DE BRAUW
BLACKSTONE
WESTBROEK

Case number: ICSID Case No. UNCT/23/3
Date: 22 May 2024

Arbitral Tribunal:
Ms. Claudia Salomon
Prof. Nassib G. Ziadé
Mr. José Emilio Nunes Pinto

RESPONDENT'S STATEMENT OF DEFENCE ON JURISDICTION

in the matter of:

ABDALLAH ANDRAOUS

Claimant,
Counsel: Lindeborg Counsellors at Law, Prof. Charles Kotuby

against:

THE KINGDOM OF THE NETHERLANDS

Respondent,
Counsel: Ministry of Foreign Affairs of the Kingdom of the Netherlands, De Brauw Blackstone Westbroek N.V.

TABLE OF CONTENTS

LIST OF DEFINITIONS

Term	Definition
Andraous	Mr Abdallah Andraous
Ansary	Mr Hushang Ansary
BdC	Banco di Caribe N.V.
BIT	2002 Agreement on the Encouragement and Reciprocal Protection of Investments between the Lebanese Republic and the Kingdom of the Netherlands
CBCS	Central Bank of Curaçao and Sint Maarten
Contracting Parties	The Kingdom of the Netherlands and Lebanon
Curaçao Courts	Curaçao Court of First Instance and the Curaçao Court of Appeal
Emergency Measures	Emergency measures dated 4 July 2018
Ennia	Ennia Caribe Holding N.V., Ennia Leven N.V., Ennia Schade N.V., Ennia Zorg N.V., EC Investments B.V., Banco di Caribe N.V.
Ennia Holding	Ennia Caribe Holding N.V.
Ennia Investments	EC Investments B.V.
Ennia Leven	Ennia Leven N.V.
Ennia Schade	Ennia Schade N.V.
Ennia Zorg	Ennia Zorg N.V.
ICJ	International Court of Justice
ILC	International Law Commission
IUSCT	Iran-United States Claims Tribunal
LTV	*Landsverordening Toezicht op het Verzekeringbedrijf* (National Insurance Supervisory Regulation)
NoA	Notice of Arbitration dated 7 February 2023
Parman Capital	Parman Capital Group LLC
Personal Statement	Personal Statement by Andraous dated 22 February 2024
PIBV	Parman International B.V.
SoC	Statement of Claim on Jurisdiction and Merits dated 22 February 2024
SoD	Statement of Defence on Jurisdiction dated 22 May 2024
S&S	Stewart & Stevenson

Term	Definition
SunResorts	SunResorts Ltd. N.V.
VCLT	Vienna Convention on the Law of Treaties

1 INTRODUCTION

1. The Kingdom of the Netherlands hereby sets forth its Statement of Defence on Jurisdiction ("SoD") with respect to the claims presented by the claimant, Mr Abdallah Andraous ("Andraous"), under the 2002 Agreement on the encouragement and reciprocal protection of investments between the Lebanese Republic and the Kingdom of the Netherlands ("BIT"). To that end, the Kingdom of the Netherlands puts forward the following jurisdictional objections.

2. First, Andraous is not a qualifying 'investor' within the meaning of the BIT. To the extent that the BIT protects dual nationals, their dominant and effective nationality cannot be that of the respondent State (here: the Kingdom of the Netherlands). As a Dutch-Lebanese national, Andraous bears the burden of proving that his dominant and effective nationality is Lebanese. Andraous has failed to discharge that burden of proof. The presented evidence, in fact, demonstrates the opposite.

3. Andraous' economic centre of interest has been in the Kingdom of the Netherlands throughout the relevant timeframe. Over the span of decades, Andraous held various positions within the Kingdom of the Netherlands, climbing the corporate ladder of businesses owned by Mr Hushang Ansary ("Ansary"). Conversely, Andraous has not pointed to a single economic interest in Lebanon during that timeframe.

4. Andraous also consistently presented himself to the Dutch authorities as a Dutch – rather than Lebanese – national since his naturalization in 2000. Andraous' disclosures to the Curaçao Commercial Register and Sint Maarten Commercial Register, for instance, list him solely as a Dutch national, as do Ennia's payroll tax cards and pension forms. Andraous also used his Dutch nationality to claim exemptions from integrity and background screenings on directors of financial institutions in Curaçao and Sint Maarten conducted by the Central Bank of Curaçao and Sint Maarten ("CBCS").

5. Moreover, Andraous voluntarily naturalized as Dutch, not only due to economic interests keeping him centred in the Kingdom of the Netherlands and "because of the investment"[1] central to his claim in the present dispute, but also given that "he feels integrated into Sint Maarten's society" and did not see himself "setting up outside the Netherlands Antilles in the future".[2]

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1 SoC, para. 144(iii).

2 **Exhibit R-010-DUTCH**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of Abdallah Andraous, p. 2. See also Sections 3.3.2.1 and 3.3.2.3 below.

Andraous even expressly offered to renounce his Lebanese nationality in favour of the Dutch nationality in the process.

6. Second, Andraous is not a qualifying 'investor' with an 'investment' in relation to his purported stake in Ennia Caribe Holding N.V. ("Ennia Holding") and its subsidiary entities (hereinafter jointly referred to as "Ennia"). Andraous has provided no evidence that he 'made' an 'investment' through an act of investing as required by the BIT. Rather, on his own account, his alleged 1% shareholding in Parman International B.V. ("PIBV"), which in turn holds the shares in Ennia Holding, was merely allotted to him on 28 December 2011 – an allotment that was supposedly in exchange for work he claims to have provided for his employer, Ansary, almost a decade prior. Andraous has not demonstrated that the alleged work was provided for the purpose of obtaining the shares. In any event, a reward received in return for work in the context of an employment relationship is not the 'making' of an 'investment' as required under the BIT.

7. Moreover, Andraous has not even demonstrated his ownership of the shares in PIBV. On the contrary, his own exhibits reveal that, on 1 December 2015, Andraous sold the shares in PIBV to a separate legal entity, [redacted]. The documents submitted by Andraous with the Statement of Claim on Jurisdiction and Merits ("SoC") thus do not support that he was the owner of shares in PIBV when the Notice of Arbitration ("NoA") was submitted (7 February 2023) or when the events of which he complains occurred (as of 2018).

8. Furthermore, the Kingdom of the Netherlands cannot be deemed to have consented to arbitrate with regard to an alleged investor so remote from the purportedly affected companies. Andraous allegedly holds an (as of now unproven) 1% shareholding in an entity (PIBV) that holds shares in another entity (Ennia Holding), which then directly or indirectly holds the companies that, in turn, hold the relevant business and assets – the connection to which is even more remote. In fact, that connection is altogether unproven given the transfer of the shares to [redacted] in 2015.

9. Third, Andraous does not have a qualifying 'investment' with respect to his claim to salary and pension rights under the BIT. He has, in fact, left the basis and extent of his salary and pension rights claim unsubstantiated. To begin with: a salary claim could only exist for services rendered in relation to which remuneration has not been paid. Andraous does not claim that he was not remunerated for work already completed.

10. Moreover, the term 'investment' under the BIT is not unbounded. Andraous' alleged salary and pension rights resulting from his employment as director in various Ennia entities cannot reasonably be interpreted as falling under "claims to money" entitled to protection under the BIT. Moreover, the BIT requires an 'investment' to have been 'made'. Based on any reasonable interpretation, the taking up of employment and working in exchange for (a claim to) payment for that work cannot be regarded as the 'making' of an 'investment' for the purposes of the BIT.

11. In general, Andraous presents a misleading narrative by conveniently omitting crucial facts. Just a few examples include:

    (i) in an attempt to obfuscate the fact that his dominant and effective nationality is not Lebanese, the SoC and Andraous' accompanying Personal Statement ("Personal Statement") fail to mention, for instance, that:

        a. Andraous' parents, wife, and all three children were Dutch nationals;[3]

        b. Andraous, his parents, and his wife had all become "integrated into the local environment and […] accepted by the local community of St Maarten",[4] and offered to renounce their Lebanese nationality in favour of the Dutch nationality in the naturalization process;[5]

        c. he declared his residence at ten different addresses in the Kingdom of the Netherlands over a span of decades;[6]

    (ii) the fact that Andraous had sold and transferred the shares allegedly constituting the 'investment' central to his claim in the present dispute to [redacted], which remains unmentioned and unexplained throughout his SoC and Personal Statement.[7]

12. The Kingdom of the Netherlands further observes that, on the major legal points in contention, Andraous rebuts positions that the Kingdom of the

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3 See paras. 26, 27 and Section 3.3.2.3 below.

4 **Exhibit R-010-DUTCH**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of Abdallah Andraous, p. 6, **Exhibit R-011-DUTCH**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of [redacted], p. 6, **Exhibit R-012**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of [redacted] and [redacted], p. 7. See also para. 5 above and Section 3.3.2.3 below.

5 See para. 138 below.

6 See paras. 140 and 141 below.

7 See para. 7 above and Section 4.2 below.

Netherlands does not advance and, in fact, fails to address the points that the Kingdom of the Netherlands does advance:

(i) Andraous argues that dual nationals are not excluded from BIT protection. The Kingdom of the Netherlands does not dispute that dual nationals can be protected under the BIT, but rather that investors whose dominant and effective nationality is that of the respondent State cannot arbitrate against that State – a point that Andraous seemingly does not disagree with.

(ii) Andraous contends that investors do not need to play an active role throughout the life of the investment. However, the Kingdom of the Netherlands argues that the 'making' of an 'investment' involves an act of investing. It does not assert that the investor needs to remain active in the management of the investment once that 'investment' has been 'made'.

(iii) Andraous argues that minority shareholders have standing to initiate investment arbitrations. The Kingdom of the Netherlands does not dispute this. It submits, however, that the connection between the purported 'investor' and the allegedly affected companies is so remote in the present circumstances, that the Kingdom of the Netherlands cannot be deemed to have consented to arbitrate with said claimant.

13. Lastly, the Kingdom of the Netherlands notes that, as detailed in its Application for Security for Costs,[8] Andraous was held liable for his unlawful conduct as director of Ennia by the Curaçao Court of First Instance and the Curaçao Court of Appeal (jointly, the "Curaçao Courts").[9] Andraous does not claim that these judgments constitute a violation of the BIT. He in fact recognizes that "a duplication of that procedure in this arbitration should be avoided"[10] and even relies on the judgments in building his factual narrative.[11] The facts as laid out by the Curaçao Courts may thus be relied upon by the Tribunal.

14. The SoD is structured as follows. Chapter 2 sketches the factual background to the dispute. Chapter 3 sets out why Andraous does not qualify as a protected 'investor' under the BIT. Chapter 4 then explains that Andraous'

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8 Respondent's Application for Security for Costs, para. 16.
9 **Exhibit RL-007-DUTCH**, Curaçao Court of First Instance, Judgment, 29 November 2021; **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023.
10 SoC, para. 64.
11 See e.g. SoC, paras. 22-35.

alleged stake in Ennia does not qualify him as an 'investor' with an 'investment' under the BIT. Chapter 5 subsequently addresses Andraous' claim regarding salary and pension rights, which likewise fail to qualify as protected 'investments'. Finally, Chapter 6 contains the Kingdom of the Netherlands' request for relief.

2 FACTUAL BACKGROUND TO THE DISPUTE

15. As a preliminary matter, this chapter succinctly provides background information on the Kingdom of the Netherlands, the CBCS, and Ennia (Section 2.1). It then sketches the relevant factual background of the dispute in chronological order. First, it describes Andraous' move to the Kingdom of the Netherlands and the start of his employment for Ennia, including the allotment and subsequent sale of his PIBV shares (Section 2.2). Next, it explains how Ennia and its policyholders were left in a precarious position following years of acute mismanagement. This required the CBCS to act to safeguard Ennia and its policyholders' interests through the emergency measures of 4 July 2018 ("Emergency Measures") (Section 2.3). Linked to this chain of events, the chapter then sets out how the Curaçao Courts have established Andraous' liability for his unlawful conduct in relation to Ennia (Section 2.4).

16. The following sections are meant to present the context of this dispute and the necessary factual background to the jurisdictional objections. The Kingdom of the Netherlands reserves the right to supplement this background with the facts as they pertain to the merits, should the Tribunal assume jurisdiction over the dispute.

2.1 Background information on the Kingdom of the Netherlands, the CBCS, and Ennia

The Kingdom of the Netherlands

17. As of 10 October 2010, the Kingdom of the Netherlands is made up of four constituent parts, which are all equally referred to as countries. These are the Netherlands, Aruba, Curaçao and Sint Maarten.[12] "The Netherlands" refers to (i) the country within the Kingdom that is located on the European continent, (ii) Bonaire, (iii) Sint Eustatius, and (iv) Saba. Prior to 10 October

[12] **Exhibit RL-010-DUTCH**, Statute of the Kingdom of the Netherlands, effective between 10 October 2010 and 16 November 2017, Article 1(1); **Exhibit RL-011-DUTCH**, Statute of the Kingdom of the Netherlands, effective between 17 November 2017 and 31 December 2023, Article 1; **Exhibit RL-012-DUTCH**, Statute of the Kingdom of the Netherlands, effective as of 1 January 2024, Article 1.

2010, the Kingdom of the Netherlands consisted of the Netherlands, the Netherlands Antilles, and Aruba.[13] Curaçao, Sint Maarten, Bonaire, Sint Eustatius, and Saba were part of the Netherlands Antilles until its dissolution on that date.

18. It is the Kingdom of the Netherlands that is party to the BIT. The notification provided for in Article 12(1) BIT – and referred to in Article 11 thereof – confirms that the BIT applies to all four countries within the Kingdom of the Netherlands.

19. The facts that have led to this dispute have mainly taken place in the Netherlands Antilles (prior to 10 October 2010) and Curaçao and Sint Maarten (after 10 October 2010).

20. The official languages of the Netherlands Antilles, and thereafter of Curaçao, are English, Dutch, and Papiamentu.[14] Sint Maarten's official languages are English and Dutch.[15]

The CBCS

21. There is one central bank that serves both Curaçao and Sint Maarten: the CBCS. The statutory goals of the CBCS are promoting (a) the stability of the currency of Curaçao and Sint Maarten, (b) the health of the financial systems of Curaçao and Sint Maarten, and (c) the security and efficiency of payment transactions in Curaçao and Sint Maarten.[16] Furthermore, pursuant to Article 8(2)(c) of its Statute, the CBCS has the official task and regulatory mandate to supervise the insurance industry in Curaçao and Sint Maarten.[17]

Ennia

22. Ennia is a full-service insurance provider, active across Curaçao, Sint Maarten, Aruba, and Bonaire. It is the largest insurer, and thereby a provider of systemic importance, in the region. Through its subsidiaries, it services half of Curaçao, Sint Maarten, Aruba, and Bonaire's market for insurance policies, and 80% of Curaçao's market for private (i.e. non-public) retirement

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13 **Exhibit RL-013-DUTCH**, Statute of the Kingdom of the Netherlands, effective between 16 September 2010 and 9 October 2010.

14 **Exhibit RL-014-DUTCH**, National ordinance determining the official languages of the Netherlands Antilles, Article 2; **Exhibit RL-015-DUTCH**, National ordinance determining the official languages of Curaçao, Article 2.

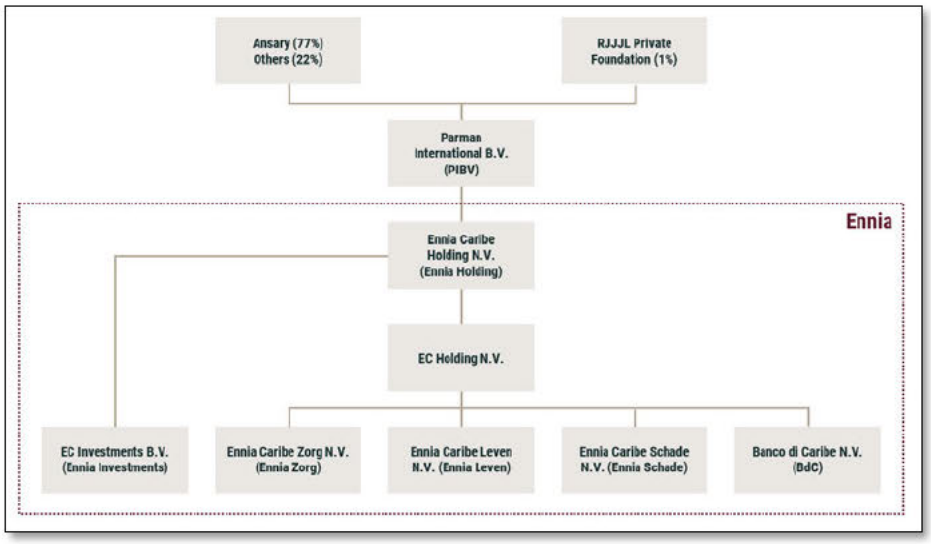
15 **Exhibit RL-016-DUTCH**, National ordinance determining the official languages of Sint Maarten, Article 2.

16 **Exhibit RL-017-DUTCH**, Statute of the Central Bank for Curaçao and Sint Maarten, Article 3(1).

17 **Exhibit RL-017-DUTCH**, Statute of the Central Bank for Curaçao and Sint Maarten, Article 8.

plans.[18] The simplified structure chart of Ennia as of 2018, at the time when the events of which Andraous complains occurred, is set out hereunder:[19]

Figure 1: Simplified structure chart of Ennia and affiliated entities in 2018



23. Ennia Leven N.V. ("Ennia Leven"), Ennia Schade N.V. ("Ennia Schade"), and Ennia Zorg N.V. ("Ennia Zorg") fall under the supervision of the CBCS as part of its regulatory and oversight duties and are Curaçao-based insurers within the meaning of the National Insurance Supervisory Regulation ("*Landsverordening Toezicht op het Verzekeringbedrijf*" or "LTV").[20] In parallel, EC Investments B.V. ("Ennia Investments") and Ennia Holding were engaged in the overall "management of funds and assets" for the benefit of policyholders.[21] Banco di Caribe N.V. ("BdC") was a subsidiary of Ennia Holding – alongside the insurers and Ennia Investments – until it was sold in 2021.[22]

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18 **Exhibit RL-007-DUTCH**, Curaçao Court of First Instance, Judgment, 29 November 2021, para. 5.6; **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 3.2.

19 **Exhibit RL-018-DUTCH**, Curaçao Court of First Instance, Judgment, 6 July 2018, para. 3.2.

20 **Exhibit C-013**, Curaçao Court of First Instance, *Central Bank of Curaçao and St Maarten v. ENNIA Caribe Holding N.V. et al.*, Judgment of 4 July 2018, ECLI:NL:OGEAC:2018:160 (translation), para. 3.1.

21 **Exhibit C-013**, Curaçao Court of First Instance, *Central Bank of Curaçao and St Maarten v. ENNIA Caribe Holding N.V. et al.*, Judgment of 4 July 2018, ECLI:NL:OGEAC:2018:160 (translation), para. 3.10.

22 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 3.2.

2.2 Andraous' relocation to the Kingdom of the Netherlands and allotment of PIBV shares

24. The ensuing paragraphs present a brief factual summary of events pertaining to Andraous' life and connections to the Kingdom of the Netherlands. These issues will be addressed in further detail in Chapters 3 and 4 below, respectively.

25. Andraous states that he moved to Sint Maarten in 1984 to work for SunResorts Ltd. N.V. ("SunResorts") as an auditor and chief financial officer until 1989. It was in this period that he met his employer and the majority shareholder of PIBV, Ansary.[23]

26. In 1991, Andraous applied for Dutch nationality due to work commitments in the Kingdom of the Netherlands, as well as because "he feels integrated into Sint Maarten's society" and did not see himself "setting up outside the Netherlands Antilles in the future".[24] He did so alongside his wife, [redacted] (maiden name: [redacted]).[25] Andraous also requested for his two children at the time, [redacted] (alternatively spelled as [redacted]) and [redacted], to be naturalized alongside him.[26] Both Andraous and his wife offered to renounce their Lebanese nationality in favour of the Dutch nationality.[27] In parallel, Andraous' parents had already been residing in Sint Maarten,[28] and in fact both naturalized as Dutch as early as 1996, in the process of which they likewise offered to renounce their Lebanese nationalities.[29]

27. Andraous acquired Dutch citizenship in 2000 through a voluntary act of naturalization that he alleges to have undertaken "because of the investment" that is central to his claim in the present dispute.[30] As of the moment of his naturalization, Andraous presented himself solely as a Dutch national before

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23 Personal Statement, paras. 8-9.

24 **Exhibit R-010-DUTCH**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of Abdallah Andraous, p. 2. See also Sections 3.3.2.1 and 3.3.2.3 below.

25 **Exhibit R-011-DUTCH**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of [redacted], p. 2.

26 **Exhibit R-010-DUTCH**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of Abdallah Andraous, p. 2.

27 **Exhibit R-010-DUTCH**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of Abdallah Andraous, p. 6; **Exhibit R-011-DUTCH**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of [redacted], p. 6.

28 **Exhibit R-010-DUTCH**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of Abdallah Andraous, p. 4.

29 **Exhibit R-012**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of [redacted] and [redacted]. See Sections 3.3.2.3 and 3.3.2.5 below.

