Manufacturing Consent to Investment Treaty Arbitration By Means of the Notion of "Arbitration Without Privity"

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Introduction

Consent to arbitration is one of the essential requirements[1] of investment arbitration. Unless parties of adispute consent to allow their dispute be resolved by arbitration, no arbitrator can hold power to adjudicate the dispute because he will lack jurisdiction. However, due to the "pro-arbitration climate[2]" of the last years, the requirement of consent is by the arbitral tribunals deemed to be more easily fulfilled than in the past. Finding that arbitral tribunals, which decide on international investment disputes, tend to interpret the "*consent to arbitration*" as too broad, the reknown legal writer Sornajarah, in a 1997 article[3], criticized this tendency stating: "*There seems to be an increasing readiness to create theory in order to permit arbitral tribunals to assume jurisdiction even in situations where the consent of the host State is unclear*".

There are several instances, in the realm of investment treaty arbitration, which indicate that arbitral tribunals tend to infer consent to arbitration too broadly. One of these instances are cases in which arbitral

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[1] According to Art. 25/1 of the ICSID Convention, for ICSID tribunals to establish jurisdiction, in addition to "consent" of parties, the dispute must concern an "investment" and the "nationality" of the investor must be of another contracting State than the host State.

[2] Emmanuel Gaillard, *Commentary*,Arbitration International, Vol. 18 (2002), 247, p. 250

[3] M. Sornarajah, *Power and Justice in Foreign Investment Arbitration*, Journal of International Arbitration,Vol.14 (1997),103, p. 124.

tribunals infer consent to arbitration based on the so called *"arbitration without privity*[4]*"*notion. The expression *"arbitration without privity"* describes that an investor, by just referring to the arbitration clause embedded in the investment treaty between her host and home State, can, despite the fact that no arbitration agreement between herself and the host State exists, initiate arbitration proceedings against her host State. In the last fifteen years, the application of the notion of arbitration without privity has become such a commonplace occurrence, that nowadays for arbitral tribunals to infer jurisdiction from an arbitration clause in an investment treaty between the host and home State of an investor is taken as a given.

The purpose of this paper is to expose, the mechanism of the notion of arbitration without privity, and its impact on arbitral jurisdiction in the realm of investment treaty arbitration. In order to allow a better view of the role of the notion of arbitration without privity, first the role of consent in arbitration will briefly be examined.

I. Consent to Arbitration

The judicial system offers *litigation as* a mechanism to resolve disputes. Litigation is described as, a "publicly funded", and "socially acceptable" method for resolving disputes[5]. Although litigation is the "classic course" of dispute resolution, other mechanisms for dispute resolution, such as arbitration, also exist. However, as described by commentators, litigation is the "norm", it is the "basic model"; and therefore the mechanism "against which other methods are measured"[6]. Bearing this fact in mind, the role of consent in arbitration, should be explained in taking the litigation system as the basic model and comparing it with arbitration.

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[4] The expression "arbitration without privity" was first used by Jan Paulsson, Arbitration Without Privity, ICSID Review Foreign Investment Law Journal, Vol. 10 (1995), 232, p.232

[5] E.g., Richard D. Freer, *Introduction to Civil Procedure,* New-York, 2006, p.3.

[6] *Id*.

A claimant does not need to have the consent of the other party in order to initiate proceedings before a court. The claimant has the discretion to resort to domestic courts. However, a claimant who instead of bringing the case before a court wishes to submit the case to arbitration, does not have the sole discretion to resort to arbitration. In principal, in order to bring a case before an arbitral tribunal, "both" parties must agree to submit their disputes to arbitration. In other words, unlike the litigation mechanism, the arbitration mechanism can only be invoked by a claimant if the opposing party to the dispute agrees to let arbitrators resolve the dispute. This difference between litigation and arbitration rises out of the fact that unlike judges, arbitrators lack the power to make decision. While a judge of a court has the power to adjudicate because the State delegates this power to her, arbitrators, principally do not enjoy such a power, because the State does not delegate the power to adjudicate to arbitrators. However, parties to a dispute can, by virtue of consensus, vest arbitrators with the power to adjudicate. In other words, the source of the power of an arbitrator to adjudicate is the "*consent*" of the litigators. Thus a valid arbitration agreement is an "*essential prerequisite*[7]" for the "establishment of the jurisdiction" of an arbitral tribunal.

