4A_306/2019[1]

Judgment of March 25, 2020

First Civil Law Court

Federal Judge Kiss, Presiding,
Federal Judge Klett,
Federal Judge Hohl,
Federal Judge Niquille,
Federal Judge Rüedi (Mr.), and
Federal Judge May Canellas
Clerk of the Court: Mr. Carruzzo.

A._____,
Represented by Dr. Xavier Favre-Bulle and Dr. Hanno Wehland,
Appellant,

v.

Bolivarian Republic of Venezuela,
Represented by Mr. Guerric Canonica
Respondent

Facts:

A.
A._____ S.L. (hereinafter: A._____ Spain, the Appellant) is a company incorporated under Spanish law and with its registered office in B._____ having been incorporated on April 15, 2011, by a representative of its parent company, C._____.

C._____ made an in-kind contribution by transferring the shares it held in the group's Venezuelan subsidiary, D._____ S.A. As a result, the Appellant owns all of the shares in D._____ S.A.

This dispute is taking place against the backdrop of the activities of D._____ S.A. in the territory of the Bolivarian Republic of Venezuela (hereinafter: Venezuela, the Respondent). The Appellant's claims against the Respondent are based on the Convention for the Reciprocal Encouragement and Protection of Investments concluded between Spain and Venezuela on November 2, 1995, ("*Convenio entre el*

[1] Translator's Note: Quote as A._____ *v.* Bolivarian Republic of Venezuela, 4A_306/2019.
The decision was issued in French. The original text is available on the website of the Federal Tribunal, www.bger.ch.

Gobierno del Reino de España y el Gobierno de la República Bolivariana de Venezuela para la Promociôn y la Protecciôn Reclproca de Inversiones,"[2] hereinafter: the BIT.).

B.
On May 18, 2015, the Appellant, relying on the arbitration clause included in the BIT, initiated arbitration proceedings against the Respondent for the purpose of obtaining damages for breach of Articles III(1), V, IV(1) of the BIT. A three-member Arbitral Tribunal was established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), under the auspices of the Permanent Court of Arbitration (PCA) and its seat was fixed in Geneva. Spanish was designated as the language of arbitration.

In an award issued on May 20, 2019, the Arbitral Tribunal declared that it did not have jurisdiction to decide on the request and ordered the costs of the arbitral proceedings be borne by the Appellant.

C.
The Appellant submitted a civil law appeal for breach of Art. 190(2)(b) of the Federal Law on Private International Law of 18 December 1987 (PILA[3]; RS 291), requesting the annulment of the award of May 20, 2019, and a finding that the Arbitral Tribunal had the jurisdiction to decide on the merits of the dispute between the parties.

The Respondent argued that the appeal should be rejected, and in the alternative, that the case should be referred back to the Arbitral Tribunal for a new award in the sense of the recitals. The Arbitral Tribunal waived its right to submit comments.

The parties voluntarily submitted a Reply and Rejoinder in which they maintained their original submissions.

Reasons:

1.
According to Art. 54(1) of the Law on the Federal Tribunal of June 17, 2005, (LTF;[4] RS 173.110), the Federal Tribunal issues its judgment in an official language,[5] as a rule, in the language of the award under appeal.

When the challenged award is issued in another language (here, Spanish) the Federal Tribunal uses the official language chosen by the parties. As the parties have written their submissions to the Federal Tribunal in French, the Federal Tribunal shall deliver its judgment in that language.

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[2] Translator's Note: In Spanish in the original text.
[3] Translator's Note: PILA is the most frequently used abbreviation for the Swiss Private International Law Act of December 18, 1987
[4] Translator's Note: LTF is the French abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173.110.
[5] Translator's Note: The official languages of Switzerland are German, French, and Italian.

2.
According to Art. 77(1)(a) LTF, a civil law appeal is admissible against the decisions of arbitral tribunals pursuant to the requirements of Art.190-192 PILA. It is not disputed that the seat of the arbitration was established in Geneva and that this dispute falls within the scope of international arbitration (see Art.176(1) PILA), and pursuant to Chapter 12 of the PILA.

