DE BRAUW
BLACKSTONE
WESTBROEK

Case number: ICSID Case No. UNCT/23/3
Date: 2 December 2024

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

**RESPONDENT'S STATEMENT OF REJOINDER ON JURISDICTION**

*in the matter of:*

**ABDALLAH ANDRAOUS**

Claimant,
Counsel: Lindeborg Counsellors at Law

*against:*

**THE KINGDOM OF THE NETHERLANDS**

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

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**LIST OF DEFINITIONS**

| Term | Definition |
|---|---|
| **Andraous** | Mr Abdallah Andraous |
| **Ansary** | Mr Hushang Ansary |
| **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 |
| **ECT** | Energy Charter Treaty |
| **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. |
| **ICJ** | International Court of Justice |
| **ICSID** | International Centre for Settlement of Investment Disputes |
| **ICSID Convention** | Convention on the Settlement of Investment Disputes between States and Nationals of Other States |
| **IUSCT** | Iran-United States Claims Tribunal |
| **Legal Opinion** | Legal Opinion of Dr Katherine Filesia dated 2 December 2024 |
| **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. |
| **Rejoinder** | Statement of Rejoinder on Jurisdiction dated 2 December 2024 |
| **Reply** | Statement of Reply on Jurisdiction dated 1 October 2024 |
| [redacted] | [redacted] |
| **SoC** | Statement of Claim on Jurisdiction and Merits dated 22 February 2024 |
| **SoD** | Statement of Defence on Jurisdiction dated 22 May 2024 |
| **SunResorts** | SunResorts Ltd. N.V. |
| **VCLT** | Vienna Convention on the Law of Treaties |

## 1 INTRODUCTION

1. Pursuant to Procedural Order No. 1 and the procedural timetable, the Kingdom of the Netherlands submits its Statement of Rejoinder on Jurisdiction ("Rejoinder") with respect to Mr Abdallah Andraous' ("Andraous") claims under the 2002 Agreement on the encouragement and reciprocal protection of investments between the Lebanese Republic and the Kingdom of the Netherlands ("BIT").

2. In its Statement of Defence on Jurisdiction ("SoD"), the Kingdom of the Netherlands has respectfully requested the Tribunal to dismiss Andraous' claims in their entirety, for lack of jurisdiction. To recall, the BIT's arbitration clause – and thus the requirements for this Tribunal's jurisdiction – can be found in its Article 9. In its relevant parts, the BIT provides as follows:

> "1) In case of disputes regarding investments between a Contracting Party and an investor of the other Contracting Party, consultations will take place between the parties concerned with a view to solving the case, as far as possible, amicably.
>
> 2) If these consultations do not result in a solution within three months from the date of written request for settlement, the investor may submit the dispute, at his choice, for settlement to:
>
> […]
>
> (d) an ad hoc arbitral tribunal which, unless otherwise agreed upon by the parties to the dispute, shall be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) […]".[1]

3. In short, the Kingdom of the Netherlands' jurisdictional objections are that:

   (i) Andraous does not qualify as a protected 'investor' because his Lebanese nationality is not his dominant and effective nationality;

   (ii) Andraous is not a qualifying 'investor' with an 'investment' in relation to his purported indirect stake in Ennia Caribe

[1] **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), Articles 9(1) and 9(2)(d).

Holding N.V. ("Ennia Holding") and its subsidiary entities (hereinafter jointly referred to as "Ennia"); and

(iii) Andraous does not have a qualifying 'investment' under the BIT with respect to his claim to salary and pension rights.

4. As will follow from this Rejoinder, Andraous has failed adequately to rebut these jurisdictional objections in his Statement of Reply on Jurisdiction ("Reply"). The documents produced by Andraous, and the absence thereof, following the issuance of Procedural Order No. 2 and the conclusion of the document production phase in fact confirm the above-referenced objections.

5. The Kingdom of the Netherlands' first jurisdictional objection is based on the dominant and effective nationality principle. That principle is recognized in arbitral case law as the most suitable way to determine whether a dual national is an investor of the 'other' Contracting Party (or rather an investor of the same Contracting Party against which the claim is being brought).[2] Andraous, on the other hand, has argued his case on the basis of case law that pertains to different legal issues, or that appears to present an isolated (and rebutted) view.[3]

6. The record of this arbitration reflects that Andraous' Lebanese nationality is not his dominant and effective nationality. The sections of the Reply which address Andraous' Lebanese nationality as purportedly being his dominant and effective nationality refer primarily back to his Statement of Claim ("SoC") and Personal Statement, with little to no references to primary and contemporaneous sources. None of the exhibits referred to by Andraous in those sections state that his nationality is Lebanese. To the contrary, all documents produced by Andraous after Procedural Order No. 2 and furnished by him with the Reply list him exclusively as a Dutch national.[4]

7. In addition, the Reply reiterates Andraous' admission that his Dutch nationality is directly tied to the alleged investment that is at issue, acknowledging that he acquired Dutch nationality because he had to be in the Kingdom of the Netherlands "for the fulfilment of his professional commitments which developed in the investment".[5] Conversely, Andraous does not properly engage with crucial facts revealed in the SoD, such as:

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2 See paras. 27 and 30 below.
3 See paras. 31-32 below.
4 See para. 62 below.
5 Reply, para. 77.

- Andraous' own prior acknowledgement that the dominant and effective nationality principle is applicable to determine his status as a qualifying 'investor';[6]

- Andraous' presentation of himself solely as a Dutch national vis-à-vis the Dutch authorities;[7]

- his offer to renounce his Lebanese nationality so as to acquire Dutch nationality in the naturalization process;[8] and

- his entire family's Dutch nationalities and prior permanent relocation to the Kingdom of the Netherlands.[9]

8. On the second jurisdictional objection, the Reply and the accompanying documents have reinforced the fact that Andraous is not an 'investor' with an 'investment' in relation to his purported indirect stake in Ennia. Together with the Reply, Andraous exhibited a share purchase agreement concluded between himself as seller and [redacted] as buyer, through which he sold and transferred his 1% shareholding in Parman International B.V. ("PIBV") as early as 1 December 2015, i.e. prior to the measures of which he complains and long prior to the commencement of this arbitration.[10] That transaction has been completed pursuant to, and in conformity with, the applicable Curaçao law, as a consequence of which he no longer owns the shares in PIBV. This is reflected in PIBV's shareholder register, which confirms [redacted] as the owner of the shares – not Andraous. It is further confirmed by Dr Katherine Filesia – an expert on Curaçao law – whose legal opinion the Kingdom of the Netherlands submits with this Rejoinder ("Legal Opinion").[11]

9. There is, furthermore, no evidence on record that would prove a relationship between Andraous and [redacted], let alone a relationship that would entail he has a claim to the assets of [redacted].[12] Andraous thus does not hold a purported 'investment' in PIBV – or an indirect shareholding in Ennia – as of 1 December 2015.

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6 SoD, para. 79.
7 See Section 2.2.2 below. See also SoD, Section 3.3.2.2.
8 See Section 2.2.3 below. See also SoD, para. 11.
9 See Section 2.2.3 below. See also SoD, para. 11.
10 **Exhibit C-114**, Share sale and purchase agreement between Claimant and [redacted] dated 1 December 2015, Article 7.
11 See para. 84 below.
12 See para. 112 below.

10. Even if, *arguendo*, Andraous were to still hold shares in PIBV, he did not 'make' an investment through an act of investing as required by the BIT.[13] Following the submission of the Reply, there continues to be no evidence of a contribution or an intention to invest on the part of Andraous.[14] Andraous has failed to satisfy his burden of proof in this respect.

11. The third jurisdictional objection pertains to Andraous' claim to salary and pension rights. In the SoD, the Kingdom of the Netherlands argued that salary and pension rights under an employment agreement do not qualify as an 'investment' under the BIT. The Kingdom of the Netherlands further submitted that Andraous had failed to substantiate the basis and extent of his alleged salary and pension claims altogether (the third jurisdictional objection).[15] There was nothing in the SoC or his Personal Statement suggesting that salary payments had not been made for services rendered.

12. In the Reply, Andraous acknowledges that his claim in relation to salary and pension does not include payments "for past services rendered in relation to which remuneration has been paid".[16] Yet, he has not clarified which salary and pension rights are included in his claim. Absent any evidence of alleged unpaid salary and pension rights, no investment under the BIT has been established – even assuming such rights can qualify as an investment (*quod non*).

13. In sum, the evidence for Andraous' contention that this Tribunal has jurisdiction over his claims that has been provided in the Reply is inconclusive at best and non-existent or contradictory at worst. The Tribunal is asked to either engage in hypotheticals,[17] or to rely on vague statements made by Andraous which cannot be substantiated by any contemporaneous evidence. To the extent there are evidentiary gaps, and in light of Andraous' inability to produce documents which are relevant and material to the determination of this Tribunal's jurisdiction (for example as regards his alleged shareholding in PIBV or alleged relationship with [redacted][18] adverse inferences may be drawn by the Tribunal to the detriment of Andraous.[19]

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13 See Section 4.1 below.
14 See Section 4.2 below.
15 SoD, paras. 231-232.
16 Reply, para. 134.
17 Reply, para. 88.
18 See Procedural Order No. 2, Annex B: Decision on Respondent's Document Production Requests.
19 See IBA Rules on the Taking of Evidence in International Arbitration, 2020, Article 9(6).

14. The Rejoinder is structured as follows. **Chapter 2** explains that Andraous does not qualify as a protected 'investor' under the BIT. **Chapter 3** sets out that Andraous does not have a protected 'investment' under the BIT either in respect of the shareholding in Ennia, or his salary and pension rights. **Chapter 4** further demonstrates that Andraous has not 'made' an investment as required by the BIT. Lastly, the Kingdom of the Netherlands reiterates its request for relief in **Chapter 5**.

## 2 ANDRAOUS DOES NOT QUALIFY AS A PROTECTED 'INVESTOR' WITHIN THE MEANING OF ARTICLES 9(1) AND 1(B) BIT

15. As set out in the SoD,[20] for the Tribunal to uphold jurisdiction, it must be established that Andraous – a dual Dutch-Lebanese national – qualifies as an 'investor of the other Contracting Party' under Article 9 BIT. Only an 'investor of the other Contracting Party' is entitled to commence arbitration under the BIT.

16. In that regard, the well-established principle of dominant and effective nationality is to be applied. That principle is a "relevant rule of international law applicable in the relations between the parties",[21] and has been identified in arbitral case law as the most suitable manner to make that determination. Applying that principle, the Kingdom of the Netherlands set out in the SoD that Andraous does not qualify as a protected 'investor' under the BIT because his dominant and effective nationality is not Lebanese.[22]

17. In the Reply, Andraous misinterprets the BIT by asserting that dual nationals "can […] sue one of their States, depending on which State violated its investment obligations".[23] In the alternative, Andraous asserts that his Lebanese nationality is his dominant and effective nationality.[24] Both arguments are incorrect.

18. In **Section 2.1** of this Rejoinder, the Kingdom of the Netherlands reiterates how an interpretation in accordance with Article 31 VCLT calls for the application of the dominant and effective nationality test. **Section 2.2** explains that Andraous has failed to meet the burden of showing that his

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20 SoD, Section 3.1.
21 SoD, para. 78 and Section 3.2.
22 SoD, Section 3.3.
23 Reply, para. 24.
24 Reply, Section I.B.

dominant and effective nationality is in fact that of the *other* Contracting Party, i.e. Lebanon, at the relevant moments in time.[25]

### 2.1 An interpretation in accordance with Article 31 VCLT leads to the application of the dominant and effective nationality principle

19. The BIT prescribes that an investor can only submit its dispute with a Contracting Party to arbitration if it has the nationality of the other Contracting Party. The arbitration clause in Article 9(1) BIT refers to "disputes regarding investments between a Contracting Party and an investor of the *other* Contracting Party" (emphasis added).[26] Similarly, 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).[27]

20. Andraous was a national of *both* the Kingdom of the Netherlands *and* Lebanon at the relevant points in time. It must therefore be determined whether, at this jurisdictional juncture, he qualifies as an 'investor of the other Contracting Party' within the meaning of Articles 9(1) and 1(b) BIT. The Kingdom of the Netherlands submits that Andraous does not qualify as such, because his Lebanese nationality was not his dominant and effective nationality when he purportedly made the investment and when he initiated this arbitration. This position follows from an interpretation of the BIT conducted in accordance with Article 31 VCLT.

21. First, contrary to Andraous' assertions,[28] such an interpretation is consistent with the ordinary meaning of the terms of Article 9(1) BIT, which requires the arbitration to be commenced by an investor of the Contracting Party other than the Contracting Party against which the claim is being brought. The word 'other' means "different from the one mentioned".[29]

22. Dual nationals are not *per se* an investor of the 'other' Contracting Party, because they would also be investors who are of the same Contracting Party. As Article 1(b) BIT likewise defines an 'investor' as "natural persons having

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25 SoD, para. 110; **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, paras. 555-558.