A consent to arbitrate expresses the voluntary agreement of the parties to refer their future or existing disputes to arbitration. However, in many cases the question of whether a consent to an arbitration agreement exists gives rise to conflicts. Since the jurisdiction of an arbitral tribunal depends on the existence and validity of the consent of both parties (claimant and defendant), the determination of whether the parties have agreed to arbitrate plays an essential role in arbitration. In many cases, it must first be determined whether enough evidence exists to deduct the intention of parties to arbitrate. This must, especially in the realm of investment arbitration, be done on a case by case basis, because in this realm, there are a large variety of forms to express consent to arbitration.

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[7] Report of Executive Directors of the International Bank*for Reconstruction and Development on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,* para. 25 *available at:* icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp [hereinafter Report of Executive Directors].

A Forms of Consent

In the realm of ***international commercial arbitration***, the traditional way to declare consent to arbitrate requires a "true contract" containing the parties consent to have their dispute resolved by arbitration[8]. However, in the realm of international investment arbitration, this traditional form is not required. The dissimilarity as to the form of consent to arbitrate is one of the aspects in which the substantial difference between international *commercial arbitration* and *investment arbitration* is to be observed[9].

In the realm of international investment arbitration there are three different forms which can be used to declare a consent to arbitrate. These can be listed as: 1) consent declared in a contract, 2) consent declared in national legislation, and 3) consent declared in a treaty[10]. Because this article focuses on the notion of arbitration without privity, following a brief description of the first two forms used to declare consent to arbitrate, the focus will be on consent declared by virtue of a treaty.

1. Consent Declared in a Contract

Like any other private party, a State acting in its private capacity, can give consent to arbitration by means of an arbitration agreement concluded directly between the investor and itself (or state-owned entity). This consent to arbitration is usually achieved through an arbitration clause in an investment contract between the host State and the investor (eg. concession agreement) which refers existing or future[11] disputes to arbitration.

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[8] Philippe Fouchard,*On International Commercial Arbitration*,Emmanuel Gaillard & John Savage (*eds.*), The Hague, 1999, p. 29

[9] Gus vanHarten, *Investment Treaty Arbitration and Public Law,* New York, 2007, p. 62-71.

[10] *Seeeg*. CristophSchreuer, *et al*, *The ICSID Convention,* Cambridge 2009, p.190, Nr.378; Ergin Nomer/Nuray Ekşi/Günseli Öztekin, *Milletlerarası Tahkim,*Istanbul 2003, p. 76; Cemal Şanlı, *Uluslararası Ticarî Akitlerin Hazırlanması ve Çözüm Yolları*, Istanbul 2011, p. 435

[11] For information regarding the debates between delegates while drafting the ICSID Con-

Consent declared in a contract differs in many ways from consent declared in a treaty. The main difference arises from the fact that, when consent to arbitrate is declared in a contract between the investor and host State, the parties who concluded the agreement and parties who will dispute before arbitrators will be the same[12]. On the other hand, if consent is declared in a treaty provision, the parties to the treaty (home and host-State of the investor) will be different than the parties who will dispute (investor and host State) before arbitrators. Thus, when consent is declared in a treaty, it is almost impossible to predict which of the many investors of a given home State, will raise a claim against the host State. Therefore, the impact of the consent declared in a contract is far more "predictable" and "manageable" than the consent declared in a treaty[13].

