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FRENCH REPUBLIC
ON BEHALF OF THE PEOPLE OF FRANCE

PARIS COURT OF APPEAL

International Commercial Chamber
DIVISION POLE 5 CHAMBER 16

JUDGEMENT OF SEPTEMBER 20, 2022

ACTION FOR ANNULMENT

(N°**78** / 2022, 15 pages)

General Directory Entry Number: no. RG 20/02439 – no. Portalis 35LV7-V-B7E-CBNBH

Decision referred to the Court: award rendered on October 29, 2019, in Paris (no. CPA2017-18)

CLAIMANT TO THE APPEAL:

Mr [S] [G] [C]
Born on [date of birth], in [city 5] (VENEZUELA)
Domiciled: [address 1], [city 2] (VENEZUELA)

Mr [E] [T] [V] [H] [V] [C] born on [date of birth], in [city 5] (VENEZUELA)
Domiciled: [address 1], [city 2] (VENEZUELA)

Represented by Mr François TEYTAUD, a lawyer at the Bar Council of PARIS, from AARPI TEYTAUD-SALEH law firm, internal mailing box: J125

With litigator Ms Katia BONEVA-DESMICHT, substituted for the hearing by Mr Romain BIZZINI and Mr Karim BOULMEH, litigators at the Bar Council of PARIS, from SCP BAKER & MC KENZIE law firm, internal mailing box: P445

DEFENDANTS TO THE APPEAL:

THE BOLIVARIAN REPUBLIC OF VENEZUELA
Acting on behalf of the Procurador General (Public Prosecutor) de la República Bolivariana de Venezuela, Procuraduría General de la República (the Bolivarian Republic of Venezuela, Public Prosecutor's Office of the Republic)
Av. [address 3] Edificio Sede de la Procuraduría General de la República, piso 8, Urb. Santa Mónica, CARACAS 1040 (VENEZUELA)

Represented by Mr Luca DE MARIA, a litigator at the Bar Council of PARIS, from SELARL PELLIRINI – DE MARIA - GUERRE law firm, internal mailing box: L0018

Represented by Mr Luca DE MARIA, a litigator at the Bar Council of PARIS, from SELEURL ALFREDO DE JESUS O.TRANSNATIONAL ARBITRATION & LITIGATION law firm

COMPOSITION OF THE COURT:

The case was heard on May 30, 2022, in open court, before the Court composed of:
Mr. François ANCEL, President
Mrs. Fabienne SCHALLER, Judge
Mrs. Laure ALDEBERT, Judge

who have deliberated on the case, a report was delivered at the hearing by Ms [N] SCHALLER under conditions referred to in Article 804 of the French Code of Civil Procedure.

Court Clerk, at the hearing: Mrs. Najma EL FARISSI

JUDGEMENT:

- adversarial

- by making the judgment available at the Court Clerk's office, the parties having been previously notified under conditions referred to in the second paragraph of Article 450 of the French Code of Civil Procedure.

- signed by Ms Fabienne SCHALLER, acting as a president and by Ms Najma EL FARISSI, Court Clerk to whom the judgement's original was handed over by the judge signatory.

I/ FACTS AND PROCEEDINGS

1- An application for the annulment of an arbitration award, handed down in Paris on October 29, 2019, was filed with the Court. The abovementioned arbitration award was delivered by the arbitral tribunal before which the case was brought based on the UNCITRAL (The United Nations Commission on International Trade Law) Rules. The arbitral tribunal declared itself incompetent to rule on an investment dispute which involved the bilateral investment treaty between Germany and Venezuela for the Promotion and Reciprocal Protection of Investments signed in Caracas on May 14, 1996 (hereinafter referred to as the "the Venezuela-Germany Treaty").

2- The Bolivarian Republic of Venezuela (hereinafter referred to as“**Venezuela**”) became a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention or Washington Convention) on June 1, 1995 and notified it on January 24, 2012.

3- Mr [S] [G] [C] et [E] [T] [V] [H] [G] [C] (hereinafter referred to as “**Messrs [G]**”), both Venezuelan and German citizens, are shareholders of companies in Venezuela, which in turn are shareholders of Sucesion [G] [C] CA (hereinafter referred to as “SHCA”), the owner of the land known as “La Salina”, with a surface area of 6,435,961.32 square meters, situated in the municipality of [address 4].

4- On May 17, 2011, Messrs [G] were informed by the representatives of the Venezuelan state company Compañía Bolivariana de Puertos S.A. (hereinafter referred to as “Bolipuertos”) of a project to build a port complex and a new container terminal on the land “La Salina”. Assessment reports were prepared to determine the land’s value, which was estimated at 1,589,736,357.21 bolivars, or approximately $306,706,129.58 according to SHCA, and at 82,667,200 bolivars, or approximately $19,224,930.23 according to Bolipuertos

5- On November 28, 2011, SHCA informed Bolipuertos that it disagreed with the area and valuation method used.

6- On March 13, 2012, Venezuela by expropriation decree ordered the expropriation/compulsory acquisition of all the movable and immovable property that constitutes the land “La Salina”.

7- Between May 2012 and April 2013, Venezuela initiated a procedure before the Venezuelan Court of Administrative Disputes and the expropriation of Messrs. [G] was recorded, without monetary compensation.

8- On June 9, 2015, Messrs. [G] sent a notice of dispute to Venezuela.

9- On June 14, 2016, Messrs. [G] filed a Notice for Arbitration with the ICSID Secretariat in charge of the ICSID Additional Facility Arbitration, which was dismissed by the Secretary General on November 10, 2016.

