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LIST OF ABBREVIATIONS

art./arts.	Article/Articles
BIT(s)	Bilateral Investment Treaty/Treaties
CJEU	Court of Justice of the European Union
EU	European Union
Ibid.	Ibidem (in the same place)
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ISDS	Investor-state dispute settlement
p./pp.	page/pages
para./paras.	paragraph/paragraphs
SCC	Stockholm Chamber of Commerce
TIP(s)	Treaties with Investment Provisions
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties

INTRODUCTION

The International Centre for Settlement of Investment Disputes represents specialised international arbitration forum designated for resolving international investment disputes between the states and foreign investors. The underlying concept of the ICSID is to encourage the promotion and protection of the foreign investment flows across the world. Resolving of international investment disputes requires balancing of the divergent interests of the host states and foreign investors, as any type of investor-state dispute settlement mechanism is inherently concerned with complex asymmetrical legal relationships. The predominantly used type of ISDS mechanism are ICSID arbitrations proceedings, available to the states via accession to the ICSID Convention. The investment disputes under ICSID arbitration proceedings are associated with application of bilateral and multilateral treaties providing for the protection of foreign investments. With regard to the voluntary nature of the arbitration proceedings and mutual influence of international treaties governing the substantive a procedural investment protection, the jurisdiction of the ICSID arbitral tribunals is subject to various conditions and requirements that need to be satisfied in every particular ICSID arbitration proceedings.

In 2007 the Republic of Bolivia denounced the ICSID Convention, triggering the wave of denunciations followed by Ecuador in 2009 and Bolivarian Republic of Venezuela in 2012. The expressed displeasure of the states in Latin America towards the ICSID system stemmed from steady increasing number of ICSID arbitral awards rendered in favour of the foreign investors and general desire to prevent initiation of new ICSID arbitration proceedings. However, such unilateral release from the ICSID system gave rise to significant discrepancies regarding the process of denunciation of the ICSID Convention and its effects on jurisdiction of ICSID Tribunals. In both legal theory and practice distinct interpretation approaches emerged resulting either in allowing the host state to release from jurisdiction of the ICSID Centre and thus deprive the foreign investor of arbitration forum or compelling the host state to submit to the jurisdiction of the ICSID Centre and face the responsibility for its actions.

Following the wave of denunciations of the ICSID Convention, the same states in the Latin America unilaterally terminated the Bilateral Investment Treaties providing the substantive and procedural protection of foreign investments. Similarly to the denunciations of the ICSID Convention, different views and approaches emerged towards the effects of unilateral termination of BITs on the jurisdiction of the ICSID Tribunals. In light of the

recent changes in procedural investment protection regime within the territory of the European Union, particular legal issues arisen in connection with consensual termination of BITs and its effects on jurisdiction of the ICSID Centre. The multilateral agreement for termination of all of the BITs concluded between the member states of the European Union significantly adversely affected the access of the foreign investors to the ICSID arbitration forum including highly disputed retrospective impacts.

Both unilateral and consensual termination of international investment agreements represents significant intervention into the procedural protection of foreign investment. Termination of the ICSID Convention or respective BITs may result in potential evasion of responsibilities of the host state arising from his unlawful conduct and includes high risk for the foreign investors in losing the ability to have their investment claim heard in ICSID arbitration forum. The effects of termination on the jurisdiction of the ICSID Centre vary in relation to different types of termination, nature of the particular investment agreement and existence of specific type of clauses incorporated into the BITs. The purpose of this study is to firstly elaborate on provided consents of the parties to ICSID arbitration proceedings, the essential requirement for establishment of jurisdiction of any ICSID Tribunal. Subsequently the study analyses termination of international investment agreements with special emphasis put on distinct effects of denunciation, unilateral and consensual termination of the ICSID Convention and the BITs on the jurisdiction of the ICSID Tribunals.

1. METHODOLOGY

1.1. Research questions

International Centre for Settlement of Investment Disputes (ICSID) provides institutional and procedural framework for arbitration and conciliation proceedings in disputes between host states and private foreign investors. ICSID represents dominant arbitral forum in the area of investor-state dispute settlement (ISDS)[1]. Since the establishment of ICSID in 1966, the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States[2] (ICSID Convention) has been ratified by 155 Contracting States[3]. Given its specific institutional and procedural framework stemming from multilateral treaty regime, ICSID arbitration proceedings are subject to distinctive jurisdictional conditions.

As many other multilateral treaties, the ICSID Convention offers mechanism for the Contracting State to denounce the ICSID Convention. Such sovereign act of the host state, however, may have serious implications on jurisdiction of the ICSID Tribunal in particular investment dispute. Given contradictory wording of the ICSID Convention provisions governing the process of denunciation, neither academics nor judiciary possess unified views on when the denunciation takes effect and whether the jurisdictional requirements are satisfied. The ICSID Convention introduces six-month time lag[4], of which interpretation resulted in contradictory decisions of ICSID Tribunals, as to whether the investor's claim fall within the jurisdiction of the Centre. Based on such theoretical discrepancies, conclusions as to whether the jurisdiction of ICSID Tribunal is established may vary with regard to distinctive approaches analysed in three periods of time, *i.e.* prior to six-month time lag, throughout its duration and after the time lag elapses. The question therefore arises, within which stated periods of time can be jurisdiction of the ICSID Tribunal established, regardless of host state denunciation of the ICSID Convention.

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1 UNCTAD (2020). *Investment dispute settlement navigator. Arbitral rules and administering institution* (https://investmentpolicy.unctad.org/investment-dispute-settlement, last accessed on 16 November 2020).

2 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed 18 March 1965, in force 14 October 1966.

3 International Centre for Settlement of Investment Disputes (2020). *Resources. Rules and Regulations* (https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview, last accessed on 15 November 2020).

4 The ICSID Convention, art. 71.

In addition to mere denunciation of the ICSID Convention, other factors and acts of the host state may adversely affect jurisdiction of the ICSID Tribunal. In cases where investor's claim stems from violation of Bilateral Investment Treaty (BIT) concluded between host state and home state of the investor, jurisdiction of the ICSID Tribunal is also subject to another jurisdictional requirements originating from particular BIT. As any other contracting party, the host state has a right to terminate the BIT. Such unilateral termination of BIT is governed by provisions of investment treaty itself and may trigger various implications dependent on specific types of clauses contained in BIT. Apart from unilateral termination of BIT, the host state may enter into agreement with home state of the investor to consensually terminate BIT. Even though these two acts of the host state appear to have similar consequences, their impact on jurisdiction of the ICSID Tribunal in particular investment dispute may be entirely different. Such considerations give rise to a question, whether consensual or unilateral termination of BIT by the host state may have adverse effect on ICSID jurisdiction and therefore deprive the investor of ICSID arbitral forum in particular dispute. It is common practice for BITs to contain standard clauses aiming to secure the same purpose, such as so-called sunset clauses. As existence of such clauses in the BIT may significantly influence the outcomes of a research, reasonable amount of discussion will be given to stated type of clauses and its effects on ICSID jurisdiction as well.

In view of all introduced discrepancies, the aim of this thesis is to assess and answer following questions:

1. What are the requirements and conditions for establishment of the jurisdiction of the ICSID Tribunal a what type of clauses in the BITs may adversely affect the jurisdiction?
2. When and under what circumstances does the ICSID Tribunal have jurisdiction over the investment dispute if the host state denounces the ICSID Convention?
3. What effect does have the unilateral and consensual termination of the BIT on jurisdiction of the ICSID Tribunal?

1.2. Sources and method

In order to answer stated research questions, the study firstly resorts to primary sources of international public law. This study provides for legal analyses and assessments of multilateral and bilateral international treaties related to ICSID arbitration and investment

protection, as well as procedural rules of selected arbitral institutions. Legal analyses further elaborated also stem from relevant decisions of international arbitral tribunals and international courts, whose decisions had been concerned with denunciation and termination of international treaties, ICSID jurisdiction and investment disputes as such. Besides the international treaties and case law, the study elaborates relevant international customs.

The legal analyses provided in the study are further supplemented with publications, commentaries and academic articles of internationally renowned experts in the field of international investment law and investment arbitration. Despite smaller range of case law dealing with jurisdictional implications of termination of international investment agreements, there is significant inconsistency in the ICSID Tribunals' rulings. Even though there is considerable amount of academic articles elaborating contradicting decisions of the ICSID Tribunals, such academic articles focuses solely on denunciation of the ICSID Convention or unilateral termination of BIT. As there is no publication that would comprehensively elaborate jurisdictional implications of termination of international investment agreements by the host state, this thesis aims to provide legal analysis of both unilateral and consensual termination of the ICSID Convention and BIT, accompanied by analyses of selected types of standard BIT clauses and their effect on ICSID jurisdiction.

For the research questions to be promptly assessed and answered, this study relies on method of analysis[5] in cases of examination of multilateral and bilateral treaty provisions and decisions of arbitral tribunals and international courts. In order to assess coherence or inconsistency of arbitral tribunals' decisions and reasonings related to similar factual and legal backgrounds, the method of synthesis[6] is applied. Further the thesis uses the method of deduction[7] when applying the academic legal theory in particular model scenarios, and also the method of generalisation[8] when confronting particular reasonings of arbitral tribunals with academic legal theory. The method of comparison[9] can be also found in this study, particularly in assessment of different types of arbitration proceedings.

With regard to the terminology, in the interest of clarity it should be noted that whenever the study refers to "termination", such term covers both denunciation of the ICSID

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5 KNAPP, Viktor (2003). *Vědecká propedeutika pro právníky* (Praha: Eurolex Bohemia), p. 75.

6 *Ibid.*

7 *Ibid.*, p. 74.

8 *Ibid.*, p. 72.

9 *Ibid.*, p. 87.

Convention as well as unilateral and consensual termination of the BIT. Should the text apply solely to one of the stated forms of termination, the study will indicate otherwise. The term "international investment agreements" is comprised of both BITs as well as the ICSID Convention. When the analysis shall refer solely to the ICISD Convention or the BITs as such, this paper will expressly indicate so.

1.3. Structure of the study

The paper is comprised of four chapters. The first chapter introduces the topic of the thesis and presents three research questions concerned with the jurisdictional requirements and conditions, termination of international investment agreements by the host state and its jurisdictional implications. The first chapter further describes the primary and secondary sources of international law on which the study relies on, followed by the description of scientific methods being used for legal analyses. The final parts of the first chapter deal with structure of the study and limitations of the paper.

The second chapter provides for definition part of the paper that elaborates crucial legal institutes, such as denunciation, unilateral and consensual termination and jurisdictional requirements, with regard to particular significance they have in international investment arbitrations. The aim of the second chapter is to establish a framework of legal institutes, of which variations and correlations with particular international investment agreements are subject of subsequent chapters of the thesis.

The third chapter addresses the first and second research question. The first research question addresses the requirements and conditions of the jurisdiction of the ICSID Tribunal together with analysis of standardised types of BIT clauses capable to adversely affect the jurisdiction. The second research question elaborates the implications of denunciation of the ICSID Convention by the host state on jurisdiction of the ICSID Tribunal in particular investment dispute. The first section referring to situations prior to denunciation of the ICSID Convention is followed by three sections analysing the aftermath of denunciation of the ICISD Convention by the host state.

The chapter number four is devoted to the third research question and therefore elaborates the effects of unilateral and consensual termination of the BIT on jurisdiction of the ICSID Tribunal. As termination of the BIT is generally governed by the provisions of the BIT itself, for the purposes of proper legal analyses this chapter further deals with so-called sunset clauses provisions, that are frequently used in the BITs.