30 SoC, para. 144(iii).

the Dutch authorities.[31] His wife and all of his children also acquired the Dutch nationality.[32]

28. As will be detailed in Section 3.3.2.4 below, Andraous has also habitually resided in the Kingdom of the Netherlands from the early 1990s until the current decade, declaring multiple addresses throughout the years. For some of these properties, Andraous took out loans or construction insurance from various Ennia entities.[33] Andraous' sister and other family members have resided or currently appear to reside in the Kingdom of the Netherlands as well.[34]

29. In 2005, Andraous became director of PIBV.[35] Between 2005 and 2018, he also worked at Ennia in various managerial or directorship functions, as set out in Section 3.3.2.1 below.[36] Andraous also served as director or board member of a number of non-Ennia entities in the Kingdom of the Netherlands.[37]

30. According to his SoC and Personal Statement, between 2001 and 2006, Andraous allegedly assisted his employer at SunResorts – Ansary – in the negotiations and related due diligence work with regard to PIBV's eventual acquisition of BdC and Ennia.[38] In exchange for that assistance, Andraous claims to have been promised shares in PIBV by Ansary. However, those allegedly promised shares were only allotted to Andraous almost a decade later, constituting 1% of PIBV's distributed shareholdings.[39] Andraous provides no details or evidence in support of this premise for being allotted the shares.

31. On 1 December 2015, Andraous sold his shares in PIBV to an entity called [redacted].[40] Andraous has left this transfer unexplained and unmentioned in the SoC. Thus, since 1 December 2015, he no longer appears to own any shares in PIBV. This is surprising, as he contends that this alleged shareholding in PIBV consitutes an 'investment' under the BIT.[41]

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31 See Section 3.3.2.3 below.
32 See Sections 3.3.2.3 and 3.3.2.5 below.
33 See paras. 147, 148 and 154 below.
34 See Section 3.3.2.5 below.
35 Personal Statement, para. 15.
36 See Section 3.3.2.1 below.
37 For example, [redacted] See Section 3.3.2.1 below.
38 SoC, para. 19.
39 SoC, para. 19.
40 **Exhibit C-040**, Parman International B.V. Stock Register, p. 4.
41 SoC, para. 105.

32. Having naturalized, worked, and regularly resided in the Kingdom of the Netherlands over the course of at least three decades, Andraous now purports to have acquired French nationality, and to have thereby lost his Dutch nationality, on 21 July 2023 – well after these proceedings were already underway.[42] Andraous' acquisiton of French nationality and purported loss of his Dutch nationality is in any event immaterial to the present dispute, having occurred after the commencement of the arbitration.

2.3 The imposition of the Emergency Measures was necessary following years of mismanagement that left Ennia in a precarious position

33. The Emergency Measures were imposed as a result of Ennia's precarious position resulting from the unlawful conduct and disregard of fiduciary duties by Andraous and his co-directors. That conduct had jeopardized the policyholders' ability to recover amounts in the long term owed to them under their insurance policies and retirement plans. In the insurance sector, funds should be handled with particular care given that, effectively, these funds come from the policyholders, who are dependent on their respective insurer(s) to make periodic payments to them under the insurance policies concerned, often over a term of multiple years (or even decades).[43] The situation had thus become dire and urgent.[44]

34. The solvency requirements that Curaçao-based insurance companies are obliged to adhere to are laid out in the LTV.[45] Article 34 LTV stipulates, among other things, that an insurer is required to maintain adequate technical provisions as liabilities on their balance sheet.[46] These technical provisions should represent the value of present and future liabilities from existing insurance agreements, and these obligations to policyholders must be fully covered by congruent assets.[47]

35. Article 36 LTV provides that a buffer – the so-called solvency margin – must be maintained by insurance companies.[48] Article 54 LTV further notes that an insurer must report to the CBCS if it does not satisfy the required solvency

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42 SoC, paras. 5 and 20.
43 **Exhibit RL-007-DUTCH**, Curaçao Court of First Instance, Judgment, 29 November 2021, para. 5.119.
44 Respondent's Application for Security for Costs, para. 16.
45 See para. 25 above.
46 **Exhibit CLA-002**, National Ordinance No 77 of 1999 containing Regulations concerning the Supervision of the Insurance Industry, Article 34.
47 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 8.8.
48 **Exhibit CLA-002**, National Ordinance No 77 of 1999 containing Regulations concerning the Supervision of the Insurance Industry, Article 36.

margin, in the manner specified by the CBCS, and update the CBCS continuously of any subsequent changes pertaining to its assets.[49]

36. In relation to these statutory requirements and the CBCS' regulatory and supervisory duties, it is important to note that the insurance business was "carried on jointly" by all Ennia entitites, with Ennia Investments "acting as an entity in which the underlying assets (largely derived from premiums paid by policyholders) are housed".[50] As mentioned above, Ennia Investments and Ennia Holding were engaged in the overall management of funds and assets for the purported benefit of policyholders.[51]

37. The CBCS' concerns regarding Ennia were long-standing and had repeatedly been made known to the then-directors of the respective Ennia entities, including Andraous, prior to the imposition of the Emergency Measures.

38. From 2006 onwards a significant concentration risk was building up with regard to Ennia's multiple investments in Stewart & Stevenson ("S&S"), a company active in the oil and gas sector whose assets had likewise been acquired by Ansary in late 2005.[52] Ansary served as chairman of the board and investment committees at S&S.[53] By March 2009, Ennia Investments' interest in S&S had reached 40%, having invested USD 92 million in acquiring the shares.[54] In November 2009, a further USD 37 million was invested in oil industry products by purchasing oil rigs from an S&S subsidiary.[55] The investment in S&S bonds, meanwhile, accounted for 58% of Ennia's total investments – a high concentration risk by any account.[56] This risk was exacerbated by the fact that S&S had a meagre CCC+ credit rating from Standard & Poor's.[57] Despite the fact that the CBCS warned Ansary, Andraous, and the other co-directors about the risk as early as August 2006, the investment in S&S had only increased over time through stocks and bonds.[58]

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49 **Exhibit CLA-002**, National Ordinance No 77 of 1999 containing Regulations concerning the Supervision of the Insurance Industry, Article 54.

50 **Exhibit C-013**, Curaçao Court of First Instance, *Central Bank of Curaçao and St Maarten v. ENNIA Caribe Holding N.V. et al.*, Judgment of 4 July 2018, ECLI:NL:OGEAC:2018:160 (translation), para. 3.10.

51 See para. 25 above.

52 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, paras. 3.55-3.65.

53 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 10.19.

54 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, paras. 3.63, 10.71.

55 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 10.71.

56 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 3.33.

57 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 10.16.

58 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, paras. 3.19, 10.2.

39. In June 2014, Ennia Investments' 40% stake in S&S was sold to Parman Capital Group LLC ("Parman Capital") – another entity owned by Ansary[59] – for USD 133.4 million.[60] Various valuation reports, however, had indicated that the value was significantly higher than the purchase price paid to Ennia Investments. For example, based on valuation reports carried out by Goldman Sachs at the request of S&S in 2011, the 40% stake was worth between USD 312 million and 680 million.[61] A valuation conducted similarly by Wells Fargo concluded that the 40% stake was worth between USD 464 million and 576 million.[62] One can only conclude that Parman Capital had substantially underpaid for the stake in S&S.

40. The CBCS was put on alert by the risky investment practices engaged in by Ennia's leadership – as part of which Andraous had managing and oversight functions in his capacity as director of various Ennia entities.[63] In particular, for the period spanning 2010–2012, the CBCS flagged the multiple intercompany loans between Ennia Leven on the one hand, and Ennia Holding and Ennia Investments on the other hand, as well as the large investments in S&S and SunResorts.[64] In accordance with its regulatory duties and monitoring requirements under the LTV, the CBCS sent repeated follow-up letters on 10 March 2014, 5 January 2015, 25 June 2015, 6 October 2015, 4 August 2016, and 22 September 2016, with instructions to desist from the granting of additional loans by Ennia Leven to Ennia Holding or Ennia Investments, and to stop unauthorised investments and receivables from affiliated entities.[65] These letters were persistently ignored.[66]

41. The 4 August 2016 letter, for example, laid out precise deadlines by which Ennia was required to comply with the CBCS' instructions, consisting of no less than ten action points.[67] These included that the additional intercompany loans and receivables from affiliated entities were no longer permitted and that the existing loans must be either repaid or reduced within a maximum of three years. In addition, the CBCS instructed for Mullet Bay (a piece of real

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59 Ansary is the majority shareholder and chief financial officer of Parman Capital. See **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 3.5.

60 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 10.17.

61 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 10.19.

62 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 10.19.

63 **Exhibit RL-007-DUTCH**, Curaçao Court of First Instance, Judgment, 29 November 2021, paras. 2.35-2.39.

64 **Exhibit RL-007-DUTCH**, Curaçao Court of First Instance, Judgment, 29 November 2021, paras. 2.33-2.38.

65 See paras. 23, 37-38 above. See also **Exhibit RL-007-DUTCH**, Curaçao Court of First Instance, Judgment, 29 November 2021, paras. 2.35-2.43.

66 **Exhibit RL-007-DUTCH**, Curaçao Court of First Instance, Judgment, 29 November 2021, paras. 2.37-2.43.

67 **Exhibit RL-007-DUTCH**, Curaçao Court of First Instance, Judgment, 29 November 2021, para. 2.42.

estate) and the shares in S&S to be sold within the next three years, with the proceeds to be "used in full by Ennia to purchase investments permitted by the […] [CBCS] as stipulated in the accounting policies".[68] Andraous and his co-directors repeatedly failed to follow these instructions.[69]

42. In late 2016, auditor [redacted], who had been appointed as supervisory director of Ennia Holding earlier that year,[70] sent an email to Andraous and his co-directors pointing out that Ennia was facing a series of "major issues" with the CBCS and the external auditor, and voicing his frustration at how Ennia's management had failed to deal with these issues over the course of almost three years:

> "We are having whistleblowers, major issues with […] the supervising Central Bank […], major issues with the external auditor, very unhappy local management that is spending a lot of time fighting all these issues instead of being busy doing business and making money".[71]

43. [redacted] went on to indicate that immediate measures must include refinancing the stake in S&S and receiving regular financial updates on that investment. [redacted] also noted that it was "absolutely absurd" that the management board had not received those updates previously in view of the size of the investment.[72]

44. In light of these issues, the CBCS notified Ennia that, as of 1 October 2016, "Ennia's management may only exercise its powers with the approval of persons designated by the Bank."[73] Two trustees were appointed to that end.[74]

45. On 16 November 2016, De Paus informed the CBCS that he was "very shocked" with regard to Ennia's financial situation given "there have been strange investments" which have taken place "against all decency standards", and resigned by the end of that month.[75]

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68 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 3.42.
69 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 3.43; **Exhibit C-013**, Curaçao Court of First Instance, *Central Bank of Curaçao and St Maarten v. ENNIA Caribe Holding N.V. et al.*, Judgment of 4 July 2018, ECLI:NL:OGEAC:2018:160 (translation), para. 3.5.
70 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 3.45.
71 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 3.45.
72 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 3.45.
73 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 3.44.
74 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 3.44.
75 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, paras. 3.46-3.47.

46. On 22 June 2018, in further disregard of the CBCS' instructions, an agreement was concluded between Ennia Investments (for which Andraous signed) and S&S (for which Ansary signed), pursuant to which S&S would receive USD 250 million from Ennia Investments, of which USD 100 million was transferred on the same day.[76] This transfer carried no benefit to Ennia and underscored once again that the interests of the policyholders were no longer paramount.[77] The special duty of care that applies to the directors and supervisory directors of insurance providers was accordingly neglected, even more so since Ennia's policyholders are also its creditors.[78] The transfer was also made in spite of repeated warnings by the CBCS pertaining to Ennia's solvency risk, instructing against investments and loans to unregulated affiliated parties to avoid a situation in which Ennia would not be able to satisfy short-term payment obligations to its policyholders.[79]

47. After discovering this transfer and finding a continued disregard of the CBCS' instructions by Andraous and his co-directors, the CBCS stepped in on 3 July 2018 and revoked the licenses of Ennia Leven, Ennia Schade, and Ennia Zorg.[80] The following day, the CBCS filed a request with the Curaçao Court of First Instance, which authorised the Emergency Measures with regard to all Ennia entities pursuant to Article 60 LTV.[81]

48. Through such an emergency arrangement, the Curaçao Court of First Instance can authorize to liquidate all or part of an insurer's portfolio, transfer all or part of the rights and obligations under or pursuant to insurance agreements, or restructure the business as well as liquidate the assets thereof in accordance with the requirements set out under the LTV.[82]

49. As noted in the court order imposing the Emergency Measures, (i) Ennia had a serious solvency deficit that was only worsening, (ii) the directors and

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76 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 3.48.

77 Respondent's Application for Security for Costs, para. 16; **Exhibit RL-007-DUTCH**, Curaçao Court of First Instance, Judgment, 29 November 2021, paras. 5.42-5.43.

78 See para. 35 above. See also **Exhibit RL-007-DUTCH**, Curaçao Court of First Instance, Judgment, 29 November 2021, paras. 5.42-5.43.

79 Respondent's Reply to Claimant's Response to the Application for Security for Costs, para. 30(v).

80 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 3.49; **Exhibit C-013**, Curaçao Court of First Instance, *Central Bank of Curaçao and St Maarten v. ENNIA Caribe Holding N.V. et al.*, Judgment of 4 July 2018, ECLI:NL:OGEAC:2018:160 (translation), para. 3.2.

81 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 3.50; **Exhibit C-013**, Curaçao Court of First Instance, *Curaçao Court of First Instance, Central Bank of Curaçao and St Maarten v. ENNIA Caribe Holding N.V. et al.*, Judgment of 4 July 2018, ECLI:NL:OGEAC:2018:160 (translation), paras. 1, 4.1-4.2. See **Exhibit CLA-002**, National Ordinance No 77 of 1999 containing Regulations concerning the Supervision of the Insurance Industry, Article 60. See also para. 25 above.

82 **Exhibit C-013**, Curaçao Court of First Instance*, Central Bank of Curaçao and St Maarten v. ENNIA Caribe Holding N.V. et al.*, Judgment of 4 July 2018, ECLI:NL:OGEAC:2018:160 (translation), para. 3.11.

shareholders of the entities active in the insurance sector, i.e. Ennia Leven, Ennia Schade, and Ennia Zorg, were not following instructions of the CBCS and trustees appointed by the CBCS, (iii) assets belonging to the insurers were being withdrawn from the supervision of the CBCS through the Ennia entities not active in the insurance sector, i.e. Ennia Investments and Ennia Holding, and (iv) USD 100 million have been withdrawn from Ennia Investments' securities account with Merrill Lynch in New York,[83] which justified fears that the assets would be transferred outside of Ennia.[84]

50. Notably, on 5 July 2018, just a day after the Emergency Measures had been enacted, the aforementioned USD 100 million transferred to S&S was returned to Ennia.[85] Half of this amount was transferred from S&S; the other half was transferred from Ansary's personal bank account. This constitutes one of many examples of how company funds in the millions of USD were dealt with by Ansary, Andraous, and others – as if they were personal assets – in disregard of their fiduciary duties.

51. In subsequent summary proceedings, PIBV twice unsuccessfully requested the Curaçao Court of First Instance to order the CBCS to revoke the Emergency Measures and to enter into negotiations with PIBV on the restructuring of Ennia.[86] In its decision dated 31 January 2019, for instance, the Curaçao Court of First Instance dismissed PIBV's claims, noting:

> "[I]t is not plausible that the trial court will find that CBCS acted unlawfully by making the application under article 60(1) LTV. It is also unlikely […] that the emergency regulation should not be pronounced. In summary, the situation is that insurers have not been complying with the applicable solvency rules for a long time, that this has not improved despite instructions from CBCS, that a final plan has been blocked by the (final) shareholder and that instead a substantial amount is taken out of the group. In those circumstances, it is plausible that (also) a court will come to the conclusion that the interest of the joint creditors requires intervention by the supervisor

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83 See para. 48 above.

84 **Exhibit C-013**, Curaçao Court of First Instance, *Central Bank of Curaçao and St Maarten v. ENNIA Caribe Holding N.V. et al.*, Judgment of 4 July 2018, ECLI:NL:OGEAC:2018:160 (translation), para. 3.5.

85 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 3.51.

86 **Exhibit C-016** Curaçao Court of First Instance, *Parman International B.V. v. Central Bank of Curaçao and St Maarten, Judgment of 31 January 2019*, ECLI:NL:OGEAC:2019:15 (translation); **Exhibit RL-019-DUTCH**, Curaçao Court of First Instance, Judgment, 28 May 2021.

and that this intervention must take place in the form of the emergency regulation."[87]

52. As set out in Section 2.4 below, the CBCS subsequently initiated proceedings to establish Andraous and his co-directors' liability for their unlawful conduct in managing Ennia, with the purpose of enhancing Ennia's solvency position by reclaiming the large amounts illegally diverted from Ennia's accounts to Ansary and others. Moreover, with a view to implementing a sustainable solution to safeguard the interests of the policyholders for the future, on 11 April 2024, the CBCS and the governments of Curaçao and Sint Maarten signed an outline agreement to restructure Ennia.[88] In accordance with the provisions of the LTV, part of Ennia's insurance activities will be the subject of a restart, thereby continuing outside the realm of the Emergency Measures and independently of the government.[89] Long-term financial contributions from the governments of Curaçao and Sint Maarten and the CBCS will seek to prevent a discount on insurance policies.[90] During the implementation of the restructuring, the CBCS will continue, in accordance with the LTV,[91] to uphold the interests of Ennia's joint creditors – including, first and foremost, its policyholders.[92]

2.4 The Curaçao Courts have confirmed Andraous' liability for his unlawful conduct as Ennia director

53. As detailed in the Kingdom of the Netherlands' Application for Security for Costs,[93] Andraous has a history of improper conduct during his directorships at Ennia. He was held liable by the Curaçao Courts in proceedings initiated by Ennia against its former directors.[94] Andraous does not claim that these judgments constitute a violation of the BIT, and in fact often relies on them for his own factual narrative,[95] while recognizing that "a duplication of that

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87 **Exhibit C-016** Curaçao Court of First Instance, *Parman International B.V. v. Central Bank of Curaçao and St Maarten*, Judgment of 31 January 2019, ECLI:NL:OGEAC:2019:15 (translation), para. 4.19.

88 **Exhibit R-013**, Central Bank of Curaçao and Sint Maarten Press Release regarding the Ennia Resolution: Signing of the Outline Agreement, 11 April 2024.

89 **Exhibit R-013**, Central Bank of Curaçao and Sint Maarten Press Release regarding the Ennia Resolution: Signing of the Outline Agreement, 11 April 2024.

90 **Exhibit R-013**, Central Bank of Curaçao and Sint Maarten Press Release regarding the Ennia Resolution: Signing of the Outline Agreement, 11 April 2024.

91 **Exhibit CLA-002**, National Ordinance No 77 of 1999 containing Regulations concerning the Supervision of the Insurance Industry, Article 63(2).

92 **Exhibit R-013**, Central Bank of Curaçao and Sint Maarten Press Release regarding the Ennia Resolution: Signing of the Outline Agreement, 11 April 2024.

93 Respondent's Application for Security for Costs, para. 16.

94 **Exhibit RL-007-DUTCH**, Curaçao Court of First Instance, Judgment, 29 November 2021; **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023.

95 See e.g. SoC, paras. 22-35.

procedure in this arbitration should be avoided".[96] The facts as laid out by the Curaçao Courts may thus be relied upon by the Tribunal.