2. Consent Declared in National Legislation

In order to attract foreign investment, many countries, most of which were "developing or formerly socialist countries", passed laws to regulate the special treatment of investment[14]. For instance Art. 8(2) of the Albanian Law on Foreign Investment of 1993 provides as follows:

" ... the foreign investor may submit the dispute for resolution and the Republic of Albania hereby consents to the sunmission thereof, to the International Center for Settlement of Investment Disputes..."

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vention, on whether consent could be given for future disputes, see. Schreuer, *id.*, p. 192, Nr.383.

[12] E.g.,van Harten,*supra* note 9, p. 63; Nigel Blackaby, *Investment Arbitration and Commercial Arbitration*, in: *Pervasive Problems in International Arbitration* (LoukasMistelis& Julian D.M. Lew (eds.) 2006, p. 219.

[13] E.g., van Harten, *supra* note 9, p. 63.

[14] See, e.g., Bernardo Cremades, *Arbitration in Investment Treaties; Public Offer of Arbitration in Investment –Protection Treaties, in:* Robert Briner& L. Yves Fortier& Klaus Peter Berger& Jens Bredow(eds.), *Law of International Business and Dispute Settlement in the 21st Century, Liber Amicorum Karl Heinz Böckstiegel,* Köln, Berlin, Bonn, München 2001, p. 156; Moshe Hirsch,*The Arbitration Mechanism of the International Center for Settlement of Investment Disputes,* Dordrecht 1993, p. 51; İlhan Yılmaz,*Uluslararası Yatırım Uyuşmazlıklarının Tahkim Yoluyla Çözümü ve ICSID*, İstanbul 2004, p. 53-57.

The existence of a single law which regulates all aspects of foreign investment -such as conditions of entry, sectors open to foreign investment, performance requirements, and termination of foreign investment- enables investors to become familiar with the laws of foreign investment of a country more easily[15].

These laws usually include provisions which declare a reference to arbitration[16]. However, in cases where the text of the provision referring to arbitration does not contain explicit and unequivocal wording which clearly declares a consent to arbitrate[17], the mere reference to arbitration may not be held as binding upon the State[18]. Consent declared in a statute which is considered to be mandatory and binding upon the State, has some similarities to consent declared in a treaty. As will be explained infra[19], such consent must be combined with the consent of the investor in order to constitute an agreement to arbitrate[20].

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[15] Sherif H. Seid, *Global Regulation of Foreign Direct Investment*, Aldershot, Hampshire 2002, p. 34.

[16] The Report of the Executive Directors to the ICSID Convention explicitly mentions that a valid consent to arbitration may be given in a States' legislation: " …Thus a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Center, and the investor might give his consent by accepting the offer in writing", Report of Executive Directors,*supra* note 7 , para 24.

[17] For instance, the Turkish law on foreign direct investment contains a provision which sets forth that, for settlement of disputes arising from investment agreements, parties are entitled to apply to international arbitration, provided that the parties agreed thereon (Turkish Law on Foreign Direct Investment, Law no 4875, dated 5 June 2003 Article 3/e). This law explicitly indicates that, the law itself does not contain consent to arbitration, thus that a foreign investor by just invoking this law can not file a case against Turkey before an arbitral tribunal. Such a foreign investor can file a case against Turkey before an arbitral tribunal, if only consent to arbitration is recorded in another instrument

[18] *Eg*. Schreuer, *supra*note 10, p. 200.

[19] *See infra* text accompanying note 32.

[20] For a critique to this view *seeinfra*text accompanying note 33.

3. Consent Declared in a Treaty

Today, an arbitration clause in an investment treaty concluded between the host State and the home State of an investor is considered to be sufficient to be regarded as the consent of the host State to arbitrate[21]. As is going to be explained infra, no separate arbitration agreement between the host State and the investor is required for establishing the jurisdiction of the arbitrators.