The civil law remedy provided for in Art. 77(1) LTF is generally only of a cassatory or annulling type (see Art. 77(2) LTF, ruling out the applicability of Art. 107(2) LTF insofar as the latter provision allows the Federal Tribunal to rule on the merits of the case). However, an exception is made when the dispute concerns, as in this case, the jurisdiction of the Arbitral Tribunal. In such a case, the Federal Tribunal, if it allows the appeal, may itself determine the jurisdiction or lack of jurisdiction of the arbitral tribunal (ATF 136 III 605[6] at 3.3.4, p 616). The Appellant's submission that this Court should decide whether the Arbitral Tribunal has jurisdiction is therefore admissible.

In principle, therefore, the matter is capable of appeal. In particular, the Award sought is a final award, the Arbitral Tribunal having terminated the proceedings by declaring its lack of jurisdiction (see ATF 143 III 462 at 3.1).

3.
In a single grievance, the Appellant relies on Art. 190(2)(b) PILA, arguing that the Panel wrongly declared that it did not have jurisdiction to decide on the claim for damages for violation of the BIT.

3.1. In deciding on its jurisdiction, the Arbitral Tribunal considered the objections to jurisdiction *ratione personae* and *ratione materiae* raised by the Respondent. The Respondent argued that the Appellant's holding of D._____ S.A.'s shares did not amount to an investment protected by the BIT and that the Appellant did not enjoy investor status under the BIT. The Arbitral Tribunal found that these two objections were intrinsically linked, as the Respondent denied the Appellant investor status precisely because of the lack of investment within the meaning of the BIT. Relying on the BIT definitions of "investor" ("*inversor*")[7] and "investment" ("*inversión*")[8], the Arbitral Tribunal held that the Appellant and the assets held by it *prima facie* had the characteristics required to be considered an investor and an investment, respectively. The decisive question in its view was whether the Appellant had made the investment in question.

> The only issue that must be discussed to resolve Claimant's [sic] objection is whether it made the investment which it owns.[9]
>
> Lo único que debe ser discutido para resolver la objeción planteada por la Demandante [*sic*] es si realizó 'la inversión de la que es propietaria.[10]

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[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/independence-and-impartiality-of-a-party-appointed-arbitrator-in

[7] Translator's Note: In English and in Spanish in the original text.

[8] Translator's Note: In English and in Spanish in the original text.

[9] Translator's Note: In English in the original text.

[10] Translator's Note: In Spanish in the original text.

Referring to the wording of Arts. I(2), III(1), IV(1) and V(1), the Arbitral Tribunal found that an asset "must have been invested"[11] ("*haber sido invertido*"[12]) by a legal or natural person of a contracting state in the territory of the other contracting state and that the holder of the asset thus having been the "active subject in the act of investing"[13] ("*el sujeto activo de la acciôn de invertir*"[14]*).* The question of the direct or indirect quality of the investment was not considered as decisive by the Arbitral Tribunal.

In order to determine whether the Appellant had made an investment, the Arbitral Tribunal considered how the Appellant had obtained the D._____S.A. shares it owned. It noted that E._____ and C._____, two American companies, had invested in Venezuela since 1990 and that at the beginning of April 2011, all the shares of D._____ S.A. were held by C._____. It was only on April 15, 2011, that the Appellant was incorporated by a representative of C._____ and that, as part of the creation of the company, C._____ made an in-kind contribution by transferring the shares it held in D._____ S.A. In light of these facts, the Arbitral Tribunal found that no "transfer of value"[15] ("*transferencia de valor*"[16]) had been made between the Appellant and C._____ for "consideration"[17] ("*contraprestación*"[18]). In the opinion of the Arbitral Tribunal, C._____'s acquisition of shares by the Appellant in the context of the latter's incorporation could not be deemed consideration, given that both the capital and the issue premium of the Appellant were paid by in-kind contribution and that without the transfer by C._____ of the shares of D._____S.A., the shares held by the Appellant would not exist. The Arbitral Tribunal found that, in the absence of consideration, the Appellant's holding of all of the shares of D._____S.A. could not be qualified as an investment within the meaning of Art. I(2) of the BIT. As regards any investments made by the Appellant itself in the assets of D._____S.A. that went beyond the mere holding of D._____S.A. shares, the Arbitral Tribunal held that their existence had not been proven.

3.2 The Appellant submitted that the Arbitral Tribunal erroneously introduced a number of conditions for the existence of an investment not contained in Art. I(2) of the BIT and applied these conditions in a manner contrary to the object and purpose of the BIT. In its view, the interpretation and application of Art. I(2) by the Arbitral Tribunal were not compatible with the requirements of Art. 31 of the Vienna Convention on the Law of Treaties of 23 May 1969 (RS 0.111; hereinafter: VCLT).

