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Landmark Investment Cases on State Consent

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I. INTRODUCTION

Consent to arbitration is an indispensable condition for the jurisdiction of an arbitral tribunal. Consent must be obtained from both or all parties. The parties enjoy a large measure of freedom in how to express their consent. Traditionally, this would take place by way of a direct agreement between the host state and the investor. Consent may also result from a general unilateral offer by the host state, expressed in its legislation or in a treaty, which is subsequently accepted by the investor. Nowadays the vast majority of cases are based on consent given in this indirect way.[1] This phenomenon has been called arbitration without privity.[2] Here too, the result is an agreement, although it is achieved indirectly and often without direct contact between the parties prior to the institution of proceedings. Consent will be valid according to its own terms, that is, to the extent that disputes are covered by its scope.

The shift from contract-based to treaty-based arbitration has had several consequences. The number of potential claimants has increased dramatically. Investors benefitting from arbitration clauses are not individually determined as in contracts, but generically described in the treaties.

At the same time, the possibility for states to act as claimants has been reduced. Since investors must accept the offer of arbitration in the treaties, the treaty-based system of investment arbitration in effect provides for investor claims against states but not vice versa. The investor is able to calibrate its acceptance of consent towards a particular dispute, thereby reducing the likelihood of a counterclaim.

The shift from contract-based to treaty-based arbitration has also had consequences for the law applied by investment tribunals to the merits. Domestic law and international law used to have roughly the same weight. With the rise of consent based on treaties, tribunals have given increasing weight to treaty law and to international law in general, at the cost of domestic law.

The law governing consent to investment arbitration is reflected in many decisions of investment tribunals and cannot usefully be portrayed through one or two cases. This overview seeks to illustrate its most important developments with the help of ten selected cases.

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[1] AM Steingruber, *Consent in International Arbitration* (Oxford, Oxford University Press, 2012) 60–68.

[2] J Paulsson, 'Arbitration Without Privity' (1995) 10 *ICSID Review/FILJ* 232; MD Nolan and FG Sourgens, 'Limits of Consent – Arbitration without Privity and Beyond' in MÁ Fernández-Ballesteros and D Arias (eds), *Liber Amicorum Bernardo Cremades* (Lima, La Ley, 2010) 873.

II. *AMCO v INDONESIA:* CONSENT THROUGH A DIRECT AGREEMENT BETWEEN THE PARTIES

The traditional form of expressing consent to arbitration is through an arbitration clause in a contract. This may be achieved through a compromissory clause in an investment contract between the host state and the investor submitting future disputes arising from the investment operation to arbitration. It is also possible to submit a dispute that has already arisen between the parties through consent expressed in a *compromis* although this rarely happens.

The agreement on consent between the parties need not be recorded in a single instrument. An investment application made by the investor may provide for arbitration. If the application is approved by the competent authority of the host state, there is consent to arbitration by both parties.

This is what happened in *Amco* v *Indonesia*.[3] The investor had submitted an application to the Indonesian Foreign Investment Board to establish a locally incorporated company for the purpose of carrying out the investment operation. The application provided that any disagreements would be submitted to the International Centre for Settlement of Investment Disputes (ICSID) arbitration.[4] The application was approved. The Tribunal accepted the validity of the consent clause and found that it was sufficient that its interpretation in good faith showed that the parties had agreed to ICSID arbitration. The Tribunal said:

> while a consent in writing to ICSID arbitration is indispensable, since it is required by Article 25(1) of the [ICSID] Convention, such consent in writing is not to be expressed in a solemn, ritual and unique formulation. … To conclude, there is a written consent to ICSID arbitration in the investment agreement (Article IX of the Application and its acceptance by the Government).[5]

III. *SPP v EGYPT*: CONSENT THROUGH HOST STATE LEGISLATION

A host state can express its consent to the Centre's jurisdiction through a provision in its national legislation or through some other form of unilateral declaration. References to dispute settlement by arbitration in national investment legislation show a considerable measure of diversity.[6] Not all references amount to consent to arbitration. Therefore, in each case the respective provisions in national laws must be studied carefully.

In *SPP* v *Egypt*,[7] the Request for Arbitration relied on Article 8 of Egypt's Law No. 43 of 1974 which provided in relevant part:

> Investment disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force

[3] *Amco Asia Corporation and others* v *Republic of Indonesia*, Decision on Jurisdiction (25 September 1983) ICSID Case No ARB/81/1.

[4] ibid para 10.

[5] ibid paras 23, 25. See also *Churchill Mining PLC and Planet Mining Pty Ltd* v *Republic of Indonesia*, Decision on Jurisdiction (24 February 2014) ICSID Case No ARB/12/14 and 12/40, paras 11–18, 199–217.

[6] See also AR Parra, 'Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment' (1997) 12 *ICSID Review/FILJ* 287, 290, 314ff; Steingruber, above (n 1) 199–201; C Schreuer, 'Investment Arbitration based on National Legislation' in G Hafner and others (eds), *Völkerrecht und die Dynamik der Menschenrechte – Liber Amicorum Wolfram Karl* (Vienna, facultas. wuv Universitäts, 2012) 527.

[7] *Southern Pacific Properties (Middle East) v Arab Republic of Egypt*, Decision on Preliminary Objection to Jurisdiction (27 November 1985) ICSID Case No ARB/84/3.

> between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered by virtue of Law No. 90 of 1971, where such Convention applies.[8]

About one year before the institution of arbitration, the Claimants sent a letter to Egypt's Minister of Tourism, which said in relevant part:

> … we hereby notify you that we accept and reserve the opportunity of availing ourselves of the uncontestable jurisdiction of the International Centre for the Settlement of Investment Disputes, under the auspices of the World Bank, which is open to us as a result of Law No. 43 of 1974, Article 8 of which provides that investment disputes may be settled by ICSID arbitration.[9]

The Tribunal embarked upon a detailed grammatical analysis of Article 8 of Law No 43, including its Arabic original. This led it to conclude that the text mandated the submission of disputes to the various methods prescribed therein to the extent that such methods were applicable.[10] The Tribunal rejected the idea that Article 8 had the consequence only of informing potential investors of Egypt's willingness, in principle, to negotiate a consent agreement.[11]

Not every reference to arbitration in domestic legislation amounts to a binding offer of consent. Other legislative provisions referring to the settlement of disputes by arbitration indicate that further action on the part of the host state is necessary to establish consent. Tribunals have rejected attempts to base jurisdiction on legislative provisions of this kind.[12]

IV. *CHURCHILL MINING v INDONESIA* AND *PLANET MINING v INDONESIA*: CONSENT THROUGH TREATIES

The same technique of offering consent to foreign investors is employed by way of treaties, to which the host state is a party. The treaty constitutes the host state's offer of consent. This offer may then be taken up by a national of the other state party to the treaty. Consent through bilateral investment treaties (BITs) has become accepted practice. Clauses offering investor-state arbitration can be found in many hundreds of BITs. In recent years, the majority of ICSID cases have been brought on the basis of consent offered by BITs or similar treaties.[13]

[8] ibid para 70.