54. First, Andraous has been found liable for the unlawful sale, in 2014, of Ennia's shares in S&S to Parman Capital. The Curaçao Court of Appeal determined, on the basis of contemporary valuation reports,[97] that the sale price was "far too low"[98] and that Andraous "can personally be seriously blamed" for allowing Ansary to determine the price, despite Ansary's clear conflict of interest arising from his dual role as Parman shareholder and as chairman of the board and executive committee of S&S.[99] The Curaçao Court of Appeal further found that there had been "clear indications" at the time of the transaction that the investment was worth considerably more than the sales price to be received from Parman.[100] For this unlawful act, Andraous was held liable, jointly and severally with Ansary and one other officer, to pay Ennia USD 117 million for the "improper performance of duties".[101]

55. Second, Andraous was found to have improperly performed his duties as an officer of Ennia by permitting the distribution of funds from Ennia to its shareholder PIBV based on defective valuations of Mullet Bay (which constituted a significant part of Ennia's financial capital[102]) and by failing to consider appraisals based on more solid foundations.[103] The Curaçao Court of Appeal found the valuations relied on by Andraous to be superficial, considering they had been authored by a local "sole proprietorship" (IEB) whose sole member was not part "of any association of appraisers" and whose reports were "limited in scope".[104] Further, the valuations were deemed "too brief in content for the purpose for which they were used", "insufficiently verifiable", and offering "entirely inadequate explanations for the significant increase in value over a period of a few months",[105] with Mullet Bay being valued in Ennia's books at over USD 422 million.[106]

56. In relation to his conduct, the Curaçao Court of First Instance concluded that "there is nothing to show that [Andraous and [redacted]] actually made an

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96 SoC, para. 64.
97 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 10.31.
98 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 10.25.
99 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 10.27.
100 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 10.27.
101 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, paras. 10.27 and 10.63.
102 In October 2010, Mullet Bay represented 55% of the value of Ennia's total assets. See **Exhibit RL-007-DUTCH**, Curaçao Court of First Instance, Judgment, 29 November 2021, para. 5.101; **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 11.16.
103 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, paras. 11.26 and 11.39.
104 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 11.14.
105 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 11.14.
106 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 11.18.

effort to arrive at a valuation that was as realistic as possible, even though there should have been every reason for those concerned […] to doubt the value assigned to Mullet Bay in the books and as a result to the equity capital of [Ennia]".[107] In fact, as explained in the Kingdom of the Netherlands' Reply to Claimant's Response to the Application for Security for Costs, Andraous actively intervened to procure high valuations of Mullet Bay:[108] when a new international land valuation expert (CBRE) had presented a far lower value of Mullet Bay (namely USD 36 million), Andraous terminated the engagement of CBRE and engaged another valuator to re-evaluate Mullet Bay.[109] After Ennia's accountant (KPMG) expressed doubts about, among other things, the accuracy of that new valuation, KPMG was fired, and a different accounting firm (Baker Tilly) was engaged.[110] Baker Tilly would later in 2021 receive a disciplinary sanction for having been insufficiently critical with regard to the valuation of Mullet Bay.[111] Having confirmed that Andraous is liable for this improper conduct, the Curaçao Court of Appeal decided that the valuation of Mullet Bay will be determined following an assessment by a court-appointed expert.[112]

57. Third, Andraous allowed large amounts to be paid by Ennia to advisors for services not rendered to, nor benefitting, Ennia, but rather rendered to Ansary for his personal benefit.[113] The Curaçao Court of First Instance held that, "without further explanation […] which is lacking, it is impossible to see why [Ennia] should reasonably have to pay these costs."[114] Likewise, the Curaçao Court of Appeal held that "[n]o reasonable director would have made such large payments without any performance in favor of the company he manages".[115] Andraous was held jointly and severally liable for this misconduct.[116]

58. Fourth, Andraous permitted persons affiliated with Ennia (including Ansary, his wife, and other family members)[117] to charge excessive travel expenses to the company, specifically for private jet flights within the United States and to "vacation destinations in Italy, France, Mexico, the Bahamas, Canada and

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107 **Exhibit RL-007-DUTCH**, Curaçao Court of First Instance, Judgment of 29 November 2021, para. 5.105.
108 Respondent's Reply to Claimant's Response to the Application for Security for Costs, para. 30.
109 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 11.22.
110 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 11.38.
111 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 11.38.
112 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 11.39.
113 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, paras. 12.18, 12.21-12.24.
114 **Exhibit RL-007-DUTCH**, Curaçao Court of First Instance, Judgment, 29 November 2021, para. 5.127.
115 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 12.24.
116 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 12.29.
117 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 12.55.

Morocco",[118] even though these costs had "no connection whatsoever" with Ennia's business.[119] The Curaçao Courts concluded that no reasonably-minded director would have allowed the payment for such costs for flights unrelated to the conduct of Ennia's business.[120]

59. Andraous' liability for unlawful acts committed to the detriment of Ennia, and in turn to the detriment of its policyholders, has been established by the Curaçao Courts. The facts as illustrated above therefore show the ongoing struggle to preserve the financial well-being of Ennia in the interest of its policyholders after years of unlawful behaviour by Andraous and his co-directors.

60. The following chapters will proceed to examine the legal issues at stake as they pertain to the Kingdom of the Netherlands' jurisdictional objections.

3 ANDRAOUS DOES NOT QUALIFY AS A PROTECTED 'INVESTOR' UNDER THE BIT

61. Andraous does not qualify as a protected 'investor' under the BIT because his dominant and effective nationality is not Lebanese.

62. Pursuant to the Vienna Convention on the Law of Treaties ("VCLT"), the term 'investor' must be interpreted in accordance with its ordinary meaning in its context and in the light of the object and purpose of the BIT. For the purpose of interpretation, any relevant rules of international law, including norms of customary international law, shall be taken into account (Section 3.1). The dominant and effective nationality principle must therefore be applied to determine whether or not a dual national is protected under the terms of the BIT (Section 3.2).

63. Andraous argues at length that dual nationals are not categorically excluded from BIT protection. However, as already noted,[121] this is not a position that the Kingdom of the Netherlands disputes. Rather, as is clear from the Kingdom of the Netherlands' submissions in relation to its Application for Security for Costs,[122] dual nationals may be protected under the BIT only to

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118 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, paras. 12.53 and 12.55.

119 **Exhibit RL-007-DUTCH**, Curaçao Court of First Instance, Judgment, 29 November 2021, para. 5.144; **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 12.54.

120 **Exhibit RL-007-DUTCH**, Curaçao Court of First Instance, Judgment, 29 November 2021, para. 5.144; **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment, 12 September 2023, para. 12.56.

121 See para. 14 above.

122 Reply to Claimant's Response to the Application for Security for Costs, para. 56.

the extent that their dominant and effective nationality is *not* that of the State they are claiming against. Andraous also recognises that this is the Kingdom of the Netherlands' actual position.[123]

64. It must be observed from the outset that the burden is on the claimant to prove facts necessary to establish jurisdiction.[124] This general rule is no different in cases where issues of nationality are in dispute.[125] In *Mihaljevic v. Croatia*, the tribunal rejected the claimant's proposition that it is for the respondent to bear the burden of proof for any contention disputing a claimant's nationality. The tribunal stated that the persuasive burden would shift to the respondent only after the claimant has first proven the facts necessary to establish the tribunal's jurisdiction,[126] concluding that the claimant had failed to do so.[127] Indeed, Andraous acknowledges that "under this test, Claimant would need to demonstrate that his Lebanese nationality is more dominant [sic] than his (former) Dutch nationality".[128]

65. As will be explained in Sections 3.1 and 3.2, the interpretation of the term 'investor' leads to the application of the dominant and effective nationality principle. The burden is thus on Andraous – as the claimant in these proceedings – to prove that his dominant and effective nationality is Lebanese. Andraous has failed to do so. Based on the evidence, it cannot be established that Andraous' dominant and effective nationality is Lebanese, and he consequently does not qualify as a protected 'investor' under the BIT (Section 3.3).

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123 SoC, para. 138 ("It is worth noting that Respondent does not argue that dual nationals are categorically excluded from the BIT, but only that the 'dominant and effective nationality' criterion applies").

124 See e.g. **Exhibit RL-020**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para. 2.15 ("[T]he Claimant has the burden to prove facts necessary to establish jurisdiction (as it positively asserts); and that the Respondent has the burden to prove that its positive objections to jurisdiction are well-founded"); **Exhibit RL-021**, *Alberto Carrizosa Gelzis and others v. Republic of Colombia*, PCA Case No. 2018-56, Award, 7 May 2021, para. 189 ("[I]t is for the party, which has the burden of proof, in this case, Claimants: […] not only [to] bring evidence in support of [their] allegations, but […] also [to] convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.").

125 **Exhibit CLA-157**, Draft Articles on Diplomatic Protection with commentaries (2006), Article 7, para. 6 ("Draft article 7 is framed in negative language: 'A State of nationality may not exercise diplomatic protection … unless' its nationality is predominant. This is intended to show that the circumstances envisaged by draft article 7 are to be regarded as exceptional. This also makes it clear that the burden of proof is on the claimant State to prove that its nationality is predominant").

126 **Exhibit RL-022**, *Marko Mihaljevic v. Republic of Croatia*, ICSID Case No. ARB/19/35, Award, 19 May 2023, para. 67 ("The Tribunal disagrees with the Claimant's submission insofar as it puts forth a general rule that where a claimant's nationality is in dispute, respondents always bear the burden of proving that the claimant does not have the requisite nationality.").

127 **Exhibit RL-022**, *Marko Mihaljevic v. Republic of Croatia*, ICSID Case No. ARB/19/35, Award, 19 May 2023, para. 139.

128 SoC, para. 139.

3.1 The term 'investor' must be interpreted in accordance with Article 31 VCLT

66. Article 1 BIT stipulates that the term 'investor' shall comprise, with regard to either Contracting Party, "natural persons having the nationality of that Contracting Party […] who have made an investment in the territory of the other Contracting Party." Article 9 BIT further specifies that "disputes regarding investments between a Contracting Party and an investor of the other Contracting Party" can be submitted to arbitration. Consequently, a tribunal will have jurisdiction over a dispute when it is satisfied, *inter alia*, that there is a qualifying "investor of the […] Contracting Party" other than the State party to the dispute.

67. Given that Andraous has the nationalities of both the Kingdom of the Netherlands and Lebanon, the parties disagree as to whether Andraous qualifies as a natural person "who ha[s] made an investment in the territory of the other Contracting Party"[129] and has standing as "an investor of the other Contracting Party".[130] Solving this question requires interpreting these provisions in accordance with Article 31 VCLT.

3.1.1 The general rule of interpretation in Article 31 VCLT

68. Under Article 31(1) VCLT, a treaty is to 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. Further, Article 31(3)(c) VCLT requires taking into account "any relevant rules of international law applicable in the relations between the parties" in the interpretation of the treaty.

69. As emphasized by the International Law Commission ("ILC") in its commentary on the VCLT, Article 31 VCLT constitutes one "general rule of interpretation" on the basis of which the application of the interpretative

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129 **Exhibit CLA-001**, Agreement on the Encouragement and Reciprocal Protection of Investments between the Lebanese Republic and the Kingdom of the Netherlands (signed on 2 May 2002, entered into force on 1 March 2004), Article 1(b).

130 **Exhibit CLA-001**, Agreement on the Encouragement and Reciprocal Protection of Investments between the Lebanese Republic and the Kingdom of the Netherlands (signed on 2 May 2002, entered into force on 1 March 2004), Article 9(1).

elements of Article 31 VCLT takes place in a single combined operation.[131] This has been repeatedly confirmed in the arbitral case law.[132]

70. Andraous thus errs in stating that every other element apart from the text is only relevant "if the text were ambiguous".[133] Notably, Andraous cites a section of the *Trapote v. Venezuela* decision, in which the tribunal takes the text as the interpretative starting point,[134] but he leaves out the two subsequent paragraphs, where the tribunal stresses the importance of Article 31(3)(c) VCLT:

> "[T]he fact that the list of criteria for interpretation in the VCLT refers first to the text does not mean that it establishes a purely semantic system of interpretation. The interpretation of the text is not an abstract and isolated exercise. […] [I]n determining the meaning and scope of a treaty, the Tribunal *must take into account all rules of international law relevant to the relations between the parties*, so that the interpretation of the agreed terms is made *in a manner consistent with international law*."[135]

71. As such, the interpretation does not end with the text of the relevant provision, but instead requires reading the text in its context, in light of its object and purpose, and in accordance, *inter alia*, with any applicable rules of international law (Articles 31(1) and 31(3)(c) VCLT, respectively).

3.1.2 Application of the interpretative elements of Article 31 VCLT

72. Article 1(b) BIT defines the term 'investor' as comprising "natural persons having the nationality of that Contracting Party […] who have made an investment in the territory of the *other* Contracting Party" (emphasis added).

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131 **Exhibit RL-023**, Reports of the International Law Commission on the 2nd part of its 17th session, 3-28 January 1966 and on its 18th session, 4 May-19 July 1966, Doc. No. A 6309 Rev. 1, p. 51, para. 8.

132 See e.g. **Exhibit RL-024-SPANISH**, *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, para. 643; **Exhibit RL-025-SPANISH**, *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, Final Award, 31 January 2022, paras. 248 and 341 ("Unlike the use of travaux préparatoires provided for in Article 32, which is optional, the application of the relevant rules of international law is an obligatory step in the interpretative process") (unofficial translation); **Exhibit RL-026-SPANISH**, *Enrique Heemsen and Jorge Heemsen v. the Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award on Jurisdiction, 29 October 2019, paras. 435-440; **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 356.

133 SoC, paras. 120 and 125.

134 SoC, para. 120, fn. 318, citing **Exhibit RL-025-SPANISH**, *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, Final Award, 31 January 2022, para. 249.

135 **Exhibit RL-025-SPANISH**, *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, Final Award, 31 January 2022, paras. 250 and 251 (unofficial translation; emphasis added).

While Andraous holds the Lebanese nationality and claims to have made an investment in the territory of the Kingdom of the Netherlands, he also holds the Dutch nationality, whereas Dutch nationals are not eligible to make claims under the BIT against the Kingdom of the Netherlands. The issue at stake is thus the extent to which claimants with both nationalities can be considered protected investors under the BIT. This requires Article 1(b) BIT to be interpreted in accordance with the other interpretative elements of Article 31 VCLT.

73. Turning to the context of Article 1(b) BIT, this includes Article 9(1) BIT, which refers to "disputes regarding investments between a Contracting Party and an investor of the *other* Contracting Party" (emphasis added). The preamble similarly refers to "investments by the investors of *one* Contracting Party in the territory of the *other* Contracting Party" (emphasis added), with the purpose of stimulating "the flow of capital and technology" between the Kingdom of the Netherlands and Lebanon. While this on its own does not answer the question of the Tribunal's jurisdiction over Andraous' claim, these two provisions underscore that the object and purpose of the BIT (and of investment treaties in general) is to protect foreign, not domestic, investors. For this reason, Andraous' position that "excluding […] [dual nationals] from the BIT's scope would discourage rather than 'stimulate the flow of capital and technology and economic development'",[136] is incorrect. In any event, there can be no 'flow' between the Contracting Parties where an 'investor' is actually predominantly local and such 'flow' does not cross into the territory of the other Contracting Party, as explained in Section 3.2 below.

74. As a further element in the application of the general rule in Article 31 VCLT, the interpretation of the term 'investor' requires taking into account any relevant rules of international law applicable in the relations between the parties. This includes relevant norms of customary international law.[137] Such norms do not require 'incorporation' into the treaty in order to apply, as they are not extraneous to the treaty "unless expressly derogated from".[138] As held by the tribunal in *Santamarta*, "recourse to principles of international law applicable between the parties does not entail adding elements to the Treaty that the Contracting Parties did not wish to include, but rather entails

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136 SoC, para. 130.

137 **Exhibit RL-028**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 89.

138 **Exhibit RL-024-SPANISH**, *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, para. 704 (unofficial translation).

interpreting the Treaty in accordance with Article 31(3)(c) VCLT and international law."[139]

75. As will be explained in detail in Section 3.2 below, this requires the application of the well-established customary norm of dominant and effective nationality, such that the BIT's definition of 'investor' can only be taken to include dual nationals to the extent that their dominant and effective nationality is not that of the State against which they are claiming.

3.1.3 Treaties with third States are irrelevant

76. Contrary to what Andraous argues,[140] subsequent investment treaties concluded between Lebanon and third parties or between the Kingdom of the Netherlands and third parties are irrelevant for the interpretation of the present BIT. Such agreements with third parties do not constitute a supplementary means of interpretation within the meaning of the VCLT.[141] Moreover, pursuant to Article 32 VCLT, recourse to "supplementary means of interpretation" is only warranted to confirm the meaning resulting from the application of Article 31 VCLT, or to determine the meaning when the interpretation according to Article 31 leaves it "ambiguous or obscure" or leads to a result that is "manifestly absurd or unreasonable". That is not the case here. Even if these treaties with third parties could be used to confirm the interpretation that dual nationals are not altogether excluded by the BIT, this is not in dispute.[142] Nor has Andraous argued that the application of the principle of dominant and effective nationality would result in an absurd or unreasonable result.

77. The express exclusion of dual nationals from protection in a treaty between the Kingdom of the Netherlands and a third country, postdating the BIT by 16 years, is the result of bilateral negotiations between the two parties to that agreement. It is immaterial for the interpretation of the present BIT, and does not indicate any intention of the Kingdom of the Netherlands to exclude the application of the customary international law norm of dominant and effective nationality from the present BIT.[143] If anything, the express inclusion of a

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139 **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 455 (unofficial translation).

140 SoC, paras. 135-136.

141 See e.g. **Exhibit RL-029**, *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 128.

142 See para. 14 above.

143 See e.g. **Exhibit RL-025-SPANISH**, *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, Final Award, 31 January 2022, para. 271 ("[T]he Tribunal is not convinced of the Claimant's argument that if the Contracting Parties expressly excluded dual nationals in other treaties, their silence in this case should be interpreted as an inclusion.

reference to the principle of dominant and effective nationality in the 2019 version of the Dutch Model Investment Agreement merely confirms its support for its application in such cases.[144]

3.2 The dominant and effective nationality principle must be applied under the BIT

78. The well-established rule of dominant and effective nationality is to be applied in the interpretation of the BIT as a "relevant rule of international law applicable in the relations between the parties" pursuant to Article 31(3)(c) VCLT.[145]

79. It must be noted from the start that Andraous has already explicitly acknowledged the application of this rule to the present dispute, namely that, "for the purposes of arbitration, it only needs to be shown that Mr Andraous' Dutch nationality is not his dominant and effective nationality".[146] Andraous has also acknowledged that this entails applying the criteria for the dominant and effective nationality test as developed in the case law.[147]

80. The dominant and effective nationality principle seeks to determine the dominant and effective nationality of an individual for the purposes of the dispute in question.[148] That a nationality is 'dominant' means it is strong enough to take precedence over the other nationality, in light of the relevant factors set out in the case law. 'Effective' refers to the notion that the nationality is actually operative and producing effects, as opposed to merely

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While the comparison between different treaties concluded by the Contracting Parties with third parties may be relevant as a matter of interpretation, the Claimant's conclusion involves a non sequitur. Indeed, the argument rests on the premise that the general rule is the protection of all events of national doubles and that, therefore, the only way to exclude them is by express agreement. As will be discussed, the Court finds that this is not effective […]. Quite simply, the BIT is silent on the question of whether the term national covers dual nationals who also have the nationality of the investor State.") (unofficial translation); **Exhibit RL-024-SPANISH**, *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, para. 725 ("Even if other BITs could be considered relevant as 'complementary means of interpretation' under Article 32 of the VCLT, the Tribunal agrees with the Respondent that those BITs do not necessarily reflect the practice of Spain and Venezuela. There are a variety of reasons why a State might consider it unnecessary and undesirable to make explicit an exclusion of dual nationals in a BIT.") (unofficial translation).

144 **Exhibit RL-030**, Dutch Model Investment Agreement (2019), Article 1(b).

145 **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, paras. 541 and 547, citing **Exhibit RL-025-SPANISH**, *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, Final Award, 31 January 2022, para. 385; **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 486.

146 **Exhibit R-014**, Notes of meeting between Abdallah Andraous and Ministry of Foreign Affairs of the Kingdom of the Netherlands, 3 November 2022, para. 87.

147 SoC, para. 140.

148 **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, para. 558.

formal.[149] The principle was developed to enable determining a claimant's predominant nationality where that person – at the relevant moments in time – held the nationalities of both States involved in the proceedings.[150]

3.2.1 Origins of the dominant and effective nationality principle

81. The dominant and effective nationality principle stems, *inter alia*, from the International Court of Justice's ("ICJ") decision in the *Nottebohm* case.[151] It was likewise affirmed in the 1955 *Mergé* decision by the Italian-United States Conciliation Commission.[152]

82. The Iran-United States Claims Tribunal ("IUSCT") further developed the dominant and effective nationality principle. In its *Esphahanian* decision, the IUSCT relied on Article 31(3)(c) VCLT to identify "any relevant rules of international law applicable in the relations between the parties" in view of the lack of any explicit provision regarding dual nationals in the text of the underlying treaty.[153] The IUSCT thus applied the principle of dominant and effective nationality, which was consistent with the nationality definition in the applicable treaty in the absence of any clearly stated exception.[154] The IUSCT determined that persons of dual nationality may file a claim only if their dominant and effective nationality was not that of the respondent State.[155] In *Case No. A/18*, the IUSCT stated that "the relevant rule of international law which the Tribunal may take into account […] is the rule that flows from the dictum of *Nottebohm*, the rule of real and effective nationality, and the search for 'stronger factual ties between the person concerned and one of the States whose nationality was involved'".[156] Likewise in the

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149 **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, paras. 538-539.

150 See Section 3.3 below on the temporal scope.

151 **Exhibit CLA-158**, *Nottebohm Case (Liechtenstein v. Guatemala)* (Merits) [1955] ICJ Rep 4, p. 22; **Exhibit RL-021**, *Alberto Carrizosa Gelzis and others v. Republic of Colombia*, PCA Case No. 2018-56, Award, 7 May 2021, para. 183.

152 **Exhibit RL-031**, Italian-United States Conciliation Commission, *Mergé Case*, Decision No. 55, 10 June 1955, paras. 1-5.

153 **Exhibit RL-032**, *Nasser Esphahanian v. Bank Tejarat*, IUSCT Case No. 157, Final Award (Award No. 31-157-2), 29 March 1983, para. 23. The IUSCT had previously dismissed the claimant's argument noting that "the Claimant's interpretation leads to an absurd result in that it would permit dual nationals to make claims before the Tribunal against either Government, or both. If dual nationals can claim on the simplistic ground that there is no provision prohibiting them from doing so, then there is no basis for refusing them the right to claim under either of their nationalities" (para. 22).

154 **Exhibit RL-032**, *Nasser Esphahanian v. Bank Tejarat*, IUSCT Case No. 157, Final Award (Award No. 31-157-2), 29 March 1983, paras. 22 and 23.

155 **Exhibit RL-032**, *Nasser Esphahanian v. Bank Tejarat*, IUSCT Case No. 157, Final Award (Award No. 31-157-2), 29 March 1983, para. 46.