Following the end of the chapter four, the conclusion summarises all of the findings and answers to the analysed research questions.

1.4. Limitations of the study

Disputes between host states and private foreign investors arising from violation of international investment agreements may be resolved before various arbitral institutions[10]. Given the specific nature of ICSID arbitral forum and its popularity, the study is limited to ICSID Convention arbitration proceedings.

Even though there are different legal instruments that may give rise to initiation of the ICSID Convention arbitration proceedings[11], with regard to the topic of this thesis, the study is limited to proceedings initiated through international investment agreements[12], with specific focus on the BITs. Another reason for this limitation is that the majority of the disputes under ICSID Convention arbitration proceedings are initiated through international investment agreements[13].

The implications of termination of international investment agreements could be of various types. This thesis focuses solely on jurisdictional implications, in particularly jurisdiction *ratione temporis* and *ratione voluntatis*. Implications on jurisdiction *ratione materiae* and *ratione personae* are not subject of this study, since termination of international investment agreements does not have significant effect on such categories of jurisdictional requirements.

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[10] *E.g.* International Centre for Settlement of Investment Disputes (ICSID), International Chamber of Commerce (ICC), The Arbitration Institute of the Stockholm Chamber of Commerce (SCC), The London Court of International Arbitration (LCIA).

[11] The ICSID Convention arbitration proceedings may be based on international investment agreements, national legislation of the host state or direct agreement between foreign investor and host state.

[12] For the purposes of this paragraph solely, the term "international investment agreements" refers both to BITs and TIPs.

[13] International Centre for Settlement of Investment Disputes (2020). *The ICSID Case Load – Statistics*. Issue 2020-2 (https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282020-2%20Edition%29%20ENG.pdf, last accessed on 22 November 2020), p. 11.

2. DEFINITION OF LEGAL INSTITUTES

2.1. ICSID Convention arbitration proceedings

The foreign investment process is inherently accompanied by divergent interests of foreign investors and host states. The investor's interest in generating profits on one hand and host state's interest in strengthening its economic development on the other, may collide and subsequently result in investment dispute. Initially, foreign investors did not have other choice than to have their investment dispute resolved within the instruments offered by host state's national law. Besides national law, foreign investors could have requested their homes states for diplomatic protection, as type of protection available within the area of public international law. Such diplomatic protection, however, could have never been able to provide sufficiently effective protection of investors' private interests, as diplomatic dialogues are by their very nature usually led within the interests of the home state itself.[14]

The underlying idea of establishment of the ICSID in 1966 was to introduce another platform for foreign private investors for settlement of their investment disputes with host states. The ICSID aims to provide credible device for resolving of potential investment disputes, encouraging the foreign investor in his initial investment decisions. Option to submit claim to independent international tribunal often serves as a safeguard of investor's legal certainty and therefore plays crucial role in general world-wide promotion and protection of the foreign investment.[15]

The ISDS may take various forms of alternative dispute resolution, such as negotiation, mediation, conciliation and arbitration.[16] The ICSID Convention arbitration proceedings, representing one of the most common used mechanism of ISDS, are arbitral proceedings resolving disputes between host states and private foreign investors. Arbitration within the ICSID system denotes *sui generis* regime characterised by strong independence from national legal systems of involved states, particularly with regard to conduct

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[14] GARCÍA-BOLÍVAR, Omar E. (2004). *Foreign Investment Disputes under ICSID. A Review of its Decisions on Jurisdiction.* The Journal of World Investment & Trade, Vol. 5, No. 1, p. 189.

[15] SUBEDI, Surya P. (2008). *International Investment Law: Reconciling Policy and Principle* (Oxford: Hart Publishing), pp. 30-31.

[16] GARCÍA-BOLÍVAR, Omar E. (2004). *Foreign Investment Disputes under ICSID. A Review of its Decisions on Jurisdiction.* The Journal of World Investment & Trade, Vol. 5, No. 1, p. 187.

of the arbitral proceedings itself and review of issued arbitral award.[17] The ICSID Convention arbitration proceedings are governed by the ICSID Convention, the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings[18], the Rules of Procedure for Arbitration Proceedings[19] and the Administrative and Financial Regulations[20].[21]

Similarly to other forms of alternative dispute resolution, the essence of ICSID Convention arbitration proceedings is the valid consent of parties to have their dispute submitted and resolved by independent arbitral Tribunal. Consent to arbitrate of a host state and an investor may take various forms and usually is not even contained in one single document, but rather inferred from combination of specific provisions and conduct of parties involved. In the area of ISDS, three types of legal instruments are commonly used to provide consent to arbitrate within its provisions. Such legal instruments are international investment agreements (such as BITs or TIPs), national legislation of the host state and direct agreement concluded between the foreign investor and the host state.[22] According to up-to-date statistics, seventy-six percent of the ICSID Convention arbitrations are based on international investment agreements provisions, sixteen percent arise from direct agreement between the host state and the foreign investor, and eight percent emerge from provisions contained in national legislation of the host state.[23] Since this study limits itself to the ICSID Convention arbitrations based on international investment agreements provisions, the elaboration in further paragraphs is restricted to consent to arbitrate enshrined in BITs and TIPs.

The aim of international investment agreements is to provide for effective protection of foreign direct investment. In order for such investment protection to be sufficiently

[17] DOUGLAS, Zachary (2009). *The International Law of Investment Claims* (Cambridge: Cambridge University Press), pp. 120-121.

[18] Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (2006).

[19] Rules of Procedure for Arbitration Proceedings (2006).

[20] Administrative and Financial Regulations (2006).

[21] International Centre for Settlement of Investment Disputes (2020). *Services. Arbitration. Overview of an Arbitration-ICSID Convention* (https://icsid.worldbank.org/services/arbitration/convention/process/overview, last accessed on 25 November 2020).

[22] SCHREUER, Christoph (2005). *Consent to Arbitration* (updated 02/2007). Transnational Dispute Management, Vol. 5 (www.transnational-dispute-management.com/article.asp?key=555, last accessed on 27 November 2020), p. 1.

[23] International Centre for Settlement of Investment Disputes (2020). *The ICSID Case Load – Statistics*. Issue 2020-2 (https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282020-2%20Edition%29%20ENG.pdf, last accessed on 26 November 2020), p. 11.

enforceable, the international investment agreements typically provide for dispute resolution mechanism, most commonly in a form of an arbitration clause incorporated within its wording. Given the voluntary nature of alternative dispute resolution, a consent given by both parties to arbitration is an essential requirement that need to be satisfied in any arbitration proceedings. As the international investment agreements are concluded between the home state of the investor and the host state, in which the investment was made, the particular arbitration clause is agreed upon between the contracting states to the international investment agreement. However, the parties of any potential investment dispute arising out of such investment agreement are the investor, as private person, and the host state, in which the investor has made his investment. Therefore, any international investment arbitration proceedings based on arbitration clause incorporated in particular investment agreement is inherently concerned with a special phenomenon, in legal theory known as *arbitration without privity*[24].

International investment agreements are instruments governed by public international law, setting the regimes of investment protection. Nevertheless, the principal beneficiary of an investment agreement is not any of the contracting states, but rather the investor himself, as a private person. Thus, in case of arbitration without privity it is not necessary for the claimant to be in a contractual relationship with the respondent. Furthermore, the breach of international investment agreement, concluded under the rules of public international law, further resolved in arbitration proceedings results in an issue of civil or commercial award. Such dichotomy between public and private international law denotes a significant feature of investment arbitrations, which secures the genuineness and clarity of the claim by allowing the injured private person to bring the claim against the host state responsible for the breach of investment agreement obligation.[25]

With regard to the voluntary consensual nature of arbitration, the presence of agreement to arbitrate between the parties to the investment dispute represents fundamental requirement that need to be satisfied. Given the *sui generis* nature of investment disputes indicated above, the legal analysis of consent to arbitrate given by both parties to the dispute is based on offer and acceptance model, a typical instrument of civil and commercial law. Depending on the particular wording used in investment agreement, the host state usually make

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[24] Term used in PAULSSON, Jan (1995). *Arbitration Without Privity.* ICSID Review - Foreign Investment Law Journal, Vol. 10, No. 2, p. 232-257.

[25] *Ibid.*, pp. 232, 256.
DOUGLAS, Zachary (2009). *The International Law of Investment Claims* (Cambridge: Cambridge University Press), pp. 6-7.

an offer to arbitrate any dispute arising out of the investment agreement in prescribed forum, and such offer need to be subsequently duly accepted by the investor, a national of another contracting state to the investment agreement.[26] However, application of the offer and acceptance model in disputes concerned with public international law element entails specific features and peculiarities, as opposed to offer and acceptance model used in traditional civil and commercial legal matters. Specifics of offer and acceptance mechanism in investment arbitrations based on international investment agreements will be elaborated in subsequent chapters of this study.

The public international law aspects of investment arbitrations are even more noticeable with regard to ICSID Convention arbitration proceedings. The ICSID Convention is multilateral international treaty, concluded and legally effective in conformity with applicable rules of public international law. The signatory member states of the ICSID Convention are subsequently acting either as respondents or home states of the claimant in particular ICSID arbitration proceedings. Such interconnection between membership in ICSID Convention and position of a party to arbitration proceedings has effect on distinctive jurisdictional requirements, that need to be satisfied in order to establish jurisdiction of the ICSID Tribunal in any particular case. Jurisdictional requirements peculiar to ICSID arbitration proceedings based on international investment agreements will be examined in depth in following chapters of the study.

In general, jurisdiction of the ICSID Tribunal need to be assessed in three basic perspectives, *i.e. ratione materiae, ratione personae* and *ratione temporis*. The jurisdiction *ratione materiae* examines the type of the investment subject to the dispute, *i.e.* the object of the claim. The jurisdiction *ratione personae* relates to the eligibility of the national bringing the claim to investment arbitration. In assessment of jurisdiction *ratione temporis,* the Tribunal considers whether the concerned investment agreements are in force and therefore in effect as of providing investment protection invoked by claimant.[27] In addition to stated perspectives, the ICSID Tribunal has to analyse, whether the consent to arbitrate was given on behalf of both parties to the investment dispute. The ICSID Tribunals also refer to the requirement of consent

[26] SCHREUER, Christoph (2005). *Consent to Arbitration* (updated 02/2007). Transnational Dispute Management, Vol. 5 (www.transnational-dispute-management.com/article.asp?key=555, last accessed on 27 November 2020), pp. 6-7.

[27] DOUGLAS, Zachary (2009). *The International Law of Investment Claims* (Cambridge: Cambridge University Press), p. 144.

as jurisdiction *ratione voluntatis*[28], highlighting the essentiality of this requirement to be fulfilled in any ICSID arbitration proceedings. With regard to the topic of the thesis, this study will not provide deeper analysis of jurisdiction *ratione materiae* and *ratione personae*. Since principal jurisdictional matters associated with termination of international investment agreements are jurisdiction *ratione temporis* and *ratione voluntatis*, these jurisdictional requirements will be subject to extensive legal analysis in subsequent chapters of the study.