[9] ibid para 40.

[10] ibid paras 74–88; See also *SPP v Egypt*, Dissenting Opinion (14 April 1988) paras 22–26.

[11] *SPP v Egypt*, Decision on Jurisdiction (1985) paras 89–101; see also *SPP v Egypt*, Dissenting Opinion (1988) para 21.

[12] *Metal-Tech Ltd v Uzbekistan*, Award 4 October 2013 paras 381–388; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, Award (24 July 2008) ICSID Case No ARB/05/22, para 329; *PNG Sustainable Development Program Ltd* v *Independent State of Papua New Guinea*, Award (5 May 2015) ICSID Case No ARB/13/33, para 286; *MNSS BV amd Recupero Credito Acciaio NV* v *Montenegro*, Award (4 May 2016) ICSID No ARB(AF)/12/8, para 171; *Venezuela Holdings, BV et al* v *Bolivarian Republic of Venezuela*, Decision on Jurisdiction (10 June 2010) ICSID Case No ARB/07/27, paras 120–140; *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV* v *Bolivarian Republic of Venezuela*, Decision on Jurisdiction (30 December 2010) ICSID Case No ARB/08/15, paras 137, 138; *Brandes Investment Partners, LP* v *Bolivarian Republic of Venezuela*, Award (2 August 2011) ICSID Case No ARB/08/3, paras 79–118; *Tidewater Inc, Tidewater Investement SRL, Tidewater Caribe, CA et al* v *Bolivarian Republic of Venezuela*, Decision on Jurisdiction (8 February 2013) ICSID Case No ARB/10/5, paras 103–141; *OPIC Karimun Corporation* v *Bolvarian Republic of Venezuela*, Award (28 May 2013), paras 100–108, 165–179; *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV* v *Bolvarian Republic of Venezuela*, Decision on Jurisdiction and the Merits (3 September 2013) para 259.

[13] The first case brought on the basis of a BIT was *Asian Agricultural Products Ltd* v *Republic of Sri Lanka*, Award (27 June 1990) ICSID Case No ARB/87/3, para 2. See also CF Amerasinghe, 'The Prawn Farm (AAPL) Arbitration' (1992) 4 *Sri Lanka Journal of International Law* 155; P Rambaud, Des obligations de l'Etat vis-à-vis de l'investisseur

Not every reference to arbitration in a BIT constitutes an offer of consent by the host state. Many clauses do amount to an unequivocal commitment.[14] This would be the case where the BIT uses language like 'hereby consents' or 'shall be submitted'. But other BITs merely contain undertakings to give consent in the future or hold out a general prospect of sympathetic consideration.[15] Still others simply state that consent may be given by way of agreements with the investor.

The fine line between the actual existence of consent and the mere prospect of future consent is illustrated by *Churchill Mining* v *Indonesia* and *Planet Mining* v *Indonesia*. Notably, in these two cases the same Tribunal deciding on the same day reached different results with respect to similar but not identical clauses in two different BITs.

In *Churchill Mining* v *Indonesia*,[16] Article 7(1) of the UK-Indonesia BIT contained the following clause:

> (1) The Contracting Party in the territory of which a national or company of the other Contracting Party makes or intends to make an investment shall assent to any request on the part of such national or company to submit, for conciliation or arbitration, to [ICSID].

The Tribunal found that this provision contained a standing offer to arbitrate any dispute that may arise in connection with an investment.[17] The Tribunal noted that this clause provided only for ICSID arbitration. It also noted the absence of any indication as to how Indonesia was to give its assent. Together with the absence of a discretion to assent, this favoured the claimant's position.[18] A detailed examination of the BIT's *travaux préparatoires* led the Tribunal to the conclusion that 'the treaty drafters considered the "shall assent" language as functionally equivalent to "hereby consents" or similar wording'.[19]

In *Planet Mining* v *Indonesia*,[20] the same Tribunal reached a different result on a somewhat differently worded ICSID clause. Article XI of the Australia-Indonesia BIT provided, that the investor may submit a dispute to ICSID adding that:

> Where that action is taken by an investor of one Party, the other Party shall consent in writing to the submission of the dispute to the Centre within forty-five days of receiving such a request from the investor;

The Tribunal found that this provision contained no standing offer to arbitrate. Rather, a further act on the part of Indonesia would be required to perfect consent.[21] A decisive element in this decision was the time sequence foreseen for Indonesia's consent after the dispute's submission to ICSID.[22] The Tribunal found confirmation for this result in the treaty practice of the two states, which indicated that Australia 'deliberately entertains the distinction between advance consent and promise to consent'.[23]

étranger (Sentence *AAPL c Sri Lanka*) (1992) 38 *Annuaire Français DIntl* 501; NG Ziadé, Some Recent Decisions in ICSID Cases (1991) 6 *ICSID Rev/FILJ* 514.

[14] See, eg, *AAPL* v *Sri Lanka*, above (n 13); *American Manufacturing & Trading Inc* v *Republic of Zaire*, Award (21 February 1997) ICSID Case No ARB/93/1, para 5.19.

[15] *Millicom International Operations BV and Sentel GSM SA* v *Republic of Senegal*, Decision on Jurisdiction (16 July 2010) ICSID Case No ARB/08/20, paras 55–66.

[16] *Churchill Mining* v *Indonesia*, above (n 5).

[17] ibid para 231.

[18] ibid paras 172–175.

[19] ibid para 230.

[20] *Planet Mining* v *Indonesia*, above (n 5).

[21] ibid para 198.

[22] ibid paras 162–165.

[23] ibid para 195.

