RADICATI DI BROZOLO
SABATINI
BENEDETTELLI
TORSELLO

Milan, 14 July 2022

EXPERT OPINION
by
professor Massimo Benedettelli

I INTRODUCTION

1. My name is Massimo Benedettelli.

2. I am full professor (*professore ordinario*) of International Law at the Department of Law of the University "Aldo Moro" in Bari. Having received tenure in 1994, during my academic career I have also taught Private International Law, International Economic Law, European Union Law, and European Commercial Law. In January 2022, upon invitation of the *Curatorium* of the Hague Academy of International Law, I have given a course on "*Powers in International Arbitration between Party Autonomy, Arbitral Authority and State Sovereignty*".

3. My scientific interests focus, *inter alia*, on international arbitration, investment law and international company and insolvency law. In light of such interests, I have also studied the interplay between arbitration and human rights. This led to the publication of two articles[1] and to a project with Oxford University Press for a book on *International Arbitration and Human Rights*, forthcoming in 2023. In December 2019, I have been invited to speak at an event organized for launching the *Hague Rules on Business and Human*

[1] Cf. MASSIMO V. BENEDETTELLI, *Human rights as a litigation tool in international arbitration: reflecting on the ECHR experience*, Arbitration International, 2015, 1–29; ID., *The European Convention on Human Rights and Arbitration: The EU Law Perspective*, in FRANCO FERRARI, *The Impact of EU Law on International Commercial Arbitration*, New York, 2017, 479-535.

Rights Arbitration, a project carried out by the Center for International Legal Cooperation under the chairmanship of Professor Bruno Simma and with the endorsement of the Dutch Ministry of Foreign Affairs.[2] I have also lectured on *The Human Rights Dimension of Commercial and Investment Arbitration* in the Summer 2022 program of the Arbitration Academy, Paris.

4. I practice law since 1988, being enrolled in the Bar Association of Milan and authorized to plead before the Italian Supreme Court. I am name partner of ArbLit, a law firm based in Milan and specialized in international commercial and investment arbitration as well as cross-border litigation. In such capacity I have acted as counsel, expert, and arbitrator (whether upon party appointment or as chair) in numerous arbitrations seated in different jurisdictions and governed by different institutional rules. I am currently the Italian member of the Court of Arbitration of the International Chamber of Commerce in Paris, having sat as alternate member from July 2018 to June 2021.

5. A detailed curriculum vitae, with a list of my main publications, is attached to this Opinion as **Annex 1**.

6. I have been requested by Freshfields Bruckhaus Deringer LLP, Amsterdam ("**Freshfields**" or "**Instructing Counsel**"), counsel to Mr Fernando Fraiz Trapote ("**Mr Fraiz**" or the "**Claimant**"), to provide this opinion in connection with an application filed by Mr Fraiz with the *Gerechtshof* of The Hague (the "**Court of Appeal**") for the setting aside of a *Final Award* dated 31 January 2022 (the "**Award**"). The Award was rendered by an arbitral tribunal (the "**Tribunal**") acting pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law, 1976 ed., (the "**UNCITRAL Rules**") in arbitral proceedings administered by the Permanent Court of Arbitration (the "**PCA**") and seated in The Hague (the "**Arbitration**"). The Arbitration was brought by Claimant against the Bolivarian Republic of Venezuela ("**Venezuela**" or the "**Respondent**", and, together with Claimant, the "**Parties**") under the *Agreement for the Reciprocal Promotion and Protection of Investments* between Venezuela and the Kingdom of Spain ("**Spain**", and, together with Venezuela, the "**Contracting Parties**") of 2 November 1995 (the "**BIT**").

7. I am impartial and independent from the Parties and their counsel. In particular, I confirm that the fact that I have been a partner at Freshfields from 2001 until 2014, as indicated in the attached curriculum vitae, does not impair or influence the analysis contained in this Opinion. Apart from the mandate received in connection with this Opinion, which is remunerated on a lump-sum basis, I have no interest in the outcome of the dispute between Mr Fraiz and Venezuela.

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[2] Cf. https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/#:~:text=The%20Hague%20Rules%20on%20Business%20and%20Human%20Rights%20Arbitration%20Project,UN%20Guiding%20Principles%20on%20Business.

8. This Opinion is rendered to the best of my genuine and educated belief, expertise, and professional knowledge, by reference to the *Convention for the Protection of Human Rights and Fundamental Freedoms* of 4 November 1950 (the "**European Convention**" or "**ECHR**") and its supplementing Protocol No. 12 of 4 November 2000 ("**Protocol 12**"), as interpreted by the European Court of Human Rights (the "**European Court**" or "**ECtHR**"), and to any principles or rules of international law relevant for the construction of said international instruments. I do not opine on the laws of any jurisdiction, including the laws of The Netherlands, although reference to certain Dutch law provisions will be made as far as it is necessary.

9. This Opinion is based on the truth and correctness of the assumptions listed below, including assumptions as to the correct interpretation of certain provisions of Dutch law which have been brought to my attention in answer to questions I have raised, as well as that no information relevant or useful for the purposes of this Opinion has not been given to me by the Instructing Counsel.

II DOCUMENTS REVIEWED AND ASSUMPTIONS MADE

10. Instructing Counsel has provided me with copy of the following documents[3] relating to the Arbitration and to a set of judicial proceedings where issues similar to those addressed here have also arisen:

    (i) the BIT;

    (ii) the Award;

    (iii) the judgment of the Court of Appeal of The Hague of 19 January 2021, rejecting an application filed by an investor for the annulment of an award by a tribunal seated in The Netherlands where jurisdiction had been declined on the ground of a *ratione personae* objection similar to the one raised by Venezuela in the Arbitration (the "**García Judgment**")[4];

    (iv) the judgment of the District Court of The Hague of 20 October 2021, rejecting an application filed by the State hosting the investment for the annulment of an award by a tribunal seated in The Netherlands where jurisdiction had been accepted on the ground that a *ratione personae* objection similar to the one raised by Venezuela in the Arbitration was unsound (the "**Egypt Judgment**")[5].

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[3] Documents (ii), (iii) and (iv) were provided to me in (office) translations into the English language.

[4] ECLI:NL:GHDHA:2021:14.

[5] ECLI:NL:RBDHA:2021:12258.