2.2. Termination of the international investment agreements

International treaties are considered the primary source of public international law. The VCLT[29] defines an international treaty as a written agreement concluded between States or international organizations governed by international law, regardless its designation.[30] International treaties may take form of bilateral or multilateral agreements, where multilateral treaties represent modern and unique legal instruments, regulating large areas of international relations. Among other sources of public international law, international treaties are significant for its considerable higher degree of legal certainty, constituting strong stabilisation element of international relations.[31] In an international treaty, the contracting parties by meeting of their wills establishes particular mutual rights and obligations, and thus create a specific 'particular international law' governing relation between those contracting parties. Essential to any agreement is an interlock of consents fuelled by parties' intention to oblige themselves and subsequently commit themselves to fulfil the provisions of the treaty. [32]

Similarly to contracts concluded under private law, the autonomy of contracting parties in the domain of public international law became a principal attribute to any international treaty, enabling the parties to tailor their contractual rights and obligations as they see fit. With regard to stressed autonomy principle, the vast majority of the VCLT rules

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[28] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20*, Award of the Tribunal, 26 April 2017, para. 101.

[29] Vienna Convention on the Law of Treaties, signed 23 May 1969, in force 27 January 1980.

[30] The VLCT, art. 2(1)(a).

[31] KOLB, Robert (2016). *The Law of Treaties*: *An Introduction* (Cheltenham: Edward Elgar Publishing), pp. 1, 3-4.

[32] *Ibid.*, pp. 8, 16.

have residual character, *i.e.* its application is limited to cases where the contracting parties did not set different rules or where the treaty provisions remain silent. However, some VCLT rules cannot be derogated by the virtue of parties' autonomy, such as *pacta sunt servanda* principle.[33] The VCLT defines *pacta sunt servanda* rule as obligation put on contracting parties to be bound by the treaty in force and to perform the treaty in good faith.[34] Alongside with principle of voluntary consent and good faith, *pacta sunt servanda* principle is considered to be a cornerstone of law of treaties.[35] The ICJ in its decision *Nuclear Tests*[36] elaborated the relationship between *pacta sunt servanda* principle and good faith, arriving at a conclusion that principle of good faith represents the foundation of *pacta sunt servanda*. Principle of good faith and *pacta sunt servanda* both govern existence and binding nature of legal obligations, since they embody trust and confidence into international relations.[37] Since *pacta sunt servanda* takes form of the general principle of international law, the parties to the agreement cannot consensually revoke its application. *Pacta sunt servanda* is therefore immune from any such consensual derogation based on parties' discretion.[38]

However, the *pacta sunt servanda* principle does not apply without any limitations. Art. 26 of the VCLT restricts the application of the principle only to treaties in force. The aim of such limitation resides in intention to specify the time period in life of a treaty, during which the principle shall apply. Following logical interpretation, the principle ceases to apply at the exact moment, when the treaty ceases to be in force. In general, a treaty ceases to be in force at the exact moment of its termination[39], that has been conducted lawfully in accordance with respective provisions of the VCLT.[40]

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[33] *Ibid.*, p. 28.

[34] The VLCT, art. 26.

[35] DÖRR, Oliver, SCHMALENBACH, Kirsten (2012). *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer-Verlag Berlin Heidelberg), p. 427.

[36] *Nuclear Tests* (*New Zealand v France*), Judgement of 20 December 1974, ICJ Rep 457.

[37] *Ibid.*, para. 49.
DÖRR, Oliver, SCHMALENBACH, Kirsten (2012). *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer-Verlag Berlin Heidelberg), p. 435.

[38] DÖRR, Oliver, SCHMALENBACH, Kirsten (2012). *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer-Verlag Berlin Heidelberg), p. 437.

[39] Apart from termination, a treaty also ceases to be in force once it becomes invalid or inoperable. Given the topic of this study, issues on invalidity and inoperability of the treaties will not be further elaborated.

[40] VILLIGER, Mark Eugen (2009). *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff Publishers), p. 365.

The treaty bonds, that have obligatory nature resulting from the application of *pacta sunt servanda* principle, may be unbound by way of lawful termination. Both legal theory and practice distinguish between different types of treaty termination. The term 'termination' is used as general designation for all types of treaty termination, irrespective of whether the act of termination causes extinction of the particular treaty as such or leads merely to suspension or withdrawal of one party from the application sphere of the treaty.[41] From another point of view, a treaty termination may be differentiated based on circumstance, whether intention to terminate derives from unilateral expression of will made by one party to the treaty or consensual meeting of parties' wills to jointly terminate the treaty by concluding an agreement on termination. With regard to the topic of this study, further elaborations will be focused on types of treaty termination based on latter distinction, *i.e.* unilateral termination and consensual termination. Termination of international investment agreements analysed from this particular perspective provides clear starting point for further elaborations dedicated to jurisdictional requirements affected by termination.

2.2.1. Unilateral termination of the international investment agreements

Unilateral termination of a treaty by its nature emerges from unilateral expression of will. All types of unilateral termination of treaties are therefore concerned with a discrepancy consisting in termination of multilateral rights and obligations by way of exercising a unilateral power. Therefore, the existence of rights and obligations stemming from the parties' treaty bonds is contingent on stand-alone decision made by one single party. Such unilateral exercise of power has enormous effect on obligations of other parties to the treaty and thus collides with *pacta sunt servanda* principle. Such collision may have a great negative impact on legal certainty in international relations, where treaty obligations constitute the backbone of public international law. For these reasons, public international law to imposes necessary limitations on unilateral termination of treaties.[42]

Considering a great impact of unilateral termination on concluded treaty obligations between the parties, the question may arise, under what circumstances should be the unilateral termination of treaty allowed under international law. Once the parties have consensually agreed on conclusion of the treaty, a preferred way to bring the treaty rights and obligations

[41] KOLB, Robert (2016). *The Law of Treaties*: *An Introduction* (Cheltenham: Edward Elgar Publishing), p. 206.

[42] *Ibid*., pp. 206-207.

to an end should be a consensual termination, *i.e.* by concluding agreement on termination. However, particular extraordinary circumstances may occur, under which it would be unjust for the party to not have a possibility to unilaterally terminate the treaty. To safeguard fairness a reasonableness in such exceptional circumstances, the international law provides special group of rules entitling the party to unilaterally terminate the rights and obligations arising out of the treaty. Legal rules related to unilateral termination in public international law are divided into two categories based on the source of their incorporation.

First category consists of rules prescribed in provision of the particular treaty. By concluding particular treaty with provisions governing its unilateral termination, the parties to the treaty anticipated occurrence of circumstances that may result in party's decision to unilaterally terminate its rights and obligations. Once the termination is conducted in accordance with particular treaty provisions, the unilateral termination is considered effective and in conformity with public international law. Incorporation of unilateral termination rules and limitations into particular treaty brings significant advantages to the one-sided character of this type of termination, since the legality of such unilateral power exercised by one party is based on previous consent given by both parties at the time of conclusion of the treaty. Although in such cases the termination of treaty depends on stand-alone decision made by one party, its collision with *pacta sunt servanda* principle is eliminated, as the parties *ex ante* consented to any potential unilateral termination conducted by one of them falling within the scope of concerned treaty provisions. Preference of unilateral termination rules established by provisions of treaty itself is evidenced by art. 42(2) and art. 54(a) of the VCLT, which state that a treaty may be terminated either based on grounds defined in provisions of a treaty itself, or in accordance with special provisions stated in the VCLT.[43]

Second category covers rules governing unilateral termination prescribed in the provisions of the VCLT. The role of the VCLT provisions on unilateral termination of treaties is to provide legal framework for the party to justifiably terminate the treaty rights and obligations once any of the exceptional circumstances occurs. The VCLT, encompassing mostly residual norms of the international law of treaties, introduces the group of extraordinary events or circumstances that give rise to a party's right to unilaterally terminate the treaty. Most of these circumstances have a common feature, that is an objective character of their

[43] *Ibid*., pp. 207-208.

origin. Thus, this type of unilateral termination, usually emerges from events that occurred irrespective of party's will or intention.[44] The VCLT considers as examples of such extraordinary circumstances, among others, material breach of the treaty by one party, supervening impossibility of performance and fundamental change of circumstances.[45] As each of stated extraordinary events triggering right to unilaterally terminate the treaty represents some kind of severe disruption of equilibrium of parties' rights and obligations, there is no doubt that each of the examples represents fair and reasonable exception from otherwise fully applicable *pacta sunt servanda* principle.

Apart from two stated categories covering the most frequent cases of unilateral termination, the VCLT also provides legal framework for residual situations, in which neither the treaty contains any provisions governing its termination, nor any extraordinary events triggering right to unilateral termination occurs. The VCLT offers solution for prescribed situation in art. 56 by introducing two exceptions, under which the unilateral termination may be exercised. First, the subjective exemption, applies when parties to the treaty intended to include right of unilateral termination into the treaty provisions, nevertheless no such provision has been incorporated into final version of the treaty.[46] Such intention may be derived from analysis of preparatory works preceding a conclusion of the treaty or any tacitly implied option to terminate. Second, the objective exemption, may be relied on in cases, where the nature of the treaty implies a right of a party to unilaterally terminate the treaty.[47] In the area of public international law several types of international treaties are considered not allow a contracting party to unilaterally terminate its rights and obligations. International practice tends to include into this category mainly international treaties on boundaries, statuses of territories, peace and disarmament. On the contrary, international treaties related to international trade, commerce and dispute settlement, are given their flexible nature and need for adaptability to current economic and political developments usually considered to fall within the scope of the objective exemption allowing its unilateral termination.[48] With regard to international investment agreements, the nature

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[44] *Ibid*., pp. 208, 220.

[45] The VCLT, arts. 60-62.

[46] The VCLT, art. 56(1)(a).

[47] The VCLT, art. 56(1)(b).

[48] KOLB, Robert (2016). *The Law of Treaties*: *An Introduction* (Cheltenham: Edward Elgar Publishing), pp. 217-219.

of investment treaties is aimed to promotion and protection of investments between the states. From this perspective, international investment agreements tend to be flexible and adaptive towards international economic and political environment. Although substantial degree of stability is necessary in order to provide effective protection of foreign investment, the sensitivity of foreign investment protection granted by investment treaties to economic and political relations between contracting states supports the conclusion that international investment agreements fall within the scope of objective exemption, and thus can be unilaterally terminated.

Although the public international law has developed throughout the time groups of rules allowing a party to international treaty unilaterally terminate its rights and obligations stemming from a treaty within prescribed limitations, the exercise of right of unilateral termination in certain situations tends to collide with other legitimate interests. Example of area, where such collision raises particular concerns is international investment law governed by bilateral investment treaties. The BITs are concluded between the host state and home state of the foreign investor. When it comes to unilateral termination of a BIT, the rights and obligations stemming from a treaty cease to provide investment protection to a foreign investor, a private person that is the ultimate beneficiary of terminated investment treaty. The issue stems from the special triangular relation between the states, being the contracting parties to the investment treaty, and the foreign investor, being the beneficiary of the treaty. Once any contracting state unilaterally terminates the investment treaty, such one-sided act, even though executed in full compliance with international law, causes extinction of particular investment treaty with all rights derived from it, including foreign investor's investment protection. Such disbalance threatening investors' rights and legitimate expectations may be prevented by particular safeguards introduced by the BITs, with the aim to safeguard investors' protection after the termination. Further analysis of concerned issue and safeguards will be provided in subsequent chapters of the study.