First, it argued that, contrary to the findings of the Arbitral Tribunal, the ordinary meaning of the words used in Art. I(2) of the BIT did not imply any act of active investment. As the wording of that provision did not stipulate any restriction as to the manner in which the assets had to be invested, there was no reason to exclude passive investments and, in particular, the situation where the investor "does no more than act as a vehicle through which the investment is made." Moreover, in introducing the requirement of consideration, the Arbitral Tribunal did not treat the act of investment independently. In the Appellant's

[11] Translator's Note: In English in the original text.
[12] Translator's Note: In Spanish in the original text.
[13] Translator's Note: In English in the original text.
[14] Translator's Note: In Spanish in the original text.
[15] Translator's Note: In English in the original text.
[16] Translator's Note: In Spanish in the original text.
[17] Translator's Note: In English in the original text.
[18] Translator's Note: In Spanish in the original text.

view, a requirement such as a consideration to be provided by the investor itself could not be inferred from the ordinary meaning of the words used in Art. I(2) BIT "assets invested by investors." In support of the definitions of the term "invest" in Spanish and French, the Appellant submitted that this term referred only to the "use of assets in a project in order to derive profits" and that the assets invested may well have been obtained in the context of a gift or succession of the contracting parties. Even assuming that consideration was required, there was no reason to believe that it had to be provided by the investor itself and not by the entity controlling it, in this case C._____. Moreover, even if the consideration were to be provided by the investor itself, the Appellant is of the opinion that this condition would have been met in this case, as there was nothing to indicate that a restructuring such as that which occurred in this case could not give rise to consideration on the part of the newly-formed company. It reiterated in this respect the argument put forward before the Arbitral Tribunal that in exchange for the shares of D._____S.A., C._____ had obtained the shares of A._____ Spain. It states in this regard that, contrary to the findings of the Arbitral Tribunal, the existence of consideration was "independent of the fact that the claimant would not exist without the transfer of the shares of D._____ S.A." and that Art. I(2) of the BIT did not in any way exclude such consideration from a newly-created company towards its parent company.

The Appellant further argued that the interpretation of Art. I(2) BIT by the Arbitral Tribunal was not compatible with the context of this provision in the BIT. In connection with this, it referred to Art. I(1)(b) BIT, according to which the term "investor" also includes legal persons incorporated in one contracting party but effectively controlled by investors of the other contracting party. In the Appellant's view, the purpose of this provision was to protect companies holding assets in the State of their incorporation once they came under the control of an investor from the other contracting party. However, if the Arbitral Tribunal's interpretation of this provision were to be followed, a Venezuelan company would not be protected at the time of its acquisition by a Spanish company, since the Venezuelan company had not carried out any act of "active" investment and would not have provided any consideration itself. The Appellant also referred to Art. II(3) BIT, according to which the BIT also applies to investments made before its entry into force by investors of one contracting party in accordance with the legal provisions of the other contracting party in the territory of the latter. According to Appellant, the contracting parties had, by this provision, clearly rejected the idea of attributing special importance to the *act* of investment. This provision indicates that it is not the act of investment but the holding of assets in the host State that is the decisive criterion for obtaining the protection of the BIT.

The Appellant submits that the interpretation given to Art. I(2) of the BIT by the Arbitral Tribunal is not compatible with the object and purpose of the treaty. In particular, the Appellant refers to the preamble of the BIT, according to which the purpose of the treaty is to encourage and protect investments of investors of one contracting party in the territory of the other contracting party by creating favorable conditions in this respect, such conditions expressly applying not only to future investments but also to investments already made. If the interpretation of the Arbitral Tribunal were to be followed, many investments, such as those made in the context of restructurings, would not be protected, which would be incompatible with the purpose of the BIT. Moreover, such an interpretation would lead to absurd distinctions. It would imply that a company acquiring shares in a local company would be protected if it made the acquisition immediately after its incorporation but would not be protected if the investment was made at the same time as its incorporation by a parent company. In the present case, if C._____ had

initially created the Appellant by investing its own funds and then transferred the D._____S.A. shares to it in exchange for the funds it had just invested, the Arbitral Tribunal would have recognized the existence of a protected investment, since an active act of investment with consideration had been made. However, an interpretation which has the effect that two scenarios that reflect exactly the same economic reality lead to different results cannot be followed. It would force investors who have made investments that do not meet the artificial requirements of the Arbitral Tribunal to resort to equally artificial transactions in order to claim treaty protection.