10- On December 22, 2016, Messrs [G] commenced an ad hoc arbitration under the United Nations Commission on International Trade Law Arbitration Rules (hereinafter referred to as the “UNCITRAL Rules”) against Venezuela under the Venezuela-Germany Treaty.

11- The arbitral tribunal, at Venezuela's request, ordered a bifurcation motion on November 13, 2017, with Venezuela challenging the jurisdiction of the arbitral tribunal.

12- On October 29, 2019, the arbitral tribunal rendered an award in Paris, stating that it lacked jurisdiction, and ordered the claimants to pay the sum of US$ 2,518,886.59 to Venezuela for the representation expenses and legal assistance, in addition to interest calculated from November 29, 2019, until the date of actual payment at the 12-month Libor US$ rate, and dismissed the claims of Messrs [G].

13- On January 28, 2020, Messrs [G] brought an action before the the Paris Court of Appeal for annulment of this award.

II/ THE PARTIES' CLAIMS

14- According to their summary submissions communicated electronically on April 7, 2022, Messrs [G] requests the Court, under articles 463, 1518 et seq. of the French Code of Civil Procedure, the Venezuela-Germany Treaty of May 14, 1996, the UNCITRAL rules and articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, to:

- ANNUL the arbitral award on jurisdiction No. 2017-18 rendered in Paris on October 29, 2019 by an ad hoc arbitral tribunal under the UNCITRAL Rules in all its provisions;

In any case,

- DISMISS all of the Bolivarian Republic of Venezuela's claims and submissions;

- ORDER the Bolivarian Republic of Venezuela to pay Messrs [S] et [T] [G] [C] the sum of 30,000 euros under Article 700 of the French Code of Civil Procedure;

- ORDER the Bolivarian Republic of Venezuela to pay all the costs.

15- According to their summary submissions in counterclaim, sent electronically on May 2, 2022, Venezuela requests the Court, under articles 699,700 and 1504 et seq. of the French Code of Civil Procedure and Article 31 of the Vienna Convention on the Law of Treaties of 1969, to:

• Find and rule that the plea raised by Messrs [G] [C] to support the application for the annulment of the arbitration award on jurisdiction issued on October 29, 2019, in PCA Case No. 2017-18 is groundless.

Accordingly:

DISMISS Messrs [G] [C]'s application for the annulment of the arbitration award on jurisdiction issued on October 29, 2019, in PCA Case No. 2017-18;

REMIND that the dismissal of the application for annulment grants exequatur (order for enforcement of a decision) to the arbitration award on jurisdiction issued on October 29, 2019, in PCA Case No. 2017-18;

ORDER Messrs [G] [C] to pay the Bolivarian Republic of Venezuela the sum of 200,000 euros under Article 700 of the French Code of Civil Procedure; and

ORDER Messrs [G] [C] to pay all the costs.

In any case:

DISMISS Messrs [G] [C]'s application under Article 700 of the French Code of Civil Procedure.

16-The proceedings were closed on May 10, 2022.

III/ GROUNDS OF THE RULING

On the plea for annulment alleging that the arbitral tribunal wrongly asserted its lack of jurisdiction (Article 1520 (1) Code of Civil Procedure)

- On the Lack of Jurisdiction "Ratione Voluntatis"

17- Messrs [G] argue that the arbitral tribunal erred in finding that it lacked jurisdiction rationae voluntatis, as Venezuelas's consent to submit a dispute with a foreign investor to arbitration under the UNCITRAL Rules was established.

18- They hold that Venezuela's consent is not limited to the ICSID Convention and that the option of the UNCITRAL Rules is an alternative.

19-They point out that the consistency between the different jurisdictions requires that the provisions relating to the dispute settelement procedure under Article 10 of the Venezuela-Germany Treaty and its Addendum 10 (hereinafter referred to as "*ad 10*") be interpreted without prioritising them, considering that the parties did not intend to deprive *ad 10* of all useful effects, but that they intended to provide an alternative wherever Venezuela was not or no longer a member of ICSID (cf. Art. 2.2 and Art. 12.3 Venezuela-Germany Treaty). They contest the argument in favour of considering that the retention of the *ad 10* clause in the Protocol has to be deemed as an omission, whereas the Venezuelan Parliament ratified the text after Venezuela joined ICSID, which justifies interpretating it as opening an offer to arbitrate for investors, and maintaining an offer to arbitrate after Venezuela revoked ICSID.

20 - They claim that it is clear from a literal interpretation of the clause, under article 31 of the Vienna Convention, that the stipulation of *ad 10* a), if superfluous, must be deemed to be unwritten and set aside, thus making UNCITRAL arbitration available, as long as the sole condition that the ICSID Additional Facility Arbitration is not available is met.

21-They add that it is clear from the will of the parties because, according to them, it would have been pointless retaining a superfluous clause, if not to guarantee protection to investors in the event that Venezuela leaves ICSID, since the clause was limited only to the "pre-CIRDI period", which no longer applies since Venezuela became a member of ICSID in June 1995 before the ratification of the Venezuela-Germany Treaty . They argue that this intent to extend protection follows from the practices adopted by both Germany and Venezuela in their respective Venezuela-Germany Treaty.