The *Planet Mining* Tribunal also noted that the giving of consent by the respondent after the institution of proceedings posed a problem since the ICSID Convention requires proof of consent for the registration of a request for arbitration.[24]

V. *GENERATION UKRAINE v UKRAINE*: ACCEPTANCE OF OFFER OF CONSENT BY THE INVESTOR, CONDITIONAL CONSENT

The agreement to arbitrate requires consent by both parties to the dispute. An investor may accept an offer of consent contained in a treaty or in legislation simply by instituting arbitration proceedings. Tribunals have accepted this form of expressing consent in numerous cases. Most investment arbitration cases in recent years are based on consent established in this way. Some tribunals have simply applied this principle without discussing its rationale.[25] Other tribunals have explained the combination of the offer given by the host state through a BIT and the acceptance by the investor through the request for arbitration.[26] In *Generation Ukraine* v *Ukraine*,[27] the Ukraine-US BIT contained an offer of arbitration. The claimant had instituted arbitration proceedings on the basis of that offer. The Tribunal said:

> it is firmly established that an investor can accept a State's offer of ICSID arbitration contained in a bilateral investment treaty by instituting ICSID proceedings. There is nothing in the BIT to suggest that the investor must communicate its consent in a different form directly to the State; … It follows that the Claimant validly consented to ICSID arbitration by filing its Notice of Arbitration at the ICSID Centre.[28]

The institution of proceedings is not, however, the only way for the investor to accept the offer of consent in a treaty. In a number of cases investors have expressed their consent in a separate document some time before submitting their request for arbitration.[29]

Generation Ukraine v *Ukraine* also serves to illustrate another point. Some expressions of consent are contingent upon the fulfilment of a future condition. In some cases, the conditions *ratione personae* for the Centre's jurisdiction have not yet been met when the document containing the consent clause is signed. For instance, in the case of ICSID arbitration, the host state or the state of the investor's nationality may not yet have ratified the ICSID Convention. In such a case, the date of consent will be the date on which all the conditions have been met.[30]

In *Generation Ukraine* v *Ukraine*, the entry into force of the BIT between Ukraine and the US on 16 November 1996 antedated the entry into force of the ICSID Convention for Ukraine

[24] ibid para 166.

[25] See, eg, *AAPL* v *Sri Lanka*, above (n 13) paras 2–4; *Fedax* v *Venezuela*, Decision on Jurisdiction (11 July 1997) ICSID Case No ARB/96/3, para 30; *Emilio Augustín Maffezini* v *Kingdom of Spain*, Decision on Jurisdiction (25 January 2000) ICSID Case No ARB/97/7, para 19.

[26] See, eg, *Wena Hotels* v *Egypt*, Decision on Jurisdiction (29 June 1999) 6 ICSID Reports 87; *Salini* v *Morocco*, Decision on Jurisdiction (23 July 2001) ICSID Case No ARB/00/4, para 27; *Tokios Tokelės* v *Ukraine*, Decision on Jurisdiction (29 April 2004) ICSID Case No ARB/02/18, paras 94–100; *Saipem SpA* v *The People's Republic of Bangladesh*, Decision on Jurisdiction (21 March 2007) ICSID Case No ARB/05/07, para 74.

[27] *Generation Ukraine, Inc* v *Ukraine*, Award (16 September 2003) ICSID Case No ARB/00/9.

[28] ibid paras 12.2, 12.3.

[29] See *SPP* v *Egypt*, above (n 7) para 40. See also *Azurix Corp* v *Republic of Argentina*, Decision on Jurisdiction (8 December 2003) ICSID Case No ARB/01/12, para 56; *ADC Affiliate Limited and ADC & ADMC Management Limited* v *Republic Hungary*, Award (2 October 2006) ICSID Case No ARB/03/16, para 363; *Wintershall Akitengesellschaft* v *Argentine Republic*, Award (8 December 2008) ICSID Case No ARB/04/14, para 10.

[30] *Holiday Inns SA and others* v *Morocco*, Decision on Jurisdiction (12 May 1974) 1 ICSID Reports 667/8. See also *Cable Television of Nevis, Ltd and Cable Television of Nevis Holdings, Ltd* v *Federation of St Kitts and Nevis*, Award (13 January 1997) ICSID Case No ARB/95/2, paras 2.18, 4.09, 5.24.

on 7 July 2000. The Respondent argued that its consent, expressed in the BIT, was only 'preliminary' and subject to 'final' consent once the ICSID Convention came into force for Ukraine.[31] The Tribunal rejected this argument. It noted that there was nothing in the BIT that suggested that its consent was only preliminary. The Tribunal said:

> [12.6] Ukraine's consent to ICSID arbitration in Article VI(3) of the BIT was naturally conditional upon a future event, *viz.* Ukraine's ratification of the ICSID Convention. This no doubt explains the proviso to the consent in Article 3(a)(i) which states: 'provided that the Party is a party to [the ICSID] Convention'. But Ukraine's free standing consent to ICSID arbitration was perfected as soon as the ICSID Convention entered into force for Ukraine on 7 July 2000. Ukraine did not make any reservation to the BIT whereby it could reassess the status of its consent once the condition precedent for its full validity had been fulfilled.[32]

The Tribunal concluded that Ukraine's consent was valid since the condition precedent to Ukraine's offer to arbitrate had been fulfilled by the date of the institution of proceedings.[33]

VI. *PING AN v BELGIUM:* APPLICATION OF CONSENT TO PAST EVENTS AND PAST DISPUTES

Bilateral investment treaties frequently provide that they shall also apply to investments made before their entry into force.[34] Some BITs state, however, that they shall not apply to disputes that have arisen before that date.[35] The time of the dispute is not identical with the time of the events leading to the dispute. Typically, the incriminated acts will have occurred some time before the dispute. Therefore, the exclusion of disputes occurring before a certain date cannot be read as excluding jurisdiction over events occurring before that date.[36]

In *Ping An* v *Belgium*[37] there were two successive BITs of 1986 and 2009 respectively between BLEU[38] and China. The 1986 BIT only provided for jurisdiction for the amount of compensation in case of expropriation, while jurisdiction under the 2009 BIT covered a much wider range of disputes. The dispute at hand arose before the 2009 BIT came into force. The

[31] *Generation Ukraine* v *Ukraine*, above (n 27) para 12.1.

[32] ibid para 12.6.

[33] ibid para 12.8. In the same sense: *Toto Costruzioni Generali SpA* v *Republic of Lebanon*, Decision on Jurisdiction (11 September 2009) ICSID Case No ARB/07/12, paras 91–94.

[34] *Alex Genin, Eastern Credit Limited, Inc and AS Baltoil* v *Republic of Estonia*, Award (25 June 2001) ICSID Case No ARB/99/2, para 326; *SGS Société Générale de Surveillance SA* v *Islamic Republic of Pakistan*, Decision on Jurisdiction (6 August 2003) ICSID Case No ARB/01/13, para 153; *Pan American* v *Argentina*, Decision on Preliminary Objections (27 July 2006) ISCID Case No ARB/ para 211; *Ioannis Kardassopoulos* v *Republic of Georgia*, Decision on Jurisdiction (6 July 2007) ISCID Case No ARB/05/18, paras 196–201; *OKO Pankki Oyi, VTB Bank (Deutschland) AG and Sampo Bank Plc* v *Republic of Estonia*, Award (19 November 2007) ICSID Case No ARB/04/6, paras 184–186; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS* v *Islamic Republic of Pakistan*, Award (27 August 2009) ICSID Case No ARB/03/29, para 131; *H&H Enterprises Investments, Inc* v *Arab Republic of Egypt*, Decision on Jurisdiction (5 June 2012) ICSID Case No ARB/09/15, paras 52–56.