156 **Exhibit RL-033**, *Decision in Case No. A-18 Concerning the Question of Jurisdiction over Claims of Persons with Dual Nationality (Decision No. DEC 32-A18-FT)*, IUSCT Case No. A-18, 6 April 1984, para. 43. As a side note, the IUSCT rejected the argument (made by Andraous in his

subsequent cases in which the dominant and effective nationality of the individual was found to be that of the respondent State, the IUSCT consistently declined jurisdiction.[157]

83. The dominant and effective nationality principle was later codified in Article 7 of the ILC Draft Articles on Diplomatic Protection.[158] The Commentary to Article 7 lists the above-mentioned cases among many decisions supporting the existence of the principle of dominant and effective nationality.[159] Furthermore, the Commentary underscores that the burden of proof regarding the dominant and effective nationality rests on the claimant.[160] It follows from Article 17 of the ILC Articles that the same rules will be applicable to investor-State treaties to the extent that they are not inconsistent with the provisions of the treaty in question.[161]

3.2.2 Application of the dominant and effective nationality principle in investor-State cases

84. The application of the principle to investor-State disputes is widely confirmed in the case law.[162] Tribunals have specifically recognized that the dominant and effective nationality principle protects the investor-State dispute settlement regime from abuse in the form of nationals bringing a claim before an international tribunal against their State of nationality.

85. The *Trapote v. Venezuela* case concerned a Spanish-Venezuelan national claiming that Venezuela had violated the Spain-Venezuela BIT in relation to his investment. The tribunal noted that the BIT did not contain express rules on whether a dual national having the nationality of the respondent State may

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SoC, para. 121, fn. 321) that the use of the disjunctive article 'or' under Article VII(1)(a) of the Algiers Declaration ("a 'national' of Iran *or* of the United States, as the case may be" (emphasis added)) made the text "so clear and unambiguous as to make further analysis unnecessary", and concluded it still had to take into account relevant rules of international law (paras. 34-36).

157 See e.g. **Exhibit RL-034**, *Michelle Danielpour v Iran*, IUSCT Case No 424-168-3, 16 June 1989; **Exhibit RL-035**, *August Frederick Benedix, et al v Iran*, IUSCT Case No 412-256-2, 22 February 1989; **Exhibit RL-036**, *Anita Perry-Rohani, et al v Iran*, IUSCT Case No 427-831-3, 30 June 1989; **Exhibit RL-037**, *Benny Diba v Iran, IUSCT Case No 444-940-2*, 31 October 1989; **Exhibit RL-038**, *Raymond Abboud, as legal representative of Christine Arianne Abboud v Iran*, IUSCT Case No 477-383-2, 16 May 1990; **Exhibit RL-039**, *Reza Nemazee, et al v Iran, IUSCT Case No 487-4-3*, Partial Award, 10 July 1990.

158 **Exhibit CLA-157**, Draft Articles on Diplomatic Protection with commentaries (2006) Article 7.

159 **Exhibit CLA-157**, Draft Articles on Diplomatic Protection with commentaries (2006) Article 7, para. 3.

160 **Exhibit CLA-157**, Draft Articles on Diplomatic Protection with commentaries (2006) Article 7, para. 6.

161 **Exhibit CLA-157**, Draft Articles on Diplomatic Protection with commentaries (2006), Article 17, para. 3.

162 Arbitral tribunals generally take into account customary international law in interpreting investment agreements. See e.g. **Exhibit RL-028**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 89.

act against the respondent State.[163] The tribunal took the view that it could not interpret the text of the treaty as being either in favour or against allowing claims by dual nationals, and therefore turned to the VCLT rules on treaty interpretation, including the object and purpose of the BIT.[164] The tribunal observed that it was "not aware of any convention or practice contemporaneous with the Treaty in which the absence of express mention of double nationals should be understood as an inclusion in every event".[165]

86. The tribunal held that a treaty may be *lex specialis* with regard to questions regulated therein, such that if the BIT contained a specific rule on dual nationals, the tribunal would be bound by it and would not have recourse to general rules of international law.[166] It then observed:

> "[I]nvestment treaties create particular rules that take precedence over the general and default rules of international law, but with respect to matters on which they do not rule, as this Tribunal considers to be the case with respect to dual nationals, the principles of international law are relevant in determining their scope".[167]

87. The tribunal therefore proceeded to apply the relevant rules of customary international law on dual nationality pursuant to Article 31(3) VCLT. It considered that the principle of dominant and effective nationality is "a relevant rule of international law applicable to the interpretation of the term investor […] when the investor is a dual national bringing an arbitration against one of the States of which it is a national".[168] In fact, the tribunal held that it is "the prevailing rule of customary international law on dual nationals, so that the term 'national' in Article I(1)(a) BIT has to be interpreted in accordance with this principle".[169] The tribunal ultimately concluded that the claimant was predominantly Venezuelan, and therefore not for a qualified 'investor' in the dispute against Venezuela.[170]

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163 **Exhibit RL-025-SPANISH**, *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, Final Award, 31 January 2022, para. 345.

164 **Exhibit RL-025-SPANISH**, *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, Final Award, 31 January 2022, paras. 270-271.

165 **Exhibit RL-025-SPANISH**, *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, Final Award, 31 January 2022, para. 270 (unofficial translation).

166 **Exhibit RL-025-SPANISH**, *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, Final Award, 31 January 2022, paras. 355-358.

167 **Exhibit RL-025-SPANISH**, *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, Final Award, 31 January 2022, para. 358 (unofficial translation).

168 **Exhibit RL-025-SPANISH**, *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, Final Award, 31 January 2022, para. 398 (unofficial translation).

169 **Exhibit RL-025-SPANISH**, *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, Final Award, 31 January 2022, para. 385 (unofficial translation).

170 **Exhibit RL-025-SPANISH**, *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, Final Award, 31 January 2022, para. 415.

88. In *Manuel García Armas v. Venezuela*, the tribunal sought to ascertain whether any principles of general international law applied pursuant to Article 31(3) VCLT in determining whether the dual-national claimant was protected under the BIT. After a thorough analysis, the tribunal concluded that States and tribunals had shown consistent support for the application of (i) the principle of an absolute prohibition on dual nationals claiming against either of their States of nationality (as applied under the ICSID system), or (ii) the principle of dominant and effective nationality. By contrast, the tribunal found no support for the proposition that dual nationals should face no restriction at all in claiming against one of the States of their nationality,[171] and, like the *Trapote* tribunal, rejected the *lex specialis* argument, noting that "[p]rinciples imported from general international custom apply unless expressly derogated from".[172]

89. The tribunal ultimately dismissed the claim on the basis of the treaty parties' intention to exclude dual nationals altogether as reflected in their choice for ICSID as the primary forum.[173] However, having observed "a broad and well-founded doctrinal trend in favour of the application of the general rules of international law on dual nationality in the field of international investment arbitration",[174] the tribunal still decided to consider what the result would have been had it applied the dominant and effective nationality test. The tribunal concluded that "even if it were admitted that the dual Spanish-Venezuelan nationals were investors protected by the Treaty, they would only be so to the extent that their claims were directed against the State to which they belong in a non-dominant manner", and found that the claimants were predominantly Venezuelan.[175] The tribunal's decision was subsequently

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171 **Exhibit RL-024-SPANISH**, *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, para. 705.

172 **Exhibit RL-024-SPANISH**, *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, para. 704 (unofficial translation).

173 **Exhibit RL-024-SPANISH**, *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, para. 723.

174 **Exhibit RL-024-SPANISH**, *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, para. 693 (unofficial translation).

175 **Exhibit RL-024-SPANISH**, *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, para. 734 (unofficial translation).

confirmed in setting-aside proceedings before the Court of Appeal of The Hague,[176] whose judgment was upheld by the Dutch Supreme Court.[177]

90. Likewise, the *Heemsen v. Venezuela* tribunal considered that "in matters of international investment, in case of silence of the Treaty, the application of the general principles of international law leads to the application of the principle of dominant and effective nationality".[178] The tribunal went on to conclude that dual nationals could claim against one of their States of nationality only to the extent that their dominant and effective nationality is not of that same State – or, in other words, when the individual "is more foreign than national" with respect to the respondent State.[179] Although the tribunal ultimately declined jurisdiction on a different ground,[180] it held that the Heemsen brothers could not qualify for protection since their dominant and effective nationality was that of the respondent State.

91. Most recently, the tribunal in *Santamarta v. Venezuela* relied on the abovementioned case law and reached similar conclusions. As Andraous also observes,[181] the tribunal recognised that the qualification as 'national' of one contracting party to the investment treaty was not affected by the possession of the nationality of the other contracting party. The tribunal then concluded that there was nothing in the text, context, or object and purpose of the applicable treaty that could be construed as incompatible with the protection of dual nationals. Andraous omits to note, however, that the tribunal immediately followed up with the following conclusion:

> "However, just as the Tribunal cannot deny the status of the Claimant as a Spaniard on the basis of the object and purpose of the Treaty, nor can the object and purpose of the Treaty allow for the denial of his status as a Venezuelan. The only thing that the Tribunal can infer from the text of the Treaty, in the light of its object and purpose, is that the Treaty provides for neither an exclusion nor a total inclusion

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176 **Exhibit RL-040-DUTCH**, *García Armas and others v. Venezuela,* Court of Appeal of the Hague, Judgment, 19 January 2021.

177 **Exhibit RL-041-DUTCH**, *García Armas and others v. Venezuela*, Dutch Supreme Court, Judgment, 21 April 2023.

178 **Exhibit RL-026-SPANISH**, *Enrique Heemsen and Jorge Heemsen v. the Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award on Jurisdiction, 29 October 2019, para. 440 (unofficial translation).

179 **Exhibit RL-026-SPANISH**, *Enrique Heemsen and Jorge Heemsen v. the Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award on Jurisdiction, 29 October 2019, para. 433 (unofficial translation).

180 **Exhibit RL-026-SPANISH**, *Enrique Heemsen and Jorge Heemsen v. the Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award on Jurisdiction, 29 October 2019, para. 411.

181 SoC, para. 121, fn. 322, citing **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 414.

> of the protection of double nationals. In other words, it confirms that the Treaty is silent on the treatment of dual nationals."[182]

92. The tribunal thus held that a treaty's silence with respect to the treatment of dual nationals does not entail a derogation from the general rules of international law. Citing Articles 7 and 17 of the ILC Draft Articles on Diplomatic Protection, the tribunal confirmed that customary principles arising from the field of diplomatic protection were applicable to investment arbitration to the extent not expressly derogated from in the respective treaty.[183] In the words of the tribunal:

> "Far from being an incompatibility, silence in the Treaty constitutes a lacuna, which necessarily requires the interpreter to have recourse to other forms of international law applicable between the Contracting Parties in order to resolve the issue. That is to say, the Treaty, as lex specialis, may create particular rules that prevail over general rules of international law, but when the Treaty is silent – as it is with respect to dual nationals – recourse must necessarily be had to the general rules of international law applicable between the Contracting Parties."[184]

93. Accordingly, the tribunal concluded that the dominant and effective nationality principle was a principle of customary international law directly applicable in investment treaty arbitration, which "is not a self-contained regime".[185] The treaty was still "part of international law and must be interpreted in accordance with it".[186] Since the claimant could only be considered an 'investor' under the treaty if their dominant and effective nationality was not that of the respondent State, which it was, the tribunal determined that it lacked jurisdiction over the claim.[187]

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182 **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 415 (unofficial translation).

183 See para. 85 above. See also **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, paras. 433-437 and 483.

184 **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 425 (unofficial translation).

185 **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 486 (unofficial translation).

186 **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 421 (unofficial translation).

187 **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 518.

3.2.3 Andraous' attempts to reject the application of the dominant and effective nationality principle must fail

94. In his SoC, Andraous attempts to reject the application of the principle of dominant and effective nationality by arguing that (i) the "text of the BIT is clear"[188] on the issue of dual nationals and one need not go further in light of the "textual conclusion",[189] (ii) it would contravene Article 3(5) BIT,[190] and (iii) it would entail an "atextual" limitation to the Kingdom of the Netherlands' "unconditional consent" to arbitration under Article 9(2)(d) BIT.[191] These arguments are misguided and ignore the purpose of these provisions.

95. First, from the fact that dual nationals are not automatically excluded under the BIT, Andraous seeks to extrapolate the conclusion that the BIT protects *any* dual national, even where the dual national's dominant and effective nationality is that of the respondent State.[192] This represents a misapplication of Article 31(3)(c) VCLT.[193] The fact that the text of the BIT does not contain an explicit provision in respect of dual nationals, cannot be construed as dispensing with an applicable principle of international law, as explained in Section 3.1 above.[194]

96. In this respect, Andraous' reliance on a passage by Zachary Douglas is yet another example of his attempts to cite authorities in a misleading way.[195] Andraous quotes Douglas as acknowledging that where a treaty's text does not expressly address the question of dual nationals, "there is no reason to imply the default rule […] that dual nationals must be excluded".[196] As explained above,[197] the Kingdom of the Netherlands does not disagree. However, the ensuing passage of Douglas' book – which Andraous omits from his quoted passage – is the key point and sheds light on the applicability

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188 SoC, para. 121.
189 SoC, para. 123.
190 SoC, para. 126.
191 SoC, para. 127.
192 See e.g. SoC, para. 124.
193 **Exhibit RL-028**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 89.
194 **Exhibit RL-042**, *Case Concerning Elettronica Sicula S.p.A (United States of America v. Italy)*, ICJ, Judgment, 20 July 1989, para. 50 ("[T]he Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so."); **Exhibit RL-024-SPANISH**, *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, para. 645 ("[A]lthough subject to certain exceptions with respect to rules that cannot be repealed, States have the power to conclude a particular treaty that displaces or sets aside the application of a rule of international law in general. But to this end, clear language in the treaty is required which is contrary to the rule of general international law") (unofficial translation).
195 See e.g. paras. 72 and 93 above.
196 SoC, para. 130; **Exhibit CLA-143**, Z. Douglas, *The International Law of Investment Claims* (CUP, 2012), p. 321, para. 600.
197 See para. 14 above.

of the dominant and effective nationality test: "[s]o long as the nationality of the adopted country is the dominant of the two […] there is no overriding consideration of principle that should prevent such an individual from investing in the [other] country […] with reliance upon a relevant investment treaty", given that the "tribunal's jurisdiction ratione personae extends to such an individual *only if the former nationality is the dominant of the two*, subject to a contrary provision of an investment treaty".[198]

97. Second, the purpose of Article 3(5) BIT is to entitle "*investments by investors* of the other Contracting Party" to "*treatment* more favourable" (emphasis added) where such treatment is provided for under the domestic law of either Contracting Party or under international law. It is evident from the text that Article 3(5) BIT is premised on the existence of a qualifying 'investor' with a qualifying 'investment' in the first place.[199] Article 3(5) BIT is thus irrelevant to determining the existence of a qualifying 'investor', because it presumes the existence of a qualifying 'investor'.

98. Third, Andraous' argument based on a reference to the Contracting Parties' "unconditional consent" to arbitration under Article 9(2)(d) BIT fails for similar reasons.[200] The Contracting Parties' "unconditional consent" to the submission of disputes to international arbitration is given "in accordance with the provisions of this Article", i.e. Article 9 BIT. Article 9 BIT governs the settlement of disputes "between a Contracting Party and *an investor of the other Contracting Party*". As such, the "unconditional consent" is necessarily premised on the existence of a qualifying 'investor'. Far from relieving prospective claimants from the requirement to prove that they are protected 'investors', the qualifier 'unconditional' merely implies that the State cannot withdraw its consent or withdraw from the treaty upon a request of an investor to commence arbitral proceedings.[201]

99. Finally, Andraous' arguments are not only untenable, but also lack credibility in view of his own prior statements. As previously indicated,[202] during consultations with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, Andraous expressly recognised the applicability of the principle

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198 **Exhibit CLA-143**, Z. Douglas, *The International Law of Investment Claims* (CUP, 2012), pp. 321-322, para. 600 (emphasis added).

199 See, by analogy, **Exhibit RL-026-SPANISH**, *Enrique Heemsen and Jorge Heemsen v. the Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award on Jurisdiction, 29 October 2019, para. 408.

200 SoC, para. 127.

201 **Exhibit RL-043**, K. Hobér, 'Investment Arbitration and the Energy Charter Treaty', in Journal of International Dispute Settlement, Vol. 1, No. 1 (2010), p. 163 (in relation to similarly-worded Article 26(3)(a) of the Energy Charter Treaty).

202 See para. 81 above.

of dominant and effective nationality to the present dispute.[203] Similarly, in his SoC, Andraous does not contest either the customary law status of the dominant and effective nationality principle, nor the support in the case law for its application in investor-State arbitration, save for the few unsubstantiated references addressed above.

100. The term 'investor' in Article 1(b) BIT must therefore be interpreted in accordance with the dominant and effective nationality principle. Although it is for Andraous to prove that his dominant and effective nationality is Lebanese,[204] the following section will explain that Andraous' dominant and effective nationality was not Lebanese.

3.3 Andraous' dominant and effective nationality is not Lebanese

101. The dominant and effective nationality test calls for an assessment of a number of factual elements.

102. Where the purported 'investment' is in the territory of the Kingdom of the Netherlands, there will be no 'investor' under the BIT if the claimant's dominant and effective nationality is not Lebanese. As emphasised in *Ballantine v. Dominican Republic*, "[n]ationality (and in the case of dual nationals, dominant and effective nationality) is interrelated to the concept of investor. There will be no investor […] if there is no (dominant and effective) foreign national."[205] Thus, "[a] tribunal may need to examine any factor that may help discern those attributes."[206]

103. The key factors for the application of the dominant and effective nationality test, as derived from case law, are set out in Section 3.3.1. Section 3.3.2 thereafter examines the factual evidence in accordance with these factors, demonstrating that Andraous' dominant and effective nationality is not Lebanese.

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203 **Exhibit R-014**, Notes of meeting between Abdallah Andraous and Ministry of Foreign Affairs of the Kingdom of the Netherlands, 3 November 2022, para. 87.

204 **Exhibit RL-020**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para. 2.15; **Exhibit RL-022**, *Marko Mihaljevic v. Republic of Croatia*, ICSID Case No. ARB/19/35, Award, 19 May 2023, para. 67; **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 512; **Exhibit RL-021**, *Alberto Carrizosa Gelzis and others v. Republic of Colombia*, PCA Case No. 2018-56, Award, 7 May 2021, para. 189; see also **Exhibit CLA-157**, Draft Articles on Diplomatic Protection with commentaries (2006) Article 7, para. 6.

205 **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, para. 553.

206 **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, para. 554.

3.3.1 The key factors in the application of the dominant and effective nationality test

104. The following key factors emerge from the case law as essential to the determination of the dominant and effective nationality of a dual national:

- the centre of the dual national's economic interests, as determined by the place where most, if not all, of their business interests are based;[207] and, conversely, the lack of economic interests in the country of the other nationality;[208]
- the presentation by the dual national as a national of a particular State in personal and business dealings, particularly towards the authorities of the State where the investment was made;[209]
- the (reasons behind the) voluntary act of naturalization;[210] and
- the dual national's habitual residence.[211]

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207 See e.g. **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 510; **Exhibit RL-025-SPANISH**, *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, Final Award, 31 January 2022, para. 414; **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, paras. 575-577; **Exhibit RL-044-SPANISH**, *Leopoldo Castillo Bozo v. Republic of Panama*, PCA Case No. 2019-40, Award, 8 November 2022, para. 209; **Exhibit RL-021**, *Alberto Carrizosa Gelzis and others v. Republic of Colombia*, PCA Case No. 2018-56, Award, 7 May 2021, para. 240; **Exhibit RL-024-SPANISH**, *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, para. 737.

208 See e.g. **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 510.

209 See e.g. **Exhibit RL-025-SPANISH**, *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, Final Award, 31 January 2022, para. 385, **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, paras. 588-596; **Exhibit CLA-169**, *Champion Trading v. Egypt* (Decision on Jurisdiction, 21 October 2003) ICSID Case No. ARB/02/9, para. 63; **Exhibit RL-026-SPANISH**, *Enrique Heemsen and Jorge Heemsen v. the Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award on Jurisdiction, 29 October 2019, para. 441 (unofficial translation); **Exhibit RL-021**, *Alberto Carrizosa Gelzis and others v. Republic of Colombia*, PCA Case No. 2018-56, Award, 7 May 2021, para. 247.

210 See e.g. **Exhibit CLA-158**, *Nottebohm Case (Liechtenstein v. Guatemala)* (Merits) [1955] ICJ Rep 4, p. 24 ("Naturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being"); **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, paras. 583-584 ("Naturalization bestows an individual with a set of rights and obligations and creates a particular bond between the individual and the State. In this Tribunal's view, naturalization should not be equated to the purchase of a good or service."); **Exhibit RL-045**, International Law Commission, First report on diplomatic protection, UN Doc. A-CN.4-506, para. 153 ("While some authorities stress domicile or residence as evidence of an effective link, others point to the importance of allegiance or the voluntary act of naturalization").