11. I understand, and have been confirmed by Instructing Counsel, that:

(i) under Article I(1) *lit.* (a) BIT, investors protected by the BIT include "*any physical person who possesses the nationality of one Contracting Party pursuant to its legislation and makes investments in the territory of the other Contracting Party*";

(ii) Article XI(2) and (3) BIT provides that disputes "*between investors of one Contracting Party and the other Contracting Party*" concerning the fulfilment by such other Contracting Party of its BIT obligations, and which cannot be amicably settled, shall be submitted, at the investor's choice, or by agreement of the Parties:

> *"2. [...]*
>
> *a) To the competent courts of the Contracting Party in whose territory the investment was made, or*
>
> *b) To the International Centre for Settlement of Investment Disputes (ICSID) established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which was opened for signature in Washington on 18 March 1965,1 provided that both States parties to this Agreement have acceded to the Convention. If either Contracting Party has not acceded to the Convention, recourse shall be had to the Additional Facility for the administration of conciliation, arbitration and fact-finding procedures by the ICSID secretariat.*
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> *3. If for any reason the arbitral bodies referred to in paragraph 2 (b) of this article are not available, or if the two parties so agree, the dispute shall be submitted to an ad hoc court of arbitration established in accordance with the arbitration rules of the United Nations Commission on International Trade Law."*

(iii) Mr Fraiz is a dual Venezuelan and Spanish national;

(iv) in 2018 Mr Fraiz filed a claim against Venezuela under the BIT (the "**Claim**") whereby he sought indemnification for damages allegedly suffered due to Venezuela's failure to pay him a prompt, adequate and effective compensation on account of acts of expropriations allegedly carried out by Venezuela in breach of the BIT and affecting certain investments he had made in Venezuela in the outdoor advertising, telecommunications, education and real estate sectors;

(v) the Claim was filed by means of an application requesting the PCA to set up an *ad hoc* arbitral tribunal and administer arbitral proceedings in accordance with the UNCITRAL Rules;

(vi) since the Parties had not agreed on the place of the arbitration, Claimant having initially proposed New York and Respondent Paris, the Tribunal exercised its powers under Article 16(1) UNCITRAL Rules determining that "*the legal seat of the arbitration is The Hague, The Netherlands*";[6]

(vii) Respondent objected to the Tribunal's jurisdiction on *ratione personae* and *ratione materiae* grounds, requesting that the proceedings be bifurcated so that the Tribunal could decide on such objections before delving into the merits of the case;

(viii) having bifurcated the proceedings, the Tribunal rendered the Award whereby it granted Respondent's *ratione personae* objection, thus finally deciding that it lacked "*jurisdiction and competence*" to hear the Claim;[7] in particular, the Tribunal found that the BIT extends the benefit of its protections to physical persons who are dual nationals of the two Contracting States but only when the claim is brought against a State other than that of the "*effective and dominant*" nationality of the investor, this not being the case with Mr Fraiz whose links with Venezuela were considered prevailing.[8]

12. I also understand, and have been confirmed by Instructing Counsel, that:

(i) The Netherlands has signed and ratified the European Convention and its Protocol 12;

(ii) the European Convention and Protocol 12 have direct effect within The Netherlands pursuant to Articles 93 and 94 of the *Grondwet* (the "**Dutch Constitution**"), binding Dutch courts and prevailing over any conflicting provision of Dutch domestic law;

(iii) Article 17 Dutch Constitution protects the fundamental right to access-to-justice by providing that no one may be prevented against her will from accessing the courts to which she is entitled to apply under the law;

(iv) awards rendered in the context of arbitrations, including investment arbitrations, which have their place/seat in The Netherlands can be annulled by

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[6] Award, § 20.

[7] Award, § 432, *lit.* (a) and (b).

[8] Award, §§ 380-400.

the competent Dutch Court of Appeal under any of the following grounds, as listed in Article 1065(1) Dutch code of civil procedure (the "**Dutch CCP**"):

> "[...]:
> *(a) absence of a valid arbitration agreement;*
> *(b) the arbitral tribunal was constituted in violation of the rules applicable thereto;*
> *(c) the arbitral tribunal has not complied with its mandate;*
> *(d) the award is not signed or does not contain reasons in accordance with the provisions of Article 1057;*
> *(e) the award, or the manner in which it was made, violates public policy or good morals*"

(v) when deciding on applications for the annulment of an award grounded under Article 1065 (1) *lit.* a) Dutch CCP, Dutch courts review the merits of the decision whereby the arbitral tribunal has assumed jurisdiction; such review is conducted as a "full review", i.e. in this case Dutch courts do not exercise the restraint in enforcing set aside powers which is normally required to protect the effectiveness of arbitral proceedings and avoid disguised appeals. The rationale for this approach is that the ground for annulment in Article 1065 (1) *lit.* a) aims to protect the fundamental right of access-to-justice enshrined in Article 17 Dutch Constitution;

(vi) Article 1052(1) Dutch CCP codifies the *Kompetenz-Kompetenz* principle by providing that

> "*the arbitral tribunal shall have the power to rule on its own jurisdiction*";

(vii) Article 1052(5) Dutch CCP regulates the consequences of an award whereby the arbitral tribunal declines jurisdiction on the ground of a non-existing or invalid arbitration agreement by providing that in such a case:

> "*the court shall have jurisdiction to hear the case*";

(viii) Article 1067 Dutch CCP regulates the consequences of the annulment of an award by the competent court by providing that:

> *"As soon as the decision setting aside the award has become final, the jurisdiction of the court shall be revived if and insofar as the arbitral award has been set aside on the ground of non-existence of a valid arbitration agreement. If and insofar as the arbitral award is set aside on any other ground, the arbitration agreement shall remain in force, unless the parties have agreed otherwise*";

(ix) The *travaux préparatoires* of the Dutch Arbitration Act 2015 evidence that the Dutch legislator has taken a pro-arbitration stance aiming to make arbitration more accessible and efficient and to favor the selection of The Netherlands as seat for commercial and investment arbitrations;

(x) According to the García Judgment, the annulment ground set out by Article 1065(1) *lit.* (a) Dutch CCP can be invoked to challenge the merits of awards whereby the arbitral tribunal has found to have jurisdiction to hear the dispute ("**positive jurisdictional awards**"), but not also the merits of awards whereby the arbitral tribunal has declined jurisdiction ("**negative jurisdictional awards**")[9]; this would hold true irrespective of whether the subject-matter of the arbitration is a commercial or investment dispute;

(xi) In the Egypt Judgment a bilateral investment treaty, which contains a definition of investor almost identical to the one set out by the BIT, was interpreted by the District Court of The Hague as granting the benefit of its protection also to investors which hold the nationality of both contracting States to the treaty, irrespective of which of the investor's nationalities was dominant and/or effective[10].

III THE QUESTION

13. I have been asked to provide my opinion on whether The Netherlands would breach its international obligations under the European Convention and Protocol 12 if the Court of Appeal were to deny Mr Fraiz's right to seek the annulment of the Award on the ground that under Dutch law negative jurisdictional awards cannot be reviewed as to their merits.

14. It is my opinion that the abovementioned question should receive a positive answer for the following reasons.

IV ANALYSIS

15. To answer the question on which I have been requested to opine, I will first briefly describe the obligations which the European Convention and Protocol 12 impose on a contracting State, and on its courts, with regard to the safeguard of human rights in the administration of justice on civil matters (**Section IV.A**). I will then outline that such obligations apply also to arbitration, including investment arbitration (**Section IV.B**), and I

[9] Cf. García Judgment, §§ 20-22. This is of course without prejudice to the fact that negative jurisdictional awards can be challenged pursuant to the other grounds listed at *lit.* b) to e) of Article 1065(1) Dutch CCP if the relevant conditions materialize.

