merely attempting to bypass some formalities set forth in a treaty containing indisputable consent to UNCITRAL arbitration. The Respondent repeats its earlier arguments that the present Treaty contains no general consent to arbitration, only “an acceptance of arbitration within the precise terms set out in article 8.”⁷⁰ In this context, the Respondent notes that the acceptability of UNCITRAL arbitration in other Venezuelan BITs or in general is irrelevant:⁷¹ the MFN clause cannot serve to import consent to arbitration where there is none in the basic treaty.

⁶⁸ Reply, ¶¶ 50-59; Hearing Transcript (10 July 2014), 37:13-39:11, citing *Maffezini v. Spain*, *supra* note 65, ¶¶ 62-63 (“[T]here are some important limits that ought to be kept in mind. [...] If the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the [MFN] clause, in order to refer the dispute to a different system of arbitration”); *Plama v. Bulgaria*, *supra* note 16, ¶ 209 (“It is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism.”); *Wintershall v. Argentina*, *supra* note 17, ¶176; Campbell McLachlan, Laurence Shore and Matthew Weiniger, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2007), ¶¶ 7.162, 7.168 (RLA-120).

⁶⁹ Reply, ¶¶ 59-61; Hearing Transcript (10 July 2014), 39:12-41:1, 101:15-102:4.

⁷⁰ Hearing Transcript (10 July 2014), 39:12-41:1. See also *supra* “Interpretation of Article 8 of the Treaty”, “Respondent’s Position”, Section V.A.1, ¶ 52 *et seq.*

⁷¹ Hearing Transcript (10 July 2014), 102:5-17.

97. In the Respondent's view, this result derives from the principle that MFN clauses do not grant investors rights that do not already exist under the basic treaty. For example, the *Hochtief v. Argentina* tribunal held:

In the present case, it might be argued that the MFN clause requires that investors under the Argentina-Germany BIT be given MFN treatment during the conduct of an arbitration but that the MFN clause cannot create a right to go to arbitration where none otherwise exists under the BIT. The argument can be put more generally: the MFN clause stipulates how investors must be treated when they are exercising the rights given to them under the BIT but does not purport to give them any further rights in addition to those given to them under the BIT.

[...]

In the view of the Tribunal, it cannot be assumed that Argentina and Germany intended that the MFN clause should create wholly new rights where none otherwise existed under the Argentina-Germany BIT. [...] The MFN clause is not a *renvoi* to a range of totally distinct sources and systems of rights and duties: it is a principle applicable to the exercise of rights and duties that are actually secured by the BIT in which the MFN clause is found.⁷²

98. The Respondent also cites the dissenting opinion of Prof. Boisson de Chazournes in *Garanti Koza v. Turkmenistan*:

In line with what the *Maffezini v. Spain* tribunal held, no investment award or decision has since then decided that an MFN provision would allow the import of consent to ICSID arbitration from another treaty. [...] The role of the MFN clause is not to substitute for a lack of consent, but to ensure that the consent given is implemented in the most favourable manner to the individual investor entitled to protection, as compared to the treatment given to other such individuals in treaties with third countries. The *National Grid v. Argentina* tribunal correctly noted that an MFN clause is not a basis for creating consent to ICSID arbitration when none exists.

[...]

Granting Article 3(3) of the U.K.-Turkmenistan BIT such extensive effect as to allow for consent to ICSID through incorporation by reference in the frame of a treaty that does not allow

⁷² Reply, ¶¶ 62-67, citing *Hochtief v. Argentina*, *supra* note 60, ¶¶ 79-82 (RLA-123); *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondent's Objection under Arbitration Rule 41(5), 16 January 2013, ¶ 74 (RLA-124); Francisco Orrego Vicuña, *Reports of [Maffezini's] Demise Have Been Greatly Exaggerated*, 3 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 299 (2012), pp. 302-303 (RLA-125).

this, would have the effect of “replac[ing] a procedure specifically negotiated by parties with an entirely different mechanism” or “system of arbitration”. It would involve a forum-shopping attitude that bypasses the consent requirement of the Respondent while running against the fundamental principles of international adjudication.⁷³

99. According to the Respondent, the majority decision in the *Garanti Koza v. Turkmenistan* case was wrong, but was in any event premised on the idea that Turkmenistan had provided a general or “essential consent” to arbitration in Article 8(1) of the UK-Turkmenistan BIT and a standing offer of UNCITRAL arbitration in Article 8(2), neither of which is present in the instant Treaty.⁷⁴