[35] Some BITs provide that they will not apply to disputes that have arisen before a certain date in the past. See *EuroGas Inc and Belmont Resources Inc* v *Slovak Republic*, Award (18 August 2017) ICSID Case No ARB/14/14, paras 427–461.

[36] *Renée Rose Levy de Levi* v *Republic of Peru*, Award (9 January 2015) ICSID Case No ARB/10/17, para 167; *Philip Morris Asia Limited* v *The Commonwealth of Australia*, Award on Jurisdiction and Admissibility (17 December 2015) PCA Case No 2012-12, para 532.

[37] *Ping An Life Insurance Company, Limited and Ping An Life Insurance (Group) Company, Limited* v *The Government of Belgium*, Award (30 April 2015) ICSID Case No ARB/12/29.

[38] Belgium Luxembourg Economic Union.

Tribunal distinguished between the temporal application of the jurisdictional provisions and the applicability of substantive provisions.[39] The Tribunal said:

> In the present case the Tribunal will not employ any presumption against retroactivity, because in its view the application of a new dispute settlement mechanism to acts which may have been unlawful when they were committed is not in itself the retroactive application of law.[40]

The dispute settlement clause in the 2009 BIT started with the words '[w]hen a legal dispute arises'. The Tribunal reached the conclusion that this clause was not to be read as covering past disputes. It held that '[w]hen a legal dispute arises' must be read as referring only to disputes that arise after the BIT's entry into force.[41] It followed that the claim was dismissed for lack of jurisdiction.

Consent expressed in a treaty may well cover events that took place before the treaty's entry into force.[42] Jurisdiction over events that occurred prior to the BIT's entry into force is not contrary to the principle of non-retroactivity as enshrined in Article 28 of the Vienna Convention on the Law of Treaties (VCLT).[43]

It follows that the question whether acts and events that occurred prior to an expression of consent to arbitration are covered by the latter should be distinguished from the issue of the applicable substantive law.[44] A jurisdictional provision in a treaty may extend to events that took place prior to the treaty's entry into force. On the other hand, the substantive law in force at the time of the relevant events will have to be applied to the merits of the case.[45]

A treaty may exclude jurisdiction in respect of acts that occurred before its entry into force.[46] If consent to arbitration contained in a treaty is limited to violations of that treaty, the date of the treaty's entry into force is also necessarily the date from which acts and events are covered by consent to jurisdiction.[47] For instance, under the NAFTA[48] and under the ECT[49] the scope of the consent to arbitration is limited to claims arising from alleged breaches of the respective treaties. In that case, the entry into force of the substantive law also determines the Tribunal's jurisdiction *ratione temporis* since the Tribunal may only hear claims for violation of that law.

[39] *Ping An v* Belgium, above (n 37) para 186.

[40] ibid para 218.

[41] ibid para 224. See also *Salini Costruttori SpA and Italstrade SpA* v *The Hashemite Kingdom of Jordan*, Decision on Jurisdiction (9 November 2004) ICSID Case No ARB/02/13, para 170; *Impregilo SpA* v *The Islamic Republic of Pakistan*, Decision on Jurisdiction (22 April 2005) ICSID Case No ARB/03/3, paras 299–300; *ABCI Investments NV* v *Republic of Tunisia*, Decision on Jurisdiction (18 February 2011) ICSID No ARB/04/12, paras 169–170.

[42] N Gallus, *The Temporal Scope of Investment Protection Treaties* (London, British Institute of International and Comparative Law, 2009) 138–141.

[43] See N Gallus, 'Article 28 of the Vienna Convention on the Law of Treaties and Investment Treaty Decisions' (2016) 31 *ICSID Review* 290.

[44] *Impregilo* v *Pakistan*, above (n 41) para 309. See also *SGS Société Générale de Surveillance SA* v *The Republic of the Philippines*, Decision on Jurisdiction (29 January 2004) ICSID Case No ARB/02/6, para 167. See also C Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (2014) 1 *McGill Journal of Dispute Resolution* 1–25; Steingruber, above (n 1) 287–288.

[45] '*Island of Palmas* case' in Reports of International Arbitral Awards, vol II (New York, United Nations Publications, 1949), 829, 845; *Tradex Hellas SA* v *Republic of Albania*, Decision on Jurisdiction (24 December 1996) 5 ICSID Reports 65; *SGS* v *Philippines*, above (n 44) para 166; *Salini* v *Jordan*, above (n 41) paras 176, 177; *Impregilo* v *Pakistan*, above (n 41) para 311; *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL* v *Republic of Romania*, Decision on Jurisdiction (24 September 2008) ICSID Case No ARB/05/20, paras 153–157; *Jan de Nul NV and Dredging International NV* v *Arab Republic of Egypt*, Award (6 November 2008) paras 132–135.

[46] See *Railroad Development Corporation* v *Republic of Guatemala*, Second Decision on Jurisdiction (18 May 2010) ICSID Case No ARB/07/23, paras 114–116.

[47] See *Generation Ukraine* v *Ukraine*, above (n 27) paras 11.1–11.4, 17.1, 17.5.

[48] North American Free Trade Agreement (entered into force 1 January 1994) (NAFTA) Art 1116.

[49] Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) (ECT) Art 26(1).

VII. *SGS v PARAGUAY*: THE SCOPE OF CONSENT

The scope of consent to arbitration offered in treaties varies.[50] Some clauses providing consent are wide and unlimited. Many BITs in their consent clauses contain phrases such as 'all disputes concerning investments' or 'any legal dispute concerning an investment'. These provisions do not restrict a tribunal's jurisdiction to claims arising from the BIT's substantive standards. By their own terms, these consent clauses encompass disputes that go beyond the interpretation and application of the BIT itself and would cover claims that arise from a contract in connexion with the investment,[51] from customary international law and from other treaties.

