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MOBIL V. VENEZUELA: THE NATIONALITY REQUIREMENT UNDER THE ICSID
CONVENTION

By
Roberto Castro de Figueiredo

I. INTRODUCTION

On June 10, 2010, an arbitral tribunal constituted under the auspices of the International Centre for Settlement of Investment Disputes (“Centre”), in accordance with the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”),¹ rendered a decision on jurisdiction in the case of *Mobil Corporation and others v. Venezuela* (“*Mobil*”).² The relevance of this decision lies in the fact that it was the first time that an ICSID tribunal expressly decided that, for the purposes of establishing the jurisdiction of the Centre, the Contracting States of the ICSID Convention are *free* to determine the nationality of juridical persons pursuant to a nationality criterion other than the place of incorporation or seat test. Until the *Mobil* decision was rendered, ICSID tribunals that were required to decide on the fulfillment of the nationality requirement set forth in Article 25(1) of the ICSID Convention had invariably applied the place of incorporation or seat test in order to determine the nationality of juridical persons.³

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¹ Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1965, 575 UNTS 159, *reprinted* in 1 ICSID Reports 3 (1993) (entered into force October 14, 1966).

² *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction of June 10, 2010 (Gilbert Guillaume, Gabrielle Kaufmann-Kohler, and Ahmed Sadek El-Kosheri).

³ CHRISTOPH H. SCHREUER, LORETTA MALINTOPPI, AUGUST REINISCH, & ANTHONY SINCLAIR, *THE ICSID CONVENTION: A COMMENTARY* 281 (Cambridge University Press, 2nd ed. 2009).

The controversy that led to the decision on jurisdiction in the *Mobil* case arose out of the nationality criteria set forth in the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela of October 22, 1991 (“Netherlands-Venezuela BIT”),⁴ which served as one of the basis for the submission of the dispute to the jurisdiction of the Centre. Pursuant to its Article 1(b), in addition to the place of incorporation test, juridical persons are also deemed to have the nationality of a party to the Netherlands-Venezuela BIT if they are controlled, directly or indirectly, by natural persons having the nationality of that contracting party or by juridical persons constituted under the laws of that contracting party.⁵ Venezuela argued, however, that four of the six claimants — two incorporated in the United States and two in the Bahamas — could not rely on this provision of the Netherlands-Venezuela BIT in order to comply with the nationality requirement of the ICSID Convention. Despite the fact that they are controlled by a Dutch national, the four claimants could not be considered as Dutch nationals for the purposes of the ICSID Convention, once they were not incorporated nor had their seat in the Netherlands.

In its decision, the *Mobil* tribunal rejected Venezuela’s contention. According to the tribunal, “Article 25 fixes the ‘outer limits’ of ICSID jurisdiction

⁴ Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Venezuela of October 22, 1991, 1788 UNTS 70 (entered into force September 14, 1993).

⁵ Article 1(b) of the Netherland-Venezuela BIT provides that:

For the purposes of this Agreement:

[...]

(b) The term ‘nationals’ shall comprise with regard to either Contracting Party:

- i. natural persons having the nationality of that Contracting Party;
- ii. legal persons constituted under the law of that Contracting Party;
- iii. legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii) above.

1788 UNTS 70, 71.

and that parties can consent to that jurisdiction only within those limits.”⁶ Once the ICSID Convention does not expressly provide for any specific criterion for the nationality of juridical persons not having the nationality of the host State, the tribunal considered that the Netherlands and Venezuela “were free to consider as nationals both the legal persons constituted under the law of one of the Parties and those constituted under another law, but controlled by such legal persons.”⁷

It is submitted in this paper, however, that the interpretation given by the *Mobil* tribunal to the ICSID Convention is inconsistent with the general rule of treaty interpretation set for the in the Vienna Convention on the Law of Treaties (“Vienna Convention”).⁸ While this would not change the outcome of the decision, given that the four claimants were in fact nationals of Contracting States of the ICSID Convention, the ICSID Convention does not confer on its Contracting States the discretion to provide for a nationality criterion other than the place of incorporation or seat test.