2.2.2. Denunciation of the international investment agreements

Unilateral termination of international treaties is closely connected to terms "denunciation" and "withdrawal". The importance of distinguishing between unilateral termination and denunciation or withdrawal emerges in situations, where multilateral international treaties are concerned. Once the bilateral treaty is unilaterally terminated by one of its contracting parties, it inevitably brings the treaty existence to an end,

as under public international law it is forbidden for a state to hold rights and obligations stemming from an international treaty solely against itself. Therefore, in such cases the stand-alone act of unilateral termination conducted by either party to the international treaty results in extinction of all treaty rights and obligations.[49]

However, in cases of multilateral international treaties, where number of contracting parties exceeds two, the unilateral termination conducted by one party does not have to ultimately result in treaty extinction. Once the multilateral treaty will not cease to exist by reason of unilateral termination, such unilateral act performed by one party will only result in release of respective party from its rights and obligations imposed by multilateral treaty. As the outcome of otherwise identical conduct substantially varies in cases of multilateral treaties, the legal doctrine introduces the term "denunciation", or similarly "withdrawal", when it comes to unilateral exit of a party from multilateral treaty under public international law. Since the rights and obligations of the contracting parties are essentially reciprocal, a denunciation does not only terminate rights and obligations of a denouncing party towards other parties, but also release other parties from their obligations towards a denouncing party. A denouncing party and other parties to the multilateral treaty are no longer obliged to apply and enforce the treaty provisions against each other.[50]

In the area of international investment law, the majority of international investment agreements take the form of bilateral investment treaties concluded between the states under public international law. Nevertheless, recent trends in international investment protection are shifting the form of legal framework towards multilateral treaties. One of the reasons for this gradual transition is intention to conclude large regional free trade agreements[51] and regional economic integration agreements. This kind of multilateral agreements, however, usually capture partial investment protection in comparison to traditional bilateral investment treaties, as they primarily focus on trade and commercial protection.[52] Another significant area of international investment law, where multilateral treaties play a crucial role, is international settlement of investment disputes. The aforementioned

[49] KOLB, Robert (2016). *The Law of Treaties*: *An Introduction* (Cheltenham: Edward Elgar Publishing), p. 213.

[50] *Ibid*., pp. 213-214.

[51] *E.g.* NAFTA (North American Free Trade Agreement), CAFTA (Central American Free Trade Agreement), CETA (Comprehensive Economic and Trade Agreement between Canada and European Union).

[52] BALAŠ, Vladimír, ŠTURMA, Pavel (2018). *Nové mezinárodní dohody na ochranu investic* (Prague: Wolters Kluwer ČR), p. 10.

ICSID Convention takes a form of a multilateral treaty acceded by 163 signatory and contracting states[53], representing a legal cornerstone of most frequently used dispute settlement forum for international investment disputes in the world.

Given the peculiar subject matter of the ICSID Convention that provides dispute resolution forum for international investment disputes, denunciation of the ICSID Convention executed by any of the member states may constitute serious jeopardy of foreign investors' rights to have their claims heard in front of the ICSID Tribunals. Thus, denunciations of the ICSID Convention by either home states or host states of the investors give rise to complex jurisdictional issues, which will be further analysed in subsequent chapters of the thesis.

2.2.3. Consensual termination of the international investment agreements

In contrast to unilateral termination or denunciation related to bilateral or multilateral treaties, a consensual termination consists in fundamentally distinct conduct of contracting parties. A consensual termination, synonymously also termed "termination by agreement", in its designation reflects the essence of this form of treaty termination, *i.e.* an agreement between contracting parties to mutually terminate the particular treaty.

One of the oldest and original principles of public international law was concerned with a lawful way how to terminate an international treaty. The rule, dated back into 19th century, prescribed that a treaty may be terminated or withdrawn from solely based on agreement made by all of the contracting parties to particular treaty. However, with the evolvement of international relations and development of international law adjusting to newly emerged situations, the stated rule cannot be applicable in current international law.[54] As elaborated in previous parts of this study, the unilateral termination of international treaties is permissible and effective, if conducted in accordance with rules and limitations imposed by either particular treaty itself or provisions of the VCLT. Nevertheless, the mere existence of stated 19th century rule alongside with consensual nature of this form of termination evidence the significance and traditional character of this legal institute.

[53] International Centre for Settlement of Investment Disputes (2021). *About ICSID. Member States. Signatory and Contracting States* (https://icsid.worldbank.org/about/member-states/database-of-member-states, last accessed on 1 April 2021).

[54] KOLB, Robert (2016). *The Law of Treaties*: *An Introduction* (Cheltenham: Edward Elgar Publishing), p. 207.

The key provision comprising current applicable law on consensual termination of international treaties is art. 54(b) of the VCLT. The article entitles the parties to particular treaty to either terminate or withdraw from a treaty at any time, providing that such termination or withdrawal is exercised in the form of consent given by all parties to the treaty and after conducted consultation with other contracting States.[55] Initial idea of allowing contracting parties to terminate the treaty by an agreement lies within the premise that contracting parties rule the fate of a treaty. Since the conclusion of a treaty is based completely at parties' discretion, analogically, the extinction of a treaty shall be also fully dependent on parties' consideration. The only limitation to consensual termination resides in the provided consent itself. In order for a consent to be valid, and thus capable of bringing rights and obligations of parties to the treaty to an end, it must be sufficiently clear. The clarity of expression of a consent is thus crucial factor to be considered in case of consensual termination, otherwise the application of *pacta sunt servanda* principle prevails, rendering the consensual termination of a treaty invalid. Once the consent given is sufficiently certain and clear, the form in which the consent is provided is irrelevant. Any form of consent, either express or implied, is valid and effective. The parties may enter into agreement on termination of a treaty, irrespective of its oral or written form. Similarly, the parties may tacitly terminate a treaty by their joint engagement in legally recognised act, which trigger the treaty termination, such as concluding a new treaty of the identical subject matter.[56] This example of tacit termination of a treaty is confirmed by art. 59(1) of the VCLT, which provides more detailed conditions on this type of treaty termination in order for such tacit termination to be legally effective.[57]

In cases of consensual termination, the collision with *pacta sunt servanda* principle is the least significant, when compared to unilateral termination or denunciation. Creation of a new agreement inherently constitutes new rights and obligations covered by new *pacta sunt servanda* principle, that prevails over former concluded treaty bond. Nevertheless, however pure and non-conflicting this form of termination may appear, in case of international investment agreements the consequences of consensual termination may become quite harsh.

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[55] The VCLT, art. 54(b).

[56] KOLB, Robert (2016). *The Law of Treaties*: *An Introduction* (Cheltenham: Edward Elgar Publishing), pp. 208-210.

[57] Art. 59(1) of the VCLT imposes two alternative conditions on the tacit termination of formerly concluded treaty. Either the intention of the parties must be established regarding the new treaty to govern the same subject matter, or the incompatibility of the new treaty provisions with the earlier treaty must be proved.

The problem resides in asymmetric relationship between states, the parties to investment agreement, and individual investors, the beneficiaries of the investment agreement and principal recipients of investment protection regime, established by investment treaty. However consensual the termination of the investment agreement was, the ultimate consent to terminate the rights and obligations constituting the basis of investment protection was given by states and not the investor, whose investment protection has been terminated. One of the most significant examples of consensual termination of investment treaties represents Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union[58], by which the member states of the European Union consensually terminated the BITs concluded between each other.

The issues with termination of international investment treaties become more complex especially in connection with international investment disputes. Termination of an investment treaty brings to an end not only substantial rights and obligations connected to investment protection, but also procedural rights and obligations of the parties related to investment protection. Vast majority of the international investment agreements contains dispute resolution mechanism safeguarding investor's right to have his investment claim resolved in particular dispute resolution forum.

Since this study is focused on ICSID Convention arbitration proceedings, the most commonly chosen dispute resolution forum for international investment disputes arising out of international investment agreements, particular correlations between investment treaties' terminations and jurisdiction of ICSID Tribunals will be examined in subsequent chapters of the thesis. Once the investment treaty is terminated by the contracting state, the act of termination may have substantial impact on investor's right to have his investment dispute, arising out of breach of terminated investment treaty, resolved in ICSID arbitration proceedings. Each type of treaty termination, *i.e.* unilateral termination, denunciation and consensual termination of international investment agreement, even though executed lawfully and in accordance with all applicable rules, may result in substantially different decision of the ICSID Tribunal, on whether it has a jurisdiction to hear particular investment claim arising out of, already terminated, investment treaty. Further analysis of each type of termination and its distinguished effects on jurisdiction *ratione temporis* and *ratione voluntatis* of ICSID Tribunals will be elaborated in separate chapters of the study.

[58] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, signed 5 May 2020, in force 29 August 2020.

3. JURISDICTION OF THE ICSID TRIBUNAL AND DENUNCIATION OF THE ICSID CONVENTION

The foreign direct investment process consists in conduct of an investor, a private person domiciled or incorporated in particular state, who makes an investment in a territory of another state. Typically, the home state of an investor and the host state, in which the investment was made, have concluded bilateral investment treaty on promotion and protection of foreign investment. Once the investor from one contracting state to the BIT made an investment, that qualifies as an investment under relevant provisions of the BIT, his investment is automatically granted a protection under particular provision of the BIT. Throughout the evolution of foreign investment protection, the international practice gave rise to model structure of the BITs that may vary on a case-by-case basis. Characteristic BITs structure is comprised of, among others, definition of an investment and an investor, admission of foreign investors, standard of treatment of investors, umbrella clauses, protection of investment against expropriation or measure having equivalent effect, compensation for damages and dispute resolution clause.[59]

Once the host state breaches any protection granted to the qualified investment under provisions of the BIT, the investor is entitled to bring a claim against the host state. Thus, in order for the BITs investment protection to be sufficiently enforceable, the investor should have an option to have his claim authoritatively decided in independent and credible dispute resolution forum. Since the foreign investor made an investment in the territory of the host state, over which the host state exercises sovereign powers, it is understandable that the protection of foreign investment is concerned with potential political pressures imposed on national courts when deciding particular investment dispute against the host state. For these reasons, the BITs are essentially similar to bargaining instruments between the home state of the investor and the host state, exchanging the advantage of incoming investment flow for consent of the host state to refer the potential investment dispute arising out of breach of the BIT to neutral arbitration forum.[60] Accordingly, the BITs are characteristically provided with dispute resolution clauses providing investor with assurance that once the protection

[59] SUBEDI, Surya P. (2008). *International Investment Law: Reconciling Policy and Principle* (Oxford: Hart Publishing), p. 84.
BALAŠ, Vladimír, ŠTURMA, Pavel (2018). *Nové mezinárodní dohody na ochranu investic* (Prague: Wolters Kluwer ČR), p. 10.