211 **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 503: "The Court considers that habitual residence is the first factor or criterion analyzed by writers and courts facing the

105. Conversely, factors that investment tribunals have considered of lesser weight include the dual national's place of birth,[212] the place where the majority of the dual national's life was spent,[213] the place and language of education,[214] the place of birth, upbringing, and education of the dual national's children,[215] political rights and participation in social and public life,[216] the place of residence of family members,[217] and ownership of real estate.[218]

106. Tribunals increasingly place the main emphasis on the centre of economic interests. For example, although in *Santamarta* the tribunal considered various factors to determine the claimant's dominant and effective nationality due to the holistic nature of the assessment,[219] it concluded that the claimant's dominant nationality was Venezuelan and not Spanish on the basis that the claimant's centre of economic interests was in Venezuela.[220] This served as a key element leading the tribunal to determine the claimant's dominant and effective nationality as Venezuelan, thereby excluding them from the protection of the bilateral investment treaty in question.

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determination of dominant and effective nationality." (unofficial translation). See also e.g. **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, paras. 563 and 577; **Exhibit RL-044-SPANISH**, *Leopoldo Castillo Bozo v. Republic of Panama*, PCA Case No. 2019-40, Award, 8 November 2022, para. 209; **Exhibit RL-021**, *Alberto Carrizosa Gelzis and others v. Republic of Colombia*, PCA Case No. 2018-56, Award, 7 May 2021, para. 238; **Exhibit RL-024-SPANISH**, *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, para. 737; **Exhibit CLA-165**, *Antonio del Valle Ruiz et al. v. Spain* (Final Award, 13 March 2023) PCA Case No. 2019-17, UNCITRAL, para. 482 (which also places relevance on the fact that the claimant visited Spain "one or two weeks once or twice a year" as a consideration showing that the claimant's effective and dominant nationality was not Spanish).

212 See e.g. **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 504 (also citing *Mergé*), **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, para. 561.

213 See e.g. **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, para. 562 ("the determination of 'dominant and effective' may not be reduced to a mathematical 'day counting' exercise").

214 See e.g. **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 504 (also citing *Mergé*).

215 See e.g. **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 504; **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, para. 568.

216 See e.g. **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 505.

217 See e.g. **Exhibit RL-025-SPANISH**, *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, Final Award, 31 January 2022, para. 414.

218 See e.g. **Exhibit RL-025-SPANISH**, *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, Final Award, 31 January 2022, para. 414.

219 **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 499.

220 **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, paras. 509-511.

107. In a similar fashion, after performing a "holistic exercise"[221] by analysing the relative weight of a multitude of factors, the tribunal in *Ballantine* accorded most prominence to the question of where the claimants were economically centred, tying it in parallel to the claimants' voluntary naturalization, which was undertaken "because of the investment".[222]

108. The claimants in that dispute were dual United States-Dominican nationals and claimed that their dominant and effective nationality was American. However, in the words of the tribunal, "while their personal and professional relations to the Dominican Republic may have been limited, it is difficult to deny that during that period of time their investment kept them economically centred in the Dominican Republic".[223] The claimants were thus deemed to be predominantly Dominican and the tribunal declined jurisdiction.

109. The significance of these key factors and the corresponding weight accorded to them by arbitral tribunals also lies in their temporality and objectivity.

110. As to temporality, the claimant's entire life is deemed "relevant but not dispositive", since what matters is the dominant and effective nationality at the relevant moments in time, as explained in *Ballantine*:

> "In cases dealing with double nationality (with one acquired after the other), it would most likely be evident that a person that was born and lived in a particular country during a long period of his or her life will have many attachments, connections and closeness with that country. For these reasons, a holistic assessment must be performed in order to discern which nationality was dominant and effective *at the relevant time* considering all the facts of the case. Taking into account a claimant's entire life within the analysis of dominance and effectiveness at a particular time does not necessarily entail ascribing more weight to one nationality over the other due to the amount of time each of them has been held. Rather an analysis should be performed to examine how, at that particular time, the connections to both States could be characterized in terms of dominance and effectiveness."[224]

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221 **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, para. 558.

222 **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, para. 598.

223 **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, para. 598.

224 **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, paras. 555-558.

111. While Andraous relies on the same case to argue that the "entire circumstances of the case" have to be taken into account,[225] he crucially omits the wording "at the relevant time". As will be explained in Section 3.3.2.5 below, Andraous relies primarily on alleged facts long preceding the events relevant for the purposes of this arbitration, which are thus of little to no relevance in determining his dominant nationality in the relevant period.[226]

112. As to objectivity, tribunals have attributed more weight to objective factors than to subjective factors.[227] Andraous puts emphasis on his "cultural attachments and traditions" and "intentions for the future".[228] However, as held by the tribunal in *Carrizosa*:

> "It is one thing to evaluate how an individual might hold himself out to the world on the basis of extrinsic evidence; it is another to base that determination upon the mere subjective feelings, however genuine and deeply held, of the subjects of the enquiry themselves and which it is impossible to test, rather than to weight any such subjective expressions of association against objectively verifiable indicia. What is required of the Tribunal is that it undertakes an objective factual enquiry."[229]

113. Andraous lists no less than 30 "criteria" that could be taken into account when applying the dominant and effective nationality test, following which he argues that "every single criterion shows that the Claimant is Lebanese – and not a Dutch – national for the purposes of this arbitration".[230] His submission, however, falls short of proving that assertion. Andraous engages with a selection of the listed factors only, such as one's place of birth, language and education, upbringing and education of one's children, place of residence of family members, and participation in social and public life.[231] However, most of these factors either pertain to his cultural and family allegiances with Lebanon and are thus highly subjective, or otherwise fall outside of the relevant temporal scope. By contrast, Andraous is silent as regards the key investment- and economically-related factors that Andraous acknowledges as relevant, including "economic and financial relations", "place of

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225 SoC, para. 142.
226 See, in particular, para. 159 below.
227 **Exhibit RL-021**, *Alberto Carrizosa Gelzis and others v. Republic of Colombia*, PCA Case No. 2018-56, Award, 7 May 2021, para. 196.
228 SoC, para. 144(viii) and (xiii).
229 **Exhibit RL-021**, *Alberto Carrizosa Gelzis and others v. Republic of Colombia*, PCA Case No. 2018-56, Award, 7 May 2021, para. 196.
230 SoC, para. 140.
231 SoC, para. 144.

profession/employment", "place of company registration", and "the investor's presentation as a national of a particular State".[232]

114. Bearing the foregoing in mind, the next section examines these key factors by reference to the facts and evidentiary record.

3.3.2 The key factors show that Andraous' dominant and effective nationality is not Lebanese

115. It is recalled that the burden is on Andraous to prove that his dominant and effective nationality is Lebanese.[233] It does not suffice for Andraous, as he has attempted,[234] to cast doubt on the fact that his Dutch nationality is his dominant and effective nationality.[235] Notwithstanding Andraous' approach, the key factors confirmed in the case law converge in one direction: Andraous' dominant and effective nationality is not Lebanese.

116. Andraous argues, *inter alia*, that, in terms of the dominant and effective nationality test, "the status of nationality of a third-party State (such as France) is irrelevant".[236] Accordingly, the parties are in agreement that Andraous' recently-obtained French nationality is irrelevant, since the purpose is to determine whether the relevant factors point to the predominance of the Lebanese nationality at the relevant points in time.

117. The following sections examine these key factors, namely Andraous' centre of economic and business interests (Section 3.3.2.1), his presentation as a Dutch national (Section 3.3.2.2), the voluntary act of naturalization (Section 3.3.2.3), and his habitual residence (Section 3.3.2.4), as well as the factors deemed of lesser weight in applying the dominant and effective nationality test (Section 3.3.2.5).

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232 SoC, para. 142.

233 See para. 66 above. See also **Exhibit RL-020**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para. 2.15 ("the Claimant has the burden to prove facts necessary to establish jurisdiction (as it positively asserts); and that the Respondent has the burden to prove that its positive objections to jurisdiction are well-founded"); **Exhibit RL-022**, *Marko Mihaljevic v. Republic of Croatia*, ICSID Case No. ARB/19/35, Award, 19 May 2023, p. 67 ("The Tribunal disagrees with the Claimant's submission insofar as it puts forth a general rule that where a claimant's nationality is in dispute, respondents always bear the burden of proving that the claimant does not have the requisite nationality.").

234 **Exhibit R-014**, Notes of meeting between Abdallah Andraous and Ministry of Foreign Affairs of the Kingdom of the Netherlands, 3 November 2022, paras. 87-88.

235 As the *Santamarta* tribunal made clear, the burden of proof is not discharged by a claimant seeking to prove that their dominant and effective nationality is not that of the respondent State; rather, the claimant has the burden of showing that their dominant and effective nationality is in fact that of the other State signatory to the investment treaty. **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 512.

236 SoC, para. 139.

3.3.2.1 Centre of economic and business interests

118. Andraous' Dutch nationality was instrumental to his business activities and the alleged investment at issue in this dispute, as he recognizes in the SoC:

> "The Claimant acquired Dutch nationality because of the investment, and not the other way around".[237]

119. At age 27, Andraous left Lebanon for Sint Maarten.[238] He worked at SunResorts (owner and operator of the Mullet Bay Resort and Casino) and states that he resided in Sint Maarten from 1984 to 1989.[239] From 1989, Andraous claims to have taken up residence in France together with his wife and children while continuing to commute regularly between France and the Dutch Caribbean due to work commitments keeping him centred in Sint Maarten.[240]

120. In 1991, in his application for Dutch nationality, Andraous stated that "he works on St Maarten" and "feels integrated into St Maarten's society" – so much so that he "does not see himself setting up outside the Netherlands Antilles in the future".[241]

237 SoC, para. 144(iii) (emphasis added).
238 **Exhibit R-014**, Notes of meeting between Abdallah Andraous and Ministry of Foreign Affairs of the Kingdom of the Netherlands, 3 November 2022, paras. 78 and 84.
239 **Exhibit R-014**, Notes of meeting between Abdallah Andraous and Ministry of Foreign Affairs of the Kingdom of the Netherlands, 3 November 2022, paras. 78 and 84.
240 Personal Statement, paras. 9-10.
241 **Exhibit R-010-DUTCH**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of Abdallah Andraous (highlighting added).

121. Between 2001 and 2006, Andraous allegedly conducted due diligence work for his long-standing employer at SunResorts, Ansary, which helped Ansary acquire BdC and Ennia in January 2006.[242]

122. Between 2005 and 2018 Andraous worked at PIBV and Ennia in various functions,[243] including, *inter alia*:[244]

(i) a member of PIBV's investment committee, which met *daily* to discuss market conditions and stock investments;

(ii) Managing Director of National Investment Bank, a subsidiary of BdC specialised in the syndication and management of large infrastructure loans;

(iii) a member of the credit committee of BdC;

(iv) exercising overall supervision of BdC in Curaçao and Aruba;

(v) overseeing ENNIA's operations in Aruba; and

(vi) supervising the administration of SunResorts in Sint Maarten.

123. Throughout the relevant time period, these numerous functions kept him "economically centered" in the Kingdom of the Netherlands.[245]

124. In May 2017, Andraous was appointed as Managing Director of a corporation in Willemstad, Curaçao, called RJJJL Management Services B.V.[246] The Curaçao Commercial Register confirms that Andraous – who is listed as having solely Dutch nationality – is the statutory director:[247]

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242 Personal Statement, para. 13.
243 SoC, para. 18.
244 Personal Statement, para. 15.
245 **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, paras. 597 and 598.
246 **Exhibit R-015**, Draft Act for RJJJL Management, 22 May 2017.
247 **Exhibit R-016**, Curaçao Commercial Register Excerpt regarding RJJJL Management Services B.V., 4 August 2020 (highlighting added).

125. An official extract from the Sint Maarten Commercial Register further reveals that, since 23 June 2008, Andraous has been a board member and secretary of the Foundation for Protection of Tourist Investments with its statutory seat in Sint Maarten. Andraous is, once again, listed as having (solely) Dutch nationality:[248]

126. By contrast to his numerous business functions and investments held in the Kingdom of the Netherlands from 1984 onwards, Andraous has not adduced any evidence of the existence of economic interests in Lebanon. Despite underscoring the importance of factors such as the "centre of his interests",[249] "economic and financial relations with the relevant State",[250] and "place of profession/employment"[251] as pertinent to determining a claimant's dominant and effective nationality, neither the SoC nor the Personal Statement contain a single example of such factors that would point to Lebanon.

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248 **Exhibit R-017**, Sint Maarten Commercial Register Excerpt regarding Foundation for Protection of Tourist Investments Sint Maarten, 20 February 2024 (highlighting added).
249 SoC, para. 141.
250 SoC, para. 142.
251 SoC, para. 142.

3.3.2.2 Presentation as a Dutch national instead of a Lebanese national

127. As of the moment of his naturalization in 2000, Andraous repeatedly presented himself as a Dutch national before the Dutch authorities, also in relation to his purported investment, as he himself admits.[252]

128. With regard to the Curaçao tax authorities, Andraous declared on multiple occasions – both before[253] and after[254] being allotted his shares in PIBV in 2011 – that he was a Dutch national, occasionally listing his Lebanese nationality as a "previous" nationality.[255]

129. Similarly, with regard to his directorship at Ennia, Andraous' disclosures to the Curaçao Commercial Register and the Sint Maarten Commercial Register uniformly specify that he is a Dutch national. No mention is ever made of his Lebanese nationality. One example, out of at least twelve other documents,[256] is set out below:

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252 SoC, para. 144(iii).

253 Namely, in 2006 and 2011 (before acquiring shares in PIBV). See **Exhibit R-018**, Central Bank of Curaçao and Sint Maarten Personal Questionnaire on Abdallah Andraous, February 2006, p. 2, and **Exhibit R-019**, Central Bank of Curaçao and Sint Maarten Personal Questionnaire on Abdallah Andraous, January 2011, p. 2.

254 **Exhibit R-020**, Curaçao Commercial Register Excerpt regarding Ennia Caribe Holding N.V., 23 May 2018.

255 See **Exhibit R-018**, Central Bank of Curaçao and Sint Maarten Personal Questionnaire on Abdallah Andraous, February 2006, p. 2; **Exhibit R-019**, Central Bank of Curaçao and Sint Maarten Personal Questionnaire on Abdallah Andraous, January 2011, p. 2.

256 **Exhibit R-021**, Curaçao Commercial Register Excerpt regarding EC Investments B.V., 18 May 2017 (highlighting added). See also e.g. **Exhibit R-022**, Curaçao Commercial Register Excerpt regarding Ennia Caribe Holding N.V., 9 July 2012; **Exhibit R-023-DUTCH**, Curaçao Commercial Register Excerpt regarding Ennia Caribe Schade N.V. intake number 10013, 15 April 2011; **Exhibit R-024-DUTCH**, Curaçao Commercial Register Excerpt regarding Resorts Caribe B.V., 24 July 2006; **Exhibit R-025-DUTCH**, Curaçao Commercial Register Excerpt regarding National Investment Bank N.V., 9 October 2007; **Exhibit R-026-DUTCH**, Curaçao Commercial Register Excerpt regarding Ennia Caribe Zorg N.V., 15 April 2011; **Exhibit R-017**, Sint Maarten Commercial Register Excerpt regarding Foundation for Protection of Tourist Investments Sint Maarten, 20 February 2024; **Exhibit R-027**, Curaçao Commercial Register Excerpt regarding Parman Caribbean Holdings B.V., 4 March 2024; **Exhibit R-028**, Curaçao Commercial Register Excerpt regarding Parman BDC Investments B.V., 4 March 2024; **Exhibit R-029**, Curaçao Commercial Register Excerpt regarding Parman International B.V., 4 March 2024, **Exhibit R-030-DUTCH**, Curaçao Commercial Register Excerpt regarding Ennia Caribe Leven N.V. Statement number 10012, 15 April 2011; **Exhibit R-031**, Curaçao Commercial Register Excerpt regarding Parman International B.V., 13 June 2019; **Exhibit R-032**, NIBanc Letter to Central Bank of Curaçao and Sint Maarten regarding Pending Information Re-Testing Integrity Directors, 5 June 2012.

130. On Ennia's internal payroll tax cards, Andraous is similarly mentioned exclusively as being Dutch, and as residing in Curaçao and Sint Maarten, from 2007 to 2018.[257] In a life insurance application for Treasure Holdings, Andraous again identified himself solely as Dutch.[258] Andraous also indicated in a pension form that his nationality is Dutch, as shown below.[259]

257 **Exhibit R-033-DUTCH**, Payroll Tax Cards of Abdallah Andraous between 2007 and 2020 and communications related to Pension Termination.

258 **Exhibit R-034-DUTCH**, Application for Treasure Holdings life insurance by Andraous, 25 June 2008.

259 **Exhibit R-035-DUTCH**, Ennia Caribe Leven N.V. Data sheet for personal details of pension entitled insured filled out by Abdallah Andraous, and internal emails regarding payments and amounts, 24 January 2019 (highlighting added).

131. This concerns the same pension that now forms part of this arbitration against the Kingdom of the Netherlands,[260] in which he must show that his dominant and effective nationality is Lebanese.[261]

132. Andraous likewise presented himself solely as Dutch in official correspondence with the CBCS. In fact, Andraous used his Dutch nationality to claim exemptions from some of the requirements pertaining to the assessment of the integrity and background of directors of financial institutions in the Dutch Caribbean.[262]

133. The Dutch authorities correspondingly identified Andraous solely by his Dutch nationality, and not by his Lebanese one. As such, Andraous actively and repeatedly presented himself as Dutch, not only for the purposes of his alleged 'investment', but also for his overall business activity in the Kingdom of the Netherlands.

3.3.2.3 Andraous' voluntary naturalization as a Dutch national

134. Turning now to the criterion pertaining to voluntary naturalization, Andraous applied for Dutch nationality as early as 1991. Nine years later, in 2000, he acquired his Dutch citizenship through a voluntary act of naturalization. This was 11 years before he was reportedly allotted shares in PIBV.[263]

135. At this juncture, the Kingdom of the Netherlands recalls that, in Andraous' own words, he "acquired Dutch nationality *because* of the investment, and not the other way around".[264] Akin to the position expressed by the claimants in the *Ballantine* case, Andraous' position in this arbitration is that the "sole reason" for his naturalization was tied to "the investment directly related to this proceeding".[265] Andraous cannot now claim that the Dutch nationality he allegedly acquired for the sake of that investment is not predominant with regard to that very same investment.

136. Moreover, Andraous did not just acquire the Dutch nationality for business reasons. In that regard, as the *Nottebohm* case invoked by Andraous makes

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260 SoC, para. 111. See also **Exhibit C-039**, Proof of pension dated 28 November 2018.
261 See paras. 4, 66 and 85 above.
262 **Exhibit R-032**, NIBanc Letter to Central Bank of Curaçao and Sint Maarten regarding Pending Information Re-Testing Integrity Directors, 5 June 2012: "For Mr. Abdallah Andraous, we point out that he is a Dutch citizen. Therefore, the requirements that you presented would apparently not apply to him."
263 NoA, para. 13.
264 SoC, para. 144(iii).
265 **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, paras. 583-584.

clear, "[n]aturalization is not a matter to be taken lightly."[266] Although the acquisition of Dutch nationality through naturalization does not have to automatically lead to fully "extinguishing one bond", i.e. the Lebanese one, "in favour of another", i.e. the Dutch one,[267] it is the rationale behind naturalization that matters in order to assess "the qualities that characterise those bonds in terms of strength and effectiveness".[268] Andraous' naturalization application shows that he requested Dutch nationality together with his wife and for both of his children (his third child was only born one year later), given his affinity with – and sense of belonging to – Sint Maarten and corresponding wish to settle there permanently.[269] His wife and all of his three children did in fact successfully naturalize – a fact omitted by Andraous in his SoC and Personal Statement.[270]

137. Furthermore, it is apparent from Andraous' naturalization documents that, at the time of his 1991 naturalization request, Andraous' parents were already residing in Sint Maarten.[271] His parents – [redacted] and [redacted] – had, in fact, applied for naturalization in the Kingdom of the Netherlands before Andraous and successfully naturalized as Dutch in December 1996, four years prior to Andraous himself.[272] Posts on social media and contemporaneous evidence similarly reveal that his sister [redacted] has been residing in Sint Maarten.[273]

138. Notably, Andraous, his wife, and his parents all expressly offered to renounce their Lebanese nationality in favour of the Dutch nationality in the naturalization process.[274]

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266 **Exhibit CLA-158**, *Nottebohm Case (Liechtenstein v. Guatemala)* (Merits) [1955] ICJ Rep 4, p. 24.

267 **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, para. 580.

268 **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, para. 580.

269 See para. 122 above.

270 **Exhibit R-010-DUTCH**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of Abdallah Andraous; **Exhibit R-011-DUTCH**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of [redacted]; **Exhibit R-036-DUTCH**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of [redacted] Andraous; **Exhibit R-037-DUTCH**, Sint Maarten Personal Records Database Extract regarding [redacted] Andraous; **Exhibit R-038-DUTCH**, Sint Maarten Personal Records Database Extract regarding [redacted] Andraous; **Exhibit R-039-DUTCH**, Sint Maarten Personal Records Database Extract regarding [redacted] and [redacted].

271 **Exhibit R-010-DUTCH**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of Abdallah Andraous, p. 4.

272 **Exhibit R-012**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of [redacted] and [redacted], pp. 1-3, 8.

273 **Exhibit R-040**, Abdallah Andraous email to [redacted] regarding cars, 20 October 2017; **Exhibit R-041**, [redacted] emails to Abdallah Andraous regarding the request for a building permit, 6 November 2014; **Exhibit R-042**, Compilation of social media posts.