II. THE NATIONALITY REQUIREMENT OF THE ICSID CONVENTION

One the peculiarities of arbitral proceedings instituted under the auspices of the Centre is that the Centre is an international organization and, thus, its functions are limited by its constitutive treaty; the ICSID Convention. This peculiarity distinguishes the Centre from other arbitral institutions, to the extent that the Centre may only exercise its jurisdiction and institute arbitral proceedings within the limits set out in the ICSID Convention. To this effect, Article 25(1) of the ICSID Convention provides that:

⁶ *Mobil Corporation*, ICSID Case No. ARB/07/27 at 42.

⁷ *Id.*

⁸ Vienna Convention on the Law of Treaties of May 23, 1969, 1155 UNTS 331, *reprinted* in 8 ILM 679 (1969) (entered into force January 27, 1980).

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and *a national of another Contracting State*, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.⁹

The nationality requirement set forth in Article 25(1) (“a national of another Contracting State”) was envisaged to serve a twofold purpose. First, it seeks to prevent the submission to the jurisdiction of the Centre of disputes between a Contracting State and its own nationals. Secondly, the nationality of a Contracting State, excluding nationals of third States, is an element of the self-contained regime of the dispute settlement system established by the ICSID Convention. This self-contained regime creates obligation to all Contracting States of the ICSID Convention and not only to the disputing parties and aims at isolating arbitral proceedings under the ICSID Convention from the interference of domestic courts.¹⁰ Article 26 of the ICSID Convention provides that “[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.”¹¹ Article 27(1) of the ICSID Convention provides further that:

No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration

⁹ 1 ICSID Reports 3 (1993), at 9 (emphasis added).

¹⁰ SCHREUER ET AL., *supra* note 3, at 351-52.

¹¹ 1 ICSID Reports 3 (1993), at 10.

under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.¹²

The ICSID Convention also imposes obligations to all Contracting States in respect of the effectiveness of arbitral awards rendered by ICSID tribunals. First, pursuant to Article 53(1) of the ICSID Convention, “[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”¹³ In addition, Article 54(1) of the ICSID Convention provides that “[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”¹⁴

All these provisions, which are the basis of the self-contained regime envisaged by the ICSID Convention, were meant to isolate ICSID arbitral proceedings from the interference of domestic courts and from the political character of claims espoused under diplomatic protection. Hence, if third States and their nationals were allowed to take part in ICSID arbitrations, the self-contained regime would be endangered, to the extent that third States are not bound by the rules of the ICSID Convention.¹⁵

¹² *Id.*

¹³ *Id.* at 17.

¹⁴ *Id.*

¹⁵ The Centre is allowed to administer arbitral proceedings between a Contracting State and a national of a non-Contracting State, or between a non-Contracting State and a national of a Contracting State under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (“ICSID Additional Facility Rules”). Pursuant to Article 2(a) of the ICSID Additional Facility Rules:

The Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rules, proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State, falling within the following categories:

III. THE NATIONALITY OF JURIDICAL PERSONS UNDER THE ICSID CONVENTION

The nationality of natural and juridical persons plays a central role in the jurisdiction of the Centre. As seen above, Article 25(1) provides that the jurisdiction of the Centre is limited to disputes between “a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and *a national of another Contracting State*.”¹⁶ The ICSID Convention, however, does not contain any rule that expressly sets forth the criteria by virtue of which the nationality of natural or juridical persons is to be determined. Except for the case of locally incorporated companies, the ICSID Convention imposes only negative requirements on the nationality of juridical persons. In this sense, pursuant to Article 25(2)(b) of the ICSID Convention:

‘National of another Contracting State’ means:

[...]

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on

-
- (a) conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State

¹ ICSID Reports 217 (1993), at 218.