3. Tribunal’s Analysis

100. The Tribunal begins its analysis of the BIT’s provisions in Article 3 on MFN treatment⁷⁵ and its implications with respect to Article 8 thereof, by referring to Article 3, paragraph 3. It leaves no doubt that the MFN provisions under this BIT are applicable to the provisions on settlement of disputes between one Contracting Party and nationals or companies of the other Contracting Party as well. Paragraph 3 reads as follows: “The treatment provided for in paragraphs (1) and (2) above shall apply to the provision of Articles 1 to 11 of this Agreement”. Article 8 thus features among the Articles to the provisions of which the MFN treatment shall apply.
101. This is not disputed by the Respondent, who, while observing that “investment tribunals are divided as to the applicability of MFN [clauses] to dispute settlement provisions”, accepts that “in this case, [...] the applicability of the MFN standards to dispute settlement is resolved by the BIT itself.”⁷⁶
102. The Tribunal thus need not pronounce itself on the applicability of MFN clauses to arbitration clauses or dispute settlement provisions in general, in particular in situations when the MFN clause is silent on the scope of its applicability. Arbitral tribunals remain deeply divided on this issue.⁷⁷ Nor does the Tribunal have to engage in an analysis as to whether the term “treatment” in

⁷³ Reply, ¶ 68, citing *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Dissenting Opinion by Laurence Boisson de Chazournes, July 3, 2013, ¶¶ 61-63 (RLA-117).

⁷⁴ Hearing Transcript (10 July 2014), 41:9-42:21, 93:3-95:13.

⁷⁵ The text of Article 3 is reproduced above. See *supra* “The Treaty”, Section III.A, ¶ 45.

⁷⁶ Reply, ¶53.

⁷⁷ The Tribunal notes that these divergencies between different Tribunals stem mostly from the fact that the BITs these Tribunals had to interpret remained silent on the applicability of the MFN clauses to investor-State dispute settlement procedures. That is the case e.g. of the Argentina-United Kingdom BIT, the Argentina-Germany BIT or the Bulgaria-Germany BIT. For that reason this Tribunal does not consider awards or decisions pursuant to such

the text of Article 8 of the Barbados-Venezuela BIT covers only substantive standards of treatment, or includes also procedural rights, including the right to initiate arbitral proceedings.⁷⁸ Article 3 in its paragraph (3) is clear that “[t]he treatment provided for” in the two paragraphs thereof shall apply also to the provisions of Article 8. As the Study Group of the International Law Commission on the Most-Favoured-Nation Clause, having studied the issue between 2009 and 2015, observed in its Final Report “[t]he point [whether MFN provisions are capable of applying to the dispute settlement provisions of the BITs] is essentially one of party autonomy; the parties to a BIT can, if they wish, include the conditions for access to dispute settlement within the scope of coverage of an MFN provision. The question in each case is whether they have done so.”⁷⁹ Venezuela and Barbados have done so in their BIT; they have agreed *expressis verbis* that the MFN treatment clause shall apply to Article 8, i.e., to dispute settlement provisions and conditions for resorting to international arbitration thereunder. Therefore, this Tribunal has no other choice than to apply and enforce these provisions “in accordance with their terms pursuant to the principle of *pacta sunt servanda*”.⁸⁰ The majority believes that it must give *bona fide* effect to the provisions agreed by the Parties in their BIT, and not to empty Article 3(3) of its meaning,

BITs (e.g., *ICS v. Argentina*, *supra* note 17; *Wintershall v. Argentina*, *supra* note 17; *Daimler v. Argentina*, *supra* note 42; *Hochtief v. Argentina*, *supra* note 60; *ST-AD v. Bulgaria*) as relevant for its interpretation and application of Articles 3 and 8 of the Venezuela-Barbados BIT, since this Tribunal has a duty to apply the provisions of Article 3 to Article 8.

⁷⁸ This is yet another divisive issue. The Tribunal, however, notes that some tribunals which interpreted MFN clauses in the BITs not expressly providing for the applicability of the MFN clause to the investor-State dispute settlement procedures have concluded that “[a]n investor’s entitlement to resort to arbitration under a BIT must be construed as an integral part of the treatment accorded to [the investor].” *Le Chèque Déjeuner and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016, ¶ 193. See also *Gas Natural SDG, SA v. Argentina*, ICSID Case No. ARB/03/10, Decision on Preliminary Questions on Jurisdiction, 17 June 2005, ¶ 29, 31, 49; *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, ¶ 102; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Interaguas Servicios Integrales de Agua, S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006, ¶ 56-59; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 (formerly *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina*) and *AWG Group Ltd. v. Argentina*, UNCITRAL, Decision on Jurisdiction, 3 August 2006, ¶ 57-61.