[10] Egypt Judgment, §§ 5.52-5.55.

will conclude by explaining why a Dutch court exercising jurisdiction on the annulment of an investment arbitration award would breach the European Convention and Protocol 12 were it to negate the right to review negative jurisdiction awards as to their merits, while under applicable law positive jurisdiction awards can be so reviewed (**Section IV.C**).

IV.A The obligations of an ECHR contracting State's court with regard to the safeguard of human rights in the administration of justice in civil matters

16. The European Convention has been entered into with the aim of "*securing the universal and* effective *recognition and observance*"[11] of the human rights and fundamental freedoms therein listed. Indeed, the European Court has repeatedly stated that, in light of its objective and purpose, the European Convention must be interpreted and applied according to a "*principle of effectivity*" so as to achieve the *effet utile* of its provisions, making the relevant rights and freedoms concrete and effective.[12] This explains why the European Convention entitles private subjects who are victims of human right breaches to file applications before the European Court against the allegedly responsible contracting State (including their own State of nationality). This also justifies the construction of the European Convention as an international law instrument laying down obligations *erga omnes partes*, in the sense that not only the State of nationality of the person whose rights and freedom have been breached, but also any other contracting State can invoke the international responsibility of the defaulting State for the breach of its treaty obligations.[13]

17. This principle of effectivity explains the breadth of Article 1 ECHR, according to which the contracting States are bound to "*secure to everyone within their jurisdiction*" the rights and freedoms defined in Section I ECHR. This provision extends the treaty safeguards to everyone, whether a physical or a legal person, over whom a contracting State happens to exercise its sovereign powers, irrespective of its nationality, thus covering

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[11] Preamble, II recital (emphasis added) ECHR (referring to the United Nation's 1948 *Universal Declaration of Human Rights* from which the European Convention draws).

[12] Cf., *inter alia*, ECtHR, *Mc Cann & al. v. United Kingdom*, Application No. 18984/91, 27.9.1995, § 146; ECtHR, *R.M.D. v. Switzerland*, Application No. 19800/92, 26.9.1997, § 51; ECtHR, *Airey v. Ireland*, Application No. 6289/73, 9.10.1979, § 24; ECtHR, *Artico v. Italy*, Application No. 6694/74, 13.5.1980, § 33; ECtHR, *El-Masri v. the Former Yugoslav Republic of Macedonia*, Application No. 39630/09, 13.12.2012, § 134; ECtHR, *Mozer v. the Republic of Moldova and Russia*, Application No. 11138/10, 23.2.2016, § 144; ECtHR, *N.D. and N.T. v. Spain*, Applications Nos. 8675/15 and 8697/15, 13.2.2020, § 171.

[13] This means that in the case under examination a breach of the human rights Mr Fraiz enjoys under the European Convention could justify claims against The Netherlands not only by Mr Fraiz and Spain, but also by other ECHR contracting States (e.g. States whose nationals have invested in third countries in light of protections granted by bilateral investment treaties when the seat of the relevant arbitration is in The Netherlands).

also a contracting State's nationals as well as nationals of non-contracting States.[14] In addition, according to the European Court, it also triggers the following corollaries: (i) contracting States are bound by both "*negative obligations*", having to abstain from behaviors which may cause the breach of a protected right or freedom, and "*positive obligations*", having to take action whenever this proves necessary to ensure its full and effective enjoyment;[15] (ii) these obligations apply to all State authorities, whether exercising legislative, administrative or judicial functions,[16] and the relevant treaty provisions must be given a "*horizontal effect*", in the sense that the contracting States can be held liable also if they do not prevent and sanction breaches of treaty rights or freedoms committed by private parties to the detriment of other private parties;[17] (iii) in addition, the contracting States are required to protect the treaty rights and freedoms "*par ricochet*", *i.e.* they must avoid taking actions which affect a person who is in their jurisdiction when such actions could indirectly result in the person being deprived by a non-contracting State of the treaty rights and freedoms.[18]

18. The *effet utile* perspective adopted by the European Convention is strengthened by Article 13 ECHR, mandating the contracting States to grant to everyone whose treaty rights and freedoms have been violated "*an effective remedy before a national authority*".[19]

19. Among the human rights and fundamental freedoms protected by the European Convention, Article 6(1) ECHR recognizes a person's "*right to a fair trial*" by providing, *inter alia*, that:

> "*In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*"

20. Given the "*prominent place*" that the right of fair trial must be attributed in democratic societies governed by the rule of law, this being the ultimate objective and purpose of the European Convention,[20] the European Court holds that a restrictive interpretation

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[14] Cf. ECtHR, *Ireland v. United Kingdom*, Application No. 2310/71, 18.1.1979, § 239.

[15] Cf. ECtHR, *X & Y v. The Netherlands*, Application No. 8978/80, 26.3.1985, § 23.

[16] Cf. ECtHR, *Vulakh and Others v. Russia*, Application No. 33468/03, 10.4.2012, § 44; ECtHR, *Navalnyy v. Russia*, Applications Nos. 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14, 15.11.2018, §§ 114-115.

[17] Cf. ECtHR, *Osman v. United Kingdom*, Application No. 23452/94, 28.10.1998, §§ 115-116; ECtHR, *Streletz, Kessler and Krenz v. Germany*, Applications Nos. 34044/96, 35532/97 and 44801/98, 22.3.2001, § 86; ECtHR, *Selahattin Demirtaş v. Turkey*, Application No. 15028/09, 23.9.2015, § 27.

[18] Cf. ECtHR, *Saadi v. Italy*, Application No. 37201/06, 28.2.2008, §§ 124-127.

[19] Art. 13 ECHR may apply also with regard to breaches of procedural rights, such as those contemplated by Art. 6(1) ECHR (cf. ECtHR, *Lesjak v. Slovenia*, Application No. 33553/02, 6.7.2006, § 28) and may have an autonomous scope (cf. ECtHR, *Golder v. United Kingdom*, Application No. 4451/70, 21.2.1975, § 33).

[20] Cf. Preamble, Recital No. 4, ECHR.

of Article 6(1) would be contrary to its spirit and *ratio* and that the protections it grants must be effective.[21] Thus, contracting States are obliged to take all actions, including by means of legislative measures, which may be needed to ensure said *effet utile*.[22]

21. For the European Court Article 6(1) embodies also the right to access-to-justice, which is "*inherent*" in the right of a fair trial, being actually the very premise for the enjoyment of all the procedural guarantees in which the fair trial translates.[23] Indeed, "[f]*or the right of access to be effective, an individual must have a clear, practical opportunity to challenge an act that is an interference with his rights*".[24]

22. Moreover, for the European Court the Article 6(1) fair trial safeguards include also the parties' "equality of arms", i.e. the right of each party to be afforded a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage vis-à-vis its counterparty, so as to ensure a "fair balance" between the parties.[25]

23. The protections granted by Article 6(1) with regard to the administration of justice in civil matters extend to all legal disputes, whether or not concerning a right protected by

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[21] Cf. ECtHR, *Delcourt v. Belgium*, Application No. 2689/65, 17.1.1970, § 25; ECtHR, *De Cubber v. Belgium*, Application No. 9186/80, 26.10.1984, § 30; ECtHR, *Moreira de Azevedo v. Portugal*, Application No. 11296/84, 23.10.1990, § 66; ECtHR, *Waite and Kennedy v. Germany*, Application No. 26083/94, 18.2.1999, § 67; ECtHR, *Prince Hans-Adam II of Liechtenstein v. Germany*, Application No. 42527/98, 12.7.2001, § 45; ECtHR, *Zubac v. Croatia*, Application No. 40160/12, 5.4.2018, § 77.