Arbitral proceedings instituted under the ICSID Additional Facility Rules, however, operate outside the rules of the ICSID Convention and, thus, they do not benefit from the self-contained regime of the ICSID dispute settlement system. In this sense, Article 3 of the ICSID Additional Facility Rules provides that:

Since the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre, none of the provisions of the Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein.

¹ ICSID Reports 217 (1993), at 218.

¹⁶ *Id.* at 9 (emphasis added).

the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.¹⁷

But while Article 25(2)(b) does not set forth a general criterion for the determination of the nationality of the juridical person, a systematic interpretation of the provision infers the intention to confer the nationality of the State in which the juridical person is incorporated or has its seat. This interpretation is based on the fact that the second clause of Article 25(2)(b) attributes to the juridical person the nationality of the Contracting State party to dispute, but allows the application of the control test in cases where the disputing parties agree to confer on the juridical person the nationality of another Contracting State upon the existence of foreign control. The control test, based on the nationality of the controllers of the juridical person, is the exception.¹⁸

Since the famous decision of the International Court of Justice (“ICJ”) in the *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (“*Barcelona Traction*”), the place of incorporation or seat test has been considered the general rule existing in public international law governing the nationality of juridical persons. In the case, which concerned the exercise of diplomatic

¹⁷ *Id.* at 9-10.

¹⁸ SCHREUER ET AL., *supra* note 3, at 279-80. The First Preliminary Draft of the ICSID Convention of August 9, 1963, defined the term “national of a Contracting State” as “(a) any company which under the domestic law of that State is its national, and (b) any company in which the nationals of that State have a *controlling interest*” (History of the ICSID Convention: Documents Concerning the Origin and Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, v. II, at 170 (1968) (emphasis added)). The Preliminary Draft of the ICSID Convention of October 15, 1963, contained the same definition, *id.* at 230, but it was excluded in the First Draft of the ICSID Convention of September 11, 1964, *id.* at 624.

protection of a juridical person incorporated in Canada but owned and controlled by Belgian shareholders, the ICJ decided that Belgium was not entitled to spouse the claim of the company regardless of the Belgian nationality of its shareholders. According to the ICJ:

In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments. [...].¹⁹

The existence, in public international law, of a rule entailing the place of incorporation or seat test was also recognized by the International Law Commission in the 2006 Draft Articles on Diplomatic Protection, according to which:

¹⁹ Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New application: 1962), Judgment of February 5, 1970, ICJ Reports 3 (1970), at 43.

*Article 9**State of nationality of a corporation*

For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.²⁰

But while the place of incorporation or seat test became the prevailing criterion in public international law, ICSID writers have argued that this rule does not prevent the use of other nationality criteria, including the control test, for the determination of the nationality of juridical persons pursuant to the first clause of Article 25(2)(b) of the ICSID Convention. Among them, Aron Broches, who designed and conducted the drafting process of the ICSID Convention, advocated a flexible approach towards the nationality requirement of juridical persons. According to him, the decision given in the *Barcelona Traction* case referred to a dispute involving the exercise of diplomatic protection in favor of a company and, therefore, it should not be automatically applied in cases submitted to the jurisdiction of the Centre. Broches argued that:

The purpose of [Article 25(2)(b)], as well as of Article 25(1), is to indicate the outer limits within which disputes may be

²⁰ International Law Commission Draft Articles on Diplomatic Protection (2006), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_8_2006.pdf (last visited on Feb 13, 2011).

submitted to conciliation or arbitration under the auspices of the Centre with the consent of the parties thereto. Therefore the parties should be given the widest possible latitude to agree on the meaning of “nationality” and any stipulation of nationality made in connection with a conciliation or arbitration clause which is based on a reasonable criterion should be accepted. In order to avoid uncertainty or unpleasant surprises in case of a challenge to the jurisdiction of the Centre, it is clearly desirable that whenever a company is not incorporated under the laws of a Contracting State to stipulate the nationality which that company is to have for the purposes of the Convention. In the absence of such a stipulation, a Commission or Tribunal will have to pronounce itself in case of a disputed nationality. I submit that in such a case which, I repeat, would not involve the issue of diplomatic protection but merely that of the outer limits within which parties may agree to submit disputes to the Centre, the decision in *Barcelona Traction* should not be regarded as controlling. When a Commission or Tribunal is faced with a challenge only if not to do so would permit parties to use the Convention for purposes for which it was clearly not intended. That is to say that the Commission or Tribunal should favour giving effect to the agreement between the parties by adopting a more functional approach, taking into account not only formal criteria such as incorporation — as Judge Riphagen said in his dissenting opinion in the *Barcelon Traction Case*, ‘A true bond of nationality such as exists between a State and its nationals who natural persons, is obviously inconceivable for juristic