Finally, the Appellant submits that the interpretation of Art. I(2) of the BIT is inconsistent with the settled case-law of arbitral tribunals in investment arbitration. It refers to various arbitral awards in which the protection of investment treaties has been conferred on indirect investments as well as Judgment 4A_65/2018[19] of December 11, 2018, which dealt with this issue in connection with the bilateral investment treaty between Germany and India. However, to introduce the requirement of an active investment act would, contrary to what the Arbitral Tribunal has held, not guarantee the protection of indirect investments. The Appellant cites various arbitral decisions, including one dealing with the BIT, in which the arbitral tribunals either did not consider it necessary to examine whether consideration had been provided in connection with the investment or explicitly rejected the argument that such consideration was necessary. The same approach was applied to the requirement of an active act of investment.

3.3 For its part, the Respondent refers extensively to the discussion of the award. In substance, it considers that the actions of D._____S.A. could constitute an investment within the meaning of the BIT, provided that the Appellant was able to demonstrate "having invested in the assets representing the investment," which is not the case here. It points out that it is necessary to make a distinction between "the object of the investment" and "the action of investment". Referring to various arbitral awards, it argues that the mere fact that an asset is included in a list of assets that may be considered as investments does not mean that it constitutes an investment protected by the treaty. In its view, the words "invested by investors of a contracting party" in the BIT make it clear that the mere holding of shares is not sufficient to obtain the protection of the treaty, since such holding must necessarily be the result of an act of investment by an investor of a contracting party. In this case, however, the shares of D._____S.A. were not acquired by the Appellant, a company incorporated long after two US companies of A._____'s group had invested in Venezuela, but rather were transferred to it without consideration. The Respondent then went on to argue the irrelevance of the arbitral case-law cited by the Appellant to this case, while emphasizing the compatibility of the Arbitral Tribunal's interpretation with Articles I(1) (b) and II(3) of the BIT as well as with the object and purpose of the treaty.

3.4.

3.4.1. Called upon to deal with a claim based on Art. 190(2)(b) PILA, the Federal Tribunal freely examines the matters of law, including preliminary matters, which determine the jurisdiction or lack thereof of the arbitral tribunal. In particular, it has determined the meaning of the terms "investment",

[19] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-65-2018

"investor" and "invest" in various bilateral investment treaties (ATF 144 III 559[20] at 4; Judgments 4A_65/2018[21] of December 11, 2018, at 2.4.1; 4A_616/2015[22] of September 20, 2016 at 3). It will do the same in this case with regard to the disputed terms "investor" ("*inversor*") and "investment" ("*inversión*")[23] in Art. I(2) of the BIT. This interpretation will be made in accordance with the rules of the VCLT (ATF 144 III 559 at 4; 141 III 495[24] at 3.5.1, p 503). It should be noted in connection with this that the fact that Venezuela has not ratified the VCLT does not preclude recourse to the rules of interpretation laid down therein in this case, since those rules have codified customary international law with regard to the interpretation of international treaties (ATF 138 II 254 at 3.1; Judgment 4A_65/2018 of November[*sic*] 11, 2018 at 2.4.1). Neither the Arbitral Tribunal nor the Parties have questioned the use of the VCLT in the interpretation of the BIT.

3.4.2.

3.4.2.1. Both the Arbitral Tribunal and the Appellant repeatedly refer to the definition of "investment" contained in Art. I(2) of the BIT. This definition reads, in Spanish and in its English translation, as follows:

> *Por 'inversiones' se designa todo tipo de activos, invertidos por inversores de una Parte Contratante en el terntorio de la otra Parte Contratante y, en particular, aunque no exclusivamente, los siguientes:*
>
> *a) Acciones, títulos, obligaciones y cualquier otra forma de participación en sociedades [...].*
>
> The term 'investments' means any kind of assets invested by investors of one Contracting Party in the territory of the other Contracting Party and in particular, although not exclusively, the following assets:
>
> a) Shares, securities, bonds and any other form of participation in companies [...].