[60] SUBEDI, Surya P. (2008). *International Investment Law: Reconciling Policy and Principle* (Oxford: Hart Publishing), p. 81.

granted to his investment via BIT is breached by the host state, his damaged rights will not remain without a remedy. Dispute resolution clauses in the BITs takes various forms ranging from setting one arbitration forum to combining several arbitration forums, sometimes also in combination with national courts of the host state. One of the most common used mechanism of ISDS offered in the BITs is ICSID arbitration forum. Given the unique character of ICSID arbitration stemming from its multilateral treaty origin, the ICSID system represents very specific *sui generis* regime based on member states' accession to the ICSID Convention. Therefore, if the contracting states to the BIT wish to offer the investors access to ICSID forum, both states need to become the member states of the ICSID Convention. The availability of ICSID arbitration proceedings is therefore closely interconnected with conjunction of two international treaties, *i.e.* the ICSID Convention and particular BIT.[61]

The ICSID Convention is a multilateral international treaty that lays down the basis for currently most commonly chosen dispute settlement forum for international investment disputes. Created within the system of the World Bank with aim to promote foreign direct investment between developed and developing states, this exclusively procedural international treaty significantly brought international arbitration proceedings into international investment law and introduced independent arbitration as leading instrument safeguarding the enforcement of substantive protection of investment governed by BITs.[62] By acceding to the ICSID Convention, the signatory member states strengthen their investment protection regimes within their territories by introducing an option for foreign investors to have their disputes arising out of protected investment resolved by ICSID Tribunal. Each of the member state of the ICSID Convention may therefore act either as a home state of the foreign investor, or as host state, in which the foreign investor from other member state made his investment. However, as any other multilateral international treaty, the ICSID Convention may be denounced by the member state at any time and at its sole discretion. It is subject to extensive contradictory legal debates, what effects and to what extent does the denunciation of the ICSID Convention executed by a host state influences jurisdiction of the ICSID Tribunals in emerged investment disputes. Further paragraphs of this chapter will provide in-depth analysis of the first research question of this study, *i.e.* when and under what circumstances does the ICSID Tribunal have jurisdiction over the investment dispute if the host state denounces the ICSID Convention.

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[61] *Ibid.*, p. 276.

[62] *Ibid.*, p. 80.

3.1. Offer and acceptance model in ICSID Convention arbitration proceedings

Prior to analysing the effects of denunciation of the ICSID Convention by the member state and how it may influence the jurisdiction of ICSID Tribunal, it is crucial to elaborate on the mechanism of how the jurisdiction of ICSID Tribunal over investment disputes is established. The process of conclusion of valid arbitration agreement between host state and foreign investor in ICSID arbitration forms the basis for any further elaborations on the effects of denunciation process and its implications on ICSID Tribunals' jurisdiction in particular investment cases.

Any investment arbitration is inherently associated with a phenomenon termed *arbitration without privity*[63]. The foreign investor is not a contracting party to the particular BIT, as the BITs are international treaties concluded between the home states of the investors and host states, in which the concerned foreign investment is made. Thus, the foreign investor and the host state are never in privity, even though the investor is the ultimate beneficiary of the BIT and thus possesses significant substantive rights of investment protection. In arbitration without privity the procedural rights of the foreign investor are not established by *ex ante* arbitration agreement between the investor and host state, since the foreign investor does not have to enter into a contractual relationship with the host state in order to initiate the claim against him in arbitral tribunal. The inevitable consequence of admissibility of such lack of privity in investment arbitration is the shift of consent to arbitrate from transactional level between particular investor and host state into more remote instruments.[64]

A consent of both parties to refer an investment dispute arisen between them to designated tribunal denotes a fundamental condition that need to be satisfied in any type of alternative dispute resolution. Once the latter party to the dispute expresses its consent, both consents to arbitrate given by both parties to the investment dispute merge into creation of arbitration agreement. The existence of valid arbitration agreement between the host state

[63] Term used in PAULSSON, Jan (1995). *Arbitration Without Privity.* ICSID Review - Foreign Investment Law Journal, Vol. 10, No. 2, p. 232-257.

[64] PAULSSON, Jan (1995). *Arbitration Without Privity.* ICSID Review - Foreign Investment Law Journal, Vol. 10, No. 2, pp. 232, 256.
WAIBEL, Michael (2014). *Investment Arbitration: Jurisdiction and Admissibility.* University of Cambridge Faculty of Law Research Paper No. 9/2014, pp. 12-13.

and foreign investor is the prerequisite for any arbitral tribunal to have a jurisdiction over particular investment dispute. However, given the peculiar triangular relations between the states and foreign investor and associated dichotomy between the public and private international law aspects of international investment arbitration, the legal theory developed special model for analysis of existence of arbitration agreement in investment disputes. When assessing whether the consents of both parties were properly given and thus the arbitration agreement was implicitly concluded, the so-called *offer and acceptance model* shall be applied. The offer and acceptance model is the traditional instrument of private contract law, nevertheless it found its extensive application within the area of international arbitration, as any arbitration is inherently regarded as consensual a voluntary form of adjudication.

Slight difficulties with application of the offer and acceptance model are connected with the very nature of foreign direct investment process. As the host state wishes to attract and promote foreign investment floats into his territory, by entering into the BIT the host state opens the possibility for any foreign investor from other contracting state to conduct investment in his territory. The investment relationship between the foreign investor and the host state is created at the exact moment, when the foreign investor from another contracting state, in compliance with all conditions laid down by the BIT, conduct an investment in the host state. Therefore, typically, there is no transactional relationship present between the host state and the foreign investor, that would establish the privity of potential investment dispute arisen between them.[65] The relationship between the foreign investor, as claimant, and the host state, as respondent, is established by the virtue of a breach of investment protection under the particular BIT provision by the host state, *i.e.* at the very moment when the dispute originates. The inevitable consequence of such discrepancies of investment arbitration without privity is that consent to arbitration of the host state and the foreign investor will not usually be neither incorporated into one single document, nor given at the same time, nor provided in the same form. Therefore, when analysing the proper existence of consent on behalf of both parties to the dispute, several aspects and legal instruments need to be analysed in their mutual correlation and taking into account throughout complexity of the situation.[66]

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[65] WAIBEL, Michael (2014). *Investment Arbitration: Jurisdiction and Admissibility.* University of Cambridge Faculty of Law Research Paper No. 9/2014, pp. 12-13, 15.

[66] SCHREUER, Christoph (2005). *Consent to Arbitration* (updated 02/2007). Transnational Dispute Management, Vol. 5 (www.transnational-dispute-management.com/article.asp?key=555, last accessed on 27 November 2020), p. 1.

A primary construct of the offer and acceptance model in investment arbitration is based on the host state providing the offer to arbitrate a dispute before arbitral tribunal with investor subsequently accepting such standing offer. As mentioned in the previous chapters of this study, there are three variations to the offer and acceptance model dependent on the type of the legal instrument, in which the offer to arbitrate is incorporated. The form of legal instrument, in which is the offer to arbitrate of the host state incorporated, usually corresponds to the legal instrument that provides the substantive investment protection in particular case. The first type of legal instrument is a direct agreement concluded between the host state and the particular foreign investor regarding his individual investment conducted within the territory of the host state. The second type is represented by the national legislation enacted by the host state[67], which incorporates opened offer of the host state to arbitrate any dispute arising out of the breach of national investment legislation before designated arbitral tribunal. The opened offer of the host state may be dully accepted by any foreign investor whose investment falls within the scope of investment protection granted by national legislation. The third type represents the most widely used legal instrument, *i.e.* bilateral investment treaty concluded between the host state and the home state of the foreign investor. Within the provisions of the particular BIT the host state provides opened offer to arbitrate any dispute arising out of breach of investment treaty in particular arbitration forum. Similarly to offer incorporated in national investment legislation, any foreign investor eligible for investment protection under the BIT may duly accept opened offer of the host state and by this way consequently conclude the arbitration agreement. Both national investment legislation and the BITs are legal instruments considered to give rise to arbitration without privity. With regard to the limitation of this study, further elaborations in subsequent paragraphs of the thesis will be focused on the BITs, as the most commonly chosen mechanism of investment arbitration in recent years.[68]

[67] Most commonly in a form of national investment code.

[68] SCHREUER, Christoph (2005). *Consent to Arbitration* (updated 02/2007). Transnational Dispute Management, Vol. 5 (www.transnational-dispute-management.com/article.asp?key=555, last accessed on 27 November 2020), pp. 1-2.
DOLZER, Rudolf, SCHREUER, Christoph (2008). *Principles of International Investment Law* (New York: Oxford University Press), pp. 238-239.

3.1.1. The offer of the host state to arbitrate

Focusing on the third type of legal instrument providing foreign investment protection, the BIT, it should be noted that the construct of the offer and acceptance model in the BITs is very similar to construct of the offer and acceptance model in another type of legal instrument capable of providing foreign investment protection, *i.e.* national investment legislation. The most efficient way for the host state to attract foreign investment flows into its territory is by concluding the BIT. During the negotiation process of the particular BIT, the host state bargain for wording of the BIT provisions, by which it establishes negotiated standard of investment protection applicable to any qualified foreign investor from the other contracting state. One of the significant safeguards encouraging the foreign investors to conduct investment in the host state is the concession of the host state consisting in giving unilateral consent to arbitrate any investment dispute arisen from the breach of the BIT provisions in independent arbitral tribunal. Providing foreign investment protection via the BITs is an attractive choice for the host state also from economic point of view, as one concluded BIT may be applicable to hundreds of foreign investors. Therefore, it saves the host state from having to separately conclude hundreds of direct agreements with each particular foreign investor that wishes to bring his investment into the state's territory. On the other hand, the absence of any direct transactional relationship between particular foreign investor and the host state that would otherwise exist in case of concluded direct agreement, must be balanced with certain modifications amending the classic contractual offer and acceptance model that is otherwise present in clear and unified form.

The offer of the host state to arbitrate shall be closely connected to substantive protection of the investment and thus incorporated in the same legal instrument that provides for the investment protection, *i.e.* in the particular BIT. It is a common practice for the BITs to incorporate a dispute resolution clause within its wording. When analysing the wording of the particular BIT dispute resolution clause, in majority of cases it may be said that the wording contains unequivocal consent of the host state to arbitration. Such unequivocal consent may be expressed as *"each Contracting Party hereby consents"* or *"any dispute shall be submitted to arbitration"*. Nevertheless, not all types of wording in dispute resolution clauses are capable of constituting an offer of the host state to arbitrate, but rather represent mere promises to give such consent in the future. An example of such rather promising wording of arbitration clause may be *"a Contracting Party shall consent"*. Where the host state merely promises to consent to arbitration in the future, it is at complete discretion of the host state

to subsequently decide not to give a consent to arbitration in particular case. Such refusal of the host state would constitute a breach of provision of the BIT containing the promise of the host state to consent to arbitration and thus would be considered as breach of the BIT. However, since the host state still did not provide his consent to arbitrate, no offer of the host state has been constituted and therefore no arbitration agreement can arise. Once the wording of dispute resolution clause in the BIT fulfils the characteristic of unequivocal consent of the host state to arbitrate the investment disputes in designated forum, the host state's offer to arbitrate is opened for a due acceptance conducted by any qualified foreign investor.[69]

It should be noted that majority of dispute resolution clauses in the BITs neither have simple structure nor provide one single dispute resolution forum. Many of dispute resolution clauses have complex structure consisting of either cascade or mutually excluding dispute settlement fora, inclusion of national courts of the host state or other special procedures set by the parties to the BIT, ultimately conditioning and limiting host state's offer to arbitrate. The dispute resolution clauses in the BIT may combine various arbitration fora, such as ICSID arbitration, ICC arbitration or arbitration under UNCITRAL rules. Depending on the particular wording of the dispute resolution clause, the right to choose between designated arbitration fora may be either at sole discretion of the investor or subject to expressly prescribed conditions, such as conclusion of additional direct agreement between the investor and the host state on selection of the arbitration forum.[70]

The offer of the host state incorporated in the particular BIT may be either expressly conditioned or limited in the wording of the BIT dispute resolution clause or implicitly conditioned or limited by other provisions in the BIT. Such implicit limitation of the offer to arbitrate is most commonly induced by some type of prescribed involvement of national courts of the host state or possible application of the so-called "most favoured nation clause" provision in the BIT. Both of these categories of provisions, including their implicit effects on the offer and consent of the host state to arbitrate, will be elaborated in more detail in subsequent parts of this study.