persons as such' — but adopting a broader approach which would give effect to economic realities such as ownership and control.²¹

The flexible approach advocated by Broches was also supported by C. F. Amerasinghe. Like Broches, Amerasinghe based his position on the idea that the place of incorporation or seat test as the only nationality criterion admitted in public international law is limited to cases involving the exercise of diplomatic protection in favor of juridical persons. Amerasinghe also sustained the application of the control test for the purposes of establishing the jurisdiction of the Centre, once such criterion is not expressly excluded by Article 25(2)(b) of the ICSID Convention. According to Amerasinghe:

It should have emerged from the above analysis that the question of nationality of juridical persons for the purpose of the Centre's jurisdiction can be dealt with by a tribunal or commission in extremely flexible terms and particularly because it is not bound by the law of diplomatic protection in this regard. The nationality of a juridical person under the Convention can be seen in the light of a broad definition which requires some adequate connection between the juridical person and a State. There may be more than one State in respect of which such connection could reasonably be established. The *travaux préparatoires* do not require a different approach. A second proposition that may be adhered to in the interpretation of the Convention is that every effort should be made to give the Centre jurisdiction by the application of the flexible approach, within the broad

²¹ Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 136 RECUEIL DES COURS 331, 360-61 (1972).

definition of nationality, and to the extent that possibilities are not explicitly excluded by the Convention itself. This does not mean that a tribunal or commission may indiscriminately hold that it has jurisdiction on the ground that a juridical person has the nationality of another Contracting State and does not initially have the nationality of the host State. In every case where it is held that there is jurisdiction on these grounds there would have to be a rational justification based on acceptable criteria.²²

According to the flexible approach advocated by Broches and Amerasinghe, the disputing parties have the discretion to adopt a nationality criterion other than the place of incorporation or seat test. And as consequence of this approach, ICSID tribunals could rely on the nationality criteria set forth in international investment treaties in assessing the fulfillment of the nationality requirement of the ICSID Convention.

Other ICSID writers have disagreed, however, with the flexible approach advocated by Broches and Amerasinghe and with the use of the control test pursuant to the first clause of Article 25(2)(b) of the ICSID Convention. MOSHE HIRSCH, for instance, argued that the ICSID Convention does not confer absolute freedom on the disputing parties to choose among different nationality criteria. According to HIRSCH, the interpretation of the ICSID Convention should take into account the relevant rules of public international law, which do not allow a flexible approach in the determination of the nationality of juridical persons.²³ For the same reason, the control test, rejected by the ICJ in the *Barcelona Traction* case, would also not be an available nationality criterion. As Hirsch pointed out:

²² C.F. Amerasinghe, *Jurisdiction Ratione Personae under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 47 28 BRIT. Y. B. I. L. 227, 259 (1974/75).

²³ See MOSHE HIRSCH, *THE ARBITRATION MECHANISM OF THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES* 85 (Martinus Nijhoff Publishers, 1993).