Relying on this clause, in particular on the statement "any kind of assets invested by investors of one Contracting Party"[25] ("*todo tipo de activos invertidos por inversores de una Parte Contratante*"[26]), as well as on similar formulations contained in Articles III(1), IV(1), V(1) of the BIT, the Arbitral Tribunal held that it was necessary for an investor to carry out an act of investment in order to benefit from the protection of the treaty. Even if the Arbitral Tribunal says that it does not wish to exclude indirect investments from the scope of the BIT, it does find it necessary that the act of investment has been carried out by the investor itself.

3.4.2.2. In the most recent decision cited by the Appellant, concerning a dispute between a German company and the Republic of India, the Federal Tribunal found that there was, to date, no abstract,

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[20] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-396-2017-2

[21] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-65-2018

[22] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-616-2015

[23] Translator's Note: In English and in Spanish in the original text.

[24] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/swiss-supreme-court-addresses-difference-between-treaty-claims-and-contract-claims

[25] Translator's Note: In English in the original text.

[26] Translator's Note: In Spanish in the original text.

definitive and unanimously accepted definition of the concept of investment in international treaties of a bilateral or multilateral nature relating to the protection and promotion of investments. Noting that investment does not necessarily have the same legal and economic meaning and that the legal definition of investment varies from one arbitral tribunal to another, not to mention the many different doctrinal views on investment, the Federal Tribunal considered that a pragmatic approach to the question should be favored by interpreting this concept in good faith on the basis of the text of the treaty under consideration, in accordance with the ordinary meaning of the relevant terms considered in their context and in the light of the object and purpose of the treaty (Judgment 4A 65/2018[27] of December 11, 2018, at 3.2.1.2.3). It should be noted that in this case the Arbitral Tribunal refused to refer to the case-law of the International Centre for Settlement of Investment Disputes (ICSID) with regard to the definition of the term "investment", pointing to its lack of consistency.

3.4.2.3. As a preliminary matter, it should be noted that the Arbitral Tribunal was correct in holding that the decisive issue in this case was not the protection of *indirect* investments. In fact, the Appellant *itself* states that the D._____S.A. shares were transferred to it by C._____ at the time of its foundation. Thus, the Appellant cannot rely on Judgment 4A_65/2018 of December 11, 2018, in which the Federal Tribunal had to rule, in particular, on the question of the protection under the bilateral investment treaty concluded between India and Germany of investments in India made by a German company through its subsidiary in Singapore. In the present case, it is irrelevant whether indirect investors can seek protection under the BIT, as the Appellant does not hold the shares of D._____S.A. through another company. Contrary to what the Appellant alleges, the requirement of the BIT inferred by the Arbitral Tribunal of an active act of investment by the investor itself does not exclude all forms of indirect investments, but only investments – direct or indirect – that do not meet these conditions. In other words, the considerations of the Arbitral Tribunal do not relate to the direct or indirect quality of the investment but to other elements that will be discussed later.

3.4.2.4. As mentioned above, the Arbitral Tribunal's arguments are essentially based on the wording of the BIT. The Tribunal attached particular importance to the phrase "invested by investors of a Contracting Party" (Art. I(2) BIT) as well as to the similar wording in Art. III(I), IV(I) and V(I) BIT and inferred from this the need for an active act of investment on the part of the investor. At first glance, the Arbitral Tribunal's reasoning seems particularly simple and unambiguous: as the Appellant did not itself actively acquire the D._____S.A. shares in exchange for consideration, it cannot claim protection under the BIT. Behind this essentially literal interpretation of the BIT, however, a more complex argument seems to emerge concerning the source of the investments and the way in which they were structured within the multinational A._____. It is not insignificant in this respect to note that the Arbitral Tribunal, in the context of its points made on the issue of indirect investment, specified that the capital and know-how invested on Venezuelan territory came from "two U.S. companies that are not protected by the Treaty" ("*dos sociedades de los Estados Unidos, no protegidas por el Tratado*").[28] What seems to lead the Arbitral Tribunal to deny the Appellant a right to the protection of the disputed investments is the fact that the act of investment – as defined by the Arbitral Tribunal – was not carried out by a Spanish company but by

[27] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-65-2018

[28] Translator's Note: In English and Spanish in the original text.

one or more U.S. companies of the same group. By introducing the requirement of "consideration"[29] ("*contraprestación*")[30] to be provided by the Spanish legal entity *itself*, the Arbitral Tribunal appears to be engaged in a material analysis of the source of the funds invested under the "formal" criterion of an act of active investment. While the Arbitral Tribunal recognizes that the shares of D._____S.A. are in themselves unquestionably an "investment" and that the Appellant, a company located in Spain, meets the necessary criteria to be considered as an "investor" within the meaning of the BIT, it denies the latter the right to protection on the grounds that the initial act of investment, presumably the creation or takeover of the Venezuelan entity, was carried out by one or more companies from a third country. In other words, it is indeed the fact that the shareholding in the Venezuelan subsidiary of the group, initially held by a company based in the United States, was transferred to a newly-created Spanish company in the context of a restructuring whose purpose was precisely to obtain the protection of the BIT, which appears to be the decisive factor which led the Arbitral Tribunal to deny the Appellant the protection of the BIT.