II. The Notion of Arbitration Without Privity

The mechanism which enables the arbitrators to assert jurisdiction by implementing an arbitration clause in a treaty between the home and host State of the investor, is generally labeled as "arbitration without privity". The word "privity", defines relationship between persons who have a legal interest in the same right or property[22]. The reason that the mechanism, this article intends to explore, is labeled as "arbitration without privity" is that the mechanism is regarded as a deviation from the general rule of non liability to persons not in privity. This mechanism, actually allows the investor to invoke the arbitration provision of a treaty concluded between the home and host States of the investor, but to which the investor himself is not a party.

The first case in which an ICSID tribunal asserted jurisdiction on the basis of an arbitration clause in a BIT was the ***Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka***[23]case. In this case, the provision, on which the investor based her arbitration request was Article 8(1) of the BIT between the governments of Great Britain and Northern Ireland and Sri Lanka. This Article provided as follows:

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[21] *Seeeg*. Nomer/ Ekşi/ Öztekin, *supra*note 10, p. 76; Sanlı, *supra*note 10, Istanbul 2011, p. 435

[22] The Merriam- Webster Dictionary

[23] Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/87/3)[hereinafter AAPL v. Sri Lanka], available at:«http://icsid.worldbank.org/ICSID/FrontServlet».

> *'' Each Contracting Party hereby consents to submit to the International Center for the Settlement of Investment Disputes … for settlement by… arbitration… any legal disputes arising between that Contracting Party and a national or company of the other Contracting Party concerning investment of the latter in the territory of the former"*

The ICSID tribunal had to decide whether this provision could be considered as sufficient consent to arbitrate. To answer this question, the tribunal applied Art. 25 of the ICSID Convention which defines the notion of consent to arbitration. Art. 25 reads as: "*… the jurisdiction of the Centre shall extend to disputes, for which the parties to the dispute "**consent in writing**" to submit to the Centre"*. The term "*consent in writing*" is not defined in the ICSID Convention, but it is defined in the Report of the Executive Directors on the Convention. According to this Report, the Convention does not require that:

> *"… the consent of the both parties be expressed in a single instrument. Thus, a host State might in its **investment promotion legislation** offer to submit disputes arising out of certain classes of investment to the jurisdiction of the Center, and the investor might give his consent by accepting the offer in writing".*

As is to be seen, according to this Report, a host State can be deemed to have given "consent" to arbitration, if a provision of its "*legislation*" declares such consent; however in this report *''there is no mention that consent to arbitration could be given by a treaty provision"*[24]. The lack of any mention of consent declaration in a treaty may be explained by tracing back in the drafting history of the ICSID Convention. Noting that, "there is little reference to bilateral investment treaties in the travaux-preparatoires to the Convention", Schreuer in his Commentary on the ICSID Convention, describes that "at the time of the Conventions drafting, BITs had only just started to appear in State practice[25]". From this statement of the commentator, it can be understood that the drafters of the ICSID Convention must not have been able to even foresee that the

[24] Cremades, *supra* note 14,p. 158.

[25] Schreuer, *et al*,*supra* note 10, p. 210 ,para 285.

BITs soon would proliferate, and that one day, almost after 30 years, an ICSID tribunal would hold arbitration provisions in investment treaties as sufficient consent given by the home State. What the drafters of the ICSID Convention did not consider was probably not thought by States which signed investment treaties before 1991. Therefore inferring consent from arbitration clauses of such dated treaties are to be considered as overriding the will of the host State; and thus it does not seem wrong to assert that the ICSID tribunal which held jurisdiction over the *(AAPL) v. Republic of Sri Lanka* case, overrode the initial intent of the drafters of the ICSID convention[26]. After all "… ICSID's original purpose was to provide a contractual (not treaty based[27]) dispute resolution mechanism in state contracts"[28].

A. Clauses Which Lead to Arbitration Without Privity and the Problem of Manufacturing of Consent

Not all, but only adequate arbitration clauses in investment treaties, are held to be declarations of consent to arbitrate before an ICSID tribunal[29]. In order to define which arbitration clauses are adequate to be considered as a consent to arbitrate, Aaron Broches has categorized arbitration clauses in BITs under 4 groups[30]. Since then, many authors[31] refer to this categorization made by Broches. According to Brochers, arbitration clauses in investment treaties can be categorized as:

1- Treaty clauses that merely state that the dispute " shall, upon agreement by both parties be submitted to an ICSID tribunal"

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[26] E.g., Sornarajah,*supra* note 3, p. 132.