26 **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).

27 **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).

28 Reply, paras. 26-29.

29 **Exhibit R-053**, Merriam-Webster, Definition of 'Other', 2024.

the nationality of that Contracting Party […] who have made an investment in the territory of the *other* Contracting Party" (emphasis added), for investors who are nationals of *both* Contracting Parties, it must be ascertained whether they are more affiliated with the 'other' Contracting Party than they are with the same Contracting Party.

23. Second, Articles 1(b) and 9(1) BIT must be read in their context. This further supports the notion that a protected investor must be of the other – as opposed to the same – Contracting Party. For example, the BIT's preamble emphasises that it concerns "investments by the investors of one Contracting Party in the territory of the other Contracting Party". Similar wording is reflected in other provisions of the BIT.[30]

24. Thus, the BIT must be interpreted in such a way as to determine whether a dual national investor is sufficiently affiliated with the other Contracting Party (as opposed to the same Contracting Party) to be allowed to bring a claim to arbitration under the BIT against that Contracting Party.

25. Third, together with the context of the BIT, any relevant rules of international law applicable in the relations between the parties shall be taken into account when interpreting the term 'investor of the other Contracting Party', pursuant to Article 31(3)(c) VCLT. The dominant and effective nationality principle is such a rule.

26. The Kingdom of the Netherlands submits that this is the rule of international law that is best suited to determine whether, despite holding both nationalities, a dual national is sufficiently affiliated with the other Contracting Party to be considered an investor of that other Contracting Party (as opposed to an investor of the same Contracting Party).

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30 See e.g. Article 2 BIT requiring each Contracting Party to "promote economic cooperation through the protection in its territory of investments of investors of the other Contracting Party"; Article 3(1) BIT requiring inter alia each Contracting Party to "ensure fair and equitable treatment of the investments of investors of the other Contracting Party"; Article 3(4) BIT requiring each Contracting Party to "observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party"; Article 5 BIT prohibiting each Contracting Party to "take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments" unless the conditions under Article 5 BIT are met; Article 6 BIT requiring that "[i]nvestors of the one Contracting Party who suffer losses in respect of their investments in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which that Contracting Party accords to its own investors or to investors of any third State, whichever is more favourable to the investors concerned".

27. Indeed, investment arbitration tribunals have repeatedly concluded that the dominant and effective nationality principle is a rule of customary international law that is to be applied to dual nationals in investor-State arbitration. Multiple tribunals have applied the principle in this context.[31] For example, the *Valle Ruiz* tribunal considered that the term investor had to be interpreted "in light of the rules on diplomatic protection, which provide the most 'reliable guidance' in this area and 'constitute the background against which the treaty's provisions must be viewed [...]'".[32] The tribunal went on to conclude that in cases where the investment treaty "fails to specify whether an investor who is a national of both the home and the host States is entitled to bring claims under the treaty, the tribunal must have recourse to the rules on diplomatic protection, which provide that it must take account of the predominant nationality".[33] This principle thus qualifies as a "relevant rule of international law applicable in the relations between the parties" under Article 31(3)(c) VCLT. In the same vein, the International Law Commission's commentary to Draft Article 7 on Diplomatic Protection explicitly confirms the principle's customary international law status.[34]

28. Given the widespread use of this rule in investment case law, Andraous' assertion that the different nature of international investment law and diplomatic protection "precludes the importation of the principle of effective nationality to investment arbitration disputes" – for which he merely refers to one piece of literature – is incorrect.[35]

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31 **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, paras. 541 and 547; **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); **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, paras. 482-486 (unofficial translation); **Exhibit CLA-165**, *Antonio del Valle Ruiz et al. v. Spain* (Final Award, 13 March 2023) PCA Case No. 2019-17, UNCITRAL, paras. 461-462; **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); **Exhibit RL-021**, *Alberto Carrizosa Gelzis and others v. Republic of Colombia*, PCA Case No. 2018-56, Award, 7 May 2021, para. 176; **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).

32 **Exhibit CLA-165**, *Antonio del Valle Ruiz et al. v. Spain* (Final Award, 13 March 2023) PCA Case No. 2019-17, UNCITRAL, para. 462.

33 **Exhibit CLA-165**, *Antonio del Valle Ruiz et al. v. Spain* (Final Award, 13 March 2023) PCA Case No. 2019-17, UNCITRAL, para. 477.

34 **Exhibit CLA-157**, Draft Articles on Diplomatic Protection with commentaries (2006), Article 7, para. 4 ("It is moreover the term used by the Italian–United States Conciliation Commission in the Mergé claim, which may be seen as the starting point for the development of the present customary rule").

35 Reply, para. 38.

29. It further follows from the International Law Commission's commentary to the Draft Articles on Diplomatic Protection that the dominant and effective nationality principle applies to bilateral investment treaties to the extent such is not inconsistent with the provisions of the relevant treaty in question.[36] Such an inconsistency would only arise if the treaty in question expressly stipulated that natural persons with the nationalities of both States party to the treaty benefit from treaty protection vis-à-vis both States. The present BIT does not contain such a stipulation.

30. This is corroborated by the fact that arbitral tribunals have held that the principle applies in cases where the bilateral investment treaty in question did not explicitly mention dual nationals.[37] Therefore, contrary to Andraous' assertion, 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.

31. Andraous relies on *Serafín Garcia Armas* to assert that the dominant and effective nationality criterion is "not consistent with the BIT's nationality requirement"[38], but this decision, dated 2014, is a single outlier in the body of case law dealing with this issue. Subsequent investment tribunals dealing with claims brought under the same bilateral investment treaty have "reached the opposite conclusion" to that in *Serafín*, as pointed out by the *Santamarta* tribunal.[39] This is because the *Serafín* tribunal erred in stopping its interpretation of the bilateral investment treaty's terms at the ordinary meaning of the terms, thereby not considering context, object and purpose

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36 SoD, para. 83; **Exhibit CLA-157**, Draft Articles on Diplomatic Protection with commentaries (2006), Articles 7 and 17.

37 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, paras. 693, 704-705, and 734 (unofficial translation); **Exhibit RL-025-SPANISH**, *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, Final Award, 31 January 2022, paras. 270, 345, 385 and 398 (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. 433 and 440 (unofficial translation); **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, paras. 415 and 486 (unofficial translation); **Exhibit CLA-165**, *Antonio del Valle Ruiz et al. v. Spain* (Final Award, 13 March 2023) PCA Case No. 2019-17, UNCITRAL, para. 477.

38 Reply, para. 40, with reference to **Exhibit CLA-115-ESP**, *Serafín García Armas v. Venezuela* (Decision on Jurisdiction, 15 December 2014) PCA Case No. 2013-3, UNCITRAL, para. 166.

39 **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 381 (unofficial translation).

as warranted by Article 31 VCLT.[40] As explained in the SoD, Article 31 VCLT contains one general rule of interpretation, composed of several interpretative elements that are to be applied in a single combined operation.[41] Such interpretative elements include relevant rules of international law (Article 31(1)(c) VCLT), including the dominant and effective nationality principle.

32. In arguing that the dominant and effective nationality principle should not be applied as part of the relevant rules of international law,[42] Andraous further relies on irrelevant case law, which concerns: (a) a situation where the respondent argued that the nationality of a legal person, which is based on the laws under which it is incorporated, could be trumped by the nationality of its ultimate beneficial owner (by contrast, Andraous is a natural person and the notion of beneficial owner is irrelevant);[43] (b) a situation where the respondent argued that a natural person with nationalities of States A and B cannot bring a claim against State C (by contrast, Andraous bringing a claim against a State whose nationality he holds);[44] (c) a situation where the respondent argued that a shell company acting as claimant did not have *bona fide* links to the home State and was controlled by another company not constituted under the laws of that State (by contrast, Andraous is a natural person and the notion of control is irrelevant);[45] and (d) a situation where a natural person, through operation of the laws of the respondent State, had lost the nationality of that State before the submission of the claim (by

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40 **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, para. 382 (unofficial translation).

41 SoD, para. 69; **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 (unofficial translation); **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 (unofficial translation); **Exhibit RL-027-SPANISH**, *Raimundo Santamarta Devis v. Bolivarian Republic of Venezuela*, PCA Case No. 2020-56, Award on Jurisdiction, 26 July 2023, paras. 356 and 382 (unofficial translation).

42 Reply, para. 39.

43 **Exhibit CLA-142**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan* (Award, 17 October 2013) ICSID Case No. ARB/09/8, paras. 97-100 and 125-128; **Exhibit CLA-133**, *Stans Energy Corp. and Kutisay Mining LLC v. Kyrgyz Republic* (Award, 30 June 2014) MCCI Case No. A-2013/29, paras. 240-241.

44 **Exhibit CLA-124**, *Saba Fakes v. Turkey* (Award, 14 July 2010) ICSID Case No. ARB/07/20, paras. 64-65.

45 **Exhibit CLA-113**, *Saluka Investments v. Czech Republic* (Partial Award, 17 March 2006) UNCITRAL, paras. 239-240.

contrast, Andraous held the nationalities of both Contracting Parties at the time of submission of his claim).[46] As such, Andraous' position cannot be supported by this case law.

33. Fourth, the object and purpose of the BIT also supports the reading that dual national investors cannot commence arbitration against the Contracting Party they have a dispute with if their dominant and effective nationality is of that Contracting Party. Andraous asserts that the object and purpose of the BIT "is to increase *foreign* investment" (emphasis added).[47] The Kingdom of the Netherlands agrees that the protection of *foreign* investors is the object and purpose of the BIT.[48] Thus, it must be established that the dual national is foreign rather than domestic. As aptly enunciated also by the *Valle Ruiz* tribunal:

> "[R]equiring an individual, who is a national of both the home State and host State, to have a stronger connection with the former is the position most in accord with the purpose of international investment agreements […], which is to provide a level playing field to foreign investors who are regarded as disadvantaged vis-à-vis domestic investors".[49]

34. The dominant and effective nationality principle, an established rule of international law, is the most suited manner in which to do so.

35. The facts of this case may serve as the best illustration of the BIT's object and purpose opposing claims under the BIT by investors against the State of their dominant and effective nationality. At all relevant times, and while allegedly making his purported investment, Andraous presented himself as a Dutch national and never made use of his Lebanese nationality.[50] What is more, Andraous was also physically in the Kingdom of the Netherlands when doing so; he admits that "he had to be present there [i.e. in the Kingdom of the Netherlands] for the fulfilment of his professional commitments which developed into the investment".[51] Therefore, for all intents and purposes, the purported investment of Andraous was domestic: made by a Dutch national using his Dutch nationality while in the Kingdom of the Netherlands. The

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46 **Exhibit CLA-145**, *Siag v. Egypt* (Decision on Jurisdiction, 11 April 2007) ICSID Case No. ARB/05/15, paras. 198-201, in particular para. 199 ("This is not a situation where a claimant is seeking to assert a particular nationality in order to bring a claim and that nationality is claimed to be ineffective").

47 Reply, header of Section I.A.3.

48 SoD, para. 73.

49 **Exhibit CLA-165**, *Antonio del Valle Ruiz et al. v. Spain* (Final Award, 13 March 2023) PCA Case No. 2019-17, UNCITRAL, para. 478.

50 See Section 2.2.2 below.

51 Reply, para. 77.

object and purpose of the BIT is not to protect such domestic investment. It is to protect *foreign* investment.

36. For the sake of completeness, Andraous' position that supplementary means of interpretation pursuant to Article 32 VCLT "confirm rather than reject the conclusion that dual nationals are included in the BIT's scope"[52] is incorrect. First, Andraous rebuts positions that the Kingdom of the Netherlands has not advanced. As reiterated above and explained in the SoD, it is not in dispute that dual nationals are not altogether excluded by the BIT, provided their dominant and effective nationality is that of the other Contracting Party.[53] Second, recourse to "supplementary means of interpretation" under Article 32 VCLT 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".[54] Neither is the case here, as the wording of the BIT provides that an investor be of the 'other' Contracting Party, thus requiring the application of relevant rules to ascertain whether the investor is, in essence, sufficiently foreign as opposed to domestic. The dominant and effective nationality principle is the most suited manner to do so. Andraous has not contended that the application of the principle of dominant and effective nationality would lead to a result that is manifestly absurd or unreasonable.

37. Andraous again makes reference to the Macao, China SAR-Netherlands bilateral investment treaty which expressly excludes Dutch nationals who are entitled to a Macao resident identity card from protection, persisting in his narrative that "the Netherlands knew what it had to do if it wanted to exclude dual nationals from the scope of a BIT, or […] include additional requirements".[55] As to that particular treaty, it is recalled that the specific provisions therein are the result of bilateral negotiations between the two parties to that agreement, 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.[56] If anything, the provision in this other treaty merely confirms the customary international law rule. It does not suggest that the Kingdom of the Netherlands has sought to deviate from that rule in the BIT.