22-They then claim that the inclusion of the possibility of resorting to ad hoc arbitration allows citizens with a dual nationality to refer to the UNCITRAL procedure since the ICSID system as a whole is closed to them. They add that it is not is not unreaseasonable to provide for an option between institutional and ad hoc arbitration since this is the consistent practice according to the Venezuela-Germany Treaties signed by Venezuela, especially as the conditions of admissibility of the three different jurisdictions. They therefore consider that this means that if access to ICSID or, if applicable, to the ICSID Additional Facility Arbitration is not available, for whatever reason, then investors have the option of asserting their rights before an ad hoc UNCITRAL arbitral tribunal. Therefore, they consider that since the ICSID Additional Facility Arbitration was not available to them, given their dual

nationality and given that Venezuela was no longer a member of ICSID in 2016, they could resort to an ad hoc UNCITRAL arbitration, without any further conditions or requirements.

23-They maintain that it was impossible for them to refer to the ICSID Additional Facility Arbitration, which is unavailable due to their dual nationality (their application was refused registration because "Messrs [G] does not correspond to the definition of "national of another State' under Article 1(6)").

24-**In response, Venezuela** maintains that the offers to arbitrate under the Treaty were no longer effective as of the date on which Messrs [G] intended to invoke it, and it argues that it made an autonomous offer to arbitrate under UNCITRAL that would still be effective.

25-It recalls the conditions under which the Treaty was negotiated and ratified by the Venezuelan Parliament and maintains that Article 10(2) of the Venezuela-Germany Treaty provides for a principal offer to arbitrate under ICSID and that Articles ad 10(a) and 10(b) of the Protocol, providing for the ICSID Additional Facility Arbitration and UNCITRAL arbitration, are only a subsidiary and temporary offer to arbitrate, effective only until Venezuela has joined ICSID.

26-It argues that, in accordance with the rules of interpretation of Article 31 of the Vienna Convention, Article 10(2) of the Treaty should be regarded as independent of Articles ad *10(a)* and *10(b)* of the Protocol which are intrinsically linked. It adds that it cannot be inferred from Article 10(2) of the Treaty that there is a general unconditional offer of arbitration, whereas it is sufficient to read the second sentence to determine that it is an offer of ICSID arbitration only, especially since, as Messrs [G] acknowledge, as far as UNCITRAL ad hoc arbitration is concerned, it is a conditional offer.

27-It points out that two cumulative conditions must be met in order to avail oneself of Article *10(b)* of the Protocol, a temporal condition provided for in Article *10(a)* with the use of the term "until", which is a temporal marker meaning that this possibility is intended to apply only until the event has occurred, contesting the useful effect that Messrs Heemsen are trying to attribute to it, as the UNCITRAL offer of arbitration provided for in Article ad *10 (b)* is only intended to have effect until 1 June 1995, which means that Messrs [G] were unable to accept the said offer on 9 July 2015, and a further cumulative condition, namely the impossibility to access the ICSID Additional Facility Arbitration, was not met. In order to meet this condition, the investor had to be unable to file an appeal, and Messrs [G] were able to file an appeal with the Secretary General, but it was not admissible because of their dual nationality.

On this point,

28- According to Article 1520, 1°, of the French Code of Civil Procedure, an action for annulment is available if the court has wrongly declared itself competent or incompetent.

29- In the context of an action for annulment based on Article 1520(1) of the French Code of Civil Procedure, it is for the annulment judge to review the arbitral tribunal's decision within their competence, whether they have declared themselves competent or incompetent, by seeking all the matters of law or fact that make it possible to assess the scope of the arbitration agreement.

30- Where the arbitration clause results from a bilateral investment treaty, it is necessary to assess the common will of the Contracting Parties to entrust the arbitral tribunal with its jurisdictional power in view of all the provisions of the treaty.

31- In the matter under consideration, Article 10 of the Treaty provides (in the original Spanish):

« Articulo 10
1. Las controversias que surjan entre una de las Partes Contratantes y un nacional o una sociedad de la otra Parte Contratante sobre derechos y obligaciones derivadas del presente Tratado en relación con las inversiones deberán, en lo posible, ser amigablemente dirimidas entre las partes en la controversia. »
« 2. Si una controversia no pudiere ser dirimida dentro del plazo de seis meses, contado desde la fecha en que una de las partes en la controversia la haya hecho valer, será sometida, a petición del nacional o de la sociedad, a un procedimiento arbitral. En la medida en que las partes en la controversia no lleguen a un arreglo en otre sentido, la controversia se someterá a un procedimiento arbitral conforme al Convenio sobre Arreglo de Diferencias relativas a Inversiones entre Estados y Nacionales de otros Estados del 18 de marzo de 1965. »

(French translation provided by Messrs [G])

"1. Disputes arising between one of the Contracting Parties and a national or company of the other Contracting Party concerning rights and obligations under this Treaty in connection with investments shall, as far as possible, be resolved amicably between the parties concerned by the dispute.

2.If a dispute cannot be resolved within six months from the date on which one of the Parties involved in the dispute has raised such a dispute, it shall, at the request of the national or company, be submitted to arbitration. To the extent that the parties involved in the dispute fails to reach agreement, the dispute shall be submitted to arbitration in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965.