3.4.2.5. The BIT does not provide any distinguishing criteria or characteristics of an "investment". Its definition of the term (cf. supra, at. 3.3.2.1) corresponds to a very classical and common definition assimilating an investment to any type of assets "invested" in the territory of the other contracting party (an "asset-based definition,"[31] Molinuevo, *International Disputes in Investment in Services*, 2012, pp. 47 ff; Bischoff/Happ, *The Notion of Investment*, in *International Investment Law*, in Bungenberg/Griebel/Hobe/Reinisch [ed.], 2015, pp. 500 ff, n. 8 ff). This definition, which focuses on the notion of "assets", includes a general clause ("any kind of assets"[32], "*todo tipo de activos*"[33]) as well as an illustrative list of investments including any form of participation in local companies. Compared to other types of definitions contained in some bilateral investment treaties, this definition can be distinguished by its breadth. Apart from the disputed formula "invested by investors", it must be noted that this definition does not contain any particular restriction or requirement regarding the nature of protected investments. On the contrary, it would seem that contracting states sought to include a wide range of investments, taking care to stress the non-exhaustive nature of the list – although provided – of examples of assets to be considered as investments ("in particular, although not exclusively, the following assets [...]"[34] "*en padicular, aunque no exclusivamente, los siguientes* [...]"[35]).

3.4.2.6. It is not uncommon for investment treaties to contain restrictive clauses aimed at narrowing their scope of protection. In particular through "denial of benefits clauses"[36] contracting states may guard against the practice of a person of a third state changing his/her/its nationality or invoking another nationality in order to obtain the protection of an investment treaty ("treaty shopping").[37] This is the case, for example, where an investment is structured in such a way as to be protected by a treaty, for example, through the incorporation of a company on the territory of one contracting state to make or hold group investments in the other contracting state. In order to restrict a use of a treaty that is deemed to be

[29] Translator's Note: In English in the original text.
[30] Translator's Note: In Spanish in the original text.
[31] Translator's Note: In English in the original text.
[32] Translator's Note: In English in the original text.
[33] Translator's Note: In Spanish in the original text.
[34] Translator's Note: In English in the original text.
[35] Translator's Note: In Spanish in the original text.
[36] Translator's Note: In English in the original text.
[37] Translator's Note: In English in the original text.

abusive, the contracting parties may in particular exclude from its protection any investor who has no economic links with the country of which he/she/it claims to be a national or any company whose capital is (entirely) held by persons from third countries (see on the whole Hoffmann question, Denial of Benefits, in Bungenberg/Griebel/Hobe/ Reinisch [ed.], 2015, pp. 598 ff). Similarly, contracting states may provide in investment treaties for clauses on the origin of the funds invested ("origin of capital clauses").[38] Such clauses may, for example, stipulate that the investment must have been made with foreign means or the protected investor's own means in order for the investment to enjoy treaty protection (Grubenmann, *Der Begriff der Investition in Schiedsgerichts-verfahren in ICSID-Schiedsgerichtsbarkeit*, 2009, pp. 220 ff). More generally, it is recognized that contracting states have - and regularly make use of - various and varied possibilities to exclude or limit the practice of "treaty shopping."[39] In addition to the above-mentioned clauses, for example, they may include in the preamble the requirement of reciprocity of protection and specify its contours or clarify by means of appropriate formulas in the definitions of investor and investment that certain strategic planning practices do not lead to treaty protection (see on the whole question Baumgartner, *Treaty Shopping in International Investment Law*, 2016, pp. 235 ff.).