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[69] *Ibid.*, pp. 6-7.
Ibid., p. 242.

[70] DOLZER, Rudolf, SCHREUER, Christoph (2008). *Principles of International Investment Law* (New York: Oxford University Press), p. 242.

3.1.1.1. Involvement of national courts

One of the reasons for introducing ISDS mechanisms, including international investment arbitration, was intention to prevent national courts of the host state from deciding the disputes arising from international investment. The preamble of the ICSID Convention indicates reserved approach towards litigations of international investment disputes before national courts and admits that even though international investment disputes would usually be subject to national legal processes, in certain cases international methods of disputes settlement may be appropriate[71]. Reasons for mostly reserved approach towards national courts proceedings of the host state concerning foreign direct investment are general concerns about lack of impartiality of the national courts towards the interests of the foreign investor. Moreover, national courts are constitutionally obliged to apply domestic law when resolving the investment dispute, which may not provide as high standard of investment protection as the one granted by the international investment treaty, *i.e.* by the international law. Application of the international law by the national court in particular dispute is largely dependent on the constitutional system of the host state, especially with regard to degree of monism or dualism tendencies contained in the constitution. Deciding the international investment claim before national courts is therefore often connected with disadvantages on behalf of the foreign investor, such as large delays, additional expenses and lack of foreseeability. On the other hand, the host state may also be burdened with disadvantages of litigating an international investment claim, namely the publicity of the domestic proceedings that may aggravate the dispute and thus negatively influence the reputation of the foreign investment policy of the host state and subsequently lower its attractivity for future inflow of foreign investment. Another significant disadvantage that may appear on behalf of the host state is concerned with factual effect of domestic decisions, especially the ones issued by national courts of higher instance. Such domestic decisions are likely to have firmly convincing character and usually trigger consequent unwillingness of the host state government to agree on any compromise or abide by decision rendered by any international tribunal.[72]

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[71] ICSID Convention, Preamble, para. 3.

[72] SCHREUER, Christoph (2005). *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, The Law & Practice of International Courts and Tribunals, Vol. 4, No. 1, pp. 1-2.

In spite of numerous disadvantages and general animosity connected to involvement of national courts of the host state in resolution of international investment disputes, the national courts may play greater or lesser role in ISDS mechanism. There are three most commonly used types of involvement of national courts in dispute resolution mechanism, the requirement of exhaustion of local remedies, the obligation to seek remedy before national courts for stated period of time and the so-called "fork in the road" provision. Any such involvement of national courts is usually established in dispute resolution clause of the particular BIT. The extent of involvement of national courts in resolving investment disputes depends on specific wording of the particular BIT. In cases of ICSID arbitration proceedings particularly, any such prescribed involvement of national courts modifies and potentially limits the offer of the host state to arbitrate. The investor must comply with such additionally imposed obligations connected with the offer of the host state to arbitrate in order to be entitled to duly accept such modified offer and subsequently access the ICSID arbitration forum.

One of the most common practices concerning involvement of national courts of the host state is the requirement of exhaustion of local remedies. Once the BIT imposes obligation on an investor to firstly exhaust all possible remedies before national courts of the host state, an investor is obliged to do so before it can submit the claim to designated arbitration forum. In such case, the opened offer of the host state to arbitrate is conditioned by exhaustion of local remedies by the investor. Prior to such exhaustion, the consent of the host state to arbitration is not given. The origin of requirement of exhaustion of local remedies in investment arbitration is closely connected to traditional principle of public international law, according to which the investor, intending to submit its international claim to international proceedings, must firstly exhaust the domestic remedies available in the national court system of the host state. Nevertheless, this traditional principle of public international law is no longer applicable in the area of investment arbitrations, as a valid consent of the host state to arbitrate provided in the BIT provisions overrides any such requirement.[73] This approach is nowadays stated in art. 26 of the ICSID Convention allowing the contracting states to the convention to make their consent to arbitrate conditional upon exhaustion of domestic judicial or administrative remedies. Art. 26 of the ICSID Convention has been interpreted

[73] *Ibid.,* pp. 215, 249.

by the ICSID Tribunals in cases *Amco v. Indonesia*[74] and *Generation Ukraine v. Ukraine*[75], where the Tribunals confirmed that once the contracting state to the ICSID Convention have not conditioned its consent to ICSID arbitration by prior exhaustion of local remedies, such condition is deemed to have been waived and thus cannot be subsequently invoked by the host state. If the state wishes to compel the investor to exhaust local remedies prior to institution of ICSID arbitration proceedings, such condition must be incorporated into provisions of the particular BIT, and so *a priori* limit the otherwise opened offer to arbitrate.[76] It should be noted that ICSID Tribunals are not the only arbitration Tribunals that deny the existence of general obligation of the investor to firstly exhausted all available local remedies available in the host state before going to international arbitration forum. In case *Nykomb v. Latvia*[77] concerned with foreign investment under Energy Charter Treaty[78], the SCC Tribunal ruled that there is no general obligation imposed by the international law or Energy Charter Treaty to exhaust local remedies unless the host state stipulated such obligation in its offer to arbitrate.[79] Therefore, if the host state wishes to condition its consent to arbitrate by exhaustion of local remedies, the host state together with the home state must explicitly incorporate such condition into provisions of the BIT or other applicable international investment agreement.

Lighter alternative to requirement of exhaustion of local remedies is condition to seek remedy before national courts for stated period of time before accessing the arbitration forum. This condition obliges an investor to firstly initiate the claim before national courts and seek redress for a prescribed period of time, usually of eighteen months. If the national court have not rendered any decision on the merits within prescribed period of time, or even if some decision on the merits have been rendered, but despite the rendered decision the investment

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[74] *Amco Asia Corporation and others v. Republic of Indonesia,* ICSID Case No. ARB/81/1, Ad hoc Committee Decision on the Application for Annulment, 16 May 1986.

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

[76] *Amco v. Indonesia,* Ad hoc Committee Decision on the Application for Annulment, 16 May 1986, para. 63. *Generation Ukraine v. Ukraine,* Award, 16 September 2003, paras. 13.4 and 13.5.

[77] *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia,* SCC Case No. 118/2001, Award, 16 December 2003.

[78] The Energy Charter Treaty, signed 17 December 1994, in force 16 April 1998.

[79] *Nykomb v. Latvia*, Award, 16 December 2003, para. 2.4 b).

dispute between the investor and host state still persists[80], the investor is entitled to submit the dispute to prescribed arbitration forum. Therefore, the offer of the host state to arbitrate is suspended for stated period of time designated for national courts proceedings and opens itself for acceptance after expiration of such period.[81]

Another commonly used provision in the BITs related to involvement of national courts of the host state in investment disputes settlement is so-called "fork in the road" provision. The previously elaborated requirement was based on obligation of the investor to seek remedy before national courts for the prescribed period of time. In such case the investor is forced to bring the investment claim to both national courts and international arbitration tribunal. The "fork in the road" requirement, however, has completely opposite effect.[82] The "fork in the road" provision entitles the foreign investor to choose particular judicial forum for litigation of his investment claim. Most typically, the selection is made between the national courts of the host state and designated international arbitration forum. The "fork in the road" provision put an obligation on the foreign investor to select the judicial forum in which his investment claim will be resolved. Once the investor makes a selection, the choice of the forum is considered to be final and cannot be revoked. If the investor chooses to litigate its investment claim in domestic courts of the host state, the jurisdiction of an arbitral tribunal over the identical dispute is excluded, and *vice versa*.[83]

In *Lauder v Czech Republic*[84] the ICSID Tribunal described purpose of the "fork in the road" provision as a tool aimed to prevent one identical investment dispute between identical parties from being litigated both in national courts and international arbitral tribunals.[85] One of the principal issues to be considered in connection with "fork in the road" provision is the definition of the identical dispute that should be prevented from multiple

[80] Example of an investment dispute that persists after decision of the national court has been rendered is the situation where the investor is not satisfied with the rendered decision or feels insufficiently remedied by the national court.

[81] *Ibid.,* pp. 216, 249-250.

[82] SCHREUER, Christoph (2005). *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, The Law & Practice of International Courts and Tribunals, Vol. 4, No. 1, p. 4.

[83] DOUGLAS, Zachary (2009). *The International Law of Investment Claims* (Cambridge: Cambridge University Press), p. 152.

[84] *Ronald S. Lauder v. Czech Republic*, UNCITRAL, 9 ICSID Rep 66, Final Award, 3 September 2001.

[85] *Lauder v Czech Republic*, Final Award, 3 September 2001, para. 161.

proceedings. The practice of arbitral tribunals in evaluation of identity of the investment disputes is not unified and the tribunals tend to apply different distinguishing criteria.

Some of the arbitral tribunals have considered investment disputes as identical, if the claims were based on a legal obligation of the same nature, *i.e.* claims stipulating the same cause of action.[86] Practical disadvantage of such distinguishing criterion lies within the nature and complexity of the investment disputes. The investment disputes are by their very nature usually composed of multiple legal obligations that are different in nature, but altogether comprising complex investment relationship. It is common for a foreign investor to find himself in a position, where his investment rights protected by the BIT were breached by the conduct of a host state, however such conduct of state may result in multiple breach of legal obligations. Such discrepancy may arise in situations, where the investor files the claim against the host state in national court for damages based on a breach of national law and subsequently files the expropriation claim in international arbitral tribunal for breach of investment protection granted by the particular BIT. In such case both claims of the investor are not stipulating the same cause of action, as one references to breach of national law and other references to breach of the BIT. Nevertheless, within both of these breaches the investor may claim same damages incurred from single conduct of a host state.[87]

Taking into account described discrepancy, some of the arbitral tribunals resort to another criterion when assessing the identity of the investment claims, that is a fundamental basis of the claim.[88] In elaboration of the fundamental basis of the claim, the tribunal must comprehensively look at the investment dispute, its origin and complexity. Within such elaboration it is unlikely for the tribunal to overlook that claimed breaches of multiple legal obligations may just be reflections of one single conduct of the host state. Similarly, if two claims invoke similar reliefs based on one single legal obligation contained in BIT, it cannot be automatically concluded that the disputes are identical.[89] With regard to described

[86] *E.g. Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004.
Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009.

[87] DOUGLAS, Zachary (2009). *The International Law of Investment Claims* (Cambridge: Cambridge University Press), p. 156.

[88] *E.g. Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009.