[27] *Explanatory parenthetical added by author*.

[28] Blackaby, *supra* note 12, p. 223, para 11-22.

[29] E.g., Aaron Broches, *Bilateral Investment Treaties and Arbitration of Investment Disputes*, in:*The Art of Arbitration: Liber Amicorum Pieter Sanders,* J. Schulz &A.J. van den Berg (eds.), Deventer, Frankfurt, 1982, p. 63; Paulsson, *supra* note 4, 236

[30] Broches,*supra*note29, p. 63.

[31] *See eg.*Yılmaz, *supra*note14, at 58-64.

2- Clauses which require "sympathetic consideration to a request for conciliation or arbitration by the Center".

3- Clauses requiring the host State "to assent to any demand on the part of the national to submit for conciliation or arbitration any dispute arising from the investment"

4- Clauses creating jurisdiction in the Center by giving consent in anticipation of the disputes

According to Broches, ***only the fourth type of treaty clause*** "*may*" be invoked by the investor to establish jurisdiction of the ICSID tribunal. Given that today ICSID tribunals automatically establish jurisdiction under the fourth type of arbitration clauses, at first sight, the cautiousness of Broches may seem to be surprising. However, taking into consideration that Broches wrote this Article in 1982, just at the beginning of the ''treatification''[32] period of investment policies, it may considered appropriate that Brochers took a cautious view.

B. The Mechanism of Arbitrationwithout Privity

In order to explain the mechanism of arbitration without privity, the majority view reveals that in order for an arbitration provision in a treaty to be considered to be binding for the State which is party to that treaty, it must be merged with the consent given by the investor[33]. This

[32] For the explanation of the term "treatification",*see* Jeswald Salacuse,*The Treatification of International Law: A Victory of Form over Life? A Crossroads Crossed?*,TransnationalDispute Management Journal, Vol. 3 (2006), at 3.

[33] *Eg*. Bernardo M. Cremades,*supra* note 14, p. 158; JulienFouret, *Denunciation of the Washington Conventionand Non-Contractual Investment Arbitration: "Manufacturing Consent" to ICSID Arbitration?*Journal of International Arbitration, Vol. 25 (2008), 71, p. 84; ''The parties in ICSID proceedings are always a state on one side and a foreign investor on the other. It is these two parties that must have consented. The ICSID Convention, when referring to consent to jurisdiction, stresses the element of mutual consent by the parties. The Preamble, in its paragraph 6, refers to mutual consent by the parties'' ChristophSchreuer, *Denunciation of the ICSID Convention and Consent to Arbitration*, in: *The Backlash Against Investment Arbitration*, (ed. Michael Waibel) The Netherlands, 2010, p.356.

view, by resembling the arbitration provision in a treaty to an offer to make an arbitration agreement, asserts that unless the investor accepts this offer, the State shall not be bound by the arbitration provision in the treaty. In other words, according to this view, the State, by embedding an arbitration clause in a treaty it concludes with another State, makes the investor an offer to make an arbitration agreement. If the investor accepts this offer, which she can do by just initiating a case before arbitral tribunals, than an arbitration agreement between the host State and the investor should be considered concluded[34].

This explanation on how arbitrators can establish jurisdiction without any arbitration agreement in traditional terms, has attracted reasonable critiques. The critics view explanations on consent of the investor as an effort to create the appearance of a "*classical agreement to arbitrate*[35]" and, therefore, they do not define the consent of the investor as a requirement for the conclusion of an arbitration agreement between the host State and investor. Rather consent of the investor is defined by the critics as "*acceptance of an opportunity provided by the state to foreign investors as a group*[36]".