274 **Exhibit R-010-DUTCH**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of Abdallah Andraous, p. 6; **Exhibit R-011-DUTCH**,

139. By all accounts, this goes beyond the acquisition of Dutch nationality as "a simple practicality to travel to and from Curaçao without a visa".[275] Based on Andraous' own narrative, his naturalization is inherently linked to his alleged 'investment', compounded by ample personal reasons alongside the commercial and economic aspects.

3.3.2.4 Habitual residence in the Kingdom of the Netherlands

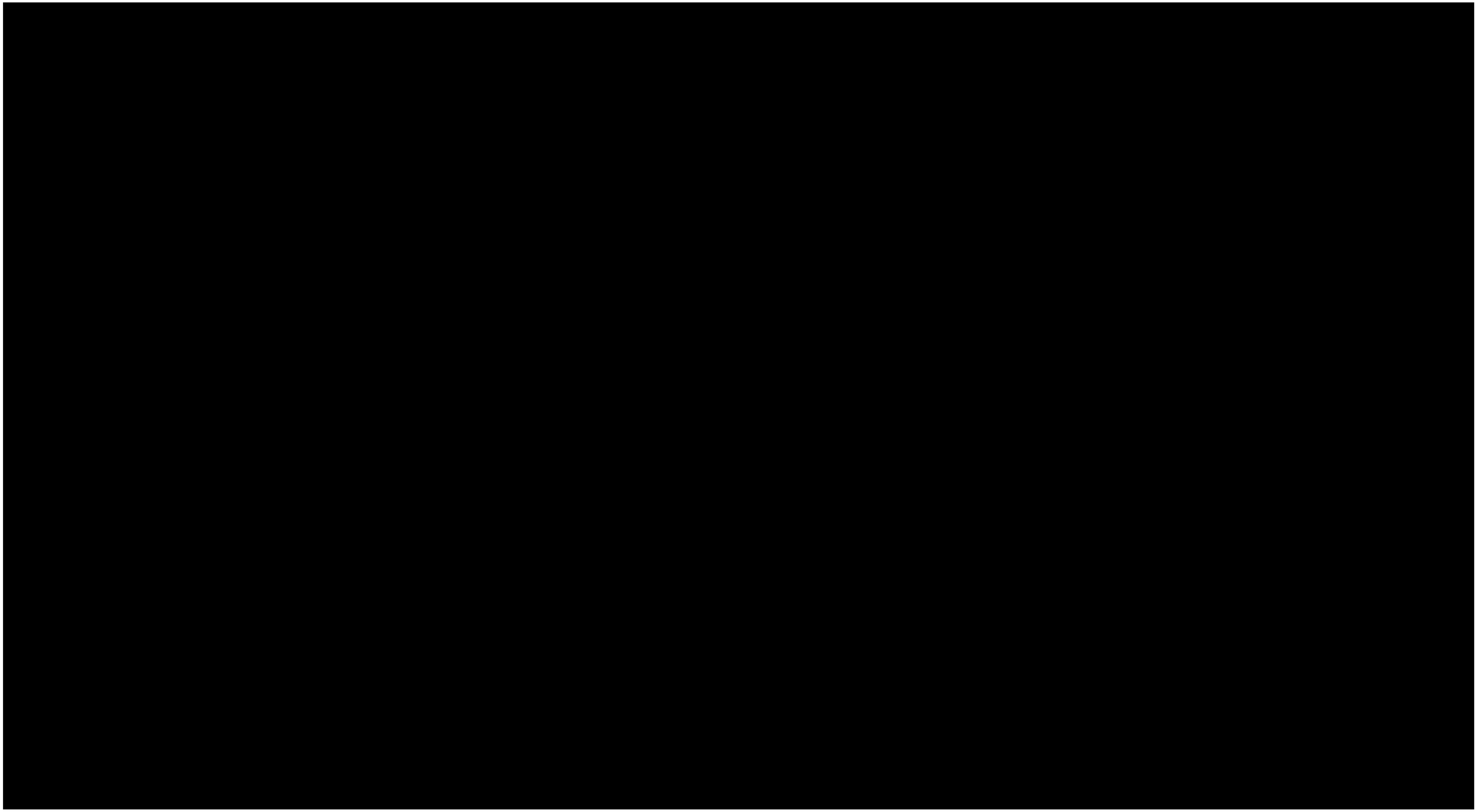
140. Andraous has continuously declared addresses and regularly claimed to reside in the Kingdom of the Netherlands after 1989. Documentation demonstrates his declared habitual residence at ten different addresses in the Kingdom of the Netherlands over the years.

141. For example, in 2017, just before the facts giving rise to the dispute, no less than five residential properties within the Kingdom of the Netherlands were identified, as illustrated in the next figure.

Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of [redacted], p. 6; **Exhibit R-012**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of [redacted] and [redacted], pp. 3 and 8.

275 SoC, para. 144(iii).

Figure 2: Andraous' declared habitual residences in the Kingdom of the Netherlands over the years



142. The history of Andraous' residence in the Kingdom of the Netherlands can be summarized as follows.

143. In the 1990s, two Mullet Bay addresses in Sint Maarten are mentioned in Andraous' naturalization papers.[276] His son [redacted]'s naturalization papers dated 1999 list both his parents as residing in Sint Maarten as well.[277] Further, as of 2005, a Maho Village address in Sint Maarten regularly appears in the documentation.[278]

144. In 2006 and 2011, Andraous repeatedly declared apartments in Sint Maarten as his place of residence.[279] These declarations were made to the CBCS in the context of Andraous' approval as a director of various Ennia subsidiaries.

145. On 26 June 2008, Andraous purchased an apartment in the Blue Marine project to be realised in Sint Maarten – the advance for which he financed with a mortgage from Ennia Leven.[280] In the same month, in a life insurance application for his entity Treasure Holdings, Andraous this time indicated his address as 'Blue Bay Resort Nr 5' in Curaçao.[281]

146. On 24 December 2009, another mortgage was taken out of one of Andraous' entities, Treasure Holdings, for Blue Marine Condo Unit Apartment D6.[282] This same address appears as Andraous' address in the Curaçao Commercial Register on multiple occasions.[283]

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276 **Exhibit R-010-DUTCH**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of Abdallah Andraous, pp. 1 and 3.

277 **Exhibit R-036-DUTCH**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of [redacted] Andraous, p. 3.

278 **Exhibit R-024-DUTCH**, Curaçao Commercial Register Excerpt regarding Resorts Caribe B.V., 24 July 2006; **Exhibit R-043**, Curaçao Commercial Register Excerpt regarding Parman International B.V., 19 December 2005; **Exhibit R-025-DUTCH**, Curaçao Commercial Register Excerpt regarding National Investment Bank N.V., 9 October 2007.

279 See personal questionnaires from the CBCS completed by Andraous in 2006 and 2011 to become director of the National Investment Bank (NA) N.V. and of Ennia Caribe Zorg N.V., respectively, in **Exhibit R-018**, Central Bank of Curaçao and Sint Maarten Personal Questionnaire on Abdallah Andraous, February 2006, p. 2; **Exhibit R-019**, Central Bank of Curaçao and Sint Maarten Personal Questionnaire on Abdallah Andraous, January 2011, p. 2.

280 **Exhibit R-044**, Ennia Caribe Leven N.V. confirmation of debt signed by Abdallah Andraous regarding mortgage, 26 June 2008.

281 **Exhibit R-034-DUTCH**, Application for Treasure Holdings life insurance by Andraous, 25 June 2008.

282 **Exhibit R-045-DUTCH**, Mortgage Contract for Blue Marine Condo Unit D6, 30 December 2009.

283 **Exhibit R-030-DUTCH**, Curaçao Commercial Register Excerpt regarding Ennia Caribe Leven N.V. Statement number 10012, 15 April 2011; **Exhibit R-023-DUTCH**, Curaçao Commercial Register Excerpt regarding Ennia Caribe Schade N.V. intake number 10013, 15 April 2011; **Exhibit R-026-DUTCH**, Curaçao Commercial Register Excerpt regarding Ennia Car be Zorg N.V., 15 April 2011.

147. Andraous' Maho Village address in Sint Maarten appears as his domicile in Citi Bank's records in Texas in 2014:[284]

148. In an official declaration dated 23 November 2017 in his capacity as statutory director of Ennia, Andraous declared that he was "residing at Curaçao Ocean Resort 6-1".[285]

149. Further, Andraous' disclosures to the Curaçao Commercial Register with regard to his directorship at Ennia over the years refer to multiple residential addresses, all located in the Kingdom of the Netherlands.[286] These include Ocean Resort Apt 6.1, Curaçao; Bluemarine Apt (or Condo) D6, Rhine Road, Maho Bay, Sint Maarten; and Maho Village, Villa 8, Sint Maarten. In parallel, the "Towers at Mullet Bay" residence is mentioned multiple times as Andraous' registered domicile on Ennia's internal payroll tax cards.[287]

150. Correspondence with Ansary in October 2017 also reveals that he owned property in Sint Maarten (for which he requested "an additional compensation for my services to the Group during the past years" when it was destroyed by hurricane Irma in 2017):[288]

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284 **Exhibit R-046**, Transfer from Abdallah Andraous' account at Citi Bank to beneficiary abroad, 27 March 2014.

285 **Exhibit R-047-DUTCH**, Statements of Abdallah Andraous and [redacted] of 23 November 2017 regarding Ennia Car be Holding N.V. Resolutions of the Extraordinary General Meeting of Shareholders and Property Shareholders, 9 February 2011.

286 See para. 131 and corresponding fn. 252 above.

287 See para. 132 above. See also **Exhibit R-033-DUTCH**, Payroll Tax Cards of Abdallah Andraous between 2007 and 2020 and communications related to Pension Termination.

288 **Exhibit R-048-FRENCH**, Documents regarding Abdallah Andraous' request for additional financial support, 6 October 2017, p. 3 (unofficial translation).

151. The same exhibit discloses, on the very first page, yet another residential address of Andraous: The Cliff at Cupecoy in Sint Maarten.[289]

152. In 2018, Andraous took out construction insurance – also from Ennia (this time from Ennia Schade) – for a villa lot in Sint Maarten, for construction work carried out from 26 April 2018 to 31 December 2018.[290] A letter from Andraous' lawyers in Curaçao to Ennia dated 9 September 2020 presents him as "residing in Sint Maarten".[291] Confirming his status as a local resident, Andraous was moreover the possessor of a Sint Maarten ID card, valid between 2016 and 2021:[292]

289 **Exhibit R-048-FRENCH**, Documents regarding Abdallah Andraous' request for additional financial support, 6 October 2017, p. 1.

290 **Exhibit R-049-DUTCH**, Ennia Caribe Schade N.V. Excerpt regarding construction insurance of Abdallah Andraous for Blue Marina Villa lot A2, 20 February 2019.

291 **Exhibit R-050**, Murray Attorneys at Law Letter to Ennia Caribe Leven N.V., 9 September 2020.

292 **Exhibit R-051**, Sint Maarten National Identity Card of Abdallah Andraous, issued 21 October 2016.

153. Andraous' claims to have only lived in Sint Maarten from 1984 to 1989 do not correspond with the facts above and are therefore misleading.[293]

154. Finally, even if one were to disregard the foregoing, and presume Andraous' habitual residence has solely been in France since 1989 (*quod non*), the residence criterion would be of no support to his assertion that his dominant and effective nationality is Lebanese. As formulated by the tribunal in *Santamarta*, where the issue was whether the claimant – who resided in the United States – was Venezuelan or Spanish, "the Claimant's place of residence cannot be used to determine whether he is predominantly Spanish or Venezuelan, as at the time relevant to this determination, he did not reside in either of these countries."[294]

155. In sum, it appears that Andraous habitually resided in the Kingdom of the Netherlands throughout the relevant period, or otherwise in France, perhaps alternating between the two, but certainly not in Lebanon.

3.3.2.5 Factors deemed irrelevant or of lesser weight

156. For the sake of completeness, the factors that have been deemed in the case law to be of lesser relevance or highly subjective – and therefore to carry less weight in determining dominant and effective nationality – will be examined in the present section. Even these factors, on which Andraous selectively

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293 SoC, para. 14; Personal Statement, paras. 8-9.

294 **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 503 (unofficial translation).

relies,[295] do not point to Andraous' dominant and effective nationality being Lebanese.

157. The fact that Andraous lived in Lebanon from his birth until 1984[296] and is still a Lebanese citizen,[297] or that he studied and married in Lebanon or has cultural ties to Lebanon,[298] is immaterial to determining his dominant nationality in the relevant period, as these factors put emphasis on a period of time "well before the [m]easures [in question] and the commencement of the arbitration", and "having been born and raised in a certain country does not necessarily imply that this is the dominant nationality".[299] This is all the more true in a case of voluntary naturalization where the claimant acquires a second nationality that is key to their economic and business interests and how they present themselves.[300]

158. What is more, Andraous testifies that he speaks English on a daily basis and that he communicated in English on Sint Maarten.[301] Accordingly, Andraous admits to speaking one of the official languages of the Kingdom of the Netherlands (English is an official language of both Curaçao and Sint Maarten[302]). His son [redacted], apart from his knowledge of English, also speaks "good Dutch", as his naturalization papers reveal.[303]

159. In general, Andraous' presentation of the facts is manifestly selective. He emphasizes his social security insurance in France (not even Lebanon), but makes no mention of his life insurance in the Kingdom of the Netherlands.[304] As described in Section 3.3.2.3 above, Andraous has also omitted to mention that close family members (his sister [redacted] and his parents) have resided or are currently residing in the Kingdom of the Netherlands, and notably that his wife, parents, and all children have Dutch citizenship:[305]

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295 See para. 115 above.
296 Personal Statement, para. 7.
297 Personal Statement, para. 4.
298 Personal Statement, paras. 5-7.
299 **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 504.
300 **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, para. 598.
301 SoC, para. 144(v).
302 See Section 2.1 above.
303 **Exhibit R-036-DUTCH**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of [redacted] Andraous, p. 5.
304 Personal Statement, para. 17(4).
305 **Exhibit R-052**, Revocable Settlor Directed Settlement of [redacted] of 2017, including [redacted]' Dutch passport, issued [redacted]; **Exhibit R-010-DUTCH**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of Abdallah Andraous; **Exhibit R-011-DUTCH**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of [redacted] Abdallah Andraous-Njeim; **Exhibit R-012**, Dutch Ministry of Justice Immigration and Naturalisation Service,

160. Moreover, Andraous' parents naturalized as early as 1996 and have in fact both continuously lived in Sint Maarten until their passing.[306]

161. Faced with these facts, Andraous' remarks that "none of his two married children were married in the Netherlands or under Dutch law"[307] or that his "extended family (three uncles, four aunts, ten first degree cousins) is all in Lebanon" are immaterial and, moreover, misleading.[308]

162. His statement that "since the [t]akeover in 2018, Claimant visited Curaçao only twice for a couple of days (in 2019 and 2020) for the purpose of court hearings" is another example of his incomplete presentation of facts.[309] Furthermore, the contention that he only travelled to the Kingdom of the Netherlands for business purposes does not hold water. Posts on social media that are publicly available depict Andraous, family, and entourage as spending significant time, organizing gatherings, or residing in the Kingdom

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Nationality and Naturalisation documents of [redacted] and [redacted]; **Exhibit R-036-DUTCH**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of [redacted] Andraous; **Exhibit R-039-DUTCH**, Sint Maarten Personal Records Database Extract regarding [redacted] and [redacted]; **Exhibit R-037-DUTCH**, Sint Maarten Personal Records Database Extract regarding [redacted] Andraous; **Exhibit R-038-DUTCH**, Sint Maarten Personal Records Database Extract regarding [redacted] Andraous.

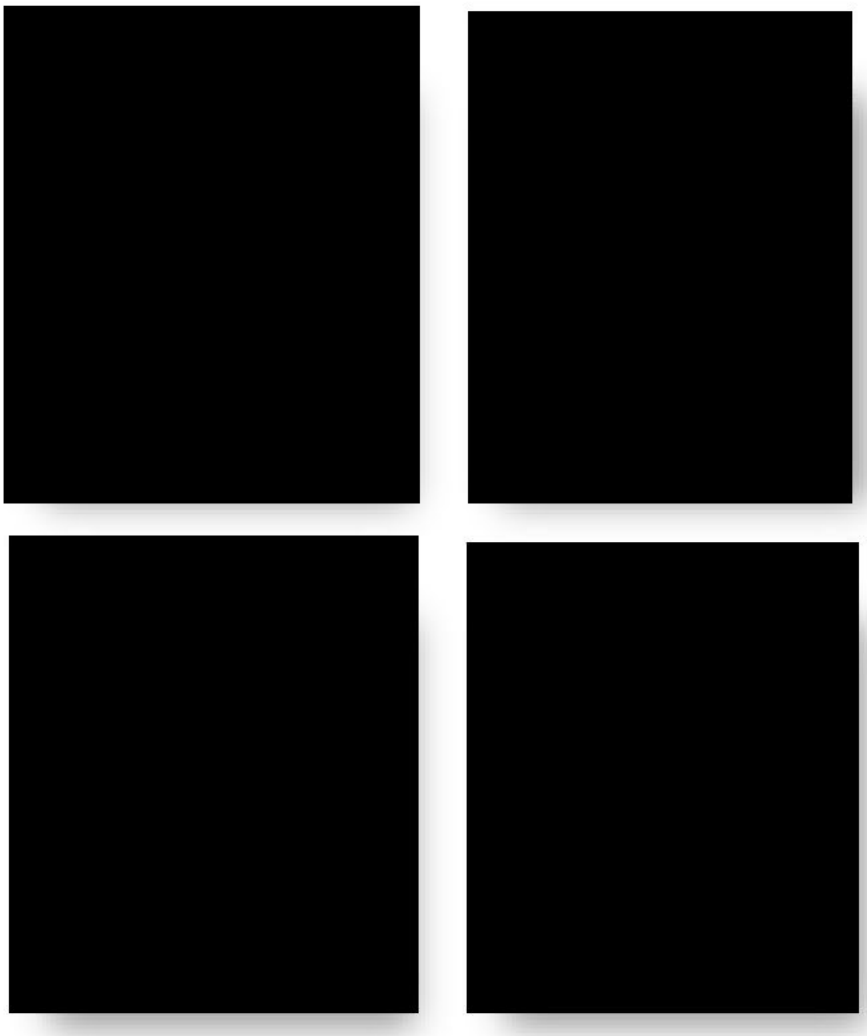
306 **Exhibit R-039-DUTCH**, Sint Maarten Personal Records Database Extract regarding [redacted] and [redacted]; **Exhibit R-012**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of [redacted] and [redacted]

307 SoC, para. 144(viii).

308 SoC, para. 144(vi).

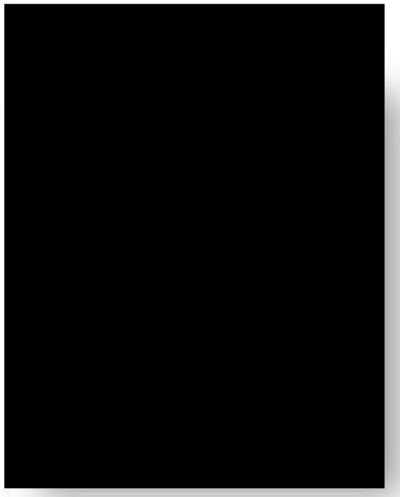
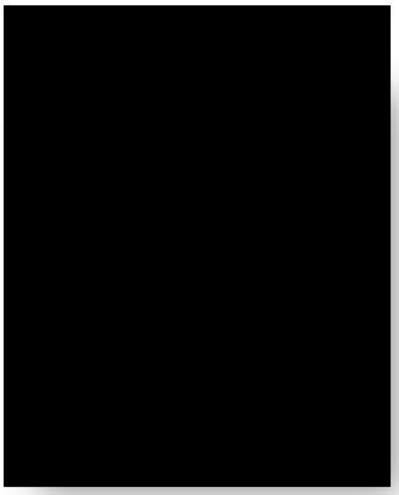
309 SoC, para. 144(xii).1

of the Netherlands both before and well after 2018.[310] These include, *inter alia*, attending religious and social events, and celebrating Christmas, Halloween, and family birthdays, in the Kingdom of the Netherlands, enjoying the 'island life' on Sint Maarten, preparing for hurricane Irma (which hit Sint Maarten in September 2017), and more:[311]



310 **Exhibit R-042**, Compilation of social media posts.

311 **Exhibit R-042**, Compilation of social media posts, p. 4 (post of 26 December 2020) (identifier added), p. 2 (post of 28 March 2021) (identifier added), p. 8 (post of 3 November 2019) (identifier added), p. 5 (post of 1 November 2020) (identifier added), p. 16 (post of 5 September 2017), and p. 15 (post of 28 January 2019).