In *SGS* v *Paraguay*,[52] a contract entered into between SGS and the Ministry of Finance of Paraguay contained a forum selection clause in favour of the Courts of the City of Asunción under the Law of Paraguay. The clause on the settlement of investor-state disputes in the BIT between Paraguay and Switzerland referred to 'disputes with respect to investments'. The Tribunal rejected the respondent's argument that the contractual forum selection ousted consent to arbitration under the BIT. The Tribunal noted that the claimant had not put forward contract claims but was arguing breaches of the BIT. In addition, the Tribunal remarked that the BIT's dispute settlement clause was broad enough to cover contract claims:

> Article 9 [of the BIT] provides for the resolution of 'disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party,' … There is no qualification or limitation in this language on the types of 'disputes with respect to investments' that a Swiss investor may bring against the Republic of Paraguay. The ordinary meaning of Article 9 would appear to give this Tribunal jurisdiction to hear claims for violation of Claimant's rights under the Contract – surely a dispute 'with respect to' Claimant's investment – should Claimant have chosen to bring them before us.[53]

The Tribunal added:

> As previously noted, the BIT's dispute resolution provisions (Article 9) are not on their terms limited to claims for breach of the BIT itself. Article 9(1) arguably extends the Treaty dispute settlement process to all manner of 'disputes related to investments' – a category broad enough to encompass contract disputes.[54]

A number of other tribunals have endorsed this position.[55] It has not, however, found unanimous support. For instance, in *SGS* v *Pakistan*[56] the Tribunal found that a BIT's consent

[50] For an overview see C McLachlan, L Shore and M Weiniger, *International Investment Arbitration* (Oxford, Oxford University Press, 2017) 48–52.

[51] For discussion of this issue see S Alexandrov, 'Breaches of Contract and Breaches of Treaty' (2004) 5 *Journal of World Investment & Trade* 555, 572; J Griebel, 'Jurisdiction over 'Contract Claims' in Treaty-Based Investment Arbitration on the Basis of Wide Dispute Settlement Clauses in Investment Agreements' (2007) 5 *Transnational Dispute Management*; J van Haersolte-van Hof and AK Hoffmann, 'The Relationship between International Tribunals and Domestic Courts' in P Muchlinski, F Ortino and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford, Oxford University Press, 2008) 962; Steingruber, above (n 1) 299–302.

[52] *SGS Société Générale de Surveillance SA* v *Republic of Paraguay*, Decision on Jurisdiction (12 February 2010) ICSID Case No ARB/07/29.

[53] ibid para 129.

[54] ibid para 183.

[55] *Salini* v *Morocco*, above (n 26) para 61; *SGS* v *Philippines*, above (n 44) paras 131–135, 169(3); *Tokios Tokelės* v *Ukraine*, above (n 26) para 52, fn 42; *Impregilo* v *Pakistan*, above (n 41) paras 57, 82, 102, 188; *Siemens AG* v *Argentina*, Award (6 February 2007) ICSID Case No ARB/02/8, para 205; *Parkerings-Compagniet AS* v *Republic of Lithuania*, Award (11 September 2007) ICSID Case No ARB/05/8, paras 261–266; *Alpha Projektholding GmbH* v *Ukraine*, Award (8 November 2010) ICSID Case No ARB/07/16, para 243; *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA* v *Oriental Republic of Uruguay*, Decision on Jurisdiction (2 July 2013) ICSID Case No ARB/10/7, paras 107, 109; *Metal-Tech* v *Uzbekistan*, above (n 12) para 378.

[56] *SGS* v *Pakistan*, above (n 34).

clause referring to 'disputes with respect to investments' did not endow it with jurisdiction over contract claims which did not also constitute breaches of the substantive standards of the BIT.[57] Although a number of tribunals have distanced themselves from that decision,[58] however, some tribunals, without analysing the matter, seem to be under the impression that once they operate under a treaty-based consent clause, they are restricted to treaty claims regardless of the wording of a BIT's jurisdiction clause.[59]

Other BIT clauses offering consent to arbitration circumscribe the scope of consent to arbitration in narrower terms. A provision that is typical of US BITs covers breaches of the treaty's substantive standards, of an investment authorisation, or of an investment agreement.[60] Other treaties restrict consent to disputes involving their substantive provisions. Tribunals operating under these restrictive clauses have found that they could only apply the substantive standards contained in these treaties.[61]

The scope for the jurisdiction of tribunals is even narrower where consent is limited to one or some of the rights granted under the Treaty. Some BITs restrict jurisdiction to expropriation or to the amount of compensation due after an expropriation. Tribunals have held that clauses of this kind restricted their jurisdiction to claims based on expropriation to the exclusion of other standards of protection.[62] However, clauses referring to compensation for expropriation extended to the question of the existence of an expropriation.[63]

VIII. *AMBIENTE UFFICIO v ARGENTINA:* CONSENT SUBJECT TO PROCEDURAL CONDITIONS

Offers of consent to arbitration are often subject to procedural conditions that a claimant must comply with before proceeding to arbitration. A common condition is that the parties first seek an amicable settlement through consultations or negotiations. Some national investment laws and numerous BITs contain the condition that a negotiated settlement must be attempted before resort can be had to arbitration. In many treaties this condition is subject to a certain period of time.

[57] ibid para 161. For a case with a similar result see *Consortium Groupement LESI-DIPENTA* v *République algérienne démocratique et populaire*, Award (10 January 2005) ICSID Case No ARB/03/08, para 25.

[58] *SGS* v *Philippines*, above (n 44) paras 133–135; *Tokios Tokelės* v *Ukraine*, above (n 26) para 52, fn 42; See also the discussions in *Salini* v *Jordan*, above (n 41) paras 97–101.

[59] *Urbaser SA* v *Republic of Argentina*, Decision on Jurisdiction (19 December 2012) ICSID Case No ARB/07/26, para 254; *Vladislav Kim and others* v *Republic of Uzbekistan*, Decision on Jurisdiction (8 March 2017) ICSID Case No ARB/13/6, paras 162–164; *UAB E energija (Lithuania)* v *Republic of Lithuania*, Award (22 December 2017) ICSID Case No ARB/12/33, paras 498, 846, 853.

[60] See KS Gudgeon, 'Arbitration Provisions of U.S. Bilateral Investment Treaties' in SJ Rubin and RW Nelson (eds), *International Investment Disputes: Avoidance and Settlement* (Eagan, West Group, 1985) 41, 45–47; KJ Vandevelde, 'U.S. Bilateral Investment Treaties – The Second Wave' (1993) 14 *Michigan Journal of International Law* 621, 655.

[61] *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA* v *Argentine Republic*, Decision on Liability (30 June 2010) ICSID Case No ARB/03/19, para 63; *Spyridon Roussalis* v *Romania*, Award (7 December 2011) ICSID Case No ARB/06/1, paras 43, 679–683; *Iberdrola Energía* v *Republic of Guatemala*, Award (17 August 2012) ICSID Case No ARB/09/5, paras 296–310.

[62] *Telenor Mobile Communications AS* v *Republic of Hungary*, Award (13 September 2006) ICSID Case No ARB/04/15, paras 18(2), 25, 57, 81–83; *Saipem SpA* v *The People's Republic of Bangladesh*, Decision on Jurisdiction (21 March 2007) ICSID Case No ARB/05/07, paras 70, 129–133.