32- On the other hand, the ad article 10 of the Protocol, which is an integral part of the Treaty, states (in the original Spanish):

« 4) Ad articulo 10
(a) Mientras la Republica de Venezuela no se haya hecho Parte del Convenio sobre el arreglo de Diferencias relativas a Inversiones entre Estados y Nacionales de otros Estados de 18 marzo de 1965, la controversia será sometida a un procedimiento arbitral ante el Centro Internacional para el Arreglo de Diferencias relativas a Inversiones conforme a las reglas que rigen el Mecanismo Complementario para la Administración de Procedimientos por la Secretaria del Centro (Reglas sobre el Mecanismo Complementario), en cuanto las partes en las controversia no hayan llegado a otro arreglo.
Complementario), en cuanto las partes en las controversia no hayan llegado a otro arreglo.
(a) En caso de que no fuera posible recurrir al procedimiento arbitral conforme a las Reglas sobre el Mecanismo Complementario, la controversia será sometida, a petición del nacional o de la sociedad, a un procedimiento arbitra ad-hoc, según las Reglas de Arbitraje de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional. »

(French translation provided by Messrs [G])

"(a) Until the Republic of Venezuela becomes a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965, the dispute shall be submitted

to arbitration before the International Centre for Settlement of Investment Disputes under the rules governing the ICSID Additional Facility Arbitration for the Administration of Proceedings by the Secretariat of the Centre (ICSID Additional Facility Arbitration Rules), if the parties to the dispute have not reached an alternative agreement.
(b) In the event that arbitration is not possible in accordance with the ICSID Additional Facility Arbitration Rules, the dispute shall be submitted, at the request of the national or company, to an ad hoc arbitration procedure, in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law.

33- The parties disagree on the alternative, or cumulative and subsidiary nature of the jurisdictions mentioned in these articles and on the articulation of articles 10, ad *10(a)* and ad *10(b).*

34- Under Article 31 § 1 of the Vienna Convention on the Law of Treaties of 23 May 1969 ("the Vienna Convention"), which lays down the general rule for the interpretation of international treaties, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

35- It is common ground that it does not follow from this rule, or from any principle of interpretation, that a distinction should be made where a text does not distinguish.

36- In the matter under consideration, the Venezuela-Germany Treaty between Germany and Venezuela signed in Caracas on 14 May 1996 contains 10 articles and the Protocol five sections numbered from 1 to 5, section 1 of the Protocol referring to Article 1 of the Treaty, section 2 to Article 3, Section 3 to Article 5 and Section 4 to Article 10, referred to as "Ad articulo 10", which in turn has three subsections numbered (a), (b) and (c), with Section (c) stating "(c) Paragraphs 3, 4, 5 and 6 of Article 10 shall apply mutatis mutandis to the cases referred to in paragraphs (a) and (b)."

37- The arbitration procedure as provided for in Article 10 of the Treaty on the settlement of disputes is articulated with the additional article of the Protocol which is an integral part of the Treaty, and constitutes the whole with ad *10(a)*, *(b)* and *(c)* of Section 5 of the Protocol.

38- It follows that where the text does not distinguish between provisions, it cannot be split. Article 10.2 of the Treaty constitutes a single paragraph, with the first and second sentences forming the whole. Addenda ad *10 (a), (b)* and *(c)* also constitute the whole entitled *« ad articulo 10 »*.

39- Therefore, Messrs [G] wrongly argue that the text would result in a split between Article 10 of the Treaty, on the one hand, and Article 10(a) of the Protocol, which would offer ICSID arbitration, and Article *10(b)*, which would open up UNCITRAL arbitration without any condition other than that the ICSID Additional Facility Arbitration be unavailable.

40- As to the interpretation to be provided to a clause that would have become obsolete after Venezuela's accession to the ICSID Convention (*ad 10(a)),* it must be noted that the Treaty, the negotiation of which began between the governments in 1991, was transferred from Venezuela to Germany for signature on 13 March 1995 on the basis of the text adopted in 1994, i.e. more than a year before Venezuela's accession to the ICSID, and has not been modified. Germany only suggested appropriate amendments in the Spanish version on 23 August 1995. The fact that the final text of the Treaty signed on 14 May 1996 includes the said clause as negotiated and validated by the parties before the accession to ICSID

without further modification does not allow one to deduce that it is deliberately superfluous and to draw interpretations from it that were not foreseen by the governments, all the more so since the law approving the Treaty could not modify the text. It was only discussed by the Permanent Foreign Policy Committee of the Venezuelan Congress on 6 November 1997 and the law approving it was published on 28 January 1998 (see “Gaceta oficial de la Republica de Venezuela” of 28 January 1998 and “Diario de Debates de la camara de diputados” of November 1997 ([G]’s exhibits 20 and 23).

41- Contrary to what Messrs [G] maintains, the timeline for the negotiations cannot therefore be used to draw conclusions as to the superfluous nature or otherwise of ad *10(a)*, and to the interpretation to be provided with regard to its retention in the Treaty. In particular, it cannot be inferred from the aforementioned that the parties attributed an autonomous meaning to clause ad 10(b) in the finalised text of the Treaty, which contained clause ad *10(a)* and ad *10(b)* of the Protocol, especially since this text was submitted as it was to Germany for signature in March 1995, before Venezuela's accession to the ICSID Convention (June 1995), and the formal amendments made subsequently by Germany to the Spanish version did not alter its meaning. As the arbitral tribunal rightly noted (§386), it was not the Venezuelan Parliament that negotiated the Treaty, and the interpretation that the Venezuelan parliamentarians may have made thereof does not allow the meaning of the Treaty itself to be altered since the ratification law does not modify its text.

42- Moreover, the fact that this wording of the Treaty is found in other Venezuela-Germany Treaty negotiated around the same time shows, on the contrary, that no secondary meaning was included that was not known to the negotiators.