[22] Cf. ECtHR, *Artico v. Italy*, Application No. 6694/74, 13.5.1980, § 33; ECtHR, *Tănase v. Moldova*, Application No. 7/08, 27.4.2010, § 180.

[23] Cf. ECtHR, *Golder v. United Kingdom*, Application No. 4451/70, 21.2.1975, § 36; ECtHR, *Naït-Liman v. Switzerland*, Application No. 51357/07, 15.3.2018, § 113.

[24] Cf. ECtHR, *Bellet v. France*, Application No. 23805/94, 4.12.1995, § 36.

[25] Cf. ECtHR, *Kress v. France*, Application No. 39594/98, 7.6.2001, § 72; ECtHR, *Regner v. Czech Republic*, Application No. 35289/11, 19.9.2017, § 146; ECtHR, *Dombo Beheer B.V. v. The Netherlands*, Application No. 14448/88, 27.10.1993, § 33; cf., in particular, ECtHR, *Platakou v. Greece*, Application No. 38460/97, 11.1.2001, §§ 44-48, referring to a case where a party was precluded from having its case heard on the merits due to a procedural rule which worked only at its disadvantage.

the European Convention,[26] whether or not having a pecuniary content,[27] including disputes grounded on provisions of public law [28] or involving the State or other public entities.[29]

24. The contracting States certainly enjoy a "*margin of appreciation*" when regulating the administration of justice, and in the exercise of the relevant discretion they may set out limits to the rights protected by Article 6(1). Such limits, however, are justified only if they aim to achieve a legitimate purpose and if the means used are reasonably proportionate to such goal.[30]

25. In any event, such regulation can never be discriminatory. This is prohibited by Article 14 ECHR, whereby "*the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ... national origin ... or other status*". The European Court has relied on these last words to broaden the scope of the prohibition of discrimination so as to cover any unreasonable difference in regulation which is based on personal conditions or characteristics of the relevant subjects.[31]

26. Article 1 Protocol 12 extends such prohibition beyond the material scope of the treaty to "*any right*" which the law of a contracting State, or a contracting State's authority (including a court) when taking measures,[32] may grant to a category of subjects and deny to another category of subjects. Consistently with the case law of the courts of most advanced jurisdictions, these provisions assert the basic principle of the "*equal protection of the laws*",[33] which commands to treat equally situations which are equal and

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[26] Cf. ECtHR, *Denisov v. Ukraine*, Application no. 76639/11, 25.9.2018, § 44; ECtHR, *Regner v. Czech Republic*, Application No. 35289/11, 19.9. 2017, § 99; ECtHR, *Károly Nagy v. Hungary*, Application No. 56665/09, 14.9.2017, § 60.

[27] Cf. ECtHR, *Bilgen v. Turkey*, Application No. 1571/07, 9.6.2021, § 65; ECtHR, *Denisov v. Ukraine*, Application no. 76639/11, 25.9.2018, § 51. See also further case law mentioned in P. VAN DIJK, F. VAN HOFF, A. VAN RIJN, L. ZWAAK, *Theory and Practice of the European Court of Human Rights*, 2006, p. 525 ff.

[28] Cf. ECtHR, *Mennitto v. Italy*, Application No. 33804/96, 5.10.2000, §§ 21-27.

[29] Cf. ECtHR, *Ringeisen v. Austria*, Application No. 2614/65, 16.7.1971, § 94; *Benthem v. The Netherlands*, Application No. 8848/80, 23.10.1985, § 34; ECtHR, *Achleitner v. Austria*, Application No. 53911/00, 23.10.2003, §§ 8, 48-49.

[30] Cf. ECtHR, *Khalfaoui v. France*, Application No. 34791/97, 14.12.1999, §§ 35-36.

[31] ECtHR, Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, 31.12.2020, § 88.

[32] Cf. ECtHR, *Savezcrkava "Riječ života" and others v. Croatia*, Application No. 7798/08, 9.12.2010, § 104. Cf. Explanatory Report to Protocol 12, §§ 22, 30.

[33] Cf. Art. 1 Dutch Constitution.

differently situations which are different[34] and puts on the lawmaker the burden of proving that any normative classification, whereby rights are granted to/obligations laid down on certain subjects and not to/on others, is rational in light of the legitimate purpose pursued and of the means used.[35]

IV.B The safeguard of human rights in the administration of justice applies also to arbitration, including investment arbitration

27. The European Court has consistently held that the human rights safeguards contemplated by Article 6(1) ECHR with regard to the administration of justice in civil matters apply also to arbitration. This is quite an obvious corollary of the fact that in contemporary jurisdictions arbitration is an alternative modality for the resolution of disputes *by adjudication*, awards being equated to court judgments as to *res judicata* and enforceability effects.[36]

28. To comply with their Article 6(1) ECHR obligations contracting States must ensure that access-to-justice and a fair trial are guaranteed both by arbitral tribunals during the arbitral proceedings, this being a consequence of the "*horizontal effect*" attributed to the treaty provisions,[37] and by their own courts in the context of arbitration-related judicial proceedings, including proceedings in the context of which the courts of the State where the arbitration is seated exercise their review function.

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[34] Cf. ECtHR, *"Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (merits)*, Applications Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, 23.7.1968, § 10; ECtHR, *Marckx v. Belgium*, Application No. 6833/74, 13.6.1979, §§ 38 ff.

[35] Cf. ECtHR, *"Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (merits)*, Applications Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, 23.7.1968, § 10; ECtHR, *Abdulaziz & al. v. United Kingdom*, Applications Nos. 9214/80, 9473/81, 9474/81, 28.5.1985, § 72; ECtHR, *Grzelak v. Poland*, Application No. 7710/02, 15.6.2010, §§ 84 ff; ECtHR, *Schwizgebel v. Switzerland*, Application No. 25762/07, 10.6.2010, §§ 82 ff; ECtHR, *National and Provincial Building Society et al. v. United Kingdom*, Application No. 117/1996/736/933-935, 23.10.1997, § 88; ECtHR, *Pine Valley Developments Ltd. et al. v. Ireland*, Application No. 12742/87, 29.11.1991, § 64; ECtHR, *Fábián v. Hungary*, Application No. 78117/13, 5.9.2017, § 121; ECtHR, *Moldovan and Others v. Romania* (No. 2), Applications Nos. 41138/98, 64320/01, 12.7.2005, § 137; ECtHR, *Sâmbata Bihor Greek Catholic Parish v. Romania*, Application No. 48107/99, 12.1.2010, § 79.