⁷⁹ STUDY GROUP ON THE MOST-FAVOURLED-NATION CLAUSE, FINAL REPORT, ANNEX TO THE REPORT OF THE INTERNATIONAL LAW COMMISSION, 70 UNGAOR SUPP. NO. 10, UN DOC. A/70/10 (14 August 2015), p. 182, ¶ 162. The International Law Commission adopted the conclusions of its Study Group, including the one which states: “[w]hether MFN clauses are to encompass dispute settlement provisions is ultimately up to the States that negotiate such clauses. Explicit language can ensure that a MFN provision does or does not apply to dispute settlement provisions. Otherwise the matter will be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis.” REPORT OF THE INTERNATIONAL LAW COMMISSION, SIXTY-SEVENTH SESSION (4 May-5 June and 6 July-7 August 2015), 70 UNGAOR SUPP. NO. 10, UN DOC. NO. A/70/10 (14 August 2015), p. 19, ¶ 42 and *ibid.*, p. 190, ¶ 216.

⁸⁰ *ICS v. Argentina*, *supra* note 17, ¶ 276. See also *Garanti Koza v. Turkmenistan*, *supra* note 35, ¶ 42.

thereby rendering it inapplicable to Article 8 as is the view preferred in the attached dissenting opinion.

103. Article 3(3) of the Barbados-Venezuela BIT is almost identical to the United Kingdom Model BIT (2008), the only difference being that in the UK Model Treaty Article 3(3) starts with the words “for the avoidance of doubt it is confirmed that” which are then followed by the words identical with the ones used by Barbados and Venezuela in their BIT, namely “the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 12 of this Agreement”. This kind of provision has been used frequently in the BITs concluded by the United Kingdom since 1990/1991.⁸¹ It may be that this example “inspired” Barbados and Venezuela during the negotiations of their BIT under consideration in the present case. Be that as it may, what is important is the fact that, as the commentators of the UK Model BIT explain, “[w]here Article 3(3) is included, it therefore provides an answer to the controversial question whether the MFN provision also applies to procedural issues such as investor-State dispute settlement.”⁸²
104. The Tribunal observes that Article 3(1) deals with treatment of “investments”, while Article 3(2) deals with treatment of “nationals or companies of the other Contracting Party” (i.e., investors). The right to submit a dispute to arbitration is a right accorded by Article 8 of the BIT, under the conditions specified therein, to an “investor”. Article 8(2) uses the expression “the investor shall have the right to submit the dispute to arbitration.” It follows that MFN treatment can extend to dispute settlement provisions only through the operation of Article 3(2) of the Treaty. “Investment” as such has no procedural rights, therefore Article 3(1) is without relevance for the purpose of the Tribunal’s inquiry into its jurisdiction.
105. It is now for the Tribunal to determine how Article 3(2) impacts the provisions of Article 8 on settlement of disputes between an investor and a State. The Tribunal agrees with the Respondent that the MFN clause cannot serve the purpose of importing consent to arbitration when none exists under the BIT between Barbados and Venezuela.⁸³ It also appears that the Claimant is arguing

⁸¹ See *National Grid v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, ¶ 85. Article 3(3) also appeared in the UK Model BIT (1991), see 3 INTERNATIONAL INVESTMENT AGREEMENTS 185.

⁸² Chester Brown & Audley Sheppard, “United Kingdom” in: C. Brown (ed.), COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES (2013), p. 728.