[89] Norton Rose Fulbright (2021). *Thought leadership. Publications. Fork-in-the-Road clauses: Divergent paths in recent decisions* (https://www.nortonrosefulbright.com/en/knowledge/publications/0bd10ad8/fork-in-the-road-clauses#autofootnote3, last accessed on 8 May 2021).

features of the investment claims it may be concluded that the "fork in the road" provisions in the BITs are particularly designed to limit the foreign investors in filing multiple investment claims with same fundamental basis in both national courts of the host state and international arbitration tribunal. The "fork in the road" provisions are significantly relevant in the BITs that entitle the investor to initiate broad spectrum of investment disputes originated in either national law of the host state or BIT. Hence, such investment disputes may potentially fall under the jurisdiction of both national courts and international tribunal and thus give rise to very high risk of competing parallel jurisdictions.[90]

With regard to the assessment of the "fork in the road" regime and its impact on the offer of the host state to arbitrate, it may be concluded that the "fork in the road" provision contained in particular BIT serves as condition precedent to the offer of the host state to arbitrate the investment dispute in an arbitration forum. Therefore, this kind of condition precedent is considered satisfied upon the selection of arbitration forum made by the eligible investor.[91]

3.1.1.2. Most favoured nation clauses

The continuous evolvement process of foreign direct investment protection is accompanied by the non-discriminatory treatment of foreign investors from different states. However, the process of negotiation and conclusion of the BIT may result in various wordings, and thus it is likely for each particular BIT to contain different set of provisions. Consequently, it is very common for the host state to conclude distinct BITs with different investment protection standards with another contracting states. Therefore, the protection of foreign direct investments made in the territory of the host state varies depending on the level of investment protection standard granted by each particular BIT. As a result, the foreign investors domiciled or incorporated in different home states that are eligible for protection of their investments may not be granted the same level of protection within the territory of the host state. Such discriminatory effect categorising foreign investors in one single host state into groups with distinct standards of protection is in international investment law generally undesirable.

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[90] DOUGLAS, Zachary (2009). *The International Law of Investment Claims* (Cambridge: Cambridge University Press), pp. 156-157.

[91] *Ibid.,* p. 152.

In order to prevent described discriminatory effects of different BITs wordings providing distinct standards of investment protection within territory of one single host state, the practice introduced the so-called "most favoured nation clause" provision. The most favoured nation clause is regarded as traditional instrument aimed to balance discriminatory effects and safeguard equal standard of protection for foreign investors who conducted their investments in territory of one single host state.[92] Once the most favoured nation clause is incorporated into the wording of the BIT, the foreign investor eligible for investment protection under the particular BIT shall be entitled to invoke the same standard of investment protection available to any other foreign investor under any other BIT concluded with the host state. The most favoured nation clause is thus able to transfer higher standard of investment protection from another BIT concluded between the host state and any other contracting state other than the home state of the investor. The investor is subsequently enabled to invoke higher standard of protection for his investment than the protection granted to him by his BIT.[93]

With regard to the application scope of the most favoured nation clauses, some of the BITs contains most favourite nation clause that by itself limits its scope of application. The limitations are usually formulated as description of parts of the particular BITs to which the most favoured nation clause is applicable, or which are excluded from its application. However, majority of the most favoured national clauses do not contain any limitation nor suggestion on which aspects of the investment shall fall under the scope of the clause. Originally, the most favoured nation clauses were aimed at extension of only substantive protection of investment. In contrast, the dispute resolution clauses established in the BIT tended to be considered as separate provisions that incorporate the consent to arbitration together with its conditions and limitations into the particular BIT. Given such peculiar independent character of dispute resolution clauses, the practice had negative approach towards legality of application of the most favoured nation clause to dispute resolution mechanism established in the BITs. Nevertheless, with evolvement of applicability of most favoured nation clauses in international investment disputes, further discussions evolved whether the general scope of application of most favoured nation clause should not

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[92] BALAŠ, Vladimír, ŠTURMA, Pavel (2018). *Nové mezinárodní dohody na ochranu investic* (Prague: Wolters Kluwer ČR), p. 34.

[93] DOLZER, Rudolf, SCHREUER, Christoph (2008). *Principles of International Investment Law* (New York: Oxford University Press), p. 253.

be extended also to procedural investment protection, *i.e.* to dispute resolution mechanisms incorporated in BITs.[94]

The discussions about extension of most favoured nation clause to procedural protection of investment were significantly elaborated in controversial decision of arbitral tribunal *Maffezini v Spain*[95]. In *Maffezini v Spain*, the investment dispute arisen between the Argentinian investor and Kingdom of Spain, concerning production of chemical products in territory of Spain. Investment of Argentinian investor was protected by the BIT concluded between Argentina and Spain, which contained provision conditioning the offer to arbitrate by imposing legal obligation on any eligible foreign investor to firstly initiate and proceed with the investment dispute in national courts of Spain for period of eighteen months before filing the claim in international arbitration tribunal. Alongside with this conditioned offer to arbitrate, the BIT between Argentina and Spain contained also the most favoured nation clause. The most favoured nation clause extended the investment treatment to any treatment granted to foreign investors within territory of Spain by any BIT concluded with a third country. According to the wording of the clause, such extended treatment shall have covered all matters subject to the BIT. By the virtue of this clause, the Argentinian investor invoked the dispute resolution mechanism incorporated in the BIT between Chile and Spain, in which the offer to arbitrate was not conditioned by compulsory litigation of investment dispute in national courts for the period of eighteen months. The arbitral tribunal allowed application of the most favoured nation clause to dispute settlement provision, confirmed that the Argentinian investor had right to initiate the investment dispute directly in international arbitration forum and therefore could have accepted Spanish offer to arbitrate in its unconditioned form incorporated in the BIT between Chile and Spain.[96] The arbitral tribunal reasoned its conclusion based on comparison of protection of investors under investment treaties to protection of traders under commercial treaties. The rights of traders under international commercial treaties were initially protected by consular jurisdiction and subsequently by any other form of jurisdiction having extraterritorial basis. The extraterritorial nature of protection in commercial treaties was deemed fundamental for protection of rights of the traders stemming

[94] *Ibid.*
BALAŠ, Vladimír, ŠTURMA, Pavel (2018). *Nové mezinárodní dohody na ochranu investic* (Prague: Wolters Kluwer ČR), pp. 33-34.

[95] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on the Objections on Jurisdiction, 25 January 2000.

[96] *Maffezini v Spain*, Decision of the Tribunal on the Objections on Jurisdiction, 25 January 2000, para. 64.

from the treaty and despite not being part of any material aspect of the trade, the dispute settlement mechanism significantly advanced the level of protection granted to foreign traders. Analogically, the dispute resolution mechanisms, as modern forms of extraterritorial jurisdiction, incorporated in international investment treaties represent essential tool in securing sufficient protection of foreign investors and thus shall be considered as inseparably connected to material aspects of investment treatment.[97]

Alongside with surprising decision of the arbitral tribunal that significantly extended the scope of application of the most favoured nation clause on procedural aspects of investment protection, the arbitral tribunal further analysed application of the clause in other scenarios. In this way the arbitral tribunal limited potentially large effects of his decision on subsequent cases. In general, the arbitral tribunal in *Maffezini v Spain* excluded application of most favoured nation clause on situations, where invoking of the clause by the foreign investor would contradict the public policy of the host state. Such public policy considerations shall arise from process of conclusion of the particular BIT, during which the contracting parties have anticipated such considerations to be essential for their acceptance of the BIT.[98] The arbitral tribunal provided examples of such situations, in which the public policy considerations are deemed to override the right of foreign investor to rely on dispute settlement mechanism incorporated in other BIT via most favoured nation clause. First two examples are requirement of exhaustion of local remedies and the so-called "fork in the road" provision, which both have been elaborated in previous parts of this study. As third and fourth example provided by the arbitral tribunal are situations, where the BIT refers to some concrete arbitration forum, *e.g.* ICSID, or where the contracting parties agreed on highly institutionalised system of arbitration with specific procedural rules. The last two examples cannot be overridden by the most favoured nation clause as they both represent very concrete expression of the will of the contracting parties to the BIT. The arbitral tribunal further complements the non-exhaustive list of examples with general guidance for any upcoming assessment, by stating that in every case the elaboration shall be conducted in order to find proper balance between the right of the foreign investor to legitimately extend his investment protection via most favoured nation clause and risk of undesirable treaty-shopping that would contravene the policy objectives of the particular BIT provisions.[99]

[97] *Ibid.,* paras. 54-55.

[98] *Ibid.,* para. 62.

[99] *Ibid.,* para. 63.

Some of the arbitral tribunals followed the reasoning of *Maffezini v Spain* and allowed the foreign investor to override the obligation to litigate the investment dispute in national courts of the host state for prescribed period of time. In *Siemens v Argentina*[100] the arbitral tribunal permitted the extensive application of the most favoured nation clause to procedural protection of investment by examining the dispute resolution clauses contained in similar BITs that were concluded by the host state at around the same time as the invoked BITs. The host state concluded three different BITs in the same year, where all of the BITs were inconsistent regarding the existence of obligation of the investor to litigate the dispute in national courts prior to institution of arbitration proceedings. The arbitral tribunal concluded that once such inconsistency occurs, the condition to submit investment dispute to national courts for prescribed period of time cannot be regarded as matter of public policy of the host state and fundamental element of consent of the host state to arbitration.[101]

Nevertheless, some of the arbitral tribunals set further limitations on scope of application of the most favoured nation clause in situations, where the foreign investor aimed to extend the jurisdiction of the arbitral tribunals. In case *Plama v Bulgaria*[102] the particular BITs did not provide for arbitration between the host state and investor, therefore the foreign investor tried to incorporate the jurisdiction of the ICSID Tribunal from other BIT into his investment dispute via most favoured nation clause. Since Bulgaria did not give any consent to ICSID arbitration in the particular BIT, no offer of the host state to arbitrate the investment disputes was incorporated in the BIT. The arbitral tribunal ruled that it is not within the abilities of the most favoured nation clause to establish ICSID jurisdiction, as it cannot transfer the otherwise not existing consent to arbitrate of the host state from one BIT to another. Moreover, the arbitral tribunal stated that the most favoured nation clause is not able to incorporate by reference any dispute resolution clause or its part from another BIT if the contracting parties to the former BIT did not intend to incorporate such provision via most favoured nation clause.[103] Another example of decision where arbitral tribunal declined the application of most favoured nation clause with regard to procedural protection

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[100] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004.

[101] *Siemens v Argentina*, Decision on Jurisdiction, 3 August 2004, para. 105.

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

[103] *Plama v Bulgaria*, Decision on Jurisdiction, 8 February 2005, paras. 184, 207, 223.

of investment was *Telenor v Hungary*[104]. In *Telenor v Hungary* the foreign investor sought to extend the jurisdiction of the arbitral tribunal to claims based not only on expropriation. The arbitral tribunal held that allowing the most favoured nation clause to substantially extend jurisdiction of the arbitral tribunal in such way would result in treaty-shopping of the foreign investors. Moreover, as the contracting parties to the former BIT intentionally limited the scope of jurisdiction to expropriation, any extension of jurisdiction via most favoured nation clause would contravene the common intentions expressed by the parties when concluding the BIT.[105]

In conclusion, the offer of the host state to arbitrate incorporated in the BIT may be significantly influenced by the most favoured nation clause contained in the particular BIT. Following the established practice of arbitral tribunals, the most favoured nation clause, if sufficiently broadly formulated, may override the condition to litigate the investment dispute in national courts for the prescribed period of time and thus transform the otherwise conditioned offer to arbitrate into unconditional offer of the host state. Surprisingly, other forms of involvement of national courts in dispute resolution mechanism, such as requirement of exhaustion of local remedies or the so-called “fork in the road” provision, were considered as matters of public policy of the host state and therefore prevented from overriding effect of the most favoured nation clause. It may be argued that once the host state expressly conditions its offer to arbitrate in the particular BIT by imposing an obligation to firstly submit the dispute to national courts, it is possible that such condition may be implied from specific policy of the host state towards the other contracting state. It is doubtful whether such condition does not represent for the host state the essential requirement of its consent to arbitration or contradicts the intention of the host state present at the time of conclusion of the particular BIT. Moreover, since the international investment arbitration is based on consensus of the parties to arbitrate, it is debatable, once the host state conditions its offer to arbitrate, whether the simple transfer of different offer from the other BIT concluded by the host state, unconditioned and made towards another contracting state in line with other policy considerations, could be in line with interest of the host state. The arbitral tribunals set out clear limitations on overriding ability of the most favoured nation clause, especially in connection with establishing the jurisdiction of arbitral tribunal that otherwise would not exist. Any other

[104] *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006.