Thus, the problems of "treaty shopping"[40] and the origin of the funds invested, which constitute the real crux of the present dispute, are known and discussed in the field of the protection of international investments. Many countries wishing to protect themselves against the abusive use of investment treaties have excluded, by means of express clauses, from their scope of application investments structured within a group of companies so as to obtain treaty protection for investments made with funds from third countries. It should be noted in this connection, by way of example, that Article 17 of the Energy Charter Treaty of December 17, 1994 (RS 0.730.0; "Energy Charter Treaty"[41]), which has been ratified by some 50 countries, including Spain, provides as follows:

> Each contracting party reserves the right to refuse the benefit of this part: (1) to any legal entity if the citizens or nationals of a third country own or control that entity and if that entity- (1) a contracting party shall not carry on substantial business activities in the area of the contracting party in which it is incorporated or (2) an investment if the refusing contracting party establishes that it is an investment of a third country with or in respect of which (a) it does not maintain diplomatic relations or (b) adopts or maintains measures that (i) prohibit transactions with investors of that country or (ii) would be infringed or circumvented if the benefits provided for in this part were accorded to investors of that country or their investments.

Another example is the Investment Treaty for the Common Market for Eastern and Southern Africa ("Investment Agreement for the COMESA Common Investment Area")[42] of May 23, 2007, ratified by a large number of African countries, which specifies that a legal person controlled by foreigners must carry out a significant commercial activity in the territory of the member State in which it is incorporated in order to qualify as an investor within the meaning of the treaty (Art. 1(4)).

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[38] Translator's Note: In English in the original text.
[39] Translator's Note: In English in the original text.
[40] Translator's Note: In English in the original text.
[41] Translator's Note: In English in the original text.
[42] Translator's Note: In English in the original text.

Many bilateral investment treaties ratified before or after the BIT contain similar limiting clauses or formulas. Examples include the Bilateral Investment Treaty of March 4, 1994, between the United States and Ukraine, which provides in Article I.2. that each contracting state may refuse to grant the advantages deriving from the treaty to a company controlled by persons of a third state if the company has no substantial business activities on the territory of the other contracting state or if it does not maintain commercial relations with the country of which such persons are nationals, or the Treaty of October 17, 2001, between Austria and Armenia on the encouragement and protection of investments, Art. 10 of which contains a similar reservation (see for further examples Baumgartner, *op. cit*, pp. 235 ff.; Hoffmann, *op. cit*. pp. 599 ff.).

It must be noted that the BIT does not contain any clause of this type. It does not contain any provision which could be likened to a "denial of benefit clause" or "origin of capital clause"[43] or any other provision introducing additional conditions so that an asset held by an investor of one of the contracting states may be regarded as an investment within the meaning of the treaty, even though such clauses were already commonplace at the time of the conclusion of the BIT, in November, 1995. Since many countries, including Spain, have already signed international investment treaties containing an explicit scope limitation to guard against "treaty shopping"[44] it must be accepted that the contracting states of the BIT knowingly renounced the inclusion of such a limiting provision in the treaty. Thus, in the absence of express provisions to the contrary in an investment treaty, it is reasonable to assume that only the nationality of the holder of the investment counts and not the origin of any consideration to be paid at the time of the investment.

3.4.2.7. The Arbitral Tribunal seeks to deprive the Appellant, a Spanish company with a shareholding in a Venezuelan company, of the protection of the BIT, on the grounds that the investment was initially made by a company located in a third State before being transferred to the Appellant, a company that is believed to have been incorporated for strategic purposes. However, there is nothing to indicate that the BIT does not reflect the will of the contracting states to exclude such investment from its scope of application. Not only have they provided a particularly broad and open definition of the term "investment", they have also refrained from including provisions introducing additional requirements designed to protect against the practice of "treaty shopping"[45] or relating to the source of the funds invested, even though such clauses are widespread in international investment practice. There is no reason to infer from the phrase "invested by investors" the requirement of an active investment that must have been made by the investor itself in return for consideration. Quite to the contrary, the BIT does not contain any requirements going beyond the holding by an investor of one contracting party of assets in the territory of the other contracting party. Consequently, the Arbitral Tribunal cannot be followed when it relies on additional conditions, which it considers not to be fulfilled in the present case, to declare that it lacks jurisdiction.