In the present author's opinion, however, the *Plama v. Bulgaria*[37] decision demonstrates that the consent of the investor is not just to be regarded as an acceptance of an opportunity, but rather as a requirement for the conclusion of the arbitration agreement. This case was brought against Bulgaria under the Energy Charter Treaty (ECT), invoking the arbitration clause[38] of this treaty. Since Bulgaria was party to the ECT,

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[34] *Id.*

[35] vanHarten, *supra* note 9, p. 68.

[36] *Id.*

[37] PlamaConsortium Limited v. Republic of Bulgaria (ICSID Case No. ARB/03/24), Decision on Jurisdiction [hereinafter referred as Plama Decision], International Legal Materials (I.L.M.) Volume 44 (2005) at 721 available at: http://worldbank.org/icsid/cases/plama-decision.pdf.

[38] The relevant Art. 26/4 of the ECT reads as follows:

In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

there was no debate on the consent of the respondent, namely Bulgaria, to arbitrate. On the contrary, the debate regarded the consent of the claimant. The respondent alleged that the consent to arbitration was not given by persons who were entitled to act in the claimant's name[39]. Thus, in the Plama v. Bulgaria case, the question of whether the claimant had properly declared consent to arbitration played a significant role for asserting jurisdiction. Although the tribunal in this case dismissed the allegations of the respondent on grounds that the relevant person who gave consent in the claimant's name was duly authorized to do so, this case is important in that it stresses the significance of the consent of the investor.

C. The Notion of Arbitration Without Privity Viewed Fromthe Perspective of Thewithdrawalsfromthe Icsid Convention

The explanations on how the mechanism of the notion of ''arbitration without privity'' works, has become very important for assessing the impact of the withdrawals from the ICSID Conventions. The core

(a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or

(ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

[39] Plama Decision, *supra* note 37, at para 83.

question is whether investors relying on the arbitration provisions in investment treaties can still initiate cases before ICSID tribunals, against host States which have already withdrawn from the ICSID Convention.

The meaning of the investor's consent in ICSID arbitration has become an important issue since the withdrawals of Bolivia[40] and Ecuador[41] from the ICSID Convention. Some commentators such as Emmanuel Gaillard[42] and Fernando Matilla-Serrano[43], partners with the international group at the law firm Shearman and Sterling, argue that regardless of Bolivia's and Ecuador's withdrawal from the ICSID Convention, these States are still bound to their commitments in the investment treaties. According to this view, investment treaties are unilateral consents binding States, and thus enable investors covered by them, to continue to bring suit against Bolivia and Ecuador.

However, according to the opposite view[44], which in the present author's opinion is more appropriate, an arbitration provision in an investment treaty shall be considered to be binding upon the host State only after the investor has declared consent to arbitration[45]. Once the

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[40] The World Bank received a written notice of denunciation of the ICSID Convention from the Republic of Bolivia on May 2, 2007. In accordance with Article 71 of the ICSID Convention the denunciation has taken effect on November 3, 2007, *See* List of Contracting States and Other Signatories of The Convention (as of May 5 2011) avaible at: «www.icsid.worldbank.org»

[41] The World Bank received a written notice of denunciation of the ICSID Convention from the Republic of Ecuador on July 6, 2009. In accordance with Article 71 of the ICSID Convention the denunciation has taken effect on January 7, 2010, *See* List of Contracting States and Other Signatories of The Convention (as of May 5 2011) avaible at: «www.icsid.worldbank.org»

[42] Emmanuel Gaillard, *The Denunciation of the ICSID Convention*,New York Law Journal, June 26 (2007), avaible at: «www.shearman.com/files/Publications».

[43] See, Damon Vis-Dunbar & Luke Eric Peterson, *Bolivia Notifies World Bank of Withdrawal from ICSID, Pursues BIT Revisions*, Investment Treaty News May 9, 2007, avaible at: «www. iisd.org/investment/itn».