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52 Reply, para. 45.
53 SoD, para. 12(i).
54 SoD, para. 76.
55 Reply, para. 45. See also SoD, para. 76.
56 SoD, para. 77.

38. Furthermore, Andraous alleges that his position is supported by the Kingdom of the Netherlands' own courts.[57] This is incorrect. Andraous misinterprets the *Bahgat* proceedings by confusing the investor-State arbitration proceedings on the one hand, with the Dutch court proceedings before the Hague District Court on the other. Notably, in the Dutch court proceedings, the Hague District Court explicitly stated that it would disregard the parties' arguments on the applicability of the dominant and effective nationality principle because it was concluded that Mr Bahgat's Finnish nationality was his dominant nationality in the relevant period.[58] Thus, the position of the Hague District Court is in line with the position of the Kingdom of the Netherlands in the present proceedings: it must be determined which nationality is dominant and effective. In *Bahgat v. Egypt*, Mr Bahgat had demonstrated that that was his Finnish nationality, on the basis of the facts.[59] In the present proceedings, also based on the facts, Andraous has not demonstrated that his Lebanese nationality is dominant and effective.

39. Finally, Andraous also references a legal authority addressing the Energy Charter Treaty's *travaux préparatoires* to support the idea that "with the exception of ICSID arbitration, there is nothing in the ECT that would prohibit dual nationals to bring claims" against one of the States of which they were a national.[60] However, that was merely the view taken by the representative of Australia, which never ratified the ECT and has in the meantime withdrawn its signatory status,[61] and such view is in any event not determinative.[62] Moreover, the very next paragraph of the authority cited by Andraous sets out that the rule of dominant and effective nationality has gained ground in the decision-making of international tribunals because, inescapably, "the question arises as to how to deal with dual national Investors", where they are not *per se* excluded from a treaty's provisions.[63]

40. Considering that Andraous held both the Dutch and Lebanese nationalities at the relevant times, it is precisely in this light that the question arises before the Tribunal. One needs to determine whether Andraous is sufficiently foreign

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57 Reply, para. 21.

58 **Exhibit RL-062-DUTCH**, *Bahgat v. Egypt,* PCA Case No. 2012-07, Judgment of the Hague District Court, 20 October 2021, paras. 5.57 and 5.66 (unofficial translation).

59 **Exhibit RL-062-DUTCH**, *Bahgat v. Egypt,* PCA Case No. 2012-07, Judgment of the Hague District Court, 20 October 2021**,** paras. 5.57 and 5.66 (unofficial translation).

60 Reply, para. 43 with reference to **Exhibit CLA-149**, Kai Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020), p. 113.

61 **Exhibit R-054**, Withdrawal of Australia from Energy Charter Treaty, 13 December 2021.

62 **Exhibit CLA-149**, Kai Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020), p. 113.

63 **Exhibit CLA-149**, Kai Hobér, *The Energy Charter Treaty: A Commentary* (OUP, 2020), p. 113.

to qualify as a protected investor of the other Contracting Party, i.e. whether his Lebanese nationality outweighs his Dutch nationality. For that purpose, the Kingdom of the Netherlands is not requesting the Tribunal to include or read into additional requirements into the BIT, but rather to interpret the term 'investor of the *other* Contracting Party' under the BIT in accordance with Article 31 VCLT, including Article 31(3)(c) VCLT.

41. For the reasons explained above – when applied to dual nationals – the term 'other' in 'investor of the other Contracting Party' should be interpreted by reference to the dominant and effective nationality principle.

### 2.2 The dominant and effective nationality test shows that Andraous' dominant and effective nationality is not Lebanese

42. As detailed in the SoD, the dominant and effective nationality test calls for an assessment of a number of factual elements.[64] These factual elements will be addressed in the following section. The Kingdom of the Netherlands wishes to make the following three preliminary points.

43. First, the burden is on Andraous – as claimant – to prove the facts necessary to establish jurisdiction, including where issues of nationality are in dispute.[65] He thus has the burden of proving that his dominant and effective nationality is in fact that of the other Contracting Party – Lebanon – and that his Lebanese nationality outweighs his Dutch nationality.[66] References to France do not demonstrate the strength of his Lebanese nationality. Rather, Andraous must demonstrate the relative strength, in other words, the dominance and effectiveness, of his Lebanese nationality over his Dutch nationality.

44. Andraous incorrectly asserts that the burden of proof for disputing his nationality now rests upon the Kingdom of the Netherlands because he has

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64 SoD, Section 3.3.

65 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"). See also SoD, para. 64.

66 **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 (unofficial translation).

already proven the facts to establish jurisdiction in his Statement of Claim.[67] This is incorrect. As articulated by the tribunal in *Pac Rim*:

> "[T]he party which alleges something positive has ordinarily to prove it to the satisfaction of the Tribunal. At this jurisdictional level, in other words, the Claimant has to prove that the Tribunal has jurisdiction. Of course, if there are positive objections to jurisdiction, the burden lies on the Party presenting those objections, in other words, here the Respondent".[68]

45. In this case, Andraous is positively asserting that his dominant and effective nationality is his Lebanese nationality.[69] The Kingdom of the Netherlands is arguing that this is *not* the case ("Andraous' dominant and effective nationality is not Lebanese"[70]), i.e. presenting a negative objection. Accordingly, the burden of proof for this negative objection cannot rest on the Kingdom of the Netherlands, when the objection counters Andraous' positive assertion, for which he bears the burden of proof.

46. Second, the connections with the two relevant States by virtue of the nationalities held by Andraous have to be examined at the relevant points in time for purposes of this dispute.[71] Thus, Andraous' entire life is deemed "relevant but not dispositive", since what matters is the dominant and effective nationality at those particular moments in time that are relevant to the dispute.[72]

47. For the purposes of the current dispute, the relevant moments in time for the Tribunal's determination on jurisdiction can be naturally identified as follows: (a) Andraous' naturalisation as Dutch in 2000, including the circumstances in which this nationality was acquired;[73] (b) the time when the events of which he complains occurred, namely as of the imposition of the Emergency

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67 Reply, para. 11(ii).

68 **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. 2.11.

69 SoC, Section III.B.2(b).

70 SoD, Section 3.3.

71 **Exhibit RL-031**, Italian-United States Conciliation Commission, *Mergé Case*, Decision No. 55, 10 June 1955, p. 247; **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, p. 26; **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, para. 552.

72 SoD, para. 110; **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, paras. 555-558; **Exhibit RL-062-DUTCH**, *Bahgat v. Egypt,* PCA Case No. 2012-07, Judgment of the Hague District Court, 20 October 2021, paras. 5.57 and 5.66 (unofficial translation).

73 **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, para. 552.

Measures in July 2018; and (c) the commencement of these proceedings by virtue of submission of the Notice of Arbitration on 7 February 2023.[74]

48. As such, Andraous' references to his French nationality are inapposite. As he admits in the Reply, "his French nationality is irrelevant with respect to the territorial jurisdiction of this Tribunal".[75] Moreover, as explained in the SoD,[76] Andraous acquired French nationality on 21 July 2023, well after these proceedings had been commenced (which is the latest relevant point in time). Any statements regarding his French nationality, including the purported loss of his Dutch nationality as a result, are therefore of no relevance.

49. In addition, most factors that Andraous alleges as pertinent in the dominant and effective nationality assessment are beyond the relevant temporal scope. Although Andraous highlights that the Kingdom of the Netherlands "ignores or discards purely objective factors" such as the place of birth, curricula and language of education, marriage, or military service,[77] these alleged facts long precede the relevant points in time for purposes of the application of the dominant and effective nationality test. As explained in the SoD,[78] the fact that Andraous lived in Lebanon until 1984, and that in the period prior to 1984 he studied, got married and did his military service in Lebanon or has certain cultural ties to Lebanon, is immaterial to determining his dominant and effective nationality at the relevant point in time and for the relevant purposes. 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".[79]

50. Third, in light of the object and purpose of the BIT – which is to increase and protect *foreign* investments as explained in **Section 2.1** above – factors which are linked to the alleged 'investment' and the circumstances surrounding this element hold most weight in view of determining which nationality is predominant. Other tribunals have equally held so.[80]

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74 SoD, para. 157.
75 Reply, para. 10.
76 SoD, para. 32.
77 Reply, para. 56.
78 SoD, para. 157.
79 **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 (unofficial translation).
80 **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 (unofficial translation); **Exhibit CLA-167**, *Ballantine v. Dominican Republic* (Final

51. In that regard, Andraous takes issue with holding subjective and personal factors of "lesser weight", by pointing to the *Nottebohm* case as having "mainly referred to personal factors".[81] Andraous further asserts that no factor is "key" in assessing which nationality is dominant and effective.[82] These arguments are inconsequential and selectively tailored to fit Andraous' narrative. First of all, *Nottebohm* was a 1955 case brought before the International Court of Justice rather than an investment arbitration. As explained in the SoD, investment treaty-related case law has developed since then, with certain factors having emerged as more – or, conversely – less important for the purposes of an investment treaty dispute.[83] Investment treaty disputes are inherently about foreign investment protection and thus different from the "personal factors" which Andraous seems to highlight.[84] Furthermore, Andraous himself quotes from *Nottebohm* as having established that the factors' "importance will vary from one case to the next".[85] It is in that light that no factor can be seen as "key" in all circumstances and for purposes of all cases. In an investment arbitration, the factors which are inherently linked to the alleged investment naturally hold more prominence. At the very least, as also highlighted below, factors which are objectively verifiable against concrete evidence are to be given more importance when compared to mere statements as to one's attachments or associations – statements which Andraous heavily relies on (see paragraph 53 below).

52. As highlighted in the SoD, the following factors are therefore "key" for the purposes of the present dispute:

> (i) (the centre of) the dual national's economic and business interests;[86]

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Award, 3 September 2019) PCA Case No. 2016-17, UNCITRAL, paras. 575-577 and 598; **Exhibit RL-044**, *Leopoldo Castillo Bozo v. Republic of Panama*, PCA Case No. 2019-40, Award, 8 November 2022, para. 209.

81 Reply, para. 53.

82 Reply, para. 54.

83 See SoD, paras. 104-108.

84 Reply, para. 53.

85 Reply, para. 54, quoting **Exhibit CLA-158**, *Nottebohm Case (Liechtenstein v. Guatemala)* (Merits) [1955] ICJ Rep 4, p. 22.

86 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 (unofficial translation); **Exhibit RL-025-SPANISH**, *Fernando Fraiz Trapote v. Bolivarian Republic of Venezuela*, PCA Case No. 2019-11, Final Award, 31 January 2022, para. 414 (unofficial translation); **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*

(ii) 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;[87]

(iii) the (reasons behind the) voluntary act of naturalisation;[88] and

(iv) the dual national's habitual residence.[89]

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*Panama*, PCA Case No. 2019-40, Award, 8 November 2022, para. 209 (unofficial translation); **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 (unofficial translation).

87 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 (unofficial translation); **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.

88 See e.g. **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".); **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".).

89 **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 Tribunal considers that habitual residence is the first factor or criterion analyzed by scholars and courts faced with the 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 (unofficial translation); **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 (unofficial translation); **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).

53. As to Andraous' alleged "attachment to Lebanon", "how Claimant views himself", and his "intention for the future",[90] it suffices to say that tribunals will ordinarily undertake an objective factual enquiry to evaluate such statements on the basis of extrinsic evidence.[91] In the absence of concrete evidence, these remain unsubstantiated statements and "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" is naturally inferior to weighing "such subjective expressions of association against objectively verifiable indicia".[92] Indeed, tribunals have held that it is not determinative that a claimant may refer to himself over the course of proceedings as, for example, Lebanese in circumstances where he is indeed Lebanese.[93] This does not impact the assessment that, upon undertaking the test, factual enquiries lead to a claimant's dominant and effective nationality being that of the other State.[94] In this case, the verifiable indicia do not point to Andraous' Lebanese nationality outweighing his Dutch nationality.

54. On the basis of the evidence before the Tribunal, Andraous has not discharged his burden that any ties to Lebanon at the relevant points in time outweigh his ties with the Kingdom of the Netherlands. This holds true for each of the factors enumerated above, as set forth in the SoD[95] and further developed below.