43- Consequently, the reading of the Treaty splitting the offers of arbitration and declaring the first superfluous and the second autonomous is contrary to the rules of interpretation of Treaties laid down by Article 31 § 1 of the Vienna Convention recalled above and is inoperative since Article 10 of the Treaty does not propose an unconditional arbitration procedure but makes the offer of arbitration subject to the ICSID Convention unless the parties otherwise agree, and that this article is completed by Section 5 of the Protocol (ad *10(a)(b)(c)),* which contains two inseparable options (a) and (b) that complement the said offer of arbitration provided for in Article 10, the first (a) providing for limited recourse to the ICSID Additional Facility Arbitration “as long as (mientras) Venezuela is not a party to ICSID” and the second (b) providing for recourse to UNCITRAL arbitration only “in the event that (en caso de que) recourse to arbitration is not possible in accordance with the ICSID Additional Facility Arbitration Rules”, establishing the subsidiary and conditional nature of the two options, compared to the main offer subject only to the ICSID Convention.

44- The Arbitral Tribunal thus rightly assessed the scope of the arbitration agreement submitted to it by taking into consideration all the legal and factual evidence applicable to the dispute and was able to deduce the cumulative and not alternative nature of the options (“German investors may only have recourse to ad hoc arbitration under the UNCITRAL Arbitration Rules under two cumulative conditions: (i) “as long as the Republic of Venezuela has not become a party to the Convention” and (ii) if recourse to arbitration under the ICSID Additional Facility Arbitration Rules is not possible” (§353 to 399).

45- There is therefore no room for a broader interpretation of Articles 31 and 32 of the Vienna Convention, nor for the application of the theory of “effet utile” (useful effect), since *ad 10(a)* is limited to the “pre-ICSID” period and *ad 10(b)* is only open if recourse to the ICSID Additional Facility

arbitration is impossible. The fact that this option has become obsolete is not a reason to dismiss the ICSID Additional Facility Arbitration.

46- This effect, which is neither unreasonable nor superfluous, cannot therefore be cancelled in favour of an irrelevant useful effect.

47- Contrary to what Messrs [G] claim, the obsolescence of that clause does not allow it to be regarded as devoid of meaning or to be interpreted as meaning that the parties intended to grant investors extensive jurisdictional protection since there is no provision in the contract that allows for such an interpretation.

48- The fact that paragraph ad *10 (a)* has been maintained, whether intentionally or inadvertently, cannot alter the scope of the offer of arbitration provided for in Article 10 of the treaty on the basis of the ICSID Convention and its two subsidiary options.

49- Messrs [G] also argue in vain, while modifying the initial meaning that the Parties attributed to the Treaty, that the option provided for in Article *10(b)* must be interpreted as an autonomous and non-subsidiary alternative solution, enrusing access to ad hoc arbitration under the aegis of UNCITRAL when neither ICSID nor the ICSID Additional Facility Arbitration is available, which would be the case in this particular instance.

50- Without needing to reiterate all the grounds stated above, it is clear from the terms of the Treaty and the Protocol, as noted by the Arbitral Tribunal (§ 373), that "*the consent of the State to settle this dispute in accordance with the UNCITRAL Rules is not to be found in the general reference to arbitration in Article 10 of the Treaty, but,* where applicable" in Article ad 10 of its Protocole" and that the scope of the arbitration agreement limits the offer of ad hoc arbitration under the UNCITRAL Rules *"in cases where arbitration is not possible under the ICSID Additional Facility Arbitration Rules"* (§392), after recalling in §374 the cumulative nature of the conditions set out in *ad 10(a)* and *(b).*

51- It is therefore irrelevant to compare contracts, which have alternatively provided investors with a free choice between several possible arbitration rules.

52- In the matter under consideration, the Treaty and its protocol do not propose an unconditional offer of arbitration. They do not allow the offer of arbitration contained therein to be extended to a period following the denunciation of the ICSID Convention (in the matter under consideration, Venezuela denounced the Convention in 2012), as such an interpretation cannot be inferred from either the text of the contract or its context, as at no time did the parties propose an unconditional offer of arbitration or foresee a possible denunciation of the ICSID Convention by Venezuela. The Arbitral Tribunal rightly found (§ 379) that *"the fact that they mentioned only Venezuela and not the two Contracting Parties supports this intent. The possibility that the Contracting Parties also envisaged the denunciation of the ICSID Convention by Venezuela must be excluded because, if that had been the intent of the Contracting Parties, there is no grounds why they should have mentioned only and exclusively Venezuela since both States could denounce the ICSID Convention".*

53- It is therefore pointless to argue, as Messrs [G] do, that the investors would at least have the possibility of asserting their rights before an ad hoc tribunal constituted in accordance with the

UNCITRAL rules since the ICSID Additional Facility Arbitration would clearly not be applicable to them on the basis of ad 10(b) alone.

54- As a matter of fact, on the one hand, the condition set out in *ad 10(b)* is that “arbitration is not possible under the rules of the ICSID Additional Facility Arbitration”. Since this condition is dependent on the condition in *ad 10(a)*, it cannot be treated independently if the condition in *ad 10(a)* is not met. In addition, even if the condition of *ad 10(a)* is met, the condition of “impossibility” of appeal is not met in the matter under consideration either since Messrs [G]’s application was rejected “because it does not meet the requirements of the definition of ‘national of another State’ in Article 1(6) within the meaning of the ICSID Additional Facility Arbitration Rule” ([G], *pièce* 19), which does not constitute an “impossibility”, but a rejection decision (“*la solicitud es denegada*” – *pièce* 19).

55- In this regard, in accordance with Article 31 of the Vienna Convention, it is not for the arbitral tribunal to modify, under the guise of interpretation, the clear terms of the Treaty.