In our view, the formulation of Article 25(2)(b) of the Convention implies that the drafters of the Convention did not intend to include the criterion of control for the purpose of determining corporate nationality. If should, however, be mentioned that it is sometimes necessary to modify the interpretation of treaty provisions in accordance with the subsequent practice of the parties in their application of the treaty. An outstanding expression of this approach is the case concerning South West Africa, in which the International Court ruled that an international instrument must be interpreted within the complete framework prevailing at the time of interpretation. It may be that the increasing recourse to the criterion of control by states and international organizations in recent years leads to an interpretation of the Convention in a manner which differs from that anticipated by its drafters, but which adapts it to the new state of the law. Despite the growing trend to recognize the criterion of control as a possible basis for identifying the nationality of a corporation, it is doubtful whether one can state categorically that this criterion is, indeed, today accepted in international law alongside the criteria of incorporation and seat. We may now be in a period of transition in this sphere, and it is premature to state with certainty how the law relating to corporate nationality will take shape in the coming years.²⁴

But while the use of the control test as a nationality criterion in the first clause of Article 25(2)(b) of the ICSID Convention remained controversial, until the *Mobil*

²⁴ *Id.* at 90-91 (internal citations omitted).

decision no ICSID tribunal had ever rendered a decision expressly allowing or disallowing the application of the control test. Before the *Mobil* case, the issue was raised in the case of *Maritime International Nominees Establishment v. Guinea*. (“*MINE*”), but no decision was given on this question. In the *MINE* case, the claimant, a juridical person incorporated in Liechtenstein, which was not a Contracting State of the ICSID Convention, was considered upon the agreement of the parties a national of Switzerland, a Contracting State of the ICSID Convention, because of Swiss control. The issue, however, was not addressed by the tribunal, given that Guinea decided not to put forward any objection to the jurisdiction of the Centre.²⁵

IV. NATIONALITY UNDER THE ICSID CONVENTION AND NATIONALITY UNDER THE BIT

The scarcity of decisions dealing with the use of the control test for the purposes of establishing the jurisdiction of the Centre may be explained by the fact that most international investment treaties providing for ICSID arbitration adopt the place of incorporation or seat test as the governing nationality criterion. Only a few international investment treaties, such as the Netherlands-Venezuela BIT, provide for the control test.²⁶ Hence, in most cases, the nationality of the juridical person will be assessed in accordance with the place of incorporation or seat test, and ICSID tribunals will not be required to address the question as to whether the ICSID Convention allows the disputing parties to rely on the control test in the first clause of Article 25(2)(b).

But the peculiarity of the *Mobil* case lies in fact that while the four claimants could only fulfill the nationality requirement of the Netherlands-

²⁵ *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Award of January 6, 1988, 4 ICSID Reports 61 (1997); *See also* HIRSCH, *supra* note 23, at 87-89; SCHREUER ET AL., *supra* note 3, at 284-85.

²⁶ KENNETH VANDEVELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* 159-60 (Oxford University Press 2010).

Venezuela BIT claiming that they were under Dutch control, they were, pursuant to the place of incorporation or seat test, nationals of Contracting States of the ICSID Convention, the Bahamas and the United States. Accordingly, even if the *Mobil* tribunal had relied on the place of incorporation or seat test in assessing the compliance with the nationality requirement of the ICSID Convention, regardless of the nationality of the four claimants under the Netherlands-Venezuela BIT, the outcome of the decision would have been the same.

The distinction between the nationality under the ICSID Convention and the nationality under the BIT comes from the fact that the nationality requirements set forth in the ICSID Convention and in the BIT serve different purposes. Under the ICSID Convention, the nationality requirement is aimed at defining the extension of the jurisdiction of the Centre. Pursuant to Article 25(1) of the ICSID Convention, the Centre may only institute arbitral or conciliation proceedings in disputes between “a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State.” On the other hand, the nationality requirement of the BIT defines the scope of application of the BIT and its function is not to alter or supplement the ICSID Convention. For the purposes of the ICSID Convention, the relevance of the fulfillment of the requirements set forth in the BIT is limited to the assessment of the question as to whether the dispute falls within the consent given by the disputing parties to the jurisdiction of the Centre.