[36] Cf. ECtHR, *Mutu and Pechstein v. Switzerland*, Applications Nos. 40575/10, 67474/10, 2.10. 2018, § 139; ECtHR, *Cyprus v. Turkey*, Application No. 25781/94, 10.5.2001, § 233; ECtHR, *Sramek v. Austria*, Application No. 8790/78, 22.10.1984, § 36; ECtHR, *Transado-Transporters Fluviais do Sado v. Portugal*, Application No. 35943/02, 16.12.2003, § 2; ECtHR, *Beg S.p.a. v. Italy*, Application No. 5312/11, 20.5.2021, § 126; ECtHR, *Lithgow and others v. the United Kingdom*, Application Nos. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, 8.7.1986, § 201; ECtHR, *Sramek v. Austria*, Application No. 8790/79, 22.10.1984, § 36.

[37] Cf. *supra*, § 17.

29. Consistently with the "*principle of effectivity*",[38] for the European Court it is immaterial whether a breach stems from a gap in the arbitration law of a contracting State, from an error in its application made by a contracting State court, or from the failure by any State authority (including a court) to take, or abstain from taking, positive action. What matters is that a person is deprived of the *effet utile* of the rights enshrined in Article 6(1).[39]

30. To be true, the European Court acknowledges that the procedure applicable to arbitral proceedings may differ from the one applicable to court proceedings and that by entering into an arbitration agreement the parties may waive, or deviate from, the fair trial safeguards which under Article 6(1) must be mandatorily respected before the courts of the contracting States.

31. However, the European Court also holds that there is a hard core of fair trial safeguards which pertain to the very concept of adjudication and therefore cannot be limited by State arbitration law or waived by the parties in dispute. Moreover, even when fair trial safeguards can be limited (i) the limit must not restrict access-to-justice in such a way or to such an extent that the very essence of the right is impaired, and must result from a rule which pursues a legitimate aim by making use of means reasonably proportional to its achievement, (ii) the waiver must be free and unequivocal, so as to ensure that the waiving party made a voluntary and conscious choice, and (iii) counter-guarantees commensurate to the importance of the safeguard which has been limited or waived must be contemplated to the benefit of the waiving party.[40]

32. There is no reason why this treaty regime aiming to provide effective safeguards to the right to access-to-justice and to the right to a fair trial in the context of arbitration should apply only to commercial and not also to investment disputes, nor am I aware of any decision or scholarly work where such a position has ever been maintained. Indeed,

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[38] Cf. *supra*, § 16.

[39] Cf. ECtHR, *Beg SpA v. Italy*, Application No. 5312/11, 20.5.2021, §§ 135-153, condemning Italy for a decision rendered by the Italian Supreme Court which had not annulled a domestic arbitral award on the ground of lack of independency and impartiality of an arbitrator who had failed to make a full disclosure as to a potential conflict of interest, notwithstanding that under Italian arbitration law arbitrators do not have such a disclosure duty.

[40] Cf. ECtHR, *Suovaniemi et al. v. Finland*, Application No. 31737/96, 23.2.1999, p. 5; ECtHR, *Deweer v. Belgium*, Application No. 6903/75, 27.2.1980, § 49; ECtHR, Eiffage S. A. *et al. v. Switzerland*, Application No. 1742/05, 15.9.2009, p.13; ECtHR, *Tabbane v. Switzerland*, Application No. 4162/12, 1.3.2016, §§ 27-36; ECtHR, *Mutu and Pechstein v. Switzerland*, Applications Nos. 40575/10, 67474/10, 2.10.2018, §§ 93, 96; ECtHR, *Beg S.p.a. v. Italy*, Application No. 5312/11, 20.5.2021, § 127. Cf. also European Commission of Human Rights, *Axelsson et al. v. Sweden*, Application No. 11960/86, 13.7.1990. That recourse to arbitration is not tantamount to a complete waiver of the Article 6(1) ECHR protections is undisputed among the commentators: cf., *inter alia*, SÉBASTIEN BESSON, *Arbitration and Human Rights*, ASA Bulletin, 2006, Volume 24, Issue 3, pp. 395-416 **(Annex 2)**; NIGEL BLACKABY, CONSTANTINE PARTASIDES, et al., *Redfern and Hunter on International Arbitration*, Kluwer Law International, 2015, pp. 569 – 604 **(Annex 3)**.

consistently with the European Court's case law on what "*justice in civil matters*" means for the purposes of Article 6(1) ECHR,[41] the facts that in investment disputes the cause of action is grounded in international law rather than in domestic law, and that the claim is brought by the investor against the State hosting the investment rather than against a private party, should be immaterial, given that (i) the investor seeks monetary relief in the form of damages aimed to remedy a wrongdoing, (ii) in the context of the arbitral proceedings the investor and the host State act on an equal foot enjoying the same procedural rights, and (iii) any pecuniary obligation imposed by the award is generally to be enforced in accordance with the same rules and procedures governing the enforcement of civil judgments in civil matters.

IV.C A Dutch court exercising jurisdiction on the annulment of an investment award would breach the European Convention and Protocol 12 if it were to refuse to review a negative jurisdictional award on its merits while admitting that such review is allowed in respect of positive jurisdictional awards

33. It is my opinion that, when exercising jurisdiction on an action for the annulment of an award rendered by an arbitral tribunal seated in The Netherlands for the adjudication of an investment dispute, a Dutch court would breach the European Convention and Protocol 12, were it to negate the investor's right to have a negative jurisdictional award reviewed as to its merits, while under applicable law the respondent State would be entitled to seek such merits review in respect of positive jurisdictional awards. In fact, by so acting the Dutch court would negate to the investor the access-to justice right it enjoys under Article 6(1) ECHR (**Subsection IV.C.1**), would give rise to a discrimination of the investor as to the enjoyment of its rights under Article 6(1) in violation of Article 14 ECHR (**Subsection IV.C.2**) and would deny to the investor the equal protection of the laws in violation of Article 1 Protocol 12 (**Subsection IV.C.3**).

IV.C.1 A decision denying the investor the right to a review on the merits of a negative jurisdictional award would breach the access-to justice right it enjoys under Article 6(1) ECHR

34. As noted, for the European Court "*access-to-justice*", *i.e.* the existence of at least one forum where subjects can vindicate the protection of their substantive rights from wrongful behaviors of other subjects, is an inherent prerequisite for an effective enjoyment of the right of a fair trial which, in turn, is of the essence in all democratic societies governed by the rule of law.[42]

35. In investment arbitration denying access to arbitral justice often means denying access to justice *tout court*. That is because, once an arbitral tribunal has found to lack jurisdiction, no alternative fora – or at least no effective ones – remain available for the investor

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[41] Cf. *supra*, *sub* § 23.

[42] Cf. *supra*, *sub* § 21.

where to invoke, and possibly be granted, remedies against breaches of investment protection standards.