⁸³ Hearing Transcript (10 July 2014), 38:9-11.

that it does not seek to import consent to arbitration in the present case from another BIT concluded by Venezuela with a third State.⁸⁴

106. The question which has to be answered is whether Venezuela has given its consent to international arbitration for disputes with Barbadian investors in the BIT at hand.
107. It is necessary to recall Article 8(4) of the BIT. It provides that “[e]ach Contracting Party hereby gives its unconditional consent to submission of disputes as referred to in paragraph 1 of this article to international arbitration in accordance with the provisions of this article”. Venezuela thus has given its *unconditional consent* to international arbitration, but of course, with the caveat “in accordance with the provisions of Article 8.” The Tribunal earlier analyzed Article 8⁸⁵ and reached its conclusion that “arbitration under UNCITRAL Rules was agreed to by the BIT’s Contracting Parties for the period during which Venezuela had not yet become a Contracting State of the ICSID Convention”.⁸⁶ Without Article 3 of the BIT, this would have been the end of the exercise.
108. Article 3(3), however, requires the Tribunal to apply “the treatment provided for in paragraph [...] (2) [...] to the provisions of” Article 8 of the BIT. The principle of effectiveness calls for giving effect to Article 3(2).
109. There can be no doubt that Venezuela has given its consent, as it is stipulated in Article 8(4) – “its unconditional consent” – to the submission of investment disputes with Barbadian investors to international arbitration. Article 8(4), by using the expression “in accordance with the provisions of this Article”, makes such submission of disputes to international arbitration subject to the conditions specified in paragraphs (1) and (2) of Article 8. These conditions determine the arbitration forum to which a dispute can be submitted, either ICSID, the ICSID Additional Facility, or arbitration under the UNCITRAL Rules. Yet, the fact remains that Article 8(4) expresses the Contracting Parties’ overall “unconditional consent” to international arbitration. Venezuela has given in Article 8 one consent to international arbitration, not three different consents (one to ICSID arbitration, one to ICSID Additional Facility arbitration and one to *ad hoc* arbitration under UNCITRAL Rules). That consent covers three different arbitral fora (ICSID, Additional Facility, UNCITRAL) under the conditions specified in Article 8.

⁸⁴ Hearing Transcript (10 July 2014), 81:8-12.

⁸⁵ See ¶¶ 68-89 above.

⁸⁶ ¶ 89 above.

110. The Tribunal notes that otherwise Article 8(4) would serve no other useful purpose as it would have been sufficient for the Contracting Parties to limit Article 8 just to its first three paragraphs. Paragraph 1 would have provided for arbitration under the ICSID Convention, while paragraph 2 would have covered scenarios prior to Venezuela's becoming Party to the ICSID Convention. There is a presumption that the Parties, by including a specific paragraph in Article 8, namely paragraph 4, by which they give their "unconditional consent to the submission of disputes [between one Contracting Party and a national or company of the other Contracting Party concerning an obligation of the former under this [BIT] in relation to an investment of the latter']⁸⁷ to international arbitration in accordance with the provisions of this Article", intended to give a meaning to this paragraph, or in other words, this paragraph has to produce the legal effects intended by the Parties.
111. In the view of the Tribunal, Article 8(4) expresses – as long as the BIT is in force, and it is not disputed that it is still in force – each Contracting Party's consent to submission of investment disputes with nationals or companies of the other Contracting Party to international arbitration. There is thus no question of importing Venezuela's consent to international arbitration with Barbadian investors through the operation of Article 3(2) of the BIT from another of Venezuela's BITs concluded with a third State. The question rather is that of the conditions for resorting to international arbitration. Venezuela, by withdrawing from the ICSID Convention, has not withdrawn its consent to international arbitration, expressed in Article 8(4) of the BIT. The consent is still there and valid. Venezuela's withdrawal from the ICSID Convention prevents Barbadian investors from instituting arbitral proceedings under Article 8(1) of the BIT as doing so is conditioned, pursuant to Article 25(1) of the ICSID Convention, upon Venezuela being a Contracting State to the ICSID Convention. The door to ICSID arbitration has thus been shut by Venezuela. However, if one day Venezuela accepts the Convention anew as it may, the door to ICSID arbitration will reopen since so long as the consent to international arbitration under the BIT has not been withdrawn, it continues to be in place. Without this consent this would not be possible because, as the last preambular paragraph of the ICSID Convention confirms "no Contracting State shall by the mere fact of its ratification acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to . . . arbitration."

⁸⁷ These are the words taken from Article 8(1) substituted for the phrase "as referred to in paragraph 1 of this Article" used in Article 8(4).