### 2.2.1 Centre of economic and business interests

55. Andraous' centre of economic and business interests was in the Kingdom of the Netherlands at all relevant points in time. To recall, the SoD establishes that: (i) when Andraous first applied for Dutch nationality in 1991, he stated that "he works on St Maarten";[96] (ii) Andraous worked for SunResorts (an Ennia affiliate) between 1984 and 2006, and at PIBV and other Ennia entities in various functions between 2005 and 2018, keeping him economically centred in the Kingdom of the Netherlands continuously for over 30 years

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90 Reply, paras. 58-63.
91 SoD, para. 112.
92 **Exhibit RL-021**, *Alberto Carrizosa Gelzis and others v. Republic of Colombia*, PCA Case No. 2018-56, Award, 7 May 2021, para. 196.
93 **Exhibit RL-044-SPANISH**, *Leopoldo Castillo Bozo v. Republic of Panama*, PCA Case No. 2019-40, Award, 8 November 2022, para. 210 (unofficial translation).
94 **Exhibit RL-044-SPANISH**, *Leopoldo Castillo Bozo v. Republic of Panama*, PCA Case No. 2019-40, Award, 8 November 2022, para. 210 (unofficial translation).
95 SoD, Section 3.3.2.
96 **Exhibit R-010-DUTCH**, Dutch Ministry of Justice Immigration and Naturalisation Service, Nationality and Naturalisation documents of Abdallah Andraous, p. 2 (unofficial translation).

between 1984 and 2018;[97] (iii) he owned several pieces of real estate, tangible goods, and various insurance policies all linking him to the Kingdom of the Netherlands;[98] and (iv) Andraous' Dutch nationality was instrumental to his business activities, as he acknowledged.[99]

56. By contrast, in the Reply, Andraous has not adduced any evidence showing economic or business interests in Lebanon. In fact, he acknowledges that "Claimant *does* consider its centre of economic interests" as being in Curaçao.[100] This also renders his statement that "Claimant spent the first ten years of his professional career in Lebanon"[101] irrelevant. Moreover, the statement – pertaining to the period between 1974 and 1984 – evidently falls outside the relevant points in time, as shown above.

57. Importantly, Andraous acknowledges *again* in his Reply that his Dutch nationality is directly tied to the alleged investment that is at issue, saying that – for the purposes of the investment – it was "convenient" to be Dutch.[102]

58. Furthermore, in the Reply, Andraous admits that the economic benefits of his 'investment' were collected on bank accounts in France and the United States of America and that he owns a bank account in Curaçao (i.e. in the Kingdom of the Netherlands).[103] No mention is made of him having a bank account in Lebanon and making use of it.

59. In parallel, Andraous refers to "the most determinative economic factor" as being the fact he "was known as a foreign tax resident" in the Kingdom of the Netherlands.[104] This is incorrect. Andraous was a foreign tax *resident* because he resided both in the Kingdom of the Netherlands and in France, not because he resided in the Kingdom of the Netherlands and in Lebanon. Moreover, his tax status is not based on his nationality, but merely on the

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97 SoD, para. 122.

98 **Exhibit R-055-DUTCH**, Andraous' liability and content insurance policy for apartment D-6, 13 February 2019; **Exhibit R-056-DUTCH**, Andraous' car insurance policy, 24 February 2011; **Exhibit R-057**, Andraous' liability and content insurance policy for apartment D-6, 26 April 2023.

99 SoD, para. 118, referring to SoC, para. 144(iii).

100 Reply, para. 74.

101 Reply, para. 56 (iii).

102 Reply, para. 77.

103 Reply, para. 76. See also **Exhibit C-103**, Banco di Caribe current account (2010-2023), which reveals regular transactions conducted by Andraous in the Kingdom of the Netherlands, e.g. pertaining to a yacht club in Curaçao and transfers of funds between Andraous family members.

104 Reply, para. 81.

residence that he declares to the tax authorities, as is also apparent from Andraous' Dutch tax return forms.[105]

60. Finally, Andraous having foreign tax residency does not change the fact the centre of his economic and business interests was in the Kingdom of the Netherlands and that he accordingly paid taxes in the Kingdom of the Netherlands. By contrast, he has not provided any evidence that he has had economic or business interests or paid taxes in Lebanon at any of the relevant moments in time.

### 2.2.2 Presentation as a Dutch national instead of a Lebanese national

61. As of the moment he acquired Dutch nationality in 2000, Andraous presented himself, persistently and exclusively, as a Dutch national before the Dutch authorities, including in relation to his purported investment as well as in private commercial and personal dealings. This holds true for all official documentation on record, both with respect to his employment and directorship at Ennia and PIBV, as well as in communications with the CBCS and the tax authorities.[106] 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 CBCS.[107]

62. Similarly, documents exhibited proactively by Andraous alongside the Reply that relate to his alleged shareholding in PIBV identify him solely as Dutch,

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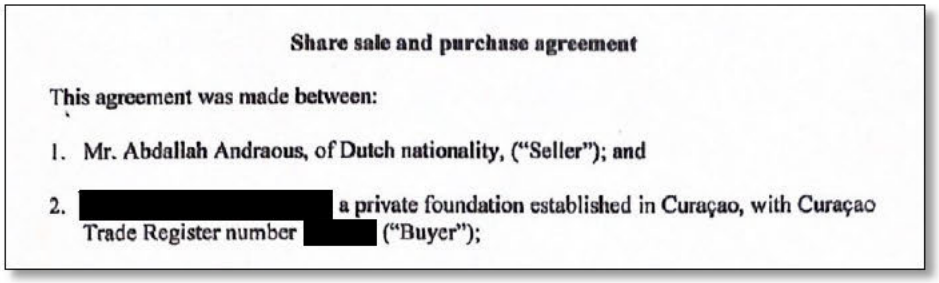
105 See e.g. **Exhibit R-058**, Andraous' Dutch tax statement, 2015; **Exhibit R-059**, Andraous' Dutch tax statement, 2016; **Exhibit R-060**, Andraous' Dutch tax statement, 2017.

106 SoD, Section 3.3.2.2. See e.g. **Exhibit R-021**, Curaçao Commercial Register Excerpt regarding EC Investments B.V., 18 May 2017. 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.

107 SoD, para. 4.

or by reference to his Dutch passport.[108] Most notably, even in the sale and purchase agreement through which Andraous sold his shares in PIBV to [redacted] he is listed exclusively as a Dutch national:[109]



**Share sale and purchase agreement**

This agreement was made between:

1. Mr. Abdallah Andraous, of Dutch nationality, ("Seller"); and
2. [redacted] a private foundation established in Curaçao, with Curaçao Trade Register number [redacted] ("Buyer");

### 2.2.3 Andraous' voluntary naturalisation as a Dutch national

63. Andraous voluntarily naturalised as Dutch. He did so because of economic interests keeping him centred in the Kingdom of the Netherlands and because of the aforementioned convenience tied to the purported investment – but not only for these reasons. He also did so because he felt "integrated into Sint Maarten's society" and did not see himself "setting up outside the Netherlands Antilles in the future".[110]

64. It is recalled that Andraous even expressly offered to renounce his Lebanese nationality in favour of Dutch nationality in the naturalisation process.[111] As held by the *Okuashvili* tribunal, relied on by Andraous:

> "A nationality one countenances to lose as a necessary and, in principle, inevitable sacrifice for obtaining another nationality cannot be regarded as predominant compared to the latter".[112]

65. Andraous' naturalisation application further reveals that he requested Dutch nationality alongside his wife and for both of his children (his third child was only born one year later). His wife and all of his three children successfully

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108 See e.g. **Exhibit C-114**, Share sale and purchase agreement between Claimant and [redacted] dated 1 December 2015; **Exhibit C-115**, Declaration of Ownership of [redacted] dated 27 September 2019.

109 **Exhibit C-114**, Share sale and purchase agreement between Claimant and [redacted] dated 1 December 2015.

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

111 SoD, paras. 5 and 138.

112 **Exhibit CLA-231**, *Zaza Okuashvili v. Georgia* (Partial Final Award, 31 August 2022) SCC Case No. EA 2019/038, para. 156.

naturalised as Dutch.[113] Furthermore, at the time of his 1991 naturalisation request, Andraous' parents had already been residing in Sint Maarten,[114] and had successfully naturalised as Dutch already in December 1996.[115]

66. Andraous omitted to mention these facts in both the SoC and in his Personal Statement. After they were brought to light by the Kingdom of the Netherlands in the SoD, Andraous fails to appropriately engage with them. For example, Andraous does not address the fact that he offered to renounce his Lebanese nationality, that he did not see himself setting up outside the Kingdom of the Netherlands, and that he felt integrated in the Kingdom of the Netherlands, in the body of the Reply.

67. Nor does Andraous address the fact that his family – his wife, children and parents – had Dutch nationality and were living in the Kingdom of the Netherlands, other than to say this was "another practicality", and that it was merely a "(welcome) coincidence" that his parents had been residing in Sint Maarten.[116] This is inapposite: whether practical or coincidental, Andraous' family resided in the Kingdom of the Netherlands, not Lebanon. In circumstances where Andraous himself puts emphasis on "family ties" and "centre of interests" as pertinent factors,[117] even on Andraous' own narrative such links point to the Kingdom of the Netherlands at the relevant moments in time.

68. In the Reply, Andraous further attempts to brush aside his Dutch nationality as (i) a "nationality of convenience", thereby (ii) asking the Tribunal to disregard it due to "the practice of ICSID tribunals".[118] This argument is inapposite and misleading.

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113 **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]; **Exhibit R-037-DUTCH**, Sint Maarten Personal Records Database Extract regarding [redacted] **Exhibit R-038-DUTCH**, Sint Maarten Personal Records Database Extract regarding [redacted]

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

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

116 Reply, para. 79.

117 Reply, para. 53 and Section 1.B.2(a)(i) and (f).

118 Reply, para. 80.

69. First, this is an UNCITRAL, not ICSID, arbitration. Tribunals in ICSID arbitrations are bound to consider and abide by the nationality requirements of Article 25 ICSID Convention in assessing whether a claimant has standing, and jurisdiction can be assumed. To that end, the very same legal authority cited by Andraous expressly states as follows:

> "It is clear, in the light of Article 25(2)(a) [of the ICSID Convention], that a dual national may not rely on a BIT between his or her two States of nationality in order to bring a claim against one of them, even if the respondent State is not the State of his or her 'dominant and effective' nationality".[119]

70. The practice of ICSID tribunals in determining questions pertaining to dual nationals' standing is thus of limited relevance in the context of the current UNCITRAL arbitration. What is more, even if one assumes Andraous was predominantly and effectively Lebanese at the relevant moments in time (*quod non*), he would not have been able to bring a claim against the Kingdom of the Netherlands under the ICSID regime.

71. Second, the ICSID case referenced by Andraous was one in which the tribunal was determining whether the claimant's nationality was one of convenience in the sense that it was specifically "obtained for the purposes of bringing his claim against the Respondent".[120] The claimant in that case was a Dutch-Jordanian national who brought a claim against Turkey based on the bilateral investment treaty between the Kingdom of the Netherlands and the Republic of Turkey, and was not a Turkish national.[121] Even if this ICSID case can be relied on, which it cannot, it follows that Andraous' Dutch nationality should be disregarded only if it was specifically obtained for the purposes of bringing a claim against the Kingdom of the Netherlands. This is not the case here. As detailed above, Andraous' naturalisation as Dutch occurred in 2000, over two decades before this arbitration was commenced, is inherently linked to his alleged 'investment', and is compounded by ample personal reasons alongside commercial and economic aspects.

### 2.2.4 Habitual residence

72. Between 1989 and 2023, Andraous has continuously declared addresses and regularly claimed to reside in the Kingdom of the Netherlands.[122] By

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119 **Exhibit CLA-168**, Anthony Sinclair, 'ICSID's Nationality Requirements' (2008) 32(1) ICSID Review - Foreign Investment Law Journal, p. 82.

120 **Exhibit CLA-124**, *Saba Fakes v. Turkey* (Award, 14 July 2010) ICSID Case No. ARB/07/20, para. 78.

121 **Exhibit CLA-124**, *Saba Fakes v. Turkey* (Award, 14 July 2010) ICSID Case No. ARB/07/20, paras. 1 and 3.

122 SoD, Section 3.3.2.4.

contrast, he never made such declarations at any address in Lebanon. As explained in the SoD,[123] the Kingdom of the Netherlands has uncovered no less than 10 properties which at various moments in time within the relevant timeframe were declared by Andraous as his habitual residences.