On the Most-Favoured-Nation Clause (MFN clause)

56- Messrs [G] argue that the Arbitral Tribunal should have established its jurisdiction by applying the most-favoured-nation (hereinafter referred to as MFN clause) clause in Article 3 of the Treaty. They explain that the Venezuela-Germany Treaty contains the Contracting States’s consent to arbitration and that the arbitral tribunal wrongly refused to apply the MFN clause contained in Article 3.

57- They consider that the consent to arbitration is contained in the text and that the refusal of the arbitral tribunal to initiate the procedure is unfounded, holding that the right to initiate the arbitration procedure is part of the concept of “treatment”, that the investor should not be treated less favourably and that the most-favoured-nation clause applies not only to investments, but also to investors.

58- Therefore, according to the definition of “treatment” provided by the UN International Law Commission, they argue that the foreign investor's right to have recourse to international arbitration is part of the concept of “treatment” that the Contracting States intended to guarantee to foreign investors in the Treaty, and they reproach the Court for failing to recall that procedural rights are part of the “treatment” referred to in the most-favoured-nation clause, unless they are expressly excluded. They therefore consider that the mere reference to “treatment” in the MFN clause is sufficient to allow the importation of the more favourable procedural provisions of another Treaty concluded by Venezuela. They add that the mere reference to the definition of “investment” in the MFN clause of Article 3 of the Protocol also allows for the importation of more favourable procedural provisions. In response to Venezuela, they invoke the Hochtief AG/Argentina (ILO Germany-Argentina) arbitration award, in which it was decided that “the terms ‘management, use and operation of an investment’ include the application of dispute settlement as an aspect of investment management”.

59- They claim that, if the parties did not define the term “treatment” and did not expressly state that it included procedural treatment, the arbitral tribunal restricted itself to a literal interpretation of the terms of the most-favoured-nation clause since they considered that any more favourable treatment, including procedural treatment, should apply, with the exception of benefits granted under integrated economic unions and tax treaties, which are expressly excluded by the clause, which is not the case in the matter under consideration. They reproach the Tribunal for having considered that the absence of an explicit reference to procedural rights in the definition of “activities” in the Treaty rendered the MFN clause

inapplicable, even though the Parties, by referring to investments and investors in Article 3 of the Treaty, intended to extend the protection of the MFN clause to both investments and investors.

60- They disagree with the Tribunal's conclusion that they sought to "import consent" to arbitration from Venezuela whereas there is already an offer of arbitration in Article 10(2) of the Treaty. Thus, by applying the MFN clause, they maintain that they do not intend, to extend the Venezuela's consent to an arbitral institution to which it would not have consented, but merely importing the fact that the selection is not conditional, in particular the existence of a hypothetical "pre-ICSID" period. They relied on *Garanti Koza v. Turkmenistan*, which held that the unrestricted selection of arbitral institution is a provision more favourable to an investor, which it may well import through the MFN clause. They argued that they were entitled to apply the MFN clause to import the unrestricted selection between different arbitral institutions set out in Article 11.2 of the Iran-Venezuela Treaty or Article 11 of the Argentina-Venezuela Treaty, which does not contain the exclusion of dual national people. They consider that since Venezuela has consented to UNCITRAL arbitration in the Germany-Venezuela Treaty, they are merely importing the procedural requirements for the conduct of that arbitration and are not importing the consent itself. In addition, even if the Tribunal were to confirm that the Treaty did not contain an UNCITRAL consent, they would be allowed to import the consent to another arbitral institution contained in a Treaty with a third State as long as the underlying treaty did indeed contain an offer of arbitration, as is the case here.

61- Finally, should it be considered that there are two conditions for the implementation of an UNCITRAL arbitration, in particular the condition of time limitation, they argue that they are entitled to rely on the MFN clause contained in a significant number of Treaties, which do not contain a time condition, to implement the provisions of the Treaty, which in turn only provide for the condition of unavailability of the ICSID Additional Facility Arbitration. They refer in particular to the Ecuador-Venezuela, Portugal-Venezuela and Sweden-Venezuela Treaty.

62- They hold that if they had only had German nationality, they could have apply the ICSID Additional Facility Arbitration, but since they had dual nationality, it was not available and they could not be allowed not to initiate UNCITRAL arbitration solely on the basis of nationality since such discrimination had to be excluded by the MFN clause.

63- **In its response, Venezuela** recalled the principle of international law according to which consent to a treaty cannot be imported through an MFN clause.

64- It further claims that, in any event, Messrs [G] cannot rely thereon because, first of all, there is no offer of arbitration since Venezuela is no longer a member of ICSID and Articles ad 10(a) and (b) are intended to apply only during the now-expired "pre-ICSID" period, the offer of arbitration contained in Article 10(2) of the Treaty no longer exists, and an MFN clause cannot alter the conditions for the exercise of procedural or jurisdictional rights. In this context, it emphasise that an MFN clause requires, first of all, that the arbitral tribunal has jurisdiction, which cannot be the case in the matter under consideration, as there is no longer an offer of arbitration. Secondly, it argues that an MFN clause cannot be invoked to substitute another dispute settlement procedure for the one provided for in the Treaty, as follows from the vast majority of case law, unless this is expressly provided for in the MFN clause, which is not the case in the matter under consideration.