112. Article 8 contains only conditions determining which one of the three arbitral fora mentioned therein may be available. It sets forth no other conditions such as those which are provided for in a number of other BITs, e.g., the requirement that an investor litigate a dispute before the domestic courts of the host State for a specific duration prior to initiating arbitral proceedings or the requirement that an investor make a *bona fide* attempt to settle the dispute through negotiations for a specified period of time (the so-called “cooling-off” period) before instituting arbitral proceedings. Therefore, in the view of the Tribunal, since Venezuela and Barbados agreed in Article 3 of their BIT that the MFN treatment clause shall apply to dispute settlement procedures under Article 8, and since the Respondent admits as much, the MFN treatment is relevant to the application of the conditions under which an arbitral forum may be seized.
113. Recourse to arbitration under the UNCITRAL Rules is subject to a temporal condition, namely that it has been envisaged for the period prior to Venezuela becoming a Contracting State of the ICSID Convention if the Additional Facility was not available for any reason.
114. It is in the nature of an MFN clause that the “treatment accorded by the granting State to the beneficiary State, or to persons [...] in a determined relationship with that State” is “not less favourable than treatment extended by the granting State to a third State or to persons [...] in the same relationship with that third State”.⁸⁸
115. The Claimant asserts that a number of the BITs concluded by Venezuela with third States provide more favourable terms to investors, including Venezuela’s BITs with Belarus, Cuba, Iran, the Russian Federation, Vietnam, Canada, the Czech Republic, Ecuador, Lithuania, Portugal and Uruguay.⁸⁹ It is not necessary for the Tribunal to analyze all these BITs. It is sufficient that one of them provides for more favourable treatment of investors in relation to the conditions under which they can have recourse to arbitration under the UNCITRAL Rules than Barbadian investors. If, in one of these BITs, the temporal condition for recourse to arbitration under the UNCITRAL Rules is less stringent, or – in other words – more favourable to investors than the one in the Barbados-Venezuela BIT, then Barbadian investors relying on Article 3(2) of the BIT can claim not to be subjected to the conditions in Article 8(2) of the BIT as they appear therein, but to the conditions more favorable to the investor from the third State.

⁸⁸ Article 5, *ILC Final Draft Articles with Commentaries on Most-Favoured-Nation Clauses* (1978), Yearbook of the International Law Commission 1978, Vol. II, Part Two, p. 21, also reproduced in A. Watts, 3 THE INTERNATIONAL LAW COMMISSION 1949-1998, 1808 (1999).

⁸⁹ Rejoinder, 31, ¶ 41.

116. One of the treaties invoked is the BIT which Venezuela concluded with Ecuador on 18 November 1993.⁹⁰ Article IX, devoted to settlement of disputes between an investor and the Contracting Party in which the investment was made, provides for international arbitration and in that context for three possible arbitral fora, namely ICSID, an ICSID Additional Facility and an *ad hoc* arbitral tribunal under the UNCITRAL Rules, like Article 8 of the Venezuela-Barbados BIT. It is useful to reproduce here the full text of Article IX of the Venezuela-Ecuador BIT. It reads:

Article IX

**Settlement of disputes between an investor
and the Contracting Party in which the investment was made**

1. Any dispute between an investor of a Contracting Party and the other Contracting Party concerning implementation by the latter of the provisions of this Agreement shall, to the extent possible, be settled by means of amicable consultations.

2. If the dispute cannot be settled within six months of the time it was initiated by one of the Parties, it may be submitted, at the request of the investor, to:

- The competent courts of the Contracting Party, in whose territory the investment was made; or
- International arbitration, on the terms laid down in paragraph 3.

Once an investor has submitted the dispute to the courts of the Contracting Party in question or to international arbitration, the choice of one or other of those procedures shall be final.

3. If the investor decides to have recourse to arbitration, the dispute shall be submitted to the International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which was opened for signature in Washington, D.C., on 18 March 1965, once both States Parties to this Agreement have acceded to the Convention. Until such condition has been met, each Contracting Party agrees that the dispute shall be submitted to arbitration in accordance with the rules of the Additional Facility of ICSID for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings.

⁹⁰ *Agreement between the Government of the Republic of Venezuela and the Government of Ecuador for the Reciprocal Promotion and Protection of Investments*, UNTS, vol. 1989, pp. 407-421 (RLA-35). It was registered with the Secretariat of the United Nations, in accordance with Article 102 of the UN Charter, by Venezuela on 10 September 1997. The text in Spanish, which is the authentic text, together with translations into English and French, was published under No. 34030 in the UN Treaty Series.

If for any reason ICSID or its Additional Facility is not available, the dispute shall be submitted, at the request of the investor, to an *ad hoc* arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

4. The arbitral award shall be limited to determining whether there is a breach of this Agreement by the Contracting Party, whether such breach has caused harm to the investor and, if such is the case, the amount of compensation which is appropriate.