3.4.2.8. The absence of restrictive clauses in an investment treaty does not mean, however, that practices aimed at abusively benefiting from the protection of that treaty should be tolerated by the contracting states. Indeed, the prohibition of abuse of rights is an internationally recognized general

[43] Translator's Note: In English in the original text.
[44] Translator's Note: In English in the original text.
[45] Translator's Note: In English in the original text.

principle which forms part of Swiss substantive public policy (ATF 138 III 322[46] at 4; 132 III 389[47] at 2.2.1). Defining the contours of this principle, which in this context amounts to drawing the line between legitimate nationality planning and treaty abuse is a difficult exercise that arbitral tribunals regularly have to undertake in investment disputes (see on the whole question Baumgartner, *op. cit.*, p. 197 ff.).

In the context of this analysis, the temporal aspect is decisive. In order to establish whether the acquisition of nationality, for example, by the creation of a company on the territory of a contracting state and the transfer of the investment to that company, constitutes an abusive practice, it is necessary to examine the moment at which it was effected in relation to a specific dispute between the investor and one of the contracting states. It should be noted in this respect that if the acquisition takes place after the commencement of the dispute, the question of possible abuse of right seems irrelevant, as the arbitral tribunal would in such circumstances decline jurisdiction in the absence of jurisdiction *ratione temporis*. On the other hand, the objection of abuse of right can be decisive when the disputed transaction was carried out in view of a specific future dispute. It must in fact be accepted that the protection of an investment treaty must be denied to an investor when he carries out a transaction for the acquisition of nationality at a time when the dispute giving rise to the arbitration procedure was *foreseeable* (*voraussehbar*)[48] and that this transaction must be considered, according to the rules of good faith, as having been carried out with a view to that dispute (Baumgartner, op. cit., p. 226). There is no need for this Tribunal to attempt to establish general criteria for determining the foreseeability of a dispute. It will be for the Arbitral Tribunal to consider this aspect in the context of the treatment of the Respondent's objection relating to an alleged abuse of right by the Appellant.

4.
It follows from the foregoing that the appeal must be admitted insofar as it seeks the annulment of the Arbitral Award of May 20, 2019.

As previously mentioned, if it admits the appeal, the Federal Tribunal may itself determine the jurisdiction or lack of jurisdiction of the arbitral tribunal. In the present case, the Arbitral Tribunal considered, at the end of its argument, that it no longer had to deal with “other objections” to its jurisdiction (“Consequently, the Tribunal is not required to rule on the other objections to jurisdiction and cannot address the merits of this case”).[49] Referring to this passage, the Respondent submits that, should this Tribunal decide in favor of the appeal, the case should be referred back to the Arbitral Tribunal for determination of the other objections of lack of jurisdiction raised by the Respondent. As the Appellant did not comment on this point in its reply of September 27, 2019, and the question of a possible abuse of right of the Appellant remains to be decided, the jurisdiction of the Arbitral Tribunal cannot be established. The case must therefore be referred back to the Arbitral Tribunal for a decision on the question of abuse of right and any other objections to its jurisdiction.

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[46] Translator’s Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/landmark-decision-of-the-swiss-supreme-court-international-arbit

[47] Translator’s Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/violation-of-public-policy-notion-of-public-policy-exclusion-of-

[48] Translator’s Note: In English and German in the original text.

[49] Translator’s Note: In English in the original text.

Thus, the Appellant is successful in its claim for the annulment of the Arbitral Award but is unsuccessful in its submission that the Arbitral Tribunal has jurisdiction. Consequently, and in view of the fact that the Appellant is successful in the principle of its appeal, two thirds of the court costs should be borne by the Respondent and the remaining third by the Appellant (Art. 66(1) LTF). The same allocation criteria will apply to the costs, set at CHF 220'000 for each of the parties (Art. 68(1) and (2) LTF). The costs will thus be awarded to this extent. In the end, the Respondent will have to pay the Appellant CHF 73'333 in that regard.

For these reasons, the Federal Tribunal pronounces:

1.
The appeal is partially admitted, the Arbitral Award of May 20, 2019, is annulled and the case is referred back to the Arbitral Tribunal for a new decision in accordance with the preceding paragraphs.

2.
Two thirds (CHF 133'333) of the judicial costs, set at CHF 200'000, are to be borne by the Respondent, while the remainder (CHF 66'667) is to be borne by the Appellant.

3.
The Respondent shall pay the Appellant compensation of CHF 73'333 as costs.

4.
This Judgment shall be communicated to the Parties and to the Arbitral Tribunal sitting in Geneva.

Lausanne, March 25, 2019.

On behalf of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:	The Clerk of the Court:
Kiss	Mr. Curchod