65- In any event, it claims that interpretation in terms of good faithe relating the wording of the MFN clause of the Treaty in its context and in light of the subject matter and purpose of the Treaty confirms that it is impossible to import from a third country Treaty an arbitral offer not made in that Treaty since Article 3(1) refers only to the treatment of “investments” and not of “investors” so that it cannot serve as a basis for importing a procedural provision in favour of an investor. It adds, with respect to Article 3(2) of the Treaty, that the reference to “investors” is in fact a “guarantee” of treatment in the territory of Venezuela with respect to activities related to investors' investments”, which is not a dispute settlement clause, especially since Article ad. 3 defines the term “activity” as including only the “administration, use and acquisition” of an investment by an investor. It therefore considers that it follows from the foregoing that the parties have correctly delimited the application of the MFN clause and that it cannot be applied to Messrs [G]’s ability to import consent to arbitration.

66- It should be emphasised that neither the Treaty with Iran nor the Treaty with Ecuador on which Messrs [G] rely, can allow for the import of a consent to arbitration since, on the one hand, the Treaty with Iran provides in its Article 11(2) for the possibility for investors to initiate UNCITRAL (United Nations Commission on International Trade Law) arbitration proceedings, ICC (International Chamber of Commerce), ICSID and provides for that binationals are excluded from the scope of application of this article, and, on the other hand, the Treaty with Ecuador provides for in its article 1(3) that binationals, which, at the time of their invistement, have been residents in the territory of the receiving State for more than two years, do not fall within the material scope of the application of the Treaty, especially since Ecuador terminated the Treaty in 2017. Therefore, it considers that Messrs [G] cannot rely on it since, on the one hand, there is no offer of arbitration at all in the Venezuela-Germany Treaty, let alone an offer relating to an UNCITRAL arbitration, and on the other hand, Messrs [G] are Venezuelan-German binationals and have always resided in the territory of Venezuela, the receiving State of their investment.

On that ground,

67- A most-favoured-nation clause is defined by the United Nations International Law Commission (in its final report on the most-favoured-nation clause of 2015) as “*the treatment provided by the granting State to the beneficiary State, or to persons or things in a specified relation to that State, which is no less favourable than the treatment provided by the granting State to a third State, or to persons or things in the same relation to that third State*”.

68- It is determined in International law that no State can be obliged to submit its disputes with other States either to mediation or to arbitration or to any other peaceful means of settlement without its consent. In this regard, nevertheless, while consent to arbitration cannot be imposed on a State, it cannot be excluded from the outset, where an offer of arbitration exists, that an MFN clause may include the import of dispute settlement procedures since “treatment of an investor” may include not only the benefit of a substantive right but also the benefit of procedural treatment ensuring a dispute settlement procedure appropriate to the object and purpose of the Treaty.

69- Nevertheless, if by such a clause the States parties to the Treaty have admitted the possibility of importing more favourable provisions, this extension can only be envisaged if the persons or things concerned by the Treaty are “in the same relationship” as the persons or things concerned in a third State, and the extension of the said treatment must fall within the scope of the Treaty. Therefore, the question of the Most Favoured Nation clause can only arise if the Basic Treaty itself contains an offer

of arbitration, in order to be able thereafter, if necessary, to claim to import the MFN clause of a Treaty excecuted with a third State which would allow the import of more favourable treatment containing more favourable procedural rights.

70-Secondly, unless expressly provided for in the MFN clause of the Treaty, the MFN clause shall have effect only to the extent and within the scope of the Treaty, and the term "treatment" referred to in the MFN clause shall not be interpreted *in abstracto*, but in accordance with the ordinary meaning to be provided thereto in the terms of the Treaty in the context thereof and in the light of its object and purpose (according to Article 31 of the Vienna Convention).

71. Nevetheless, in the matter under consideration, it follows, on the one hand, from the grounds set out above that the offer of arbitration contained in the Germany-Venezuela Treaty did not offer an unconditional arbitration procedure, but an offer of arbitration subject to the ICSID Convention, which Venezuela denounced in 2012, and that, on the other hand, this offer of arbitration included two cumulative subsidiary options (ad 10(a) and (b)) which were inapplicable at the date on which Messrs [G] availed themselves thereof since Venezuela was no longer a member of the ICSID since 2012 and the ICSID Additional Facility Arbitration was denied to them due to their dual nationality (decision of rejection by the Secretary of the ICSID of November 10, 2016 – [G]'s Exhibit No. 19).

72- On the other hand, it follows from article 3 of the treaty containing the MFN clause (translation by [G]):

1. Neither Contracting Party shall make subject investments in its territory, which are held by nationals or companies of the other Contracting Party or which are under their effective control, to treatment less favourable than that provided to investments of its own nationals and companies or to investments of nationals and companies of third States.

2. Neither Contracting Party shall subject nationals or companies of the other Contracting Party to less favourable treatment in its territory in respect of their investment-related activities than that provided to its own nationals and companies or to nationals and companies of third countries.

3. This Treaty shall not extend to the privileges which any of the Contracting Parties shall grant to nationals and companies of third countries forming part of a customs or economic union, a common market or a free trade area or by association with such groupings.

4. The treatment provided by this Article shall not extend to benefits that either Contracting Party grants to nationals or companies of third countries as a result of an agreement for the avoidance of double taxation or other agreements in tax matters."

73. Based on these provisions, and those contained in Article Ad *3(b)* on the definition of "less favorable treatment" applicable to investors *("Activities", within the meaning of paragraph 2 of Article 3 shall include, in particular, but not exclusively, the administration, use, and operation of an investment. In particular, but not exclusively, "less favourable"treatment, within the meaning of Article 3, shall include less favourable conditions for an investment affecting the acquisition of raw materials and other supplies, energy and fuel, as well as means of production and operation of any kind, or the sale of products within the country and abroad. Measures adopted for reasons of internal or external security, public order, public health or morality shall not be considered as "less favorable" treatment within the meaning of Article 3",* Messrs [G] argues that it is possible to import more favorable procedural provisions contained in another Treaty concluded by Venezuela with a state other than Germany, including a more favorable arbitration offer.