5. Arbitral awards shall be final and binding on the parties to the dispute. Each Contracting Party shall execute them in accordance with its legislation.⁹¹

⁹¹ The original Spanish text of Article IX reads:

ARTICULO IX
SOLUCION DE CONTROVERSIAS ENTRE UN INVERSOR Y LA
PARTE CONTRATANTE RECEPTORA DE LA INVERSION

1.- Toda controversia entre un inversor de una Parte Contratante y la otra Parte Contratante respecto del cumplimiento por ésta de las disposiciones de este Convenio será, en la medida de lo posible, solucionada por consultas amistosas.

2.- Si la controversia no hubiera podido ser solucionada en el término de seis meses a partir del momento en que hubiera sido planteada por una u otra de las Partes, podrá ser sometida, a pedido del inversor:

O bien a los tribunales competentes de la Parte Contratante en cuyo territorio se realizó la inversión,

- O bien al arbitraje internacional en las condiciones descritas en el párrafo (3).

Una vez que un inversor haya sometido la controversia a las jurisdicciones de la Parte Contratante implicada o al arbitraje internacional, la elección de uno u otro de esos procedimientos será definitiva.

3.- Si el inversor resuelve someter la controversia a arbitraje, éste se efectuará en el Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (C.I.A.D.I.), creado por el "Convenio sobre Arreglo de Diferencias Relativas a las Inversiones entre Estados y Nacionales de otros Estados", abierto a la firma en Washington el 18 de marzo de 1965, cuando cada Estado Parte en el presente Convenio haya adherido a aquel. Mientras esta condición no se cumpla, cada Parte Contratante da su consentimiento para que la controversia sea sometida al arbitraje conforme con el reglamento del Mecanismo Complementario del C.I.A.D.I. para la administración de procedimientos de conciliación, de arbitraje o de investigación.

- Si por cualquier motivo no estuviere disponible el CIADI ni su mecanismo complementario, la controversia será sometida, a petición del inversor, a un tribunal de arbitraje "ad hoc" establecido de acuerdo con las reglas de arbitraje de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (C.N.U.D.M. I.).

4.- La sentencia arbitral se limitará a determinar si la Parte Contratante ha incumplido este Convenio, si ese incumplimiento ha causado un daño al inversor y, si este fuere el caso, a fijar el monto de la indemnización correspondiente.

5.- Las sentencias arbitrales serán definitivas y obligatorias para las partes en la controversia. Cada Parte Contratante las ejecutará de conformidad con su legislación.

117. The Tribunal notes that paragraph 2 gives the investor a choice, which once made becomes final, to submit a dispute which could not be settled amicably within six months, either to the competent courts of the host State or to international arbitration. In relation to international arbitration the provision specifies that such submission of a dispute shall be “on the terms laid down in paragraph 3”.
118. In the view of the Tribunal, paragraph 2 of Article IX of the Ecuador-Venezuela BIT expresses the consent of these two States to international (investment) arbitration similarly to how such consent is given in Article 8(4) of the Barbados-Venezuela BIT, albeit in the latter it is expressed in an even more emphatic way (“Each Contracting Party hereby gives its *unconditional* consent”). Further the Tribunal does not see any material or substantive difference in the formulas used in Article 8(4) (“consent [...] to international arbitration in accordance with the provisions of this Article”) and in Article IX(2) (“[i]nternational arbitration, on the terms laid down in paragraph 3”). Both refer to the conditions specified in the provisions referred to therein.
119. The Tribunal has analyzed above⁹² the conditions set forth in Article 8 of the Barbados-Venezuela BIT, more precisely in paragraphs 1 and 2 thereof. Moving now to the terms, or in other words the conditions, laid down in paragraph 3 of Article IX of the Ecuador-Venezuela BIT, the Tribunal wishes to make several observations.
120. *First*, it provides for recourse to ICSID arbitration “once both States Parties to the [BIT] have acceded to the [ICSID] Convention”. It is worth recalling that the Ecuador-Venezuela BIT was signed on 18 November 1993 when only Ecuador was a party to the ICSID Convention,⁹³ while Venezuela was only a signatory State but not yet a Contracting Party to the ICSID Convention.⁹⁴ The exact same situation of Venezuela not being a Party to the ICSID Convention continued when it signed the BIT with Barbados a few months later, on 15 July 1994.⁹⁵
121. *Second*, under these same circumstances, both BITs now under the Tribunal’s focus, provide for the ICSID Additional Facility. The Tribunal has already interpreted the words “[a]s long as [...] Venezuela has not become a Contracting State of the [ICSID] Convention”, in Article 8(2) of the

⁹² See *supra*, ¶¶ 74-89.