73. The only response Andraous presented in the Reply is that "he resided in different *temporary* properties during his time in the Dutch Caribbean. However, this was in addition to his parallel residence in Paris, France which has remained unchanged for several years".[124] Whether at temporary properties or not, the conclusion still holds: Andraous habitually resided in the Kingdom of the Netherlands throughout the relevant period, or otherwise in France, perhaps alternating between the two, but – yet again – certainly not in Lebanon. In the Reply, Andraous explicitly ties his residing in the Kingdom of the Netherlands to his alleged investment, admitting that he lived there "to have a foothold there for his professional and investment activities".[125]

74. On top of that, the documents produced by Andraous illustrate that his address at [redacted] in Sint Maarten was not a 'temporary property' at all. Rather, Andraous declared that he resided at this address in 2011/2012, 2019 and 2023:[126]

ENNIA Caribe Holding N.V. office Sint Maarten

Policy number: [redacted]
Policyholder:
Sint Maarten DWI

| | |
|---|---|
| Product | Ennia Casco |
| Start date | 24 February 2011 |
| End date | 24 February 2012 (after which each time it is tacitly renewed for 1 year) |
| Change reason | New Application |
| Insurance no. | 1 |

| | | | |
|---|---|---|---|
| Brand | HYUNDAI | Year of manufacture | 2007 |
| Type | ELANTRA | Licence plate no. | [redacted] |
| Vehicle identificaiton no. | [redacted] | Intended use | Private |

123 SoD, Section 3.3.2.4.
124 Reply, para. 71.
125 Reply, para. 73.
126 **Exhibit R-056-DUTCH**, Andraous' car insurance policy, 24 February 2011; **Exhibit R-055-DUTCH**, Andraous' liability and content insurance policy for apartment D-6, 13 February 2019; **Exhibit R-057**, Andraous' liability and content insurance policy for apartment D-6, 26 April 2023.

| | |
|---|---|
| **Policy number** | [redacted] |
| Policyholder | Andraous, A.A. |
| **Product** | **Content Insurance Flexible** |
| Change date | 13 February 2019 |
| End date | 26 April 2019 (each year it will be tacitly renewed for 1 more year) |
| Change reason | Change of address |
| Insurance order no. | 1 |
| Risk address | Rhine Road Blue Marine Appartment D-6 Sint Maarten |
| Standard | New value |
| Further specification | Contents in a flat located on the 1st floor of a 5-storey building. |
| Building type | Concrete stone and roof made of hard material |
| Type | Content |
| Destination | Flat |
| Conditions | IPV001, S 004 |

| **Cover type** | **Sum insured** | **Clause** | **Own risk** |
|---|---|---|---|
| Related causes | 40,300 | 1757 | |
| Fire damage | 40,300 | 1757, 1843 | |
| Catastrophe causes | 40,300 | 1757 | |
| Burglary/theft/robbery | 40,300 | 1757 | |

Mr. A.A. Andraous
[redacted]
Sint Maarten D.W.I.

**Premium Invoice**

**Philipsburg, 15-03-2023**

| | |
|---|---|
| **Underwriter** | : Ennia Caribe N.V. |
| **Policy due date** | : 26-04-2023 |
| **Premium period** | : 26-04-2023 to 26-04-2024 |
| **Invoice number** | [redacted] |
| **Policy number** | |
| **Type of insurance** | : Opstal / Inboedel |
| **Description** | [redacted] |
| **Amount in USD** | : 270,69 |
| | 1 USD equals 1,79 ANG |

75. Andraous' habitual residence in the Kingdom of the Netherlands is further corroborated by multiple flight tickets between France and Sint Maarten

which reveal that Andraous would spend months at a time in the Kingdom of the Netherlands and travel back and forth between the two locations.[127]

76. Andraous disputes that the element of habitual residence would point to the Kingdom of the Netherlands but is unable to refer to any habitual residence in Lebanon. As indicated, a habitual residence outside the Kingdom of the Netherlands or Lebanon, including in France, is immaterial, as the issue of habitual residence only arises in the comparison between the Lebanese and the Dutch nationality.

77. While acknowledging that the (present) situation in Lebanon may cause a person to find refuge elsewhere, the Kingdom of the Netherlands points out that this fact is immaterial to Andraous' claim. His decision to leave Lebanon in 1984 when he was just 27 years old was voluntary, as was his decision never to return to Lebanon on a permanent basis in the 40 years since. This is further reinforced by his entire family's relocation and subsequent naturalisation as Dutch citizens.

78. Indeed, the evidence presented by Andraous on his most recent relations with Lebanon reveal that he no longer wishes to avail himself of the benefits that the Lebanese nationality might otherwise offer. For example, he has stated that relying on Lebanese social security would be a disadvantage, as the coverage would be less than what he could obtain elsewhere, and that it would require that he relocates to Lebanon, which he does not intend to do.[128] A similar statement was made concerning medical care.[129]

79. This demonstrates that Andraous' Lebanese nationality is ineffective and in any event not dominant, throughout the relevant moments in time for purposes of the present dispute. Andraous invariably refers to the impossibility of relying on Lebanon to obtain benefits of his Lebanese nationality. Instead, the desired benefits – a safe residence, social security,

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127 **Exhibit R-061-FRENCH**, Andraous' plane tickets, Paris-Sint Maarten, 12 April – 20 June 2015; **Exhibit R-062-FRENCH**, Andraous' plane tickets, Paris-Sint Maarten, 12 April – 27 June 2015; **Exhibit R-063-FRENCH**, Andraous' plane tickets, Paris-Sint Maarten, 5 July – 21 August 2015; **Exhibit R-064-FRENCH**, Andraous' plane tickets, Paris-Sint Maarten, 29 March – 5 August 2016; **Exhibit R-065-FRENCH**, Andraous' plane tickets, Paris-Sint Maarten, 23 April – 11 August 2017; **Exhibit R-066**, Andraous' plane tickets, Paris-Sint Maarten, 13 January – 1 June 2020; **Exhibit R-067**, Andraous' plane tickets, Paris-Sint Maarten, 13 January – 3 April 2020; **Exhibit R-068-FRENCH**, Andraous' plane tickets, Paris-Sint Maarten, 14 August 2019 – 12 January 2020; **Exhibit R-069**, Andraous' plane tickets, Paris-Sint Maarten, 14 August – 16 September 2019.

128 Reply, para. 67.

129 Reply, para. 67.

medical care, a reliable income, financial security, and leisure – were all obtained despite, not because of, his Lebanese nationality.

## 3 ANDRAOUS DOES NOT HAVE A PROTECTED 'INVESTMENT' UNDER THE BIT

80. As set out in the SoD,[130] Andraous does not have a protected 'investment' under the BIT, either in relation to (i) his alleged shareholding in PIBV, which he does not hold or which is too remote, or (ii) his alleged salary and pension rights, which do not qualify as an 'investment' under the BIT.

81. In the Reply, Andraous maintains that he is the owner of 1% of shares in PIBV.[131] Andraous furthermore confirms that there was a share sale and purchase agreement for the sale of those shares to [redacted], but argues that the sale never materialised because the purchase price was not paid.[132] In the alternative that the shares were sold and transferred to [redacted], Andraous argues that he is the sole beneficiary of [redacted] and thus, the indirect owner of the PIBV shares.[133] Moreover, Andraous maintains that next to his shareholding, his remuneration and pensions before and after the adoption of the Emergency Measures qualify as 'investments' under the BIT.[134]

82. As described below, Andraous has not demonstrated his holding of shares in PIBV at the points in time relevant for jurisdictional purposes. Even if he did, that shareholding is too remote to qualify for BIT protection (**Section 3.1**).

83. Furthermore, Andraous continues to misinterpret the BIT when alleging that his salary and pension rights qualify for BIT protection. Andraous' alleged salary and pension rights do not qualify as a protected 'investment' under the BIT (**Section 3.2**).

### 3.1 Andraous does not have a protected 'investment' under the BIT with respect to his alleged shareholding in PIBV

84. Andraous has not proven his ownerships of shares in PIBV at the relevant points in time when the events he complains of allegedly occurred (2018) and when he commenced this arbitration (2023). On the contrary: all evidence on the record – including the shareholder register of PIBV – confirms that he

130 SoD, Chapters 4 and 5.
131 Reply, para. 111.
132 Reply, para. 117.
133 Reply, para. 118.
134 Reply, para. 130.

sold the shares to [redacted] on 1 December 2015. This is furthermore supported by Dr Katherine Filesia's Legal Opinion, which concludes that – pursuant to Curaçao law and based on the underlying documentation – [redacted] "is the holder of the legal title of the shares".[135]

85. Andraous is thus no longer the owner of the shares (**Section 3.1.1**). Moreover, Andraous has failed to provide any evidence proving a relationship with [redacted] that would qualify him as owning the shares in PIBV (**Section 3.1.2**).

86. Even if, for the sake of argument, Andraous establishes that he – directly or indirectly – owns PIBV shares, 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 beneficiary relationship to a 1% indirect shareholding in Ennia (**Section 3.1.3**).

### 3.1.1 Andraous sold his shares in PIBV to [redacted]

87. As outlined in the SoD,[136] Andraous has failed to demonstrate his ownership of shares in PIBV at the relevant points in time, namely when the Emergency Measures were adopted in July 2018 and at the time of commencement of this arbitration in February 2023.

88. From Andraous' own evidence submitted with the SoC, it follows that Andraous sold and transferred his shares in PIBV to [redacted] in December 2015.[137] Accordingly, Andraous did not own shares in PIBV at the relevant points in time in 2018 and 2023.

89. The Reply does not provide any evidence as to Andraous owning shares in PIBV in 2018 and 2023 either. To the contrary: the additional documents provided with the Reply all confirm that the shares were transferred to [redacted] namely under a share purchase agreement concluded between Andraous as seller and [redacted] as buyer dated 1 December 2015 ("SPA").[138]

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135 Legal Opinion, para. 21.
136 SoD, Section 4.2.
137 **Exhibit C-40**, Parman International B.V. Stock Register, p. 4; **Exhibit C-114**, Share sale and purchase agreement between Claimant and [redacted] dated 1 December 2015.
138 **Exhibit C-114**, Share sale and purchase agreement between Claimant and [redacted] dated 1 December 2015, Article 7.

90. Article 7 SPA sets out that the transfer of the shares in PIBV from Andraous to [redacted] is effective as of the date of acknowledgement by the company (i.e. by PIBV).[139]

> 7. This agreement shall have immediate effect upon its execution. The transfer of the Shares will be effective as of the date of acknowledgement thereof by the Company or the date this agreement is served upon the Company (whichever occurs first).

91. On 1 December 2015, Andraous himself – acting on behalf of PIBV – signed the SPA for acknowledgement by PIBV.

> The Company hereby: acknowledges the abovementioned transfer of the Shares and undertakes to register the transfer and the date thereof in its shareholders register.
>
> [redacted]
>
> By : Abdallah Andraous
> Title : Managing Director
> Date : December 1, 2015

92. The PIBV stock register likewise confirms that Andraous sold his shares (25,000 A shares) to [redacted] on 1 December 2015. [redacted] is listed as the successor shareholder in PIBV's stock register.[140]

**Stockregister** of
Parman international B.V.
Established in Curaçao Trade registry
97128

| | | |
|---|---|---|
| shareholder full name | Bahram Ansary | Abdallah Andraous |
| address | 4 Somerset House<br>Somerset Road<br>London, SW19 5JA | 28, Avenue Hoche<br>75008 Paris |
| change of address | | |
| quantity of shares | 25,000 A shares | 25,000 A shares |
| serial numbers | A 2,456,857 u/i<br>A 2,481,856 | A 2,481,857 u/i<br>A 2,506,856 |

[redacted]

139 **Exhibit C-114**, Share sale and purchase agreement between Claimant and [redacted] dated 1 December 2015, Article 7.

140 **Exhibit C-40**, Parman International B.V. Stock Register, p. 4.

93. In his Reply, Andraous argues that the sale and transfer to [redacted] is "immaterial" because it "never materalised".[141] However, Andraous offers no substantiation or documentary evidence to support this contention. In advancing this position, he merely alleges that the purchase price was not paid.

94. First, as a matter of governing Curaçao law, the sale and transfer of shares to [redacted] was effected regardless of whether the purchase price was paid (in part or in full). Once the shares were transferred, the purchasing private foundation owns the shares whether or not the purchase price has been paid in full. If not paid in full, the outstanding portion of the purchase price amounts to a claim to be paid (from dividends or otherwise), but it does not reverse the transfer, as confirmed by the Legal Opinion.[142]

95. Second, the terms of the SPA expressly stipulate that the shares were for the benefit, risk and account of [redacted] already as of 16 August 2013.[143]

> 2. The Shares are for the benefit, risk and account of Buyer effective August 16, 2013 (the "Effective Date").

96. Third, Andraous' own statements regarding the dividends he had allegedly received in the period from the effective date in August 2013 until 2015,[144] confirm that all or part of the purchase price has been paid. This is in line with the SPA which sets out that any distribution by PIBV will be paid to Andraous on account of the purchase price.[145]

> 5. Any distribution by the Company to its shareholders will be paid to the Seller, as payment on account of the Purchase Price, until the Purchase Price is paid in full..