163. Taken together, the eventuality that Andraous may maintain certain subjective personal and cultural connections to Lebanon pales in comparison to the fact that:

(i) the centre of Andraous' economic interests is in Curaçao and Sint Maarten, and thereby in the Kingdom of the Netherlands, not Lebanon;

(ii) Andraous consistently presented himself as Dutch in his personal and business dealings, including in his communications with authorities in the Kingdom of the Netherlands;

(iii) Andraous voluntarily naturalized as Dutch "because of the investment" that forms the core of the dispute in these proceedings;

(iv) additionally, Andraous voluntarily naturalized out of attachment to the Kingdom of the Netherlands and sought naturalization for his wife and children, expressing his intention to reside in the Kingdom of the Netherlands for the foreseeable future with the entire family, and alongside his parents who were also Dutch citizens and residing there;

(v) Andraous offered to renounce his Lebanese nationality so as to obtain Dutch nationality; and

(vi) Andraous habitually resided in the Kingdom of the Netherlands, and in any event not in Lebanon.

164. Other, subjective factors linked to Lebanon fall outside of the relevant temporal scope and are deemed of lesser weight, and thus fail, in any event,

to undermine his effective and dominant connections to the Kingdom of the Netherlands at the relevant moments in time.[312]

165. Andraous' ties to the Kingdom of the Netherlands outweigh any ties with Lebanon for the purposes of determining his dominant and effective nationality in the context of the present dispute. Andraous is therefore not a qualifying 'investor' for the purposes of the BIT.

4 ANDRAOUS' ALLEGED SHAREHOLDING IN ENNIA DOES NOT QUALIFY FOR BIT PROTECTION

166. Andraous' alleged shareholding in Ennia does not qualify for protection under the BIT.

167. First, Andraous has not 'made' an 'investment' within the meaning of the BIT (Section 4.1). The allotment of a 1% shareholding in PIBV, allegedly for services provided almost a decade prior, does not amount to an act of investing, let alone to making a contribution aimed at attaining those shares, as required by the BIT.

168. Second, Andraous has not demonstrated his ownership of shares in PIBV at the relevant points in time, namely when the events he complains of allegedly occurred. On the contrary: the only evidence submitted by Andraous shows that he no longer owns those shares (Section 4.2).

169. Third, the Kingdom of the Netherlands cannot be deemed to have consented to arbitrate with regard to a purported 'investment' as remote from the allegedly affected companies as Andraous' unproven 1% indirect shareholding in Ennia. Andraous' alleged 'investment' is too remote to qualify for BIT protection (Section 4.3).

4.1 Andraous has not 'made' a qualifying 'investment'

170. Andraous does not qualify as an 'investor' with an 'investment' under the BIT. In his own words, he merely "got allotted shares [in PIBV] for his past and continuing services" in 2011.[313] That allotment does not satisfy the provisions of the BIT requiring the 'making' of an 'investment'.

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312 See e.g. **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 515 ("It is undoubtedly clear from the Plaintiff's statement that he has close and genuine ties with Spain, however, it is not apparent either from his testimony, or from the record, that these links are detrimental to his ties with Venezuela") (unofficial translation).

313 NoA, para. 13.

171. As recalled in Chapter 2, Andraous allegedly prepared the due diligence work for the negotiations with BdC and Ennia upon Ansary's request in the period 2001 to 2006, by which time he was "considered to work for Parman [PIBV] and its new subsidiaries BdC and ENNIA".[314] Andraous further alleges that he was "not paid for any of the negotiations and due diligence work" for PIBV, but was instead promised to be paid later in shares in the company.[315] He was ultimately "given/transferred 25,000 Class A shares" for his "work for the company" provided almost a decade prior.[316] However, Andraous fails to furnish any evidence of such promise between himself and Ansary. This basic premise of Andraous' case remains unsubstantiated.

172. It follows from the terms of the BIT that the 'making' of an 'investment' is required (Section 4.1.1). The case law confirms the requirement of an 'act of investing' entailing a contribution aimed at the 'making' of an 'investment', which Andraous' allotment of shares does not fulfil (Section 4.1.2).

4.1.1 The terms of the BIT require an act of investing

173. The provisions of the BIT, which have to be interpreted in accordance with Article 31 VCLT, require an 'investment' to have been 'made'. Moreover, the BIT protects 'investments' 'by' the 'investors'.

174. First, Article 1(b) BIT defines 'investor' as a national of one Contracting Party who has "*made* an investment" in the territory of the other Contracting Party (emphasis added). Similar formulations are included in other provisions of the BIT. Article 8 BIT prescribes that the BIT shall "apply to investments, which have been *made* before that date, in accordance with the laws and regulations as applicable in the territory of the Contracting Party concerned at the time when the investments were made."[317] Article 9(2)(a) BIT refers to "[t]he competent court of the Contracting Party in the territory of which the investment has been *made*".[318] Article 12(3) BIT covers "investments *made* before the date of the termination of the present Agreement".[319]

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314 Personal Statement, para. 14.
315 Personal Statement, para. 14.
316 Personal Statement, para. 14.
317 **Exhibit CLA-001**, Agreement on the Encouragement and Reciprocal Protection of Investments between the Lebanese Republic and the Kingdom of the Netherlands (signed on 2 May 2002, entered into force on 1 March 2004), Article 8 (emphasis added).
318 **Exhibit CLA-001**, Agreement on the Encouragement and Reciprocal Protection of Investments between the Lebanese Republic and the Kingdom of the Netherlands (signed on 2 May 2002, entered into force on 1 March 2004), Article 9(2)(a) (emphasis added).
319 **Exhibit CLA-001**, Agreement on the Encouragement and Reciprocal Protection of Investments between the Lebanese Republic and the Kingdom of the Netherlands (signed on 2 May 2002, entered into force on 1 March 2004), Article 12(3) (emphasis added).

175. The ordinary meaning of 'made' requires that an 'act of investing' has to have taken place. As will be further discussed in Section 4.1.2 below, "the verb 'made' implies some action in bringing about the investment".[320]

176. Second, the object and purpose of the BIT, as expressed in its preamble, likewise confirms this interpretation. The preamble specifies that the BIT was concluded with a desire by the Contracting Parties to "strengthen their traditional ties of friendship and to extend and intensify the economic relations between them, particularly with respect to investments *by* the investors of one Contracting Party in the territory of the other Contracting Party".[321] The term 'by' has been interpreted to signify that the investor is the actor and entails an active role for that investor.[322]

177. In line with the general rule of treaty interpretation contained in Article 31 VCLT discussed in Section 3.1 above, a treaty is to 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".[323] The ordinary meaning of 'made' requires an 'act of investing' to have taken place. The object and purpose of the BIT further supports this interpretation. Article 1(b) BIT thus requires an 'act of investing'.

4.1.2 Andraous' allotment of shares does not satisfy the requirement of an act of investing entailing a contribution aimed at the 'making' of the 'investment'

178. Tribunals have confirmed that where the investment treaty contains a provision that the 'investment' must have been 'made', an action of investing is required.[324] Such an act of investing inherently requires "a contribution that extends over a certain period of time and that involves some risk".[325] Notably,

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320 **Exhibit RL-046**, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, para. 222.

321 **Exhibit CLA-001**, Agreement on the Encouragement and Reciprocal Protection of Investments between the Lebanese Republic and the Kingdom of the Netherlands (signed on 2 May 2002, entered into force on 1 March 2004), Preamble (emphasis added).

322 **Exhibit RL-046**, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, para. 228.

323 **Exhibit CLA-054**, Vienna Convention on the Law of Treaties, Article 31(1).

324 **Exhibit RL-046**, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, para. 222; **Exhibit RL-047**, *Komaksavia Airport Invest Ltd. v. The Republic of Moldova*, SCC Case 2020/074, Final Award, 3 August 2022, paras. 152-155; **Exhibit RL-048-SPANISH**, *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, paras. 815 and 816; **Exhibit RL-049**, *Alapli Elektrik BV v. Republic of Turkey*, ICSID Case No. ARB/08/13, Award, 16 July 2012, paras. 358-360.

325 **Exhibit RL-050**, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. 2007-07-AA280, Award, 26 November 2009, para. 207.

tribunals have endorsed this view "irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings".[326]

179. In *SCB v. Tanzania*, for instance, the tribunal interpreted the reference to "investments made" in the Tanzania-UK BIT as requiring "some action in bringing about the investment".[327] The tribunal noted that the Tanzania-UK BIT – like the present BIT – repeatedly used the term "made" when referring to investors and their investments,[328] such that, "[f]or the Tribunal, the text of the [Tanzania-UK] BIT reveals that the treaty protects investments "made" by an investor in some active way".[329]

180. This was also supported by reference to the object and purpose of the Tanzania-UK BIT as reflected in its preamble, which set out the contracting parties' focus on "increasing 'investment by nationals and companies of one State in the territory of the other State'", whereby the term 'by' "implies an active role of some kind for that company".[330] Similarly, as set out above, the preamble of the present BIT highlights the economic relations between the parties, "particularly with respect to investments *by* the investors of one Contracting Party in the territory of the other Contracting Party".[331]

181. The *SCB* tribunal held:

> "To benefit from Article 8(1)'s arbitration provision, a claimant must demonstrate that the investment was made at the claimant's direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner. […] [F]or an investment to be 'of' an investor […] some activity of investing is needed".[332]

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326 **Exhibit RL-050**, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. 2007-07-AA280, Award, 26 November 2009, para. 207.

327 **Exhibit RL-046**, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, para. 222.

328 **Exhibit RL-046**, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, paras. 222-224.

329 **Exhibit RL-046**, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, para. 225.

330 **Exhibit RL-046**, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, para. 228. For similar reasoning, see e.g. **Exhibit RL-047**, *Komaksavia Airport Invest Ltd. v. The Republic of Moldova*, SCC Case 2020/074, Final Award, 3 August 2022, paras. 152 and 153*;* **Exhibit RL-049**, *Alapli Elektrik BV v. Republic of Turkey*, ICSID Case No. ARB/08/13, Award, 16 July 2012, paras. 358-360.

331 **Exhibit CLA-001**, Agreement on the Encouragement and Reciprocal Protection of Investments between the Lebanese Republic and the Kingdom of the Netherlands (signed on 2 May 2002, entered into force on 1 March 2004), Preamble (emphasis added).

332 **Exhibit RL-046**, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, paras. 230-232.

182. Since there was no action by SCB that could be considered *a contribution directed at acquiring the shares in question*, nor any evidence that showed that the investment had been made at the direction of SCB as an investor, the tribunal found that the claimant had "been unable to demonstrate its active participation in the investing process".[333]

183. The requirement of an "act of 'investing'" was also recently upheld by the tribunal in *Komaksavia v. Moldova*,[334] in the sense of a lack of an act of investing by the claimant directed at acquiring the shares in question:

> "[There must be] proof that the putative investor itself actually engaged in the activity of investing […]. All that has been shown is that it received shares in Avia Invest. But as the *Quiborax* tribunal found, a distinction must be made between the objects (or 'legal materialization') of an investment, such as shares or title to property, and the action of investing, which requires some contribution of money or assets."[335]

184. In a similar fashion to the *SCB* tribunal, the *Komaksavia* tribunal endorsed that "inherent in the act of 'investing' is an objective element: a requirement of a positive act that involves some sort of contribution to acquire the asset or enhance its value, coupled with an expectation or desire that the asset will produce a return over a period of time, with the possibility or risk that it may not do so".[336] The tribunal concluded that the claimant had "made no contribution of its own to acquire the shares" in question, and consequently faced no actual risk of loss of an 'investment'.[337]

185. In his SoC, Andraous argues that "'once […] equity in a company is acquired, [an investor need not] make further investments or be particularly active in the management of the investment' in order to qualify for protection",[338] and that the term 'made' does not require the claimant to have an ongoing "active role in the investment".[339] This argument misses the point. The BIT does not require an active role in managing the investment once the investment has

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333 **Exhibit RL-046**, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, para. 264 (emphasis added).
334 **Exhibit RL-047**, *Komaksavia Airport Invest Ltd. v. The Republic of Moldova*, SCC Case 2020/074, Final Award, 3 August 2022, para. 155.
335 **Exhibit RL-047**, *Komaksavia Airport Invest Ltd. v. The Republic of Moldova*, SCC Case 2020/074, Final Award, 3 August 2022, paras. 175-177.
336 **Exhibit RL-047**, *Komaksavia Airport Invest Ltd. v. The Republic of Moldova*, SCC Case 2020/074, Final Award, 3 August 2022, para. 155.
337 **Exhibit RL-047**, *Komaksavia Airport Invest Ltd. v. The Republic of Moldova*, SCC Case 2020/074, Final Award, 3 August 2022, paras. 175-177.
338 SoC, para. 110, fn. 301 (emphasis in the original).
339 SoC, para. 117.

already been made, but rather an act of investing at the outset, at the time of the 'making' of the 'investment'.

186. Andraous' reliance, for instance, on *Flemingo v. Poland* in support of the statement that "the reinvestment of profits or the later acquisition of shares in a pre-existing investment in the host State both qualify as covered investments",[340] is thus misguided. The *Flemingo* tribunal agreed with the reasoning of the aforementioned *SCB* tribunal in requiring that an investment must be 'made' by, and not simply held by, an investor.[341] The issue is not whether the reinvestment of profits or later acquisition of shares may qualify, but rather that the investment treaty requires any such investment to have been 'made' in the first place, i.e. through an act of investing.

187. Likewise, Andraous' reliance on cases like *Clorox v. Venezuela* to argue that cash contributions are not required as long as there is some transfer of value to the host State,[342] as well as other cases regarding claimants who made an active contribution of knowledge or 'sweat equity', is also misplaced.[343] The question is not whether 'sweat equity' or other non-monetary forms of contribution can constitute the 'making' of the investment, but rather whether Andraous has demonstrated that he has made any contribution aimed at acquiring the investment, namely the shares in PIBV.

188. It is notable that in the present case, Andraous was merely "allotted" the shares allegedly based on an unsubstantiated promise by Ansary for services rendered many years prior.[344] Andraous furnished no evidence that the alleged work in question was provided as contribution aimed at ultimately obtaining the shares in PIBV that he eventually received. It is worth noting that such *ad hoc* arrangements between Andraous and Ansary were not unusual. As mentioned in Section 3.3.2 above, in 2017, for instance, Andraous requested "an additional compensation *for my services to the Group* during the past years" in order to purchase a property.[345] Such *ex post facto* dealings do not – and cannot – constitute the 'making' of a qualifying 'investment' as required by the BIT.

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340 SoC, para. 110.

341 **Exhibit CLA-073**, *Flemingo v. Poland* (Award, 12 August 2016) UNCITRAL, para. 323.

342 SoC, para. 118.

343 **Exhibit CLA-097**, *Mason v. Korea* (Decision on Respondent's Preliminary Objections, 22 December 2019) PCA Case No. 2018-55, UNCITRAL, para. 212; **Exhibit CLA-096**, *A11Y v. Czech Republic* (Award, 29 June 2018) ICSID Case No. UNCT/15/1, para. 40; **Exhibit CLA-091**, *Sistem Mühendislik v. Kyrgyzstan* (Decision on Jurisdiction, 13 September 2007) ICSID Case No. ARB(AF)/06/1, para. 80.

344 SoC, para. 19. See also NoA, para. 13.

345 **Exhibit R-048-FRENCH**, Documents regarding Abdallah Andraous' request for additional financial support, 6 October 2017 (unofficial translation; emphasis added).

189. Moreover, those services were rendered in the context of an employment relationship between Andraous and Ansary.[346] As also set out in Chapter 5 below, engaging in work in the context of an employment relationship in order to obtain a benefit, is not the same as providing a contribution directed at 'making' an 'investment'. A conclusion to the contrary would be tantamount to holding that a national of one Contracting Party taking up employment at a company constituted under the laws of another Contracting Party may qualify as the making of an 'investment' within the meaning of the BIT. Such a reading would render every expatriate employee an investor in the State where they work under the applicable investment treaties.

190. Andraous furthermore argues that he received the shares in exchange for having allegedly contributed personal "goodwill and know-how", which "are likewise listed as a protected *investment* under Article 1(a)(iv) of the BIT".[347] This argument conflates the notion of contribution with 'investment'; on Andraous' own account, Article 1(a)(iv) BIT only deals with the latter. Moreover, it is based on an erroneous understanding of the terms 'goodwill' and 'know-how' as employed in that provision. Article 1(a)(iv) BIT deals with a particular category of 'investments' consisting of "*rights* in the field of intellectual property, technical processes, goodwill and know-how".[348] These rights refer to specific and highly complex intangible assets with measurable economic benefits. In that context, 'goodwill' refers to the value created by the sale or purchase of a business for an amount higher than the sum of the net fair value of all of the assets purchased in the acquisition and the liabilities assumed in the process.[349] 'Know-how' refers to a type of commercial confidential information that is primarily characterized by its technical nature.[350] Meanwhile, Andraous' alleged "personal 'goodwill' and know-how'"[351] in the sense of general business acumen and services provided to companies fall well outside the scope of the rights mentioned as 'investments' in Article 1(a)(iv) BIT.

191. Andraous thus cannot be deemed to have 'made' an 'investment' within the meaning of the BIT: there was no act of investing in relation to the shares that eventually "got allotted [to him] for his past and continuing services"[352]

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346 Personal Statement, para. 14.
347 SoC, para. 109 (emphasis added).
348 **Exhibit CLA-001**, Agreement on the Encouragement and Reciprocal Protection of Investments between the Lebanese Republic and the Kingdom of the Netherlands (signed on 2 May 2002, entered into force on 1 March 2004), Article 1(a)(iv) (emphasis added).
349 **Exhibit RL-051**, Investopedia, Definition of 'Goodwill', 2024.
350 **Exhibit RL-052**, Thomson Reuters Practical Law, 'Overview of know-how and technical assistance', 2024.
351 SoC, para. 109.
352 NoA, para. 13.

in the context of his employment relationship with Ansary, let alone a contribution aimed at obtaining those specific shares. In fact, as detailed in Section 4.2 below, Andraous' case fails on yet another count: he has not even proven his ownership of the shares at the relevant moments in time.

4.2 Andraous has not proven his ownership of shares in PIBV

192. Andraous has failed to adduce evidence of his ownership of the shares in PIBV. In fact, the evidence that Andraous has provided shows the opposite, namely that he transferred ownership over the shares to a separate legal entity long before the events of which he complains occurred (2018 onwards) and the initiation of this arbitration (7 February 2023).

193. On 1 December 2015, Andraous sold and transferred his shares in PIBV to RJJJL Private Foundation:[353]

194. This transfer of ownership of the shares allegedly constituting Andraous' investment remains unmentioned and unexplained throughout the SoC and the Personal Statement. Based on his own evidence, Andraous does not hold an 'investment' in Ennia.

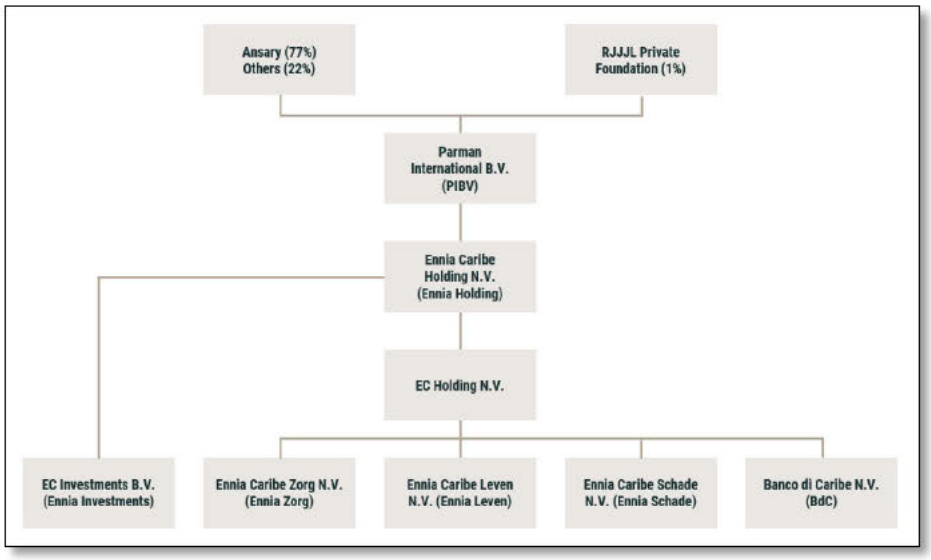
4.3 Andraous' alleged 'investment' is too remote to qualify for BIT protection

195. Even assuming that Andraous holds shares in PIBV (*quod non*), Andraous argues that he holds an (otherwise unproven) 1% shareholding in an entity (PIBV), that holds shares in another entity (Ennia Holding), which then directly or indirectly holds the companies that, in turn, hold the relevant business and assets – the connection to which is even more remote. The Kingdom of the Netherlands cannot be deemed to have consented to

353 **Exhibit C-040**, Parman International B.V. Stock Register, p. 4.

arbitrate with regard to an alleged investor so remote from the allegedly affected companies.