⁹³ Ecuador signed the Convention on 15 January 1986 and deposited its instrument of ratification on the same date. The Convention entered into force for Ecuador on 14 February 1987.

⁹⁴ Venezuela signed the Convention on 18 August 1993 and deposited its instrument of ratification on 2 May 1995. The Convention entered into force for Venezuela on 1 June 1995.

⁹⁵ See *supra*, ¶ 3 and note 1, as well as ¶ 76.

Barbados-Venezuela BIT as “leav[ing] no doubt that the Parties had in mind the period prior to Venezuela becoming a Party to the ICSID Convention”.⁹⁶ The Tribunal also noted the agreement of the Parties to the dispute on this point in relation to the availability of the ICSID Additional Facility only in Venezuela’s pre-ICSID period.⁹⁷ The Ecuador-Venezuela BIT provides in Article IX(3) that “[u]ntil such condition has been met [i.e., until both Contracting Parties to the BIT ‘have acceded to the [ICSID] Convention’], each Contracting Party agrees that the dispute shall be submitted to arbitration in accordance with the Additional Facility of ICSID”. In the view of the Tribunal, the expression “until such condition has been met” means, in the circumstances prevailing at the moment of signing the Ecuador-Venezuela BIT, until Venezuela has become a Party to the ICSID Convention, or in other words it covers the pre-ICSID period. Accordingly, the Tribunal does not see any material difference in the temporal scope of the expressions “[a]s long as . . . Venezuela has not become a Contracting State of the [ICSID] Convention” and “[u]ntil such condition has been met [i.e., until ‘both States Parties to the [BIT] have acceded to the [ICSID] Convention’]”.

122. The Tribunal pauses here to observe that investors from Ecuador and from Barbados in Venezuela, in relation to international arbitration with Venezuela before an ICSID Tribunal or under the Additional Facility Rules, were in the same situation. ICSID became available only once Venezuela ratified the ICSID Convention. Until that moment, in the pre-ICSID period for Venezuela, they could have instituted arbitral proceedings under the Additional Facility Rules, but not once that pre-ICSID period was terminated.
123. *Third*, both BITs also contemplate the possibility of seizing an *ad hoc* arbitral tribunal under the UNCITRAL Rules. But there the similarity ends. The Barbados-Venezuela BIT provides that “[i]f for any reason Additional Facility is not available the investor shall have the right to submit the dispute to arbitration under the [UNCITRAL Rules]”. This option is envisaged in Article 8(2) which the Tribunal interpreted to the effect that its introductory words “[a]s long as [...] Venezuela has not become a Contracting State of the [ICSID] Convention” apply also in relation to the availability of arbitration under the UNCITRAL Rules.⁹⁸
124. The structure of Article IX(3) of the Ecuador-Venezuela BIT differs from paragraph 2 of Article 8 of the Barbados-Venezuela BIT. Article IX(3) is divided into two distinct subparagraphs. The

⁹⁶ See *supra*, ¶ 83.

⁹⁷ See *supra*, ¶¶ 81, 86.

⁹⁸ See *supra* ¶¶ 83-84.

original Spanish text makes this abundantly clear by not only separating the two subparagraphs, but also by opening the second one with a hyphen. The second subparagraph gives a right to the investor to submit a dispute to an *ad hoc* tribunal under the UNCITRAL Rules not only when the Additional Facility is for any reason not available, but also when ICSID itself is for any reason not available. This is a critical difference in comparison with the Barbados-Venezuela BIT.