97. Moreover, Andraous' attempt to use a UBO statement of Ennia Caribe Holding N.V. of 31 December 2013 to prove that he is the owner of the PIBV shares is incorrect.[146] First, the statement is dated 31 December 2013, i.e. well before the conclusion of the aforementioned SPA in 2015, the imposition

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141 Reply, para. 117.
142 Legal Opinion, para. 21.
143 **Exhibit C-114**, Share sale and purchase agreement between Claimant and [redacted] dated 1 December 2015, Article 2.
144 Based on Andraous' own statements, he received dividends until 2015. See Reply, paras. 86 and 120.
145 **Exhibit C-114**, Share sale and purchase agreement between Claimant and [redacted] dated 1 December 2015, Article 5.
146 Reply, para. 117; **Exhibit C-100**, UBO Statement of ECH dated 31 December 2013.

of the Emergency Measures in July 2018, and the time of commencement of the arbitration proceedings in February 2023. It therefore does not prove his ownership of the shares at the relevant moments in time. A statement from December 2013 is certainly incapable of disproving a share transfer that, according to all evidence on record, occurred in December 2015. Second, UBO statements are merely internal company documents with limited evidentiary value for the purposes of the current discussion and satisfying Andraous' burden of proof.

98. Lastly, Andraous is also referring to certain dividend distributions in order to prove his alleged shareholding in PIBV. Notably, Andraous states that he received dividends until 2015 and not thereafter.[147] It is recalled that this coincides with the sale and transfer of shares to [redacted], which occurred at the end of 2015, as shown above. Thus, the transfer of the shares to [redacted] at the end of 2015 is consistent with Andraous receiving dividends until 2015. In that regard, it is also worth noting that despite Andraous' assertions, there is no trace of dividend receivables in either Andraous' French or Dutch tax statements.[148]

99. In sum, faced with the underlying documents outlined above – and no evidence to the contrary – the conclusion is that [redacted] is the owner of the PIBV shares, as similarly confirmed by the Legal Opinion:

> "Given the available documents, and in line with the legal requirements as stipulated by the [Civil Code of Curaçao] and set forth [in the Legal Opinion], it should be concluded that [redacted] is the holder of the legal title of the shares in the capital of Parman International B.V. Consequently, [redacted] would qualify as a shareholder. This is regardless of whether it paid for the shares in full, since the payment of a purchase price is no requirement for the transfer of the shares".[149]

147 Reply, para. 86.

148 **Exhibit R-058**, Andraous' Dutch tax statement, 2015; **Exhibit R-059**, Andraous' Dutch tax statement, 2016; **Exhibit R-060**, Andraous' Dutch tax statement, 2017; **Exhibit R-070**, Andraous' Dutch tax statement, 2018; **Exhibit R-071**, Andraous' Dutch tax statement, 2015 - 2019 **Exhibit R-072-FRENCH**, Andraous' French tax statement, 2015; **Exhibit R-073-FRENCH**, Andraous' French tax statement, 2016; **Exhibit R-074-FRENCH**, Andraous' French tax statement, 2017; **Exhibit R-075-FRENCH**, Andraous' French tax statement, 2018; **Exhibit R-076-FRENCH**, Andraous' French tax statement, 2019; **Exhibit R-077-FRENCH**, Andraous' French tax statement, 2020; **Exhibit R-078-FRENCH**, Andraous' French tax statement, 2021; **Exhibit R-079-FRENCH**, Andraous' French tax statement, 2022.

149 Legal Opinion, para. 21.

### 3.1.2 Andraous' ownership of the shares remains unproven

100. Andraous alleges in the alternative that he is the "sole beneficiary" of [redacted] and for that reason still "hold[s] 1% of [PIBV] shares".[150] This statement is not accompanied by any evidence and, as shown below, does not in any way demonstrate that Andraous owns the 1% shareholding in PIBV.

101. A private foundation – or *Stichting Particulier Fonds* in Dutch ("SPF") – is a particular form of foundation with separate legal personality under Curaçao law.[151] An SPF does not have any shareholders.[152] An SPF does have a board – typically a trust office. The manner in which the board of the SPF manages the SPF's assets, including the making of any distributions, is determined by the articles of association of the SPF.[153]

102. Notably, the concept of a "beneficiary" of an SPF is not defined under Curaçao law.[154] Therefore, as also explained in the Legal Opinion:

> "[T]he precise nature and extent of the rights attributed to the beneficiary could only be assessed based on specific corporate documents (e.g., articles of association). In other words, to ascertain the beneficial interest in the assets of an SPF, there must be written evidence setting out that a particular person holds a specified right regarding the assets of the SPF in question. Without such documentation, it is impossible to determine if the (potential) beneficiary has or will have a present or future entitlement to assets of the SPF".[155]

103. In turn, unless a person has been assigned rights to the SPF's assets in accordance with the SPF's articles of association, such person does not have an interest in the SPF's assets, nor can such person enforce (i.e. obtain a court order) against the SPF to make distributions.

104. In the present case, it follows from [redacted] articles of association that its founder is [redacted], an entity to which Andraous has

150 Reply, para. 118.
151 Legal Opinion, para. 22.
152 Legal Opinion, para. 23. See also **Exhibit RL-063-DUTCH**, H. Th. M. Burgers, "The Private Foundation", Den Haag: Boom juridisch (2017), p. 1 (unofficial translation).
153 Legal Opinion, para. 30.
154 Legal Opinion, para. 26.
155 Legal Opinion, para. 30.

not attempted to demonstrate any relationship.[156] Furthermore, the same entity operates as the board of [redacted].[157]

105. By contrast, the articles of association contain no reference to Andraous (whether as beneficiary or otherwise), nor any directions on how [redacted] funds are to be distributed and in what circumstances. Rather, pursuant to the articles of association, the board has discretion to determine how its assets are distributed, as the purpose of [redacted] is:

> "[T]o make distributions out of its assets to such institutions and persons as the board may determine and to provide financial assistance to such institutions and persons by means of loans, granting securities, annuity contracts and the like".[158]

106. In light of the discretionary nature of distributions (if any), the Legal Opinion explains that:

> "[T]he potential beneficiary(ies) of [redacted] does/do not have a right, not even a contingent right, to assets of the SPF, or to specific assets of the SPF. Such a person has *a mere hope* of becoming the recipient of a distribution, in the event that the board actually makes such a distribution".[159]

107. Notably, no documents establishing any relationship between Andraous and [redacted] were produced by Andraous, except for one document dated 27 September 2019.[160] This document – specifically prepared for the purpose of an unidentified transaction that would have occurred in 2019 – is insufficient to demonstrate that Andraous indirectly owns the PIBV shares at the relevant moments in time for the purposes of this arbitration, as also corroborated by the Legal Opinion.[161]

108. First, the document does not reflect the situation either at the time of adoption of the Emergency Measures in 2018, or at commencement of this arbitration in 2023. Accordingly, the document does not satisfy Andraous' burden of

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156 **Exhibit R-080**, Curaçao Chamber of Commerce Dossier regarding [redacted] including Articles of Association, 12 May 2011, p. 5.

157 **Exhibit R-080**, Curaçao Chamber of Commerce Dossier regarding [redacted], including Articles of Association, 12 May 2011, pp. 3-4; **Exhibit C-114**, Share sale and purchase agreement between Claimant and [redacted] dated 1 December 2015, p. 2.

158 **Exhibit R-080**, Curaçao Chamber of Commerce Dossier regarding [redacted], including Articles of Association, 12 May 2011, Article 2(1).

159 Legal Opinion, para. 34.

160 **Exhibit C-115**, Declaration of Ownership of [redacted] dated 27 September 2019.

161 Legal Opinion, para. 40.

proving that he held an indirect investment in Ennia at the relevant points in time.

109. Second, the document mentions, but does not define the term 'beneficiary'. As noted, a 'beneficiary' of an SPF is not a defined notion under Curaçao law and can have different meanings. Unless explicitly indicated otherwise in its articles of association, the board of the SPF has discretion (but not an obligation) to make distributions. Indeed, the articles of association of [redacted] expressly determine that the board, i.e. [redacted], has discretion to decide whether to make distributions, if any. The articles do not provide that distributions must be made to a particular person, nor that distributions must be made in particular circumstances. Instead, they leave it to the board's discretion to determine when, to whom and in relation to what assets of the SPF distributions will be made, if at all. Thus, even if one assumes that the declaration reflects some sort of beneficiary status of Andraous, it does not show that Andraous has a claim vis-à-vis [redacted] assets – let alone a claim to the 1% shareholding in PIBV (which may be just one of the SPF's assets). The most the document could show is that Andraous in 2019 was an individual to whom distributions could potentially be made if the board had decided to make distributions to him in its discretion. It does not show that the board must make any distribution to Andraous, let alone must do so when Andraous so wishes, and it certainly does not show that the board must distribute the 1% shareholding in PIBV to Andraous when he so wishes. Therefore, Andraous has no entitlement to the 1% shareholding in PIBV.

110. Third, if Andraous had in fact been designated as the intended future recipient of particular assets of the SPF in accordance with the SPF's articles of association, a corporate resolution to that effect must exist. None has been produced, despite the Tribunal's order that Andraous produce all documents relating to his relationship with [redacted].[162] This conclusively demonstrates that no such documents exist. Even if a corporate resolution existed containing an intention to make certain future distributions to Andraous, it remains subject to the board's discretion to make distributions as it sees fit and can thus be amended until a distribution has actually been made.

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162 Procedural Order No. 2, Annex B: Decision on Respondent's Document Production Requests, p. 28.

111. Fourth, Andraous' French and Dutch tax statements do not contain a single trace of either SPF-owned assets or income generated therefrom.[163] This further confirms that Andraous has no claim on the SPF's assets, including the SPF's 1% shareholding in PIBV.

112. In sum, there is no evidence – neither on the record nor at all – of the relationship, if any, between Andraous and [redacted] There is certainly no evidence to conclude that Andraous can exercise any rights towards [redacted], let alone that Andraous has a claim to [redacted] 1% shareholding in PIBV. As concluded in the Legal Opinion:

> "[I]n view of the discretion held by the board of the SPF to make distributions as it sees fit, Mr. Andraous is not legally entitled to particular assets of [redacted] nor may claim that [redacted] transfer particular assets to him".[164]

113. Even if, for the sake of completeness, Andraous were to be considered a beneficiary of [redacted] (*quod non*), he would not have any right or claim over its assets, but merely a hope or a legally non-enforceable expectation that he may be considered to receive at some point some distribution as determined by the board. However, as held by the tribunal in *Agarwal and Mehta v. Uruguay*, "a hope is not an asset",[165] so it cannot be deemed a qualifying investment:

> "[T]he Claimants' rights or interests were dependent on the decisions of third parties […]. In the meantime, the Claimants had no right or interest in the *Trust's* assets, but only the hope of benefiting from the *Trust*, and the value of that hope resembles the value of the interest that a person with the expectation of receiving an inheritance might

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163 **Exhibit R-058**, Andraous' Dutch tax statement, 2015; **Exhibit R-059**, Andraous' Dutch tax statement, 2016; **Exhibit R-060**, Andraous' Dutch tax statement, 2017; **Exhibit R-070**, Andraous' Dutch tax statement, 2018; **Exhibit R-071**, Andraous' Dutch tax statement, 2015 - 2019 **Exhibit R-072-FRENCH**, Andraous' French tax statement, 2015; **Exhibit R-073-FRENCH**, Andraous' French tax statement, 2016; **Exhibit R-074-FRENCH**, Andraous' French tax statement, 2017; **Exhibit R-075-FRENCH**, Andraous' French tax statement, 2018; **Exhibit R-076-FRENCH**, Andraous' French tax statement, 2019; **Exhibit R-077-FRENCH**, Andraous' French tax statement, 2020; **Exhibit R-078-FRENCH**, Andraous' French tax statement, 2021; **Exhibit R-079-FRENCH**, Andraous' French tax statement, 2022.

164 Legal Opinion, para. 41.

165 **Exhibit RL-064-SPANISH**, *Prenay Agarwal, Vinita Agarwal and Ritika Mehta v. Oriental Republic of Uruguay*, PCA Case No. 2018- 04, Award, 6 August 2020, para. 224 (unofficial translation). See also para. 229 ("For these reasons, the Tribunal concludes that the Claimants' interests in a *discretionary trust* did not constitute property for the purposes of the BIT and, as such, the Claimants lacked standing [...]".) (unofficial translation).

> have. In the [tribunal's] view, a hope is not an asset. It is comparable to a conditional benefit."[166]

114. Any rights that Andraous may expect to hold over [redacted] assets are subject to its board's discretion. As such, Andraous would have only had the hope of benefitting from potential distributions by [redacted], which cannot be considered a protected investment under the BIT.

115. The Kingdom of the Netherlands thus reiterates that Andraous has failed to meet his burden of proof that he owns the shares in PIBV and thus the alleged indirect investment in Ennia.

### 3.1.3 Andraous' alleged 'investment' is in any event too remote to qualify for protection under the BIT

116. Even if, for the sake of argument, one assumes that Andraous through [redacted] has a claim to the 1% shareholding in PIBV, this relationship is too remote to qualify as a protected investment under the BIT. The same applies if one assumes that the sale to [redacted] was, at an unspecified point in time and for an unknown reason, reversed.