36. Indeed, when commercial disputes are at bar, by entering into the arbitration agreement the parties oust the jurisdiction of courts, which under the private international law rules in force in the relevant State would otherwise be the "*juge naturel*" for the relevant claim. Whether the claim is grounded on contractual or tortious liability, relates to corporate relationships, intellectual property rights or real estate assets, arises from a construction project, a M&A deal, a supply contract, there will certainly be one or more courts in the world which would be in principle empowered to hear it. This means that if, for whatever reason (even an erroneous one), the arbitral tribunal finds that the arbitration agreement is inexistent, invalid or ineffective, the claimant will still be entitled to submit its claim for adjudication by the courts of at least one jurisdiction (e.g., the State where the respondent is domiciled, the State where the contractual obligation is to be performed, the State where the harmful event occurred, the State where the company seat is located, etc.).

37. To the contrary, arbitral tribunals are the "*juge naturel*" of claims under investment treaties, contemporary investment law being grounded on the very idea that investment protection standards must be matched by the investor's power to have them enforced through adjudication by one or more international arbitrators, rather than by the courts of the host State, which under international law are instrumentalities of the respondent State and may be presumed not to offer the same guarantees as to independency and impartiality offered by an international arbitral tribunal.[43]

38. If this is true in general in investment arbitration (as well as in certain cases of international commercial arbitration, e.g. where State-owned or State-affiliated parties are involved),[44] it is even more true in the case at bar.

39. I note that Article XI(2) BIT grants to the investor the right to sue the host State before its own courts, but I consider this to be irrelevant, for two reasons.

40. First, Article XI(2) BIT could be construed as incorporating a "fork-in-the road" mechanism whereby once the choice of pursuing claims via arbitration is made, the investor is

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[43] Cf., *inter alia*, NORBERT HORN, "Arbitration and the Protection of Foreign Investment: Concepts and Means", in NORBERT HORN and STEFAN M. KRÖLL (eds), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects, Studies in Transnational Economic Law*, Kluwer Law International, 2004, pp. 3-31 **(Annex 4)**.

[44] Imagine a dispute of an international oil company with the state oil company of Venezuela about the loss of a concession; also in that setting, the Venezuelan courts may be presumed not to offer the same guarantees as to independency and impartiality offered by an international arbitral tribunal.

precluded from activating the other dispute resolution mechanism.[45] This means that, since Mr Fraiz has filed an arbitration claim, the Venezuelan courts would be entitled to refuse to hear his case. Second, it is notorious and in the public domain that the Venezuelan judicial system does not offer those guarantees of fair trial which Article 6(1) ECHR imposes on the contracting States[46], so that if a Dutch court were to maintain that Mr Fraiz's right to access-to-justice before an arbitral tribunal does not need to be protected by reviewing the Award on its merits since Mr Fraiz could theoretically seek protection of his investment rights before Venezuelan courts, The Netherlands would act contrary to the protection "*par ricochet*" of the treaty rights and freedoms commanded by the European Court.[47]

41. Thus, by not allowing a review of the Award on its merits on the ground that under Dutch arbitration law such review is contemplated only for positive jurisdictional awards, The Netherlands would abdicate its obligation to take positive actions so as to protect treaty rights and freedoms by granting them "*horizontal effects*" in the context of private relationships[48] (such as the one established between the Parties, and between the Parties and the members of the Tribunal), as well as by safeguarding their *effet utile* in the context of the exercise by Dutch courts of their powers over arbitrations seated in The Netherlands. In fact, were the Tribunal for whatever reason wrong in declining jurisdiction, Mr Fraiz's right to be heard with regard to his investment rights would be definitively jeopardized.

42. This is not an abstract argument. The fact that the Tribunal could have well been wrong in upholding the *ratione personae* jurisdictional objection raised by Venezuela is confirmed by the Egypt Judgment, where in a quite similar context the competent Dutch court found that a dual national investor may be covered by a bilateral investment treaty and seek protection vis-à-vis the relevant host State irrespective of which nationality is dominant and effective. It is striking to note that, following the Garcìa Judgment, a Dutch court could a priori deny to Mr Fraiz the right to be heard as to his entitlement to have the Claim settled by an arbitral tribunal when his application, if heard, would likely lead

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[45] Cf. CAMPBELL MCLACHLAN, *Lis Pendens in International Litigation*, *Recueil des cours*, t. 336, 2009, pp. 66-68 **(Annex 5)**.

[46] According to the World Justice Project Rule of Law Index of 2021 **(Annex 6)**, out of the 139 jurisdictions measured, Venezuela figures as the last one in the general ranking. As for the individual categories, Venezuela occupies the 129th place in terms of "*absence of corruption*", 135th in terms of "*fundamental rights*", 138th in terms of "*civil justice*".

[47] Cf. *supra*, fn. 18 and related text.

[48] Cf. *supra*, *sub* § 17.

the same court to rule that the Tribunal should not have rejected jurisdiction to settle the Claim by arbitration, consistently with Dutch judicial precedents on the same issue.[49]

43. Nor can it be argued that by submitting to the Dutch *lex arbitri* (as a result of The Hague being the seat for the Arbitration), and thus to an arbitration law which does not expressly contemplate the possibility to have negative jurisdictional awards reviewed as to their merits, Mr Fraiz may have validly waived his relevant access-to-justice right.

44. First, being the very premise for the enjoyment of the right to a fair trial, access-to-justice falls within the category of procedural rights that the European Court considers not waivable since it pertains to the essence of the administration of justice.[50]

45. Second, even if the waiver were to be considered admissible in principle, according to the European Court's case law in order to be valid it should result from a free and unequivocal choice consciously made by the waiving party.[51] I understand that Mr Fraiz never declared, not even in an implied or indirect way, that he accepted to renounce the right of having a negative jurisdictional award reviewed as to its merits by the competent court. In fact, it was the Tribunal who fixed the arbitration seat in The Hague due to the Parties' failure to reach an agreement. Interestingly, the different seats proposed by Mr Fraiz and Venezuela (New York and Paris, respectively) would have triggered the application of arbitration laws which allow challenges on the merits of negative jurisdictional awards for errors made by the arbitral tribunal.[52]

46. Third, investment arbitrations are ultimately grounded in the relevant bilateral, or multilateral, treaty so that the disputing parties can regulate the arbitral proceedings only within the limits of the powers of autonomy which the relevant contracting States grant

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[49] Incidentally, I also note that, as already mentioned (*supra*, § 25) Art. 14 ECHR not only prohibits discriminations in general, but also characterizes nationality as a "suspect" criterion for normative classifications which justifies a higher level of judicial scrutiny. This means that when an arbitral tribunal distinguishes between investors who hold dual nationality of the contracting State parties and investors who hold the nationality of one contracting State party only for the purpose of granting the benefit of its jurisdiction only to the latter and deny it to the former, the existence of a discrimination is presumed unless evidence is given that the different regulatory treatment is justified in light of the purpose pursued by the relevant treaty and the means used to achieve it. Although I do not purport to opine on the correctness of the Award in this respect, I believe that this is an additional reason which justifies its review on the merits, since otherwise the competent Dutch court may end-up cooperating in the implementation of what *prima facie* appears a discrimination on the ground of nationality in breach of the ECHR.