[44] Eg.,Fouret, *supra* note 33, p. 84.

[45] The history of the ICSID Convention approves this approach as well. While drafting Art 72 (then Art.73), a question of whether a subsequent withdrawal from the Convention by a State before any claim had been in fact submitted to the Centre, would still compel the State to accept the jurisdiction of the Centre was answered by Mr. Broches.

investor accepts the State's offer to arbitrate, the State cannot withdraw the offer it has made[46]. However, until the investor accepts the State's offer to arbitrate, the State can, then, withdraw the offer. Thus, despite the fact that an investor can declare her consent to arbitration by initiating proceedings, it is ''inadvisable for an investor to rely on an ICSID consent clause contained in a treaty without making a reciprocal declaration of consent[47]''.

Due to the fact that no consent to arbitration will exist until the investor initiates proceedings, and by the time an investor initiates proceedings against Bolivia or Ecuador these States will already not be party to the ICSID Convention, ICSID tribunals shall not have jurisdiction over proceedings initiated against Bolivia and Ecuador after the denunciation of the ICSID Convention by these States take effect.

The question of whether the investors, who, before Bolivia and Ecuador withdrew from the ICSID Convention, have accepted these States' offer to arbitrate can still refer disputes to arbitration, must be answered positively. In fact, the answer to this question can be inferred from Art. 72 of the ICSID Convention.This Article states explicitly that rights and obligations under the Convention arising out of the State's consent given before receipt of a denunciation shall remain unaffected by that denunciation. At this point it is noteworthy that, Art. 72 of the ICSID Convention refers to cases where consent to arbitration exists. Thus, Art. 72 cannot be invoked in cases where the investor's approval of the State's

In this answer he said that: *" a general statement (as to arbitration) would not be binding on the State which had made it until it had been accepted by an investor. If the State withdraws its unilateral statement by denouncing the Convention before it has been accepted by any investor, no investor could later bring a claim before the Center. If however, the unilateral offer of the State has been accepted before the denunciation of the Convention, then disputes arising between the State and the investor after that date of denunciation will still be within the jurisdiction of the Center"*; History of the ICSID Convention, Vol. II. Part 2.

[46] ''This new world of arbitration is one where the claimant need not have a contractual relationship with the defendant and where the tables could not be turned'', Paulsson, *supra* note 4, 232.

[47] Schreuer, *supra*note 33, p. 363.

offer to arbitrate is missing, because in such a case the sole existence of the State's offer to arbitrate will not constitute consent to arbitrate[48].

Conclusion

To infer consent to arbitration by means of the so called notion "arbitration without privity", has developed a commonplace usage today. Thus, negotiators to investment treaties today, compose dispute resolution clauses, which they intend to embed in the treaty, being conscious of the impact of this notion. However, the same is not true for dispute resolution clauses embedded in treaties concluded before this notion was first applied in the AAPL v. Sri Lanka case in 1991. Even negotiators to the ICSID Convention did not foresee that arbitration clauses in investment treaties could be considered as the host States' unilateral offer of consent to arbitrate, which can be deemed to be perfected by investors when they submit a dispute to arbitration. The dispute resolution clauses of the investment treaties concluded before 1991 have been designed without considering the possibility that the arbitration clause in the treaty could be held as the States unilateral offer of consent to arbitration. Therefore inferring consent from arbitration clauses of such old treaties could be regarded as overriding the will of the host State.

Despite the fact that the notion of arbitration without privity has been applied since 1991, the dispute on how the mechanism of this notion is to be explained has not been settled yet. Contrary to this, due to the withdrawals of Ecuador and Bolivia from the ICSID Convention, explanations on how the mechanism of the notion of "arbitration without privity" works, has in the last five years become more important than ever. This is because the answer to the question of whether investors can still initiate proceeding against these countries before arbitral tribunals lies in the explanation on how the mechanism of the notion of arbitration without privity works.

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[48] See, Shreuer, *supra*note 33, p. 364.