117. As set out in the SoD,[167] the Kingdom of the Netherlands cannot be deemed to have consented to arbitrate with regard to an alleged investor so remote from the allegedly affected companies as Andraous: the alleged beneficiary of an SPF that holds a 1% shareholding in an entity that, through another entity, holds shares in the allegedly affected companies. As is demonstrated below, Andraous' argument in the Reply that "the manner in which an investor structures and holds its investments is irrelevant"[168] is incorrect.

118. Although minority shareholdings may be considered an investment in certain circumstances, tribunals have repeatedly acknowledged the problem of remoteness between a minority or indirect shareholder on the one hand and the allegedly affected company on the other hand.[169] In turn, tribunals and

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166 **Exhibit RL-064-SPANISH**, *Prenay Agarwal, Vinita Agarwal and Ritika Mehta v. Oriental Republic of Uruguay*, PCA Case No. 2018- 04, Award, 6 August 2020, para. 224 (unofficial translation).

167 SoD, Section 4.3.

168 Reply, para. 118.

169 **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, paras. 50-52; **Exhibit RL-054**, *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 122; **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

academic commentators have expressed the need for setting a cut-off point.[170] This is further supported by the case that Andraous himself put forward in his Reply,[171] *Noble v. Ecuador*, in which the tribunal agreed that "[t]here may well be a cut-off point somewhere […]".[172]

119. As described in the SoD,[173] the extent of a claimant's shareholding and the structure through which it is held must be considered in order to establish whether the Kingdom of the Netherlands has indeed consented to arbitrate with regard to the claimant in question. As emphasised above, the present case is an example of a connection that is simply too remote to fall within the Kingdom of the Netherlands' consent to arbitrate, i.e. beyond the cut-off point, by any measure.

120. Andraous' reliance on *El Paso v. Argentina* is misplaced. Contrary to Andraous' assertion, the tribunal in that case did not consider that minority shareholders are protected irrespective of the percentage of their shareholding, but rather discussed the question of whether a minority shareholding must be substantial or whether even a single share could give rise to a claim as "some concern has indeed been voiced by international tribunals that not any minor portion of indirectly owned shares should necessarily be considered an investment".[174] On the facts of the case, the tribunal considered it unnecessary to deal with that question since El Paso's shareholding in the affected Argentinian companies was more than 10%.[175] This is far more substantial than an unidentified relationship with an entity that holds an indirect 1% shareholding in the allegedly affected companies.

121. In conclusion, Andraous has failed to discharge his burden of proving that he holds an indirect investment in Ennia. Even if one assumes, for the sake of argument, that Andraous was [redacted] 'beneficiary' at the relevant moments in time, it is unclear what rights or entitlements in respect of the 1%

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Admissibility, 29 July 2008, para. 100 (unofficial translation); **Exhibit RL-065**, *El Paso v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 211.

170 See e.g. **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; **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. See also SoD, paras. 196-201.

171 Reply, para. 128.

172 **Exhibit CLA-260**, *Noble Energy v. Ecuador* (Decision on Jurisdiction, 5 March 2008) ICSID Case No. ARB/05/12, para. 82.

173 SoD, Section 4.3.

174 **Exhibit RL-065**, *El Paso v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 211.

175 **Exhibit RL-065**, *El Paso v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, paras. 7 and 212.

shareholding in PIBV held by [redacted] were assigned to him. Even if such unspecified and unproven rights were taken into account, Andraous' relationship towards Ennia is too remote. Andraous alleged investment does not qualify for BIT protection.

### 3.2 Andraous' alleged salary and pension rights do not qualify as 'investment'

122. As set out in the SoD,[176] Andraous does not have a qualifying 'investment' with respect to his claim to salary and pension rights under the BIT because those rights, even assuming they exist, do not fall within the definition of 'investment' as interpreted in accordance with Article 31 VCLT.

123. In the Reply, Andraous maintains that "Claimant's remuneration and pensions" are "claims to money, to other assets or to any performance having an economic value" within the meaning of the BIT.[177] Alternatively, if not a self-standing investment, Andraous alleges that these are "related to, and supplement" his alleged shareholding in PIBV.[178] These arguments do not hold water.

124. First, Andraous' alleged salary and pension rights resulting from his employment as director in various Ennia entities cannot reasonably be considered an 'investment' under the BIT. Moreover, his alleged shareholding in PIBV and salary and pension rights are not tied to each other as part of a complex investment operation (**Section 3.2.1**). Second, following two rounds of written submissions, Andraous still leaves the basis of his salary and pension rights claim unsubstantiated and has not furnished any evidence to establish the existence and extent of this alleged claim (**Section 3.2.2**).

#### 3.2.1 The term 'investment' is not unbounded

125. Andraous' interpretation of the term 'investment' to include salary and pension rights cannot be reconciled with the general rule of treaty interpretation (Article 31 VCLT) as it disregards the ordinary meaning of the terms in their context and in the light of the object and purpose of the BIT.

126. It is recalled that Article 1 BIT defines 'investments' as "every kind of asset" and includes an illustrative list of qualifying investments such as "claims to

176 SoD, Section 5.1.
177 Reply, para. 130.
178 Reply, para. 130.

money, to other assets or to any performance having an economic value".[179] To that end, as established by tribunals in non-ICSID investment arbitrations, "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'".[180] The illustrative list, therefore, cannot be interpreted in isolation and the term 'investment' must be given an inherent meaning: "the illustrative list [of assets under the BIT] does not trump the objective, ordinary meaning of the definition that precedes it".[181]

127. Salary and pension claims resulting from Andraous' employment as Ennia's director cannot be considered an 'investment' under any ordinary meaning of that term.

128. This is supported by the BIT's preamble (i.e. the context of Article 1 BIT), which provides that agreement upon the treatment of investments will "stimulate the flow of capital and technology and the economic development of the Contracting Parties".[182] Moreover, the BIT's object and purpose is not to stimulate foreign – or, in the present case even domestic – employment, but foreign investment.

129. The case law confirms that the definition of an 'investment' is not unbounded.[183] Tribunals have similarly warned against a mechanical application of the categories listed in the applicable investment treaty without considering the inherent meaning of the term investment.[184] As established in *Doutremepuich v. Mauritius*, an arbitration conducted under the

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179 **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).

180 **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.

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

182 **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.

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

184 **Exhibit RL-050**, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. 2007-07-AA280, Award, 26 November 2009, para. 184-185; **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; **Exhibit CLA-108**, *Alps Finance v. Slovak Republic* (Award, 5 March 2011) UNCITRAL, para. 237.

UNCITRAL rules, 'investments' should be defined by reference to the objective and ordinary meaning of the term, which entails that the alleged investment meets certain criteria, including the existence of a contribution to the host State and a participation in risks.[185]

130. In the Reply, Andraous acknowledges that "Claimant […] does not argue that employment agreements are investments in all contexts. Indeed, all else being equal, foreign nationals engaging in work for a company constituted under the laws of the other Contracting State are usually not investors for the purposes of the BIT".[186] Andraous also acknowledges that, generally, "mere salary and pension rights under employment agreements, or indeed one-off sale-purchase agreements, do not necessarily qualify as 'investments'".[187]

131. However, he asserts that "what distinguishes this case from normal employment relationships is that, by contributing services, time, know-how and goodwill, Claimant did make and acquire an investment, i.e. a shareholding in Parman, and received regular monthly payments before and – for some time – after the [Emergency Measures] in the form of salary and pensions".[188] This reasoning is incorrect.

132. It is inherent in any employment relationship that an employee contributes time, service and knowledge to the employer or the employer's business. These contributions are typically the reason that a person is being employed. They do not suggest that the rights that the employee receives in return – claims to salary and pension – amount to an investment rather than a benefit under an employment agreement.

133. Andraous relies on *Alps Finance v. Slovak Republic* to argue that his salary and pension rights are contractual rights derived from, or affixed to, his alleged investment, i.e. the shareholding in PIBV, or payment obligations relating to a contract to provide services, and for that reason fall within the category of 'claims to money' listed in Article 1(a)(iii) of the BIT.[189] Similarly, Andraous refers to *Ambiente Ufficio et al. v. Argentina* to argue that when a

185 **Exhibit RL-060**, *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019, para. 117-118; See also **Exhibit CLA-108**, *Alps Finance v. Slovak Republic* (Award, 5 March 2011) UNCITRAL, para. 241.
186 Reply, para. 132.
187 Reply, para. 132.
188 Reply, para. 133.
189 Reply, para. 133.

multi-faceted investment is made, the tribunal must look at the economic substance of the operation in question in a holistic manner.[190]

134. The *Ambiente Ufficio* tribunal considered the process of issuing bonds and their circulation on the secondary markets in the form of security entitlements as a single economic operation because they:

> "[…] are part of one and the same economic operation and they make only sense together: Without the prior insurance to be able to collect sufficient funds from the individual purchasers of security entitlements, the underwriters would never have committed to the payment of the lump sum payment".[191]

135. Andraous then attempts to tie his alleged salary and pension rights to his alleged shareholding in PIBV, presenting them as part of a 'holistic and unified' or 'multi-faceted' investment.[192]

136. However, unlike the investment operation in *Ambiente Ufficio et al. v. Argentina* case, Andraous' alleged shareholding in PIBV and his alleged salary and pension rights are not tied to each other as part of a complex investment operation. Nor are they affixed to his alleged shareholding in PIBV as in *Alps Finance v. Slovak Republic*. Andraous' salary and pension rights had arisen in 2005 from his employment relationship with various Ennia entities,[193] and existed long before, and independent of, the allotment of the 1% shareholding in PIBV to him in 2011.

### 3.2.2 The burden of establishing the basis and extent of his salary and pension claim is on Andraous

137. As set out in the SoD,[194] Andraous alleges that he is entitled to salary and pension rights – which he claims qualify as an 'investment' – yet has left the basis and extent of his salary and pension rights claim unsubstantiated. In the Reply, Andraous asserts that this issue pertains to the quantum phase and that he is therefore not required to provide substantiation at this stage.[195]

138. This is incorrect. The basis of his alleged salary and pension rights does not pertain to quantum, but to the issue of whether salary and pension rights qualify as protected investments under the BIT, which needs to be answered

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190 Reply, para. 135.
191 **Exhibit CLA-111**, *Ambiente Ufficio et al. v. Argentina* (Decision on Jurisdiction and Admissibility, 8 February 2013) ICSID Case No. ARB/08/9, paras. 429-430.
192 Reply, para. 135.
193 SoD, para. 122.
194 SoD, Chapter 5.
195 Reply, para. 136.

at this jurisdictional juncture. It is Andraous who has invoked the alleged salary and pension rights as the basis for this Tribunal's jurisdiction, and it is therefore Andraous' burden to demonstrate their basis and extent at this jurisdictional stage.

139. Andraous has not met that burden of proof. Following two rounds of written submissions, it remains unclear what Andraous' claim for salary and pension rights entails.

140. First, any outstanding claims to salary could only exist in the event of services rendered for which remuneration has not been paid.[196] However, Andraous has not denied that his salary was paid for the duration of his employment.[197] Indeed, in the Reply Andraous acknowledges that "Claimant does not claim for past services rendered in relation to which remuneration has been paid".[198]

141. Second, any claims to salary since his dismissal as director are non-existent: one is not entitled to salary if no longer in the job. As of termination of his employment contract with Ennia, Andraous is no longer entitled to salary and pension rights. Andraous may be alleging that his employment contract should not have been terminated by Ennia, but that allegation – even if correct – does not give him a right to salary or pension. At most, Andraous would have a claim against Ennia for compensation for unlawful termination of his employment contract. Andraous does not allege that he holds such a claim, and even if there were such a claim, it is clearly beyond the jurisdiction of this Tribunal.

142. In sum, Andraous has not furnished any evidence of the existence of his alleged salary and pension rights, and such non-existent rights do not qualify as an investment under the BIT.

## 4 ANDRAOUS HAS NOT 'MADE' AN INVESTMENT UNDER THE BIT

143. As set out in the SoD,[199] even assuming that Andraous is the owner of the shares in PIBV (*quod non*), Andraous has not 'made' an 'investment' within the meaning of the BIT. This is because his shares in PIBV were merely

196 SoD, para. 229

197 SoD, paras. 228-229. 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".

198 Reply, para. 134.

199 SoD, Section 4.1.

allotted to him without a contribution in return. Such an allotment does not amount to the making of an investment as is required by the BIT.[200]

144. In the Reply, Andraous ignores the wording of the BIT, asserting that "simple ownership suffices" and an investment need not have been "actively made".[201] Andraous further claims that his contribution was an "active one",[202] and – although not a monetary investment *per se* – was a form of "sweat equity",[203] placing his "business knowledge and experience" into the covered category of 'investment'.[204] These positions are without basis.