74- Nevetheless, if by such a clause, the States parties to the Treaty have admitted the possibility of importing more favourable provisions applying to investments (Article 3.1) or to nationals of the other contracting party (Article 3.2), this extension is only intended to take effect within the limits and scope of the basic treaty, which presupposes that the Treaty is applicable and that the offer of arbitration is still open to the said investors since the MFN clause can only be invoked if the investor is likely to benefit from the consent to arbitration of the requested State (cf. Final Report of the Study Group on the Most-Favored-Nation Clause, Yearbook of the International Law Commission 2015 - Venezuela Exhibit No. 15 – *"a person who does not meet the required criteria to be an investor under the bilateral investment treaty cannot become an investor by invoking an MFN clause. Just as MFN cannot be used to alter the conditions for the exercise of substantive rights, neither can it be used to alter the conditions for the exercise of procedural or jurisdictional rights. An investor that does not meet the requirements for bringing an action against the respondent state cannot defeat those requirements by invoking the procedural provisions of another bilateral investment treaty").*

75- Nevetherless, in the matter under consideration, independently of the issue related to the dual nationality of Messrs [G], which motivated the rejection by the Secretary General of ICSID of their request for arbitration under the ICSID Additional Facility Arbitration (Exhibit No. 19 mentioned above), it follows from the above-mentioned grounds that, with Venezuela having denounced the ICSID Convention in 2012, the offer of arbitration limited to the ICSID Convention provided for in the Treaty was no longer open at the date of the request for arbitration made by Messrs [G] (2015 and 2016), and the two cumulative subsidiary options were no longer applicable.

76-The [G] group could not therefore invoke the benefit of the MFN clause of the Treaty in order to import a new consent to arbitration from the State of Venezuela on the basis of the Treaty when the offer of arbitration had been expressly limited in time and in its conditions.

77- Furthermore, the MFN clause at issue is itself limited in scope since it lists in ad 3(b), admittedly and non-exhaustively, the limited activities for which the MFN clause could be invoked ("the administration, use, and operation of an investment", or "less favourable" treatment within the meaning of Article 3, specifically *"less favourable conditions for an investment which affect the acquisition of raw materials and other supplies, and other supplies, energy and fuel, as well as means of production and operation of any kind, or the sale of products within the country and abroad"),* which substantially differs from a clause that would allow for the import of dispute settlement procedure or the benefit of a substantive right to ensure a dispute settlement procedure appropriate to the object and purpose of the Treaty.

78-Accordingly, both the absence of an unconditional offer of arbitration and such an MFN clause cannot serve as a basis for extending the jurisdiction of the arbitral tribunal, and, as the arbitral tribunal constued it (§408) *"there is nothing in the Treaty to indicate that the intent of the Contracting Parties was to allow the application of the MFN clause to import procedural requirements from more favourable Treaties"* so that this plea will also be rejected, without it being necessary to investigate on a case-by-case basis whether the other Treaties signed by Venezuela could have been invoked.

- On the Matter of the *Rationae Personae* Jurisdiction

79- Where the arbitration clause is contained in a bilateral investment Treaty, the common will of the contracting parties to have recourse to arbitration must be assessed in the light of all the provisions of the treaty so that the arbitral tribunal has jurisdiction to hear a dispute only if it falls within the scope of the treaty and meets all the conditions for its application.

80-It follows from the above grounds that the offer of ICSID arbitration no longer existed at the time of the request made by Messrs [G] and that the Arbitral Tribunal rightly held that the Treaty did not offer any alternative under the aegis of UNCITRAL apart from the exception provided for in ad 10(b), which was only subsidiary and no longer applicable, and that consequently, the lack of jurisdiction *rationae voluntatis* of the arbitral tribunal renders the question of its jurisdiction rationae personae as moot, with the conditions for the application of the Treaty not being satisfied.

81-The fact that Germany is still a member of ICSID and that the arbitration may be opened under the ICSID Additional Facility Arbitration also has no bearing on the question of the arbitral tribunal's jurisdiction, since it declared itself incompetent *rationae voluntatis* under the UNCITRAL Arbitration Rules at the time when Messrs [G] acted, and that jurisdiction *rationae personae*, assuming it is established, would not itself allow the tribunal to declare itself competent.

82-It follows from all these exhibits that the arbitral tribunal was right to declare itself incompetent to rule on the claims of Messrs [G] and that the action for annulment must consequently be rejected.

On the Fees and Costs

83-. Messrs [G], the losing parties, must be ordered to pay the costs.

84- In addition, they must be ordered to pay to the Republic of Venezuela, which had to incur irreducible costs in order to assert its rights, a compensation under Article 700 of the French Code of Civil Procedure, for which it is fair to set at the total sum of EUR 100 000.

VI/OPERATIVE PART OF THE JUDGMENT

The Court hereby :

1-Dismiss the action for annulment of the award rendered in Paris on October 29, 2019 (PCA No. 2017-18) pursuant to the UNCITRAL Rules ;

2- Order Messrs [G] to pay the Republic of Venezuela the total sum of 100,000 euros under Article 700 of the French Code of Civil Procedure;

3. Order Messrs [G] to pay the costs.

The Court Clerk **On behalf of the President**
Najma EL FARISSI **Fabienne SCHALLER**