[63] *Señor Tza Yap Shum* v *Republic of Peru*, Decision on Jurisdiction (19 June 2009) ICSID Case No ARB/07/6, paras 129–188; *Beijing Urban Construction Co Ltd* v *Republic of Yemen*, Decision on Jurisdiction (31 May 2017) ICSID Case No ARB/14/30, paras 50, 59–69, 74–108.

If these 'waiting periods' are jurisdictional requirements, they must be complied with by the time of the institution of proceedings. As a consequence, if the request for arbitration is submitted before the expiry of the period foreseen for a settlement, a tribunal would have to decline jurisdiction.[64]

In *Ambiente Ufficio* v *Argentina*,[65] Article 8(1) of the Italy-Argentina BIT provided that disputes 'shall be, insofar as possible, resolved through amicable consultations'. The Tribunal found that this crated an obligation to enter into consultations.[66] It did, however, find that there had to be a chance for meaningful consultations. The Tribunal said:

> there is considerable authority for the proposition that mandatory waiting periods for consultations (let alone a *simple* duty to consult, as in the present case) do not pose an obstacle for a claim to proceed to the merits phase if there is no realistic chance for meaningful consultations because they have become futile or deadlocked.[67]

In the particular case, no consultations had taken place. The Tribunal noted that Argentina had passed legislation which forbade any settlement.[68] It followed that the claimant had not violated the requirement to engage in consultations.[69]

Other tribunals too have decided that there was no need to comply with waiting periods prior to the institution of arbitration proceedings since they would have been futile and would hence not have served any useful purpose.[70]

The reaction of tribunals in cases where the claimants had not complied with the requirement to first attempt an amicable settlement has not, however, been uniform.[71] In a number of cases, tribunals found that non-compliance with waiting periods did not affect their jurisdiction.[72] Other tribunals have treated waiting periods as requirements for jurisdiction or admissibility that had to be strictly observed.[73]

[64] The International Court of Justice has addressed the issue of non-compliance with a requirement to engage in negotiations in a treaty providing for the Court's jurisdiction: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v *United States of America)*, Judgment (Jurisdiction and Admissibility) [1986] ICJ Rep 14, 427–429. See also PM Dupuy, 'Preconditions to Arbitration and Consent of States to ICSID Jurisdiction' in M Kinnear and others (eds), *Building International Investment Law* (Alphen aan den Rijn, Wolters Kluwer, 2016) 219, 227–228.

[65] *Ambiente Ufficio SpA and others* v *Argentina*, Decision on Jurisdiction and Admissibility (8 February 2013) ICSID Case No ARB/08/9.

[66] ibid paras 577–580.

[67] ibid para 582.

[68] ibid para 585.

[69] ibid para 588.

[70] *SGS* v *Pakistan*, above (n 34) paras 80, 183–184; *LESI–DIPENTA* v *Algeria*, above (n 57) para 32(iv); *Teinver SA, Transportes de Cercanías Sa and Autobuses Urbanos del Sur SA* v *Argentine Republic*, Decision on Jurisdiction (21 December 2012) ICSID Case No ARB/09/1, paras 126–129; *Philip Morris* v *Uruguay*, above (n 55) paras 227–229; *Giovanni Alemanni and others* v *Argentine Republic*, Decision on Jurisdiction and Admissibility (17 November 2014) ICSID Case No ARB/07/8, paras 301–317.

[71] C Schreuer, 'Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5 *Journal of World Investment & Trade* 231, 232; G Born and M Šćekić, 'Pre-Arbitration Procedural Requirements "A Dismal Swamp"' in DD Caron and others (eds), *Practising Virtue Inside International Arbitration* (Oxford, Oxford University Press, 2015) 227.

[72] *Ethyl Corporation* v *The Government of Canada*, Decision on Jurisdiction (24 June 1998) UNCITRAL, paras 76–88; *Ronald S Lauder* v *The Czech Republic*, Final Award (3 September 2001) UNCITRAL, paras 181–191; *Wena Hotels* v *Egypt*, above (n 26); *Metalclad Corporation* v *United Mexican States*, Award (30 August 2000) ICSID Case No ARB(AF)/97/1, paras 64–67; *Bayindir* v *Pakistan*, above (n 34) paras 88–103; *Biwater Gauff* v *Tanzania*, above (n 12) paras 343–347; *Abaclat and others* v *Argentine Republic*, Decision on Jurisdiction and Admissibility (4 August 2011) ICSID Case No ARB/07/5, para 564.

[73] *Antoine Goetz et consorts* v *République du Burundi*, Award (10 February 1999) ICSID Case No ARB/95/3, paras 90–93; *Enron Corporation* v *Argentine Republique*, Decision on Jurisdiction (14 January 2004) ICSID Case No ARB/01/3, para 88; *Burlington Resources Inc* v *Republic of Ecuador*, Decision on Jurisdiction (2 June 2010) ICSID Case No ARB/08/5, paras 312–318, 332–340; *Murphy Exploration & Production Company International* v *Republic*

The decisive criterion should be whether there was a promising opportunity for a settlement. There is little point in declining jurisdiction and sending the parties to the negotiating table if negotiations are obviously futile. Negotiations remain possible while the arbitration proceedings are pending. Even if the institution of arbitration was premature, the waiting period will often have expired by the time a decision on jurisdiction is rendered. Under these circumstances, compelling the claimant to start the proceedings anew would be uneconomical. A better way to deal with non-compliance with a waiting period is a suspension of proceedings to allow additional time for negotiations if these appear promising.[74]

Some consent clauses in BITs provide for a mandatory attempt at settling the dispute in the host state's domestic courts.[75] The period foreseen for this purpose is often 18 months. The investor may proceed to international arbitration if the domestic proceedings do not result in a decision during that period or if the dispute persists after the domestic decision.

A requirement of this kind attached to consent to arbitration creates a considerable burden to the party seeking arbitration with little chance of advancing the settlement of the dispute. A final decision by the domestic courts in a complex investment dispute is unlikely within eighteen months. Even if a decision is rendered, the dispute is likely to persist if the investor is dissatisfied with the outcome. Therefore, arbitration remains an option after the expiry of the period of 18 months. It follows that the most likely effect of a clause of this kind is delay and additional cost. One tribunal has called a provision of this kind 'nonsensical from a practical point of view'.[76]

Some tribunals have found the requirement to submit the dispute to domestic courts for a certain period to be procedural. Therefore, it could be handled with some flexibility.[77] In a number of cases, tribunals decided that resort to domestic courts prior to the institution of arbitration proceedings would have been futile and would have served no useful purpose. Therefore, there was no need to comply with directions contained in treaties to first go to domestic courts.[78]

In *Ambiente Ufficio* v *Argentina*,[79] Article 8 of the Argentina-Italy BIT provided that, if amicable consultations were unsuccessful, the dispute is to be submitted 'to a competent administrative or judicial jurisdiction' of the host state for 18 months. Only if the dispute

of Ecuador, Award on Jurisdiction (15 December 2010) PCA Case No 2012-16, paras 90–157; *Tulip Real Estate and Development Netherland* v *Republic of Turkey*, Decision on Jurisdiction (5 March 2013) ICSID Caso No ARB/11/28, paras 55–72; *Supervisión y Control SA v Republic of Costa Rica*, Award (18 January 2017) ICSID Case No ARB/12/4, paras 336–348, 351.