145. The provisions of the BIT, which have to be interpreted in accordance with Article 31 VCLT, require an 'investment' to have been 'made' by way of an act of investing (**Section 4.1**). No such act entailing a contribution exists here, and there is no evidence of Andraous having received the shares in PIBV in return for his alleged services to Ansary provided a decade prior. In the absence of such evidence, the allotment of shares in PIBV was made to Andraous without a contribution and gratuitously, thereby not amounting to having 'made' an investment (**Section 4.2**). In any event, the taking up of employment in exchange for a remuneration – whether in the form of salary or in the form of salary and shares – cannot be regarded as the 'making' of an 'investment' for the purposes of the BIT (**Section 4.3**).

### 4.1 The ordinary meaning of the BIT's terms requires an act of investing

146. As explained above in Section 2.1, the BIT must be interpreted in line with the general rule of treaty interpretation contained in Article 31 VCLT. As also set out in the SoD, the terms of the BIT require an 'investment' to have been 'made' by the investor (Article 1(b) BIT).[205] Andraous fails to appreciate this requirement and only refers to Article 1(a) BIT in the Reply.[206]

147. The ordinary meaning of 'made' requires an act of investing to have taken place. As set out in the SoD and established by tribunals, where the investment treaty contains a provision that the 'investment' must have been 'made', an action of investing is required.[207] The *SCB* tribunal, for example,

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200 SoD, Section 4.1.2.
201 Reply, para. 90.
202 Reply, para. 94.
203 Reply, para. 96.
204 Reply, para. 94.
205 SoD, Section 4.1.
206 Reply, para. 112.
207 SoD, Section 4.1.1; **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

held that in order to benefit from BIT protection, "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".[208]

148. Andraous' main line of argumentation is that simple ownership would suffice and that there are "*usually* no additional requirements"[209] in bilateral investment treaties, thereby conveniently ignoring that the BIT relevant to this dispute does contain such an additional requirement. Similarly, Andraous refers to a textbook on international investment law but omits to underline the passage stating that the "debate hinges on the exact wording of the treaty in question".[210] The exact wording of the BIT provides as follows:

- 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).

- 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" (emphasis added).

- 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*" (emphasis added).

- Article 12(3) BIT covers "investments *made* before the date of the termination of the present Agreement" (emphasis added).[211]

149. As established by the tribunal in *Luis Garcia Armas*, where the provisions of the investment treaty similarly required investors to 'make' investments:

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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. 815-816 (unofficial translation); **Exhibit RL-049**, *Alapli Elektrik BV v. Republic of Turkey*, ICSID Case No. ARB/08/13, Award, 16 July 2012, paras. 358-360.

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

209 Reply, para. 90 (emphasis added).

210 Reply, para. 90; **Exhibit CLA-086**, Ursula Kriebaum, Christoph Schreuer and Rudolf Dolzer, Principles of International Investment Law (3rd edn, OUP, 2022), p. 79.

211 SoD, paras. 173-174.

> "Although less frequent than other types of definition of the term 'investment', there are also other bilateral investment treaties that adopt formulas similar to those of the BIT, i.e., that require the investor to make the investment itself - to have an active performance in the investment and not merely a passive one such as, for example, a passive holding of shares. A similar definition is enunciated in the treaty applied in the case of Standard Chartered Bank v. Tanzania […]".[212]

150. Andraous' reliance on *Garanti Koza LLP v. Turkmenistan* and *Flemingo v. Poland* to argue that investment tribunals have rejected the requirement of contribution or that an investment must be "actively made" is misleading.[213]

(i) When relying on *Garanti Koza*, Andraous disregards that the tribunal distinguished the wording of the bilateral investment treaty applicable in that case – which did not specify any particular active relationship between investors and their investments – from the wording of other treaties which do specify such a relationship.[214] The tribunal specifically noted that "*unlike some treaties*, the BIT does not specify any particular relationship between the claimant and the investment necessary for the treaty to apply and for jurisdiction to attach".[215] In that case, the wording of the treaty in question stated "investment means every kind of asset", containing no active wording akin to 'made'. The reasoning of this tribunal confirms that the wording of the applicable treaty is essential in determining whether an active act of investing is required.

(ii) Likewise, the *Flemingo* tribunal in fact agreed with the reasoning of the aforementioned *SCB* tribunal, stressing that the wording of the Tanzania-UK bilateral investment treaty required that an investment must be 'made' by, and not simply held by, an investor.[216] The *Flemingo* tribunal then distinguished the Tanzania-UK treaty from the one in front of the tribunal, namely the India-Poland bilateral investment

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212 **Exhibit RL-066-SPANISH**, *Luis Garcia Armas v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/16/1), Award, 30 October 2024, para. 204 (unofficial translation).

213 Reply, para. 90.

214 **Exhibit CLA-098**, *Garanti Koza LLP v. Turkmenistan* (Award, 19 December 2016) ICSID Case No. ARB/11/20, paras. 229-230.

215 **Exhibit CLA-098**, *Garanti Koza LLP v. Turkmenistan* (Award, 19 December 2016) ICSID Case No. ARB/11/20, para. 229 (emphasis added).

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

treaty, noting that the latter included as 'investments' assets that are 'established' or 'acquired' in accordance with the laws of the host State.[217] By contrast, the BIT does not include the wording 'acquired' but rather repeatedly employs the term 'made' when referring to investors and their investments, akin to the Tanzania-UK treaty. The *Flemingo* tribunal's substantiation further exemplifies the importance of examining the exact wording of the treaty in question.

151. The BIT therefore protects investments actually made by the investor in the territory of the other Contracting Party, i.e. when the investor has carried out the act of investing.

### 4.2 Being gifted or allotted shares does not amount to having 'made' an investment

152. The act of investing requires "a contribution that extends over a certain period of time and that involves some risk".[218] Thus, at a minimum, Andraous must demonstrate that the investment was made at his direction, and that it was funded by him.[219] He has not provided evidence of either. Being gifted shares or receiving them gratuitously, in this case by means of allotment of a 1% shareholding in PIBV, does not amount to an act at Andraous' direction, nor an act that was funded by Andraous.

153. No documentation has been submitted by Andraous proving that there has been any contribution from Andraous in connection with the acquisition of the shares in PIBV, nor of the nature of such contribution and its eventual amount. In circumstances where contribution is an indispensable requirement for the existence of a protected 'investment',[220] Andraous has not demonstrated that he has 'made' an investment.[221]

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217 **Exhibit CLA-073**, *Flemingo v. Poland* (Award, 12 August 2016) UNCITRAL, para. 324.

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

219 See also SoD, paras. 178-184, **Exhibit RL-046**, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, paras. 222-224; **Exhibit RL-047**, *Komaksavia Airport Invest Ltd. v. The Republic of Moldova*, SCC Case 2020/074, Final Award, 3 August 2022, paras. 152-155 and 175-177.

220 **Exhibit RL-066-SPANISH**, *Luis Garcia Armas v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/16/1), Award, 30 October 2024, para. 239 (unofficial translation); **Exhibit RL-050**, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. 2007-07-AA280, Award, 26 November 2009, para. 207.

221 **Exhibit RL-066-SPANISH**, *Luis Garcia Armas v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/16/1), Award, 30 October 2024, paras. 211 and 239-240 (unofficial translation).

154. In the absence of any evidence, Andraous resorts to inference, asserting that "there is no reason why shares would be transferred to Claimant free of charge",[222] and that "the share transfer suffices to demonstrate that Claimant's investment of work, knowledge and time was not done gratuitously".[223] This is insufficient to discharge a burden of proof that Andraous has 'made' an investment. The investment and its 'making' are separate elements to be proven. Pursuant to Article 31 VCLT, treaty clauses must be interpreted to avoid either rendering them superfluous or depriving them of significance, in line with the principle of effectiveness.[224] If the mere holding of alleged shares were to suffice as proof that the 'investment' was 'made', the requirement that the investment was 'made' would be given no meaning.

155. Andraous further alleges that "the shares were to be transferred to Claimant after the acquisition of Banco di Caribe and Ennia as *quid pro quo*, and were later replaced by shares in [PIBV]".[225] Again, this statement, not supported by any evidence, does not discharge his burden of proof. Prior to selling these shares to [redacted] Andraous has come to own shares without evidence of any contribution whatsoever. In such circumstances, as held by the *Komaksavia* tribunal, a claimant cannot be deemed to have a qualifying investment "in the absence of any evidence of a contribution having been paid".[226]

156. In the Reply, Andraous asserts that there was a contribution on his behalf in the form of "the specialist business knowledge and experience that Claimant brought" to his employer.[227] However, Andraous submitted no evidence that the alleged work and business experience in question was provided as contribution aimed at obtaining the shares in PIBV that were allotted to him – as opposed to being provided in return for a salary and pension.[228] Nor can this be derived from the circumstances, such as in the cases cited by Andraous – for example *Bayindir v. Pakistan*, where the claimant in question

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222 Reply, para. 88.
223 Reply, para. 88.
224 **Exhibit RL-067**, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, (Preliminary Objections), ICJ Reports 2011, para. 133; **Exhibit RL-068**, *Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929*, PCIJ, Series A, No. 22, p. 13; **Exhibit RL-069**, *Corfu Channel (United Kingdom v. Albania)*, (Merits), ICJ Reports 1949, p. 24; **Exhibit RL-070**, *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, (Judgment), ICJ Reports 1994, para. 51.
225 Reply, para. 88.
226 **Exhibit RL-047**, *Komaksavia Airport Invest Ltd. v. The Republic of Moldova*, SCC Case 2020/074, Final Award, 3 August 2022, para. 175.
227 Reply, para. 94.
228 SoD, paras. 187-188.

had trained 63 engineers, provided equipment and personnel, *and* had injected funds.[229]

157. For the same reasons, Andraous makes an inapposite argument regarding 'sweat equity'. As explained in the SoD and at the outset of this chapter, the question is not whether 'sweat equity' or other non-monetary forms of contribution are in principle capable of constituting the 'making' of the investment, but rather whether Andraous has demonstrated that he has made a contribution aimed at acquiring the investment, namely the shares in PIBV.[230] Absent any evidence to this effect, he has not so demonstrated.

158. To conclude, Andraous has not demonstrated that he has undertaken any activity aimed at acquiring an 'investment', and therefore 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 in PIBV that were allotted to him, let alone a contribution aimed at obtaining those shares.

### 4.3 The taking up of employment is not the 'making' of an 'investment' under the BIT

159. In any event, even if the shares in PIBV had been allotted to Andraous in exchange for his work by way of 'sweat equity', this does not amount to the making of an investment. A national of one Contracting Party engaging in employment at a company constituted under the laws of the other (or the same) Contracting Party cannot be regarded as an 'investor' who is 'making' an 'investment' in the territory of that other Contracting Party.[231] Holding otherwise would go far beyond the ordinary meaning of the 'making' of an investment.

160. As outlined by the *Alps Finance v. Slovakia* tribunal, an 'investment' is required to meet certain criteria, namely "(a) a capital contribution to the host-State by the private 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".[232] Engaging in work in the context of an employment relationship in order to obtain a benefit, is not the 'making' of an 'investment'. It entails no contribution and no risk "of

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229 **Exhibit CLA-247**, *Bayindir v. Pakistan* (Decision on Jurisdiction, 14 November 2005) ICSID Case No. ARB/03/29, paras. 115 and 121.

230 SoD, para. 187.

231 SoD, Sections 5.1 and 5.2.

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

the sort that is inherent in the notion of investment".[233] If it were otherwise, every expatriate would be an investor in the State where they work.[234] This cannot be the case.

161. In addition, Andraous maintains the argument of having delivered "goodwill and know-how", thereby framing these as an 'investment'.[235] He does so inconsistently. At times, he asserts that "the specialist business knowledge and experience that Claimant brought to Parman is a specifically covered category of investment",[236] presumably referring to Article 1(a)(iv) BIT. On other occasions, it is asserted that Andraous' "investment of time, service, goodwill and know-how […] entitled him to 'claims to money' by way of salary and valuable pensions",[237] presumably in the context of Article 1(a)(iii) BIT. Both assertions are incorrect to begin with, because Andraous continues to conflate the notion of 'contribution' with 'investment'.

162. As to the former assertion, it is furthermore based on a flawed understanding of the terms 'goodwill' and 'know-how' as employed in the BIT. 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".[238] As set out in the SoD, these pertain to a particular category of 'investments', the scope of which is specific and confined.[239] Andraous' alleged business acumen and experience provided to his employer falls well outside the scope of the rights mentioned as 'investments' in Article 1(a)(iv) BIT.[240]

163. As to the latter assertion, as explained above, the taking up of employment is not the 'making' of an investment under the BIT, such that no "claims to money" by way of salary and pension could arise under the BIT in the context of an expatriate employee undertaking work for his employer.[241]

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233 **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.
234 SoD, paras. 189, 224, and 227.
235 Reply, para. 135.
236 Reply, para. 94.
237 Reply, para. 135.
238 **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).
239 See SoD, para. 190.
240 SoD, para. 190.
241 See para. 159 above.

## 5 REQUEST FOR RELIEF

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

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

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.