Accordingly, even if the *Mobil* tribunal had applied the place of incorporation or seat test in order to determine the nationality of the four claimants for the purposes of the ICSID Convention, the dispute would still have been within the jurisdiction, despite their Dutch nationality under the BIT. The nationality requirement of the ICSID Convention would be met due to the incorporation of the four claimants in the Bahamas and in the United States, at the same time that the nationality requirement of the BIT would be complied with, given that the claimants were controlled by a Dutch national.

But the reasoning adopted in the *Mobil* decision, sustaining the freedom of the parties to choose a nationality criterion other than the place of incorporation or seat test, would also allow the submission to the jurisdiction of the Centre of disputes where the nationality of a Contracting State could only be determined pursuant to the control test. In this situation, the question as to whether the first clause of Article 25(2)(b) of the ICSID Convention admits the use of the control test becomes relevant.

V. INTERPRETATION OF ARTICLE 25(2)(B) OF THE ICSID CONVENTION

The use of the control test in order to determine the nationality of juridical persons under the first clause of the Article 25(2)(b) of the ICSID Convention is contingent upon the interpretation given to the term “nationality” as employed in this provision. In other words, it must be established the meaning of the term “nationality” for the purposes of defining how a juridical person is considered to be a national of a given State.

As an international treaty, the ICSID Convention must be interpreted in accordance with the Vienna Convention, which codified the rules of treaty interpretation existing in customary international law.²⁷ Pursuant to the general rule

²⁷ The rules of treaty interpretation of the Vienna Convention were recognized by the ICJ as the codification of the existing customary international law on law of treaties. In this sense, in the *Arbitral Award of 31 July 1989* case, the ICJ observed that the principles of treaty interpretation “are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point” (Judgment of November 12, 1991, ICJ Reports 53, at 70); *See also* Maritime Delimitation and Territorial Questions Between Qatar and Bahrain, Judgment of February 15, 1995, ICJ Reports 6, at 18; Oil Platforms, Judgment of December 12, 1996, ICJ Reports 803, at 812; Kasikili/Sedudu Island, Judgment of December 13, 1999, ICJ Reports 1045, at 1059; Sovereignty Over Pulau Ligitan and Pulau Sipadan, Judgment of December 17, 2002, ICJ Reports 625 at 645; Avena and Other Mexican Nationals, Judgment of March 31, 2004, ICJ Reports 12 at 48; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of July 9, 2004, ICJ Reports 136 at 174; Legality of Use of Force, Judgment of December 15, 2004, ICJ Reports 1160 at 1199. For an analysis of the recognition by the ICJ of the customary international law status of the rules of treaty

of treaty interpretation contained in Article 31(1) of the Vienna Convention, “[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.”²⁸ The reference to the “context” in which “terms of the treaty” are employed entails the application of the so-called principle of integration. Pursuant to such principle, the search for correct meaning of the terms of a treaty is not limited to determining the ordinary meaning of a term, in isolation. The treaty must be interpreted as whole, taken into account the wording of the provision where the term is employed, all provisions of the treaty as a unit, and other elements that form the context of the terms of the treaty for the purposes of interpretation.²⁹

interpretation of the Vienna Convention, see Santiago Torres Bernárdez, *Interpretation of Treaties by the International Court of Justice Following the Adoption of the 1989 Vienna Convention on the Law of Treaties*, in LIBER AMICORUM PROFESSOR SEIDL-HOHENVELDERN – IN HONOUR OF HIS 80TH BIRTHDAY 721 (Gerhard Hafner, et al., eds., The Hague Kluwer Law International 1998); RICHARD GARDINER, *TREATY INTERPRETATION* 13-17 (Oxford University Press 2008). In the *Territorial Dispute* case, between Libya and Chad, the ICJ applied the rules of treaty interpretation embodied in the Vienna Convention to a treaty concluded in 1955 on the basis that they were the existing international customary law rules of treaty interpretation (Judgment of February 3, 1994, ICJ Reports 6, at 21-22). This decision confirms the idea that in 1965, when the ICSID Convention was concluded, the rules of treaty interpretation of the Vienna Convention had the status of customary international law and, for this reason, they are applicable to the interpretation of the ICSID Convention (See D.W. GREIG, *INTERTEMPORALITY AND THE LAW OF TREATIES* 111 (British Institute of International and Comparative Law 2001); See also *Dispute Regarding Navigational and Related Rights*, Judgment of July 13, 2009, 48 ILM 1183, at 1200; *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of April 20, 2010, para. 65, available at <http://www.icj-cij.org/docket/files/135/15877.pdf> (last visited May 4, 2010).