[74] See *Western NIS Entreprise Fund* v *Ukraine*, Order (16 March 2006) ICSID Case No ARB/04/2; *Daimler Financial Services AG* v *Argentine Republic*, Award (22 August 2012) ICSID Case No ARB/05/1, para 188.

[75] C Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4 *Law and Practice of International Courts and Tribunals* 1, 3–5; K von Papp, 'Biting the Bullet or Redefining "Consent" in Investor-State Arbitration? Pre-Arbitration Requirements After *BG Group v Argentina*' (2015) 16 *Journal of World Investment & Trade* 695; Born and Šćekić, above (n 71); Dupuy, above (n 64) 219; McLachlan, Shore and Weiniger, above (n 50) 55–58.

[76] *Plama Consortium Limited* v *Republic of Bulgaria*, Decision on Jurisdiction (8 February 2005) ICSID Case No ARB/03/24, para 224.

[77] *Telefónica SA* v *Argentine Republic*, Decision on Jurisdiction (25 May 2006) ICSID Case No ARB/03/20, paras 91–93; *TSA Spectrum de Argentina SA* v *Argentine Republic*, Award (19 December 2008) ICSID Case No 05/5, paras 98–113; *Teinver* v *Argentina*, above (n 70) para 135; *Philip Morris* v *Uruguay*, above (n 55) paras 98–150; *İçkale Inşaat Limited Siketi* v *Turkmenistan*, Award (8 March 2016) ICSID Case No ARB/10/24, paras 195–263.

[78] *Abaclat* v *Argentina*, above (n 72) paras 585–591; *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa* v *Argentina*, Decision on Jurisdiction (19 December 2012) ICSID Case No ARB/07/26, paras 106–202; *Alemanni* v *Argentina*, above (n 70) paras 302–317.

[79] *Ambiente Ufficio* v *Argentina*, above (n 65).

still exists after that period may the dispute be submitted to international arbitration. In the particular case, the claimants had not brought their case before the domestic courts.

The Tribunal found that the requirement to have recourse to domestic courts was a binding precondition for access to international arbitration.[80] At the same time, it found that it had to apply the 'futility exception' to this obligation:

> the futility exception to the exhaustion of local remedies rule in the field of diplomatic protection is, in the light of Art. 31(3)(c) of the VCLT, also applicable to clauses requiring recourse to domestic courts in international investment law.[81]

The Tribunal noted that Argentinean legislation had ruled out redress before Argentine courts and the Supreme Court had confirmed the constitutionality of the legislation. Under these circumstances, the claimants had not violated the BIT's requirement of having recourse to respondent's domestic courts.[82] The Tribunal said:

> Given the jurisprudence of the Supreme Court of Argentina and in the light of the circumstances prevailing in the present case, the Tribunal concludes that having recourse to the Argentine domestic courts and eventually to the Supreme Court would not have offered Claimants a reasonable possibility to obtain effective redress from the local courts and would have accordingly been futile. Hence, Claimants did not violate the duty to have recourse to Argentine courts under Art. 8(2) and (3) of the Argentina-Italy BIT when they submitted the Request for Arbitration on 23 June 2008.[83]

IX. *MILLICOM v SENEGAL:* TERMINATION OF CONTRACT CONTAINING CONSENT

The termination of an investment contract between the host state and the investor does not necessarily terminate the validity of a clause providing for arbitration contained in that contract. To hold otherwise would largely deprive the arbitration clause of its intended effect. The tribunal must have the power to decide on disputes concerning the agreement's termination or invalidity even if the tribunal's very existence depends on the agreement's validity.

International arbitral practice has developed the doctrine of the severability or separability of arbitration agreements. Under this doctrine, the agreement providing for arbitration assumes a separate existence, which is autonomous and legally independent of the agreement containing it.[84] The most important argument in favour of this doctrine is the assumption that the parties, in providing for the arbitration of disputes relating to the agreement, intended *all* disputes, including disputes about the agreement's validity, to be resolved through arbitration.[85] Otherwise, a party could at any time defeat its obligation to arbitrate simply by declaring the agreement void or terminated. Therefore, the 'intention of the parties and the requirements of effective arbitration combine to give rise to the concept of severability'.[86] This principle of

[80] ibid paras 589–593.
[81] ibid paras 603, 607.
[82] ibid para 628.
[83] ibid para 620.
[84] For an extensive analysis see SM Schwebel, *International Arbitration: Three Salient Problems* (Cambridge, Cambridge University Press, 1987) 1–60.
[85] ibid 3.
[86] ibid 4.

severability of the arbitration agreement is supported by the weight of international arbitral codifications[87] and cases as well as by national arbitral practice.[88]

In *Millicom* v *Senegal*,[89] the Republic of Senegal had granted the claimant a telephone concession. Article 11 of the Concession Agreement provided for international arbitration in case of a dispute. Just over two years later, Senegal formally terminated the Concession agreement citing violations of the agreement on the part of the investor.[90] When Millicom initiated ICSID proceedings under the Concession Agreement, the respondent contested the tribunal's jurisdiction arguing that the Agreement had ended as of the date of its termination. The Tribunal rejected this argument and said:

> it is undisputed that an arbitration clause is autonomous and that the end of a contract in which it is incorporated does not eliminate its effects; on the contrary, the arbitration which is agreed to therein also covers the principle and effects of the end of the contract. To admit the contrary would amount to depriving it of an important part of its practical effect since it would suffice for a party to abandon a contract in order to escape from it. This reasoning must apply also to the Concession.[91]

Despite the clear authority in favour of the severability of a contractual arbitration clause, it is advisable to include an explicit provision in a consent clause to the effect that it applies to the contract's validity, construction, application and termination.[92]

X. *RUMELI v KAZAKHSTAN*: TERMINATION OF LEGISLATION PROVIDING FOR CONSENT

A host state is free to change its investment legislation including a provision offering consent to arbitration to foreign investors. An offer of consent contained in national legislation that has not been taken up by the investor will lapse when the legislation is repealed. The situation is different if the investor has accepted the offer in writing while the legislation was still in force. The consent agreed to by the parties then becomes insulated from the validity of the legislation containing the offer. It assumes a contractual existence independent of the legislative instrument that helped to bring it about.