125. Ecuador and Venezuela knew when they concluded their BIT that ICSID would be available “once both States Parties to this [BIT] have acceded to the [ICSID] Convention”, i.e., once Venezuela ratified it, as Ecuador had already been a Party to the ICSID Convention. For the period prior to Venezuela’s ratification of the ICSID Convention, as the words “[u]ntil such condition has been met” used in the second sentence of the first paragraph of Article IX clearly indicate, the Additional Facility was the substitute forum. The words in the separate second subparagraph “[i]f for any reason ICSID [...] is not available” cannot be limited just to one single reason, namely to Venezuela becoming a Party to the ICSID Convention through its ratification, since that reason was already specifically addressed in subparagraph 1 of Article IX and the “remedy” provided for therein in the form of the Additional Facility. “Any reason” in relation to the ICSID has to have a broader meaning, covering also a situation when the ICSID, having become open to an Ecuadorian investor following Venezuela’s ratification of the ICSID Convention, would later be unavailable for “any reason”, for instance as a result of denunciation of that Convention pursuant to its Article 71.
126. The Tribunal reads the condition “[i]f for any reason ICSID or its Additional Facility is not available”⁹⁹ for recourse to arbitration under the UNCITRAL Rules as a cumulative one, meaning that neither ICSID nor its Additional Facility is available. The Additional Facility is not available since, in the view of the Tribunal, it was contemplated for the period before Venezuela ratified the ICSID Convention and thus joined Ecuador, among other States, as a Contracting Party thereto. That is, in the Tribunal’s view, the meaning of the phrase “[u]ntil such condition has been met” in Article IX(3). In any event, irrespective of the temporal scope of that phrase, the Additional Facility is not available to investors from Ecuador under the Ecuador-Venezuela BIT since both countries denounced the ICSID Convention and are no longer Contracting Parties to it. Ecuador did so on 6 July 2009 with effect, under Article 71 of the ICSID Convention, as of 7 January 2010. Venezuela’s denunciation of the ICSID Convention on 24 January 2012 took effect on 25 July 2012. Nor is ICSID available for Ecuadorian investors in investment disputes with

⁹⁹ In the original Spanish text “- Si por cualquier motivo no estuviera disponible el CIADI ni su mecanismo complementario”.

Venezuela. However, Ecuadorian investors may still have recourse to UNCITRAL arbitration since neither ICSID nor the Additional Facility is available. Therefore, they benefit from more favorable treatment than investors from Barbados.

127. Venezuela in its BIT with Ecuador in Article IX(2) agreed to international arbitration with Ecuadorian investors, on the terms laid down in paragraph 3. Venezuela, in relation to investors from Barbados, has given in Article 8(4) its unconditional consent to international arbitration in accordance with the provisions of that Article. Both Articles provide for three arbitral fora (ICSID, Additional Facility, UNCITRAL arbitration) under the conditions specified therein. The conditions under which Ecuadorian investors have a right to recourse to an UNCITRAL arbitration are more favorable than the conditions for investors from Barbados.
128. However, in Article 3(2) of its BIT with Barbados Venezuela accepted an obligation not to subject nationals or companies from Barbados to treatment less favorable than that which it accords to nationals or companies of any third State. Ecuador is such a third State. Under Article 3(3) of the Barbados-Venezuela BIT such treatment shall also apply, beyond any doubt, to the settlement of disputes with investors who are nationals of Barbados. Venezuela, having given its consent to international arbitration, shall accept that Barbados' investors shall have recourse to UNCITRAL arbitration, which is listed in Article 8(2) of the BIT, under conditions which are not less favorable than the conditions under which Ecuadorian investors have such recourse to UNCITRAL arbitration pursuant to Article IX of the Ecuador-Venezuela BIT.
129. It follows that investors from Barbados, relying on Article 3(2) of the Barbados-Venezuela BIT, are entitled to submit their investment disputes with Venezuela in accordance with its Article 8 on the same conditions as investors from Ecuador.
130. Accordingly, the Tribunal comes to the conclusion that, having regard to Article 3(2) of the BIT and Article IX of the Ecuador-Venezuela BIT, the objection of the Respondent that the Tribunal lacks jurisdiction *ratione voluntatis* has to be rejected.

VI. COSTS

131. The Tribunal reserves the question of costs until a later stage of these proceedings.

VII. DECISION

132. For the reasons set forth above, the Tribunal decides:

(1) By two votes to one, that:

- a. The Respondent's Objection to Jurisdiction *ratione voluntatis* is rejected;
- b. The proceeding shall continue under a schedule to be established after consultation with the parties;

(2) Unanimously, that:

- c. All questions of costs are reserved.

Date: 26 July 2016

Place of arbitration: The Hague


The Honourable L. Yves Fortier PC CC OQ QC


Professor Marcelo Kohen
(subject to attached dissenting opinion)


H.E. Judge Peter Tomka
(Presiding Arbitrator)