²⁸ Vienna Convention on the Law of Treaties, May 23, 1969, 115 UNTS 331, *reprinted* in 8 ILM 679 at 691-692 (1969) (emphasis added).

²⁹ The principle of integration was defined by G. Fitzmaurice as follows:

“*Principle of Integration.* Treaties are to be interpreted as a whole, and with reference to their declared or apparent objects, purposes, and principles”

G.G., Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y. B. I. L. 1, 9 (1951).

The elements that define the context of the terms of a treaty for the purposes of interpretation are set forth in Articles 31(2) and (3) of the Vienna Convention, which provides that:

Accordingly, the term “nationality”, as employed in the first clause of Article 25(2)(b) of the ICSID Convention, may not be construed without taking into consideration the whole wording of the provision and the other provisions of the ICSID Convention.

The first element of the context of term “nationality” is the wording of the second clause of Article 25(2)(b). As mentioned before, Article 25(2)(b) does not provide for any specific criterion for the determination of the nationality of juridical persons, but its second clause allows the disputing parties to agree to confer on the juridical person that has the nationality of the Contracting State party to the dispute the nationality of another Contracting State because of foreign control. This exception constitutes strong evidence of the intention envisaged in the ICSID Convention to confer on the place of incorporation or seat test the status of a general rule governing the nationality of juridical persons for jurisdictional purposes. It implies that the juridical person has nationality of the Contracting State party to the dispute because of the place of incorporation or seat, but, as an exception, the disputing parties may agree to confer on the juridical person a different nationality pursuant to the control test.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties

Vienna Convention on the Law of Treaties, May 23, 1969, 115 UNTS 331, *reprinted* in 8 ILM 679, 692 (1969).

This interpretation is also confirmed taking into account another element of the context of the term “nationality”. Pursuant to the Article 31(3)(c) of the Vienna Convention, “[t]here shall be taken into account, together with the context [...] any relevant rules of international law applicable in the relations between the parties.”³⁰ The relevant rules existing in customary international law suggests that the only nationality criterion available in public international law is the place of the incorporation or seat test, as recognized by the ICJ in the *Barcelona Traction* case.

Nevertheless, Broches and Amerasinghe, who advocated the use of nationality criteria other than the place of incorporation or seat test, including the control test, based their position on the idea that, while the second clause of Article 25(2)(b) implies the place of incorporation or seat test, Article 25(2)(b) does not exclude the use of other nationality criteria in order to determine the nationality of juridical persons that do not have the nationality of the Contracting State party to the dispute pursuant to the place of incorporation or seat test. These writers also argued that the rule defined by the ICJ in the *Barcelona Traction* case is limited to cases involving the exercise of diplomatic protection in favor of juridical persons and it should not be automatically applied in cases submitted to the jurisdiction of the Centre. This argument, according to them, is based on the idea that the conclusion of the ICSID Convention aimed at establishing a dispute settlement system that departs from the traditional diplomatic protection practice and, therefore, the rules developed and applied in diplomatic protection cases should not place restrictions on the jurisdiction of the Centre.

The idea that the ICSID Convention aimed at establishing a system disconnected from the rules developed in diplomatic protection practice seems, however, inconsistent with the ICSID Convention itself, given that the ICSID Convention does not operate in isolation from the rules of diplomatic protection. As mentioned above, one of the rules designed to create the self-contained regime of the ICSID Convention is contained in its Article 27(1). This rule prevents a

³⁰ Vienna Convention on the Law of Treaties, May 23, 1969, 115 UNTS 331, *reprinted* in 8 ILM 679, 692 (1969).