Figure 3: Simplified structure chart of Ennia and affiliated entities in 2018



196. Tribunals have acknowledged the problem of remoteness between a minority and/or indirect shareholder on the one hand and the allegedly affected company on the other hand. For instance, the tribunal in *Enron v. Argentina* was faced with a 35% minority shareholding – a portion significantly larger than Andraous' alleged 1% minority stake in PIBV, the entity which in turn holds Ennia – and noted:

> "The Argentine Republic has rightly raised a concern about the fact that if minority shareholders can claim independently from the affected corporation, this could trigger an endless chain of claims, as any shareholder making an investment in a company that makes an investment in another company, and so on, could invoke a direct right of action for measures affecting a corporation at the end of the chain."[354]

197. The tribunal acknowledged that "there is indeed a need to establish *a cut-off point* beyond which claims would not be permissible as they would only have

[354] **Exhibit RL-053**, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, para. 50.

a remote connection to the affected company."[355] The tribunal considered that this required establishing the extent to which a host State had consented to arbitration: where a claim is only remotely connected with the affected company, that claim should be considered inadmissible as being too remote.[356]

198. The same concern was shared by the tribunal in *Phoenix v. Czech Republic*, which held that "not any minor portion of indirectly owned shares should necessarily be considered as an investment."[357]

199. Moreover, in *African Holding v. Congo* the tribunal considered the remoteness of the claimant's investments, namely certain debt instruments stemming out of construction contracts held indirectly through various intermediary companies. It agreed with the *Enron* tribunal that there was "a limit to how far this process can go, as it could go so far that even distant investors could become protected claimants. In that case, the limit was set by whether the indirect owner and controller could be considered as covered by the state's consent to arbitration, and it was found that this was indeed the case".[358] Applying the *Enron* approach, the tribunal rejected the State's objection after considering that there was "no doubt" that the State was sufficiently aware of the foreign nationals benefitting from the investment treaty's protection.[359]

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355 **Exhibit RL-053**, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, para. 52 (emphasis added).

356 **Exhibit RL-053**, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, para. 52 ("If consent has been given in respect of an investor and an investment, it can be reasonably concluded that the claims brought by such investor are admissible under the treaty. If the consent cannot be considered as extending to another investor or investment, these other claims should then be considered inadmissible as being only remotely connected with the affected company and the scope of the legal system protecting that investment.")

357 **Exhibit RL-054**, *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 122.

358 **Exhibit RL-055-FRENCH**, *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award on the Objections to Jurisdiction and Admissibility, 29 July 2008, para. 100 (unofficial translation).

359 **Exhibit RL-055-FRENCH**, *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award on the Objections to Jurisdiction and Admissibility, 29 July 2008, para. 101: "Given that in this proceeding the Blattner family was well known to the Government of the Democratic Republic of the Congo since it acquired SAFRICAS from its original Belgian owners and retained its ownership and business in the various transactions that followed, including more recently New Biz Congo, there could be no doubt as to the identity of the United States nationals or companies that had benefited from the protection of the Treaty." (unofficial translation).

200. Effectively, to argue that there is no cut-off point would be tantamount to holding that a national of one Contracting Party who has, for instance, only one ordinary share in a publicly traded locally incorporated company in the other Contracting Party with a share capital of 4,000,000 shares, falls under the protection of the applicable BIT.

201. The need for a solution to this remoteness issue has also been addressed in literature. In particular, it has been held that "the current state of the law would leave the state parties to investment treaties to face a multitude of claimants […] – possibly with minimal interest – the identity of which could not be foreseen".[360] To tackle this situation, commentators have stated that it is "essential" to set a cut-off point in order to filter "manifestly unpredictable investors".[361] More specifically, it has been suggested that "a minimum shareholding of 10%", together with "knowledge or at least the reasonable possibility of knowledge" on the part of the host State, should be applied as useful criteria.[362]

202. Indeed, Andraous' alleged indirect minority shareholding does not satisfy the awareness requirement on the part of the host State at the relevant point in time. Given that Andraous presented himself solely as a Dutch national and indirectly held only a very minimal interest – without even exercising any direction or providing any contribution when being allotted the 1% shareholding in PIBV – in the allegedly affected company, the Kingdom of the Netherlands could hardly be deemed to have been sufficiently aware of Andraous benefitting from the protection of the BIT. This is compounded by the fact that the issuance of shares in PIBV to Andraous could not have been known to the (organs) of the Kingdom of the Netherlands by consulting the public records, as Curaçao law does not require a registration of issuance or transfer of shares. The fact that Andraous then transferred the shares in PIBV to RJJJL Private Foundation in 2015 only further solidifies this point.

203. On the facts, the present case is as extreme as it gets – leaving aside for a moment that Andraous has not even proven his ownership of the 1% stake, as detailed in Section 4.2 above. If there is a remoteness threshold, Andraous is plainly beyond it. Prior to 2015, Andraous was allotted a 1% stake in PIBV,

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360 **Exhibit RL-056**, T. Wälde and B. Sabahi, "Compensation, Damages and Valuation in International Investment Law" in O. Muchlinski, *Oxford Handbook of International Investment Law* (2008), p. 1102.

361 **Exhibit RL-056**, T. Wälde and B. Sabahi, "Compensation, Damages and Valuation in International Investment Law" in O. Muchlinski, *Oxford Handbook of International Investment Law* (2008), p. 1102.

362 **Exhibit RL-056**, T. Wälde and B. Sabahi, "Compensation, Damages and Valuation in International Investment Law" in O. Muchlinski, *Oxford Handbook of International Investment Law* (2008), p. 1102.

the entity that in turn holds Ennia – a portion significantly lower than the minority shareholdings in any of the cases that have emphasized the need to establish a cut-off point to ensure that 'not any minor portion' of shares can lead to an investment treaty claim. In turn, Andraous' alleged shareholding in Ennia does not qualify for BIT protection.

5 ANDRAOUS' CLAIM TO SALARY AND PENSION RIGHTS DOES NOT QUALIFY FOR BIT PROTECTION

204. In his SoC, Andraous further claims that the Kingdom of the Netherlands breached its BIT obligations since – once removed as managing director of Ennia – he no longer received salary, pension, and emoluments as alleged 'investments' under the BIT.[363]

205. Andraous does not have a qualifying 'investment' with respect to his claim to salary and pension rights under the BIT. First, as also confirmed by the arbitral case law, the term 'investment' under the BIT, though broad, is not unbounded. Andraous' alleged salary and pension rights resulting from his employment as director in various Ennia entities cannot reasonably be interpreted as falling under "claims to money" entitled to protection under the BIT (Section 5.1). Second, the BIT requires an investment to have been 'made'. Based on any reasonable interpretation, the taking up of employment and working in exchange for (a claim to) payment for that work cannot be regarded as the 'making' of an 'investment' for the purposes of the BIT (Section 5.2). Third, Andraous has, in fact, left the basis and extent of his salary and pension rights claim unsubstantiated. For one thing, a salary claim could only exist for services rendered in relation to which remuneration has not been paid, which he does not even claim to be the case (Section 5.3).

5.1 Salary and pension rights do not qualify as 'investments'

206. Andraous' interpretation of the term 'investment' under the BIT cannot be reconciled with the general rule of Article 31 VCLT, which makes it clear that an unduly broad construction of the notion of 'investment' would disregard the ordinary meaning of the terms in their context and in the light of the object and purpose of the BIT (Section 5.1.1). This is likewise confirmed in the case law (Section 5.1.2).

[363] SoC, paras. 111 and 112.

5.1.1 The term 'investment' must be interpreted in accordance with Article 31 VCLT

207. Article 1 BIT defines 'investments' as "every kind of asset" and provides an illustrative list of qualifying 'investments' – including "claims to money, to other assets or to any performance having an economic value".[364]

208. Pursuant to the aforementioned general rule of treaty interpretation in Article 31 VCLT, this illustrative list cannot be interpreted in a vacuum: "the illustrative list [of assets under the BIT] does not trump the objective, ordinary meaning of the definition that precedes it."[365] Likewise, "if an asset does not correspond to the inherent definition of 'investment', the fact that it falls within one of the categories listed in […] [the BIT] does not transform it into an 'investment'."[366] To hold otherwise would result in an overly broad interpretation that would disregard the ordinary meaning of the terms in their context and in the light of the object and purpose of the BIT.

209. The term 'investment' must therefore be given some inherent meaning, as also foreshadowed in Chapter 4 above. Otherwise, the non-exhaustive list of assets that could fall under a broad definition of 'investment' provides no "benchmark against which to assess […] categories of assets".[367]

210. Interpreting Article 1(a) BIT in accordance with Article 31 VCLT, the mere fact of taking up employment and doing work in exchange for (a claim to) payment for that work – i.e. Andraous' salary and pension benefits resulting from his employment as Ennia's director – cannot plausibly be regarded as an 'investment' under any ordinary meaning of that term.

211. Similarly, as per its object and purpose, the BIT is meant to encourage foreign investment, not to attract expat employees. Pursuant to its aim to "stimulate the flow of capital and technology and the economic development of the

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364 **Exhibit CLA-001**, Agreement on the Encouragement and Reciprocal Protection of Investments between the Lebanese Republic and the Kingdom of the Netherlands (signed on 2 May 2002, entered into force on 1 March 2004), Article 1(a)(iii).

365 **Exhibit RL-047**, *Komaksavia Airport Invest Ltd. v. The Republic of Moldova*, SCC Case 2020/074, Final Award, 3 August 2022, para. 148.

366 **Exhibit RL-050**, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. 2007-07-AA280, Award, 26 November 2009, para. 207. See also e.g. **Exhibit RL-057**, W. Shan and L. Wang, "The Concept of "Investment" Treaty Definitions and Arbitration Interpretations", in J. Chaisse et al. (eds.), *Handbook of International Investment Law and Policy* (2021), p. 41.

367 **Exhibit RL-050**, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. 2007-07-AA280, Award, 26 November 2009, para. 180. See also **Exhibit RL-058**, *Rasia FZE and Joseph K. Borkowski v. Republic of Armenia*, ICSID Case No. ARB/18/28, Award, 20 January 2023, para. 373.

Contracting Parties", the BIT intends to protect particular kinds of assets, not mere employment agreements.

212. Based on these considerations, Andraous' proposed construction of Article 1(a) BIT is untenable as a matter of international law. His alleged salary and pension rights resulting from his employment as Ennia director do not constitute 'investments' subject to BIT protection.

5.1.2 The arbitral case law confirms that the term 'investment' is not unbounded

213. The case law confirms that the definition of an 'investment' is not unbounded. The *OI European v. Venezuela* tribunal, for instance, held that not all assets, by the mere fact of being included in the non-exhaustive list of examples under the BIT, constitute an investment: "[s]uch assets must be a true investment in order to meet the objective and inherent characteristic of all investments."[368]

214. The tribunal then specifically took pension rights as an example of an asset that does not qualify as an 'investment':

> "[T]hink about a citizen of a foreign country who is entitled to collect a pension. The pensioner's credit right could be understood as something that would fall under […] the BIT. However, *the right to receive a pension does not constitute an investment* and accordingly should not be understood as being included under the BIT's scope of protection".[369]

215. This illustrates the danger of the "mechanical application of the categories listed" in an investment treaty based on an overly broad interpretation of 'investment', without regard to the term's inherent meaning. [370] As cautioned by the tribunal in *Romak v. Uzbekistan*, this "would eliminate any practical limitation to the scope of the concept of 'investment'".[371]

216. This point was also aptly described in the award in *Komaksavia v. Moldova*:

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368 **Exhibit CLA-095**, *OI European v. Venezuela* (Award, 10 March 2015) ICSID Case No. ARB/11/25, para. 218. See also e.g. **Exhibit RL-050**, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. 2007-07-AA280, Award, 26 November 2009, para. 207.

369 **Exhibit CLA-095**, *OI European v. Venezuela* (Award, 10 March 2015) ICSID Case No. ARB/11/25, para. 218 (emphasis added).

370 See **Exhibit RL-050**, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. 2007-07-AA280, Award, 26 November 2009, para. 184.

371 See **Exhibit RL-050**, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. 2007-07-AA280, Award, 26 November 2009, para. 185.

> "[W]ithout any such benchmark, Article 1(1)'s generality ('every kind of asset invested by investors') could be seen as encompassing even transactions that bear none of the traditional hallmarks of investment, such as (for example) a one-time purchase of goods."[372]

217. The tribunal illustrated further:

> "An example is useful to illustrate the point. No one would suggest that a home State buyer who orders a product over the internet from a host State seller has 'invested in' the host State, simply by wiring funds into the country. This is despite the fact that, purely formalistically, the money sent for the purchase might be characterized as an 'asset' of a national of one Contracting Party which was introduced into the territory of the other Contracting Party. […] The point is that even though the funds transmitted in one direction, and the product transmitted in the other direction, might be covered by the breadth of the 'every kind of asset' terminology in many BITs – and perhaps even could fall within certain categories of a typical illustrative list of assets – that terminology cannot function on its own as a sufficient definition of investment. Rather, it requires interpretation by reference to the ordinary meaning of the concepts of 'investment' and 'investing'."[373]

218. In *Nova Scotia Power v. Venezuela*, the tribunal likewise observed that "neither the definition of investment, nor the BIT, should function as a Midas touch for every commercial operator doing business in a foreign state who finds himself in a dispute", and that "none of the dispute resolution mechanisms provided for in Article XII could bear the over-proliferation of claims that would result from boundless interpretations of the term 'investment'."[374]

219. In the same vein, the tribunal in *Doutremepuich v. Mauritius*, citing *Romak*, held that the term 'investments' should be defined by reference to the objective and ordinary meaning of the term.[375] To this end, the tribunal deemed it necessary for the investment to comply with certain criteria,

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372 **Exhibit RL-047**, *Komaksavia Airport Invest Ltd. v. The Republic of Moldova*, SCC Case 2020/074, Final Award, 3 August 2022, para. 148.

373 **Exhibit RL-047**, *Komaksavia Airport Invest Ltd. v. The Republic of Moldova*, SCC Case 2020/074, Final Award, 3 August 2022, paras. 149 and 150.

374 **Exhibit RL-059**, *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela (II)*, ICSID Case No. ARB(AF)/11/1, Award, 30 April 2014, para. 82.

375 **Exhibit RL-060**, *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019, para. 117.

including the existence of a contribution to the host State and a participation in risks.[376]

220. The case law referenced by Andraous does not support the fact that any form of rights stemming from a contractual relationship – let alone a purported right to payment under an employment relationship – can qualify as an investment.[377] Rather, those cases concern accepted forms of investment (e.g. claims to a share of the profits of a project and loans as part of a complex set of arrangements for the development of a hotel,[378] share purchase agreement,[379] operation and ownership of a business,[380] non-payment of invoices under a services contract with a State that was integral to that State's import operations[381]) or merely confirms that the notion of 'investment' is broad. Either way, it fails to show that the interpretation of the definition of 'investment' under the BIT is unbounded and capable of covering a salary under an employment agreement. As seen above, it is quite the opposite: tribunals have warned against a purely literal interpretation of the list of assets under the applicable investment treaty.

221. For instance, in the *Alps Finance v. Slovak Republic* award invoked by Andraous, the tribunal cautioned:

> "More than that, a merely literal application of category (c) of Article 1(2) would lead, in the present case, to what Article 32(2)(b) of the Vienna Convention defines as a 'manifestly absurd or unreasonable result'."[382]

222. It emphasized that "[t]ribunals must therefore be cautious to enforce the true intention of the Contracting Parties to the specific treaty forming the basis of their jurisdiction".[383]

223. The tribunal then referred to the minimum requirements needed for an 'investment', namely "(a) a capital contribution to the host-State by the private

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376 **Exhibit RL-060**, *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019, para. 118.

377 SoC, paras. 111 and 112.

378 **Exhibit CLA-104**, *Alpha Projektholding v. Ukraine* (Award, 8 November 2010) ICSID Case No. ARB/07/16, paras. 265-274. See also SoC, paras. 111-112.

379 **Exhibit CLA-066**, *Dayyani et al. v. Korea (I)* (Judgment of the English High Court of Justice, 20 December 2019) PCA Case No. 2015-38, paras. 12 and 67. See also SoC, para. 112.

380 **Exhibit CLA-107**, *Tidewater v. Venezuela* (Award, 13 March 2015) ICSID Case No. ARB/10/5, para. 118. See also SoC, para. 112.

381 **Exhibit CLA-109**, *SGS v. Paraguay* (Decision on Jurisdiction, 12 February 2010) ICSID Case No. ARB/07/29, para. 88. See also SoC, para. 112.

382 **Exhibit CLA-108**, *Alps Finance v. Slovak Republic* (Award, 5 March 2011) UNCITRAL, para. 237.

383 **Exhibit CLA-108**, *Alps Finance v. Slovak Republic* (Award, 5 March 2011) UNCITRAL, para. 239.

contracting party, (b) a significant duration over which the project is implemented and (c) a sharing of operational risks inherent to the contribution together with long-term commitments."[384] It also listed examples of what normally qualifies as an 'investment' under the category of "claims and rights to any performance having an economic value", such as rights stemming from "contracts for public works or infrastructures, or concessions of public services, or long-term loans or similar financing instruments, made by the investor with a State or State-entities. [...] In such cases, the underlying contracts were long-term contracts having a significant importance for the economy of the host-State."[385] Accordingly, receiving salary and pension rights in exchange for work under an employment agreement entails no contribution and no risk "of the sort that is inherent in the notion of investment".[386]

224. A purely literal reading of the term "claims to money" to include salary and pension rights would not accord with any reasonable interpretation of the definition of 'investment' intended by the Contracting Parties under the BIT.

5.2 Andraous has not 'made' a qualifying 'investment' by engaging in work under an employment agreement

225. As explained in Section 4.1 above, the BIT requires an 'investment' to have been 'made'. This follows from the terms of the BIT and is further supported by the BIT's object and purpose, which highlights the economic relations between the parties, "particularly with respect to investments by the investors of one Contracting Party in the territory of the other Contracting Party".

226. A national of one Contracting Party engaging in work under an employment agreement at a company constituted under the laws of the other Contracting Party cannot be regarded as an 'investor' who is 'making' an 'investment' in the territory of that other Contracting Party. This goes far beyond the inherent meaning of the terms 'investor', 'investment', and the 'making' of an investment.

227. The BIT protects 'investors' who have sought to 'make' an 'investment', not expatriate employees claiming salary and pension rights subsequent to the termination of their employment.

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384 **Exhibit CLA-108**, *Alps Finance v. Slovak Republic* (Award, 5 March 2011) UNCITRAL, para. 241.

385 **Exhibit CLA-108**, *Alps Finance v. Slovak Republic* (Award, 5 March 2011) UNCITRAL, para. 234.

386 **Exhibit RL-059**, *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela (II)*, ICSID Case No. ARB(AF)/11/1, Award, 30 April 2014, paras. 112-113.

5.3 There is no claim to salary payments to begin with

228. Andraous alleges that he is entitled to salary payments amounting to an 'investment'. At the same time, he himself acknowledges that he received regular monthly payments "in exchange" for his alleged investment of "time, know-how and goodwill", and that these payments ceased following his dismissal as a director of Ennia.[387]

229. Any outstanding "claims to money" could only exist in the event of services rendered for which remuneration has not been paid.[388] There is nothing in the SoC and the Personal Statement claiming that payments were not made for services already rendered.[389]

230. Moreover, as detailed in the Kingdom of the Netherlands' Application for Security for Costs and briefly recalled in Section 2.4 above, there were solid grounds for the termination of Andraous' employment. The Curaçao Courts confirmed that Andraous has a track record of improper business conduct, including misappropriating and shifting assets in companies over which he has control, or in which he holds an interest, for his own benefit and to the detriment of the creditors of those companies and of his personal creditors. This includes, *inter alia*, improper business practices by partaking in non-arms' length transactions with entities affiliated to Andraous, and incurring costs of no benefit to the company that Andraous was controlling or managing. As also explained in Section 2.4 above, Andraous does not claim that the judgments of the Curaçao Courts constitute a violation of the BIT, and in fact recognizes that "a duplication of that procedure in this arbitration should be avoided".[390]

231. There is thus no "claim to money" in this respect: Andraous has not denied that his salary was paid for the duration of his employment; he has also not asserted that the termination of his employment constitutes a violation of the BIT.

232. Finally, as with the other points detailed in Chapter 3 (qualifying 'investor') and Chapter 4 (qualifying 'investment' 'made' by a qualifying 'investor')

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387 SoC, para. 114; NoA, para. 58.

388 In this regard, Andraous cites *SGS v. Paraguay* to argue that the "non-payment of invoices under the services contract will result in a breach of the [BIT]". The *SGS* case, however, concerned Paraguay's non-payment of 25 invoices for *services that had already been rendered* by the claimant to the Paraguayan State. See SoC, para. 112; **Exhibit RL-061**, *SGS v. Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February 2012, para. 39.

389 See e.g. SoC, para. 111: "As part of his position and in exchange for his investment of time, know-how and goodwill, Claimant also received regular monthly payments before and – for some time – after the Takeover in the form of salary and pensions." See also NoA, para. 58: "the CBCS stopped paying Mr Andraous' salary when he was removed as managing director".

390 SoC, para. 64. See also Section 2.3 above.

above, Andraous has not furnished any factual evidence to establish which of his salary and pension rights would even fall, in his view, within the ambit of Article 1(a) BIT.

233. In consequence, Andraous' alleged salary and pension rights resulting from his employment as Ennia director are not subject to BIT protection.

6 REQUEST FOR RELIEF

234. In light of the foregoing, the Kingdom of the Netherlands respectfully requests that the Tribunal:

- Render an award dismissing Andraous' claims in their entirety, for lack of jurisdiction; and
- Order Andraous to pay all of the Kingdom of the Netherlands' costs.

235. The Kingdom of the Netherlands reserves its right to supplement and/or amend its Statement of Defence, including the request for relief.

Respectfully submitted on behalf of the Kingdom of the Netherlands.

[redacted]

Ministry of Foreign Affairs of the Kingdom of the Netherlands

[redacted]

De Brauw Blackstone Westbroek N.V.