[50] Cf. *supra*, *sub* § 3113.

[51] *Ibid*.

[52] As to French law, cf. Art. 1052(3) *Code de procédure civile*, as interpreted by Cour d'appel, Paris (1ère Ch. suppl.), *Société Swiss Oil v. société Petrogab et République du Gabon*, 16.6.1988, **(Annex 7)**. As to US law, cf. Section 10 (a) (4) Federal Arbitration Act, as interpreted by the Supreme Court, *First Options of Chicago, Inc. v Kaplan*, 514 US 938, U.S. S. Ct. 1995 **(Annex 8)**.

them. There is no evidence that, when entering into the BIT, Spain and Venezuela considered the possibility that negative jurisdictional awards would be immune from review, nor that they contemplated the possibility for the protected investors to make any relevant waiver. Actually, the evidence goes in the opposite direction. Under the first arbitral dispute resolution mechanism contemplated by Article XI(2) *lit.* b) BIT, the investor is entitled to activate arbitral proceedings administered by the International Center for the Settlement of Investment Disputes pursuant to the 1965 *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, Article 52 of which, as currently interpreted, allows the annulment of incorrect negative jurisdictional awards.[53]

47. By denying Mr Fraiz the right to have the Award reviewed as to its merits, the Court of Appeal would breach Mr Fraiz's access-to-justice right with regard to the investment protections he enjoys under the BIT, thus causing a violation by The Netherlands of its obligations under Article 6(1) ECHR.

IV.C.2 A decision denying to the investor the right to have negative jurisdictional awards reviewed as to their merits would give rise to a discrimination on the enjoyment of its rights under Article 6(1) ECHR in violation of Article 14 ECHR

48. As noted, Article 14 ECHR prohibits a contracting State to discriminate as to the enjoyment of the rights granted by Article 6(1) ECHR, a discrimination existing when identical situations are treated differently and different situations are treated equally with no reasonable justification, regard being paid to the aim pursued and the means used.[54]

49. I understand that Article 1065(1) *lit.* a) Dutch CCP is intended to work as a safeguard with regard to access-to-justice to State courts. This is confirmed by the provisions of Article 1052 Dutch CCP, according to which the consequence of a negative jurisdictional award is that State courts "*shall have jurisdiction to hear the case*", and by Article 1067 Dutch CCP, according to which after the annulment of an award the jurisdiction of State courts "*revives*".

50. I have not been asked, and do not intend, to opine on Dutch law issues. I cannot fail to notice, though, that if such premise is correct, Article 1065(1) *lit.* a) in conjunction with Article 1052 Dutch CCP must have been conceived having in mind domestic disputes only, since only in such case the fact that the arbitral tribunal declined jurisdiction or a finding that it wrongly assumed jurisdiction would trigger the automatic effect of re-

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[53] Cf. Art. 52(1)(b) ICSID Convention, as interpreted, inter alia, in *Compania de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, Decision on Annulment, Case No ARB/97/3, 2002; *Malaysian Historical Salvors Sdn, Bhd v. Government of Malaysia*, Decision on Annulment, ICSID Case No. ARB/05/10, 16.4.2009; and *Helnan International Hotels A/S v. Arab Republic of Egypt*, Decision of the ad hoc Committee, ICSID Case No. ARB/05/19, 14.6.2010.

[54] Cf. *supra*, *sub* § 25.

attributing to State courts the power they would have had to hear the relevant claim, but for the existence of an arbitration agreement. In fact, while The Netherlands can set out the scope of the international jurisdiction of its own courts, it certainly cannot regulate when and under which conditions foreign courts are empowered to hear a cross-border case, nor are judgments of Dutch courts on issues of arbitral jurisdiction necessarily going to be recognized abroad. This means that when the arbitration has been seated in The Netherlands only for "neutrality" reasons, so that there are no other connections between the dispute and The Netherlands which under Dutch private international law would grant jurisdiction to Dutch courts on the subject-matter of the dispute, the "revival" of the State courts' jurisdiction contemplated by Articles 1052 and 1067 Dutch CCP may well not occur. Certainly, it will not occur when the arbitration deals with claims made by a foreign investor against a foreign State under an investment protection treaty since Dutch courts would have no jurisdiction to adjudicate such treaty claims as to their merits.

51. This means that, in light of its very rationale, the limitation which is implicit in the provision of Article 1065(1) *lit.* a) Dutch CCP, when it expressly grants to Dutch courts the power to annul positive jurisdictional awards which were wrong when finding in favor of the arbitral jurisdiction, but is silent as to the annulment of negative jurisdictional awards which may also have been wrong when declining jurisdiction, should not apply to – at least[55] – international investment arbitrations seated in The Netherlands. It is apparent that such situations have not been considered by the Dutch legislator because otherwise, by making negative jurisdictional awards exempt from review as to their merits, Article 1065(1) *lit.* a) would run counter to its very objective of protecting access-to-justice.

52. Were this construction to be deemed not correct and were Article 1065(1) *lit.* a) Dutch CCP, as construed by the Court of Appeal in the García Judgment, to be applied to (investment) arbitrations seated in The Netherlands, then its provision would give rise to a discrimination in the enjoyment of access-to-justice. Since in investment disputes investors typically act as claimant and States hosting the investment typically act as respondent, such construction of Article 1065(1) *lit.* a) Dutch CCP would mean that in the same set of proceedings jurisdictional awards can be challenged as to their merits by one party but not by the other party, the host State being granted the benefit of a procedural tool which is denied to the investor. This becomes clear if one compares the case at bar with the case decided in the Egyptian Judgment. In the latter case, in fact, the host State/respondent was given the opportunity to be heard *ex novo* by a Dutch court with regard to a jurisdictional objection it had raised on the ground of the dual

[55] As mentioned above (*supra*, § 38 and fn. 44), access-to-justice could be jeopardized also in the context of commercial disputes submitted to arbitration, where State-owned or State-affiliated companies are involved.

nationality of the investor/claimant and which had been rejected by the arbitral tribunal; here, at reversed roles, a Dutch court would deny the investor/claimant the right to be heard again with regard to a jurisdictional objection of the same kind which has been raised by the host State/respondent and granted by the arbitral tribunal. Such result would be at odds not only with the access-to-justice right, but also with the equality of arms principle, which, as noted, is also a corollary of the fair trial guaranteed by Art. 6(1) ECHR.[56]

53. In my view it is not correct that, as stated in the García Judgment, a review of negative jurisdictional awards as to their merits would go counter to the *Kompetenz-Kompetenz* principle codified by Article 1052(1) Dutch CCP. The power of an arbitral tribunal to decide on its own jurisdiction has nothing to do with the distinct question of whether courts can review the relevant arbitral decision so as to protect the fundamental right to access-to-justice. This is demonstrated by the arbitration laws of the most advanced and "arbitration friendly" jurisdictions, which normally combine the *Kompetenz-Kompetenz* principle with the power of their courts to annul both positive and negative jurisdictional awards when wrong on their merits, thus indicating that the relevant, different functions performed by the arbitral and court adjudicators can be perfectly reconciled.[57] But this is also confirmed by the very same provision of Article 1065(1) *lit.* a) Dutch CCP, which allows Dutch courts to revisit, actually by means of a "full review", a jurisdictional decision rendered by an arbitral tribunal when such decision found in favor of the existence, validity and effectiveness of the arbitration agreement.