Contracting State from exercising diplomatic protection if one of its nationals and another Contracting State consented to submit the dispute to the jurisdiction of the Centre. Article 27(1), accordingly, infers the existence of a nationality criterion that allows the Contracting State to exercise diplomatic protection in favor a national. This nationality criterion is the place of incorporation or seat test and not the control test, which is not admitted in diplomatic protection.

The consequence of the implied nationality criterion in Article 27(1) is that, if the first clause of Article 25(2)(b) admitted the control test, the ICSID Convention would contain a contradiction between these two provisions. The term “nationality” in the first clause of Article 25(2)(b) would cover not only juridical persons incorporated or that have the seat in a Contracting State, but those that are controlled by nationals of the Contracting State. On the other hand, the term “nationals” in Article 27(1) would cover juridical persons that are incorporated or have the seat in a Contracting State, but not those that are controlled by nationals of the Contracting State. Likewise, following the interpretation given by the *Mobil* tribunal to the nationality requirement of the ICSID Convention, the nationality of juridical persons under the first clause of Article 25(2)(b) would be an element of the autonomy of the disputing parties, while in Article 27(1) it would be a requirement that could not be waived by the will of the parties.

The contradiction that would result from the use of the control test in the first clause of Article 25(2)(b) of the ICSID Convention militates against the flexible approach adopted in the *Mobil* decision. As mentioned before, one of the controlling principles contained in Article 31(1) of the Vienna Convention is the so-called principle of integration. Pursuant to this principle, for the purposes of interpretation, a treaty forms a unit and must be interpreted accordingly, as a whole, and its terms may not be construed in isolation. As a consequence, a term used in different occasions in a treaty must be assumed to have a consistent meaning through out the whole treaty, avoiding any internal contradiction between

its provisions.³¹ In this sense, in interpreting the first clause of Article 25(2)(b) of the ICSID Convention, one must assume that the term “nationality” was meant to have the same meaning through out the whole ICSID Convention and that there is no contradiction between its provisions.

The misinterpretation given by the *Mobil* tribunal lies in the fact that it failed to look at the ICSID Convention as whole, especially at Article 27(1). The existence of a criterion in Article 27(1) governing the nationality of juridical persons pursuant to the place of incorporation or seat test prevents ICSID tribunals from relying on the control test for the purposes of establishing the jurisdiction of the Centre. Like in Article 27(1), the nationality of juridical persons as a jurisdictional requirement is not an element of the autonomy of the disputing parties that could be waived by the will of the disputing parties.

VI. CONCLUSION

This article sought to demonstrate that the decision on jurisdiction rendered in the *Mobil* case was based on a misinterpretation of the nationality requirement of the ICSID Convention. Contrary to what the tribunal pointed out, the ICSID Convention does not allow the application of a nationality criterion other than the place of incorporation or seat test in order to define the nationality of juridical persons. This conclusion is reached on the basis of the rules of treaty interpretation embodied in the Vienna Convention. The nationality requirement is one of the elements that form the self-contained regime envisaged by the ICSID Convention and is not dictated by the autonomy of the disputing parties.

³¹ See GYÖRGY HARASZTI, SOME FUNDAMENTAL PROBLEMS OF THE LAW OF TREATIES 108 (Jozsef Decsenyi, trans., Akadémiai Kiadó 1973); ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM’S INTERNATIONAL LAW 1273, n.12 (Longman, 9th ed., 1992); ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 106-107 (Springer 2007).

Nevertheless, despite the misinterpretation given by the *Mobil* tribunal to the ICSID Convention, the outcome of the decision would have been the same if the tribunal had applied the place of incorporation or seat test in order to assess the fulfillment of the nationality requirement of the ICSID Convention. Even though the four claimants against which Venezuela challenged the jurisdiction of the Centre would not qualify as Dutch nationals under the ICSID Convention, they were, in fact, nationals of Contracting States, the United States and the Bahamas, where they were incorporated.