In *Rumeli* v *Kazakhstan*,[93] the Respondent's Foreign Investment Law (FIL) of 1994 contained an offer of consent to ICSID arbitration. In addition, Article 6(1) of the FIL granted foreign investors protection against adverse changes in legislation for a period of ten years from the date of the investment.[94] The claimants made the relevant investments from 1998 to 2002. The FIL was repealed in 2003. The claimants request for arbitration, containing their acceptance of the offer of arbitration was registered in 2005.[95]

[87] See ICSID Additional Facility Rules, r 45(1); 2012 ICC Rules of Arbitration, Art 6(9); 2014 UNCITRAL Arbitration Rules, Art 23(1); 1985 UNCITRAL Model Law on International Commercial Arbitration, Art 16(1); Institut de Droit International, 'Resolution on Arbitration between States, State Enterprises or State Entities, and Foreign Enterprises, Art 3(a)' (1989) 63 *Annuaire II* 324, 326.

[88] Schwebel, above (n 84) 24–59.

[89] *Millicom International Operation BV and Sentel GSM SA v Republic of Senegal*, Decision on Jurisdiction (16 July 2010) ICSID Case No ARB/08/20.

[90] ibid paras 8, 11, 12, 88.

[91] ibid para 91. See also *Duke Energy International Peru Investments No 1 Ltd* v *Republic of Peru*, Decision of the ad hoc Committee (1 March 2011) ICSID Case No ARB/03/28, paras 125–144.

[92] GR Delaume, 'How to Draft an ICSID Arbitration Clause' (1992) 7 *ICSID Review/FILJ* 168, 174.

[93] *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri v Kazakhstan*, Award (29 July 2008) ICSID Case No ARB/05/16.

[94] ibid para 333.

[95] ibid paras 220–222, 334.

The respondent argued that the consent to arbitrate under the FIL was no longer effective since the FIL had been repealed prior to the investor's acceptance of the offer of arbitration through the request for arbitration.[96] The Tribunal found that it had jurisdiction on the basis of the FIL pursuant to its Article 6(1). Therefore, the offer of consent in the FIL remained applicable to the dispute.[97] In addition, the Tribunal applied the doctrines of acquired rights and estoppel to the situation. The Tribunal said:

> Respondent has expressed its consent to ICSID arbitration on December 28, 1994, the date of the entry into force of the FIL, and it remains applicable to the dispute pursuant to Article 6(1). On the other hand, Claimants have consented to ICSID jurisdiction by filing their Request for Arbitration. The Arbitral Tribunal has therefore jurisdiction under the FIL.
>
> Besides Article 6(1), it is also well established in international law that a State may not take away accrued rights of a foreign investor by domestic legislation abrogating the law granting these rights. This is an application of the principles of good faith, estoppel and *venire factum proprium*.[98]

XI. *FÁBRICA DE VIDRIOS v VENEZUELA:* CONSENT AND THE DENUNCIATION OF THE ICSID CONVENTION

Under Article 71 of the ICSID Convention, a Contracting State may denounce the Convention with six months' notice.[99] Since participation in the Convention of the host state and of the investor's state of nationality are conditions for the validity of consent to ICSID arbitration, the termination of either state's participation in the Convention would vitiate consent. Article 72 of the ICSID Convention blocks this indirect way of withdrawing consent. It provides that the Convention's denunciation by the host state or the investor's home state shall not affect the rights and obligations arising out of consent given before receipt of the notice of denunciation.[100]

Tribunals have given different interpretations to these provisions on denunciation with respect to the timing of expressions of consent. Some tribunals did not see a need for perfected consent at the time of the notice of denunciation and held that a request for arbitration accepting an offer of consent could still be filed within the six-month period until the denunciation takes effect in accordance with Article 71.[101]

Venezuela submitted its notice of denunciation of the ICSID Convention on 24 January 2012. In accordance with Article 71 of the Convention the denunciation took effect six months

[96] ibid para 308.

[97] ibid paras 332–336.

[98] ibid paras 334, 335, *cf* also *Caratube International Oil Company LLP* v *Republic of Kazakhstan*, Award (27 September 2017) ICSID Case No ARB/08/12, paras 689–696.

[99] ICSID Convention on the Settlement of Investments Disputes Between States and Nationals of other States (entered into force 14 October 1966) Art 71: Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.

[100] ICSID Convention, Art 72: Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.

[101] *Inversión y Gestión de Bienes* v *Kingdom of Spain*, Decision on Jurisdiction (21 June 2013) ICSID Case No ARB/12/17, paras 58–68; *Venoklim Holding BV* v *Bolivarian Republic of Venezuela*, Award (3 April 2015) ICSID Case No ARB/12/22, paras 61–68; *Blue Bank International & Trust (Barbados) Ltd* v *Bolivarian Republic of Venezuela*, Award (26 April 2017) ICSID Case No ARB/12/20, paras 108–120.

after receipt of the notice, ie on 25 July 2012. In *Fábrica de Vidrios* v *Venezuela*,[102] the claimants sought to accept the offer of consent to ICSID's jurisdiction contained in the Netherlands-Venezuela BIT on 20 July 2012, just under six months after Venezuela's notice of denunciation. The Tribunal found that the investor's acceptance of the offer of consent after the date of the notice of denunciation was too late. The consent that is preserved by Article 72 is not the offer of consent in the BIT but mutual consent by the host state and the investor. The Tribunal reached this result with the help of the last sentence of Article 25(1) of the ICSID Convention: 'When the parties have given their consent, no party may withdraw its consent unilaterally'. The Tribunal said:

> The phrase 'consent in writing to submit to the Centre' is equivalent in meaning to an arbitration agreement and thus perfected consent. … Whilst the phrase 'no party may withdraw its consent unilaterally' relates to the possible conduct of one party only, the preceding phrase '[w]hen the parties have given their consent' makes it clear that 'consent' in the final phrase is not directed to the idea of unilateral consent that arises where a Contracting State has given its consent to ICSID arbitration in an investment treaty or domestic legislation. In other words, it is not being used to describe the legal situation created by a unilateral engagement of a Contracting State to submit to ICSID arbitration (but before that engagement is relied upon by a national of another Contracting State). The last sentence of Article 25(1) simply means that where there is perfected consent, it cannot be undone by the conduct of one of the parties.[103]

[102] *Fábrica de Vidrios Los Andeles, CA and Owens-Illinois de Venezuela, CA* v *Bolivarian Republic of Venezuela*, Award (13 November 2017) ICSID Case No ARB/12/21.
[103] ibid para 277.