54. There is also no merit in the other reason supporting the García Judgment, when the Court of Appeal notes that a judgment setting aside a negative jurisdictional award would have no practical effect since the arbitral tribunal would not be bound by it. As a matter of fact, to comply with the mandate received from the parties, arbitral tribunals not only must apply the arbitration law in force in the State where their arbitration is seated, they must also respect decisions rendered in arbitration-related matters by the courts of the relevant jurisdiction for the simple reason that in most contemporary legal systems the choice of the seat of the arbitration works at once as a connecting factor, triggering the application of the relevant *lex arbitri*, and as a jurisdictional criterion, attributing jurisdiction on arbitration-related matters to the relevant courts. Indeed, by disregarding a judgment of the competent Dutch court an arbitral tribunal requested to adjudicate on the Claims would breach its mandate and render an award at risk of being set aside. Moreover, once the negative jurisdictional award is annulled, the investor would be free to file a new arbitration claim before a newly constituted arbitral tribunal

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[56] Cf. *supra*, § 22.

[57] Cf. Arts. 1466 and 1052(3) French *Code de Procedure civile*; Arts. 186 and 190 Swiss Federal Statute on Private International Law; Arts. 30 and 67 English Arbitration Act 1996.

without running the risk that the host State may invoke the *res judicata* effects of the negative jurisdictional award rendered by the previous tribunal.

55. Nor could it be argued that this would be tantamount to mandating that jurisdictional awards must always be subject to appeal, while Art. 6(1) ECHR does not oblige the contracting States to contemplate one or more instances of appeal of judicial decisions. The European Court, in fact, has clearly stated that this has nothing to do with the situation that arises when any such remedy is offered to one party only, because in such a case Article 14 is breached.[58]

56. As a result, the Court of Appeal would cause a breach by The Netherlands of its obligations under Article 14 ECHR, by reference to Article 6(1) ECHR, if Mr Fraiz would be precluded to seek the annulment of the Award on the ground that under Dutch law negative jurisdictional awards cannot be reviewed as to their merits.

IV.C.3 The decision denying the investor the right to have negative jurisdictional awards reviewed as to their merits would breach the equal protection of the laws in violation of Article 1 Protocol 12

57. As noted, Art. 1 Protocol 12 requires contracting States to ensure that the equal protection of the laws is guaranteed within their jurisdiction. As noted, this triggers the duty to avoid normative classifications, i.e. rules which grant rights/impose obligations to/on a certain category of subjects while denying the same to another category of subjects, when such normative classifications are not reasonable in light of the aim pursued (which must be legitimate) and the means used (which must be proportional).[59]

58. This implies that, even if no breach of Art. 6(1) ECHR would be established, Article 1065(1) *lit.* a) Dutch CCP, if interpreted as precluding the right of the investor to challenge a negative jurisdictional award, could be considered at odds with the European Convention. In fact, as already pointed out above, in situations where Dutch courts would not have jurisdiction on the subject-matter of the dispute at bar, the provision would lead to a result in contradiction with its very purpose, which is that of protecting access-to-justice as required by Article 17 Dutch Constitution.

59. In addition, if the approach taken by the Dutch legislator in legislating on arbitration is that of favoring recourse to this instrument for the settlement of disputes and protecting party autonomy, it would obviously run against both such objectives to allow the challenge of positive jurisdictional awards for errors on their merits, while denying the same type of challenge of negative jurisdictional awards. This is because the parties

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[58] Cf. EctHR, *Case relating to certain aspects of the laws on the use of languages in education in Belgium* (merits), Applications Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, 23.7.1968, "B. Interpretation adopted by the Court", § 9.

[59] Cf., *supra*, *sub* § 26.

would be deprived of the opportunity to have their dispute settled by arbitral justice, and their agreement to arbitrate respected, in all situations where the arbitral tribunal was wrong in finding that the arbitration agreement was not existent, invalid or ineffective. This explains why in "arbitration friendly" jurisdictions parties are entitled to challenge on the merits both kinds of jurisdictional awards,[60] and that jurisdictions where negative jurisdictional awards cannot be reviewed as to their merits are reforming their arbitration law to remove such limitation[61] or are overcoming such limitation by way of interpretation.[62]

60. By denying Mr Fraiz the right to seek the annulment of the Award on the ground that Article 1065 Dutch CCP does not allow to challenge negative jurisdictional awards as to their merits, the Court of Appeal would be making application of a legislative provision which, if so interpreted, would run afoul the principle of the equal protection of the law enshrined in Article 1 Protocol 12.

V CONCLUSIONS

61. For all the above reasons, and based on the assumptions set out above, it is my opinion that, should the Dutch Court deny Mr Fraiz the right to challenge the Award as to its merits, such behavior would trigger a breach by The Netherlands of its obligations under the European Convention and its Protocol 12.

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I remain available in case any clarification or further study on the issue is made necessary.

Prof. Avv. Massimo Benedettelli

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[60] Cf., *supra*, *sub* fn. 57.

[61] This is the case of Singapore: cf. Section 21(9) Singapore Arbitration Act, as reformed in 2012 upon a proposal made by the Singapore Academy of Law - Law reform committee, *Report of The Law Reform Committee on Right to Judicial Review of Negative Jurisdictional Rulings*, January 2011 **(Annex 9)**.

[62] Cf. Cour supérieure du Québec, *Télébec ltée c. Société Hydro-Québec*, 14.7.1997 **(Annex 10)**.

ANNEXES

Annex-1	*Curriculum vitae*
Annex-2	SÉBASTIEN BESSON, *Arbitration and Human Rights*, ASA Bulletin, 2006, Volume 24, Issue 3, pp. 395-416
Annex-3	NIGEL BLACKABY, CONSTANTINE PARTASIDES, et al., *Redfern and Hunter on International Arbitration*, Kluwer Law International, 2015, pp. 569 – 604
Annex-4	NORBERT HORN, "Arbitration and the Protection of Foreign Investment: Concepts and Means", in NORBERT HORN and STEFAN M. KRÖLL (eds), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects, Studies in Transnational Economic Law*, Kluwer Law International, 2004, pp. 3-31
Annex-5	CAMPBELL MCLACHLAN, *Lis Pendens in International Litigation, Recueil des cours*, t. 336, 2009, pp. 66-68
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Annex-9	*Report of The Law Reform Committee on Right to Judicial Review Of Negative Jurisdictional Rulings*, January 2011
Annex-10	Cour supérieure du Québec, *Télébec ltée c. Société Hydro-Québec*, 14.7.1997