[105] *Telenor v Hungary*, Award, 13 September 2006, paras. 93, 95, 97 and 100.
DOLZER, Rudolf, SCHREUER, Christoph (2008). *Principles of International Investment Law* (New York: Oxford University Press), pp. 255-257.

conclusion would result in disruptive application of the most favoured nation clause, as the clause would be able to establish a consent of the host state to arbitrate that has never been given and thus compel the state to subordinate to jurisdiction of the arbitral tribunal.

The offer of the host state to arbitrate incorporated in the particular BIT may be comprised of complex structure involving various requirements and conditions. In general, any foreign investor that aims to have his investment dispute resolved in designated arbitration forum, must comply with the structure, requirements and conditions stipulated of the offer of the host state to arbitrate, otherwise the offer is not opened for acceptance and thus the consent of the host state to arbitration is not given. The particular attention should be brought to the BIT provisions involving national courts of the host state into the dispute resolution mechanism implemented in the particular BIT. Some type of involvements of national courts, such as requirement of exhaustion of local remedies or obligation to litigate the investment dispute in national courts for prescribed period of time, are capable of suspending the offer of the host state to arbitrate and act like conditions precedents. Moreover, non-compliance with such conditions by foreign investor will result in blocking of the offer of the host state and inherent absence of consent of the host state to arbitration. The third type of involvement of national courts taking the form of the so-called "fork in the road provision" renders the offer of the host state conditional upon the choice of the foreign investor. Once the foreign investor chooses the national courts of the host state, the offer of the host state together with the consent to arbitrate is no longer given. With regard to evolving discussions on applicability of the so-called "most favoured nation clause" provisions to procedural protection of investment, the existence of such clause in the particular BIT may override some conditions or requirements of the offer and thus ultimately transfer the consent of the host state from another BIT to the concerned investment dispute. The arbitral tribunals have so far permitted the most favoured nation clause to override the requirement to litigate the investment dispute in national courts for prescribed period of time, whereas in cases of exhaustion of local remedies and so-called "fork in the road" provisions the application of the clause was denied as both requirements are considered to fall within the public policy of the host state. However, with regard to the indispensably consensual nature of investment arbitration, as one of the methods of alternative dispute resolution, it is still questionable whether such transfer of consent originally granted in another BIT towards another contracting party shall be permissible.

3.1.2. Acceptance of the offer of the host state to arbitrate by the investor

With regard to voluntary and consensual nature of dispute resolution mechanisms, the corner stone and fundamental condition of any investment arbitration proceedings is existence of an arbitration agreement between the parties to arbitration. The arbitration agreement is created by meeting of consents of both parties to the dispute to arbitrate the particular investment dispute in designated arbitration forum. Since in case of foreign direct investment the international investment agreements are concluded between home states of the foreign investors and host states, within which territory is the foreign investment made, the subsequently emerged investment dispute between the host state and the foreign investor is inevitably concerned with a phenomenon termed *arbitration without privity.* The practical consequence of arbitration without privity is the situation, where the foreign investor, as a party to the investment dispute and ultimate beneficiary of the BIT, must provide its consent to arbitration. In order to reflect such specific feature of investment arbitration, the legal theory developed special tool for assessment of existence of perfected arbitration agreement between the parties, *i.e.* the offer and acceptance model. As elaborated in the previous parts of this study, the host state provides its consent to arbitration in offer to arbitrate incorporated in the particular BIT. Therefore, in order to constitute perfected arbitration agreement between the parties to the dispute, the foreign investor, eligible under provisions of the particular BIT, must provide its consent to arbitration by acceptation of such offer. Acceptance of valid opened offer to arbitrate by eligible foreign investor prefects the arbitration agreement between the foreign investor and the host state. Such newly created arbitration agreement between the parties to the investment dispute remains effective and represents legal basis for subsequent conduct of the arbitration proceedings.[106]

Similarly to classic offer and acceptance model used in private contract law within national legal systems, the acceptance in international investment arbitration must have specific features in order to have ability to complement the offer and thus perfect the arbitration agreement. In general, the acceptance shall be a reflection of the particular offer and be compatible with the structure and requirements set by the offer to arbitrate. The acceptance of the offer to arbitrate may take either the expressed or implied form.

[106] DOLZER, Rudolf, SCHREUER, Christoph (2008). *Principles of International Investment Law* (New York: Oxford University Press), pp. 242-243.

Within the firstly stated form of acceptance, the express acceptation, the conduct of the foreign investor consists in providing explicit statement, in which the investor consents to arbitration. Even though it is at the sole discretion of the foreign investor whether to accept the offer of the host state and thus provide consent to arbitration, there are couple of model situations, in which the foreign investor is induced to submit his consent at quite early stage of his investment activities, prior to commencement of any investment dispute. Some of the BITs by themselves contain provision that imposes obligation on the foreign investor to submit his consent to arbitration and thus explicitly accept the offer of the host state to arbitrate incorporated in the same BIT. Moreover, the BIT may also particularly state that any benefits stemming from the BIT will only be applicable to foreign investors who submitted their express consent to arbitration. Once the foreign investor accepts the offer, the arbitration agreement is considered as perfected, and both the host state and the foreign investor are entitled to initiate the arbitration proceedings in prescribed arbitration forum at any time following the acceptation. Not only the BITs themselves, but also the host states may induce the foreign investors to accept the offer to arbitrate. The host states usually persuade the foreign investor to provide explicit consent to arbitration at the initial stage of the investment. Most commonly the host states use obligation to submit the express consent of the foreign investor to arbitration as requirement for admitting the foreign direct investment into their territory or as condition for granting a licence necessary for the investor to conduct his business within their territory.[107] However pressuring on the foreign investor the described situations may seem, it should be noted that the mechanism of dispute settlement in the form of investment arbitration is primarily designed to protect the foreign investors from unjust treatment of their investment. In conclusion, requirement or obligation of the foreign investor to *a priori* submit his explicit consent to arbitration and thus early accept the offer to arbitrate may be considered as rather advantageous for the foreign investor, since the arbitration agreement commence to exist from an early stage of his investment activities.

Unless the particular BIT obliges the foreign investor to expressly submit the consent to arbitration to the host state, the offer of the host state to arbitrate may also be accepted by the foreign investor in implied way. In such case, the consent of the investor to arbitration will be inferred from the conduct of a foreign investor. The most commonly occurring form

[107] *Ibid.*, p. 243.
SCHREUER, Christoph (2005). *Consent to Arbitration* (updated 02/2007). Transnational Dispute Management, Vol. 5 (www.transnational-dispute-management.com/article.asp?key=555, last accessed on 27 November 2020), p. 8.

of implied consent to arbitration is initiation of arbitration proceedings in arbitration forum designated to resolve the investment dispute. Even though the conduct of the foreign investor by which he consents to arbitration is not addressed to the other party of the arbitration proceedings, *i.e.* the host state, but rather to designated arbitration forum, the consent of the foreign investor is deemed to be lawfully provided and the arbitration agreement between the parties to arbitration is considered to be established. The permissibility to implicate the consent to arbitration from institution of arbitration proceedings by the foreign investor is closely connected with the nature of investment arbitration being termed as the arbitration without privity. The established practice of the arbitral tribunals allowing the arbitration agreement between the parties to the investment dispute being perfected by institution of arbitration proceedings by the foreign investor was most significantly affirmed in case *Generation Ukraine v Ukraine*[108].[109] In *Generation Ukraine v Ukraine,* the BIT concluded between Ukraine and the United States designated ICSID as forum for arbitration proceedings and did not contain any provision requiring the foreign investor to address his explicit consent to arbitration directly to the host state. The foreign investor from the United States without any prior submission of his consent to arbitration to Ukraine filed the Notice of Arbitration at the ICSID. The arbitral tribunal held that by filing the Notice of Arbitration at the ICSID the investor validly consented to the ICSID arbitration proceedings. With reference to well established decision-making practice the arbitral tribunal confirmed the right of any foreign investor to accept the offer of the host state incorporated in the BIT and providing for ICSID arbitration forum via instituting ICSID arbitration proceedings.[110]

The acceptance of the offer to arbitrate may be indirectly influenced by the two mutually interconnected institutes that are commonly incorporated in the BITs that may affect the acceptance of the offer to arbitrate by the foreign investor. The first institute capable of having effect on the acceptance of the offer to arbitrate is the provision in the particular BIT imposing obligation on the foreign investor to submit a notice of intent to arbitrate

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

[109] DOLZER, Rudolf, SCHREUER, Christoph (2008). *Principles of International Investment Law* (New York: Oxford University Press), p. 243.
SCHREUER, Christoph (2005). *Consent to Arbitration* (updated 02/2007). Transnational Dispute Management, Vol. 5 (www.transnational-dispute-management.com/article.asp?key=555, last accessed on 27 November 2020), p. 8.

[110] *Generation Ukraine v Ukraine*, Award, 16 September 2003, paras. 12.2 and 12.3.

arisen investment claim in designated arbitration forum. Another institute, most frequently used in combination with the notice of intent is a provision of the particular BIT establishing the so-called "cooling-off period" that obligates the foreign investor to negotiate the arisen investment dispute for prescribed period of time prior to institution of arbitration proceedings. Both institutes will be jointly elaborated in subsequent section of the study.

3.1.2.1. Notice of intent and cooling-off periods

One of the standardised types of requirements contained in the vast majority of the BITs is the so-called "cooling-off period". The cooling-off periods imposes an obligation on the foreign investor to endeavour to amicably settle the investment dispute before the institution of the arbitration proceedings. Such amicable settling is likely to have a form of negotiations or consultations for prescribed period of time. The particular provisions in the BIT establishing the cooling-off periods usually set the time frame for compulsory negotiation phase in a range between three months and twelve months. Once the prescribed period of time elapses and the parties have taken steps to amicably settle the investment dispute without successfully reaching the settlement, the foreign investor is entitled to initiate the arbitration proceedings in conformity with applicable provisions of the BIT.[111] The frequent incorporation of the cooling-off provisions into the BITs is connected with the general purpose to let some period of time elapse between the factual circumstances that triggered the investment dispute and submission of the investment dispute to arbitration proceedings. The cooling-off period is designed to induce the host state and the foreign investor to attempt to amicably settle the investment dispute and thus avoid submission of the dispute to arbitration proceedings.[112]

Another institute closely connected to the cooling-off period is the notice of intent, synonymously called "a trigger letter". The notice of intent is a submission of the foreign investor addressed to the host state, by which the foreign investor informs the host state on the existence of the investment dispute and the intention to institute the arbitration

[111] DOLZER, Rudolf, SCHREUER, Christoph (2008). *Principles of International Investment Law* (New York: Oxford University Press), p. 247.
SCHREUER, Christoph (2005). *Consent to Arbitration* (updated 02/2007). Transnational Dispute Management, Vol. 5 (www.transnational-dispute-management.com/article.asp?key=555, last accessed on 27 November 2020), p. 16.

[112] SCHREUER, Christoph (2004). *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road.* The Journal of World Investment & Trade, Vol. 5, No. 2, p. 232.

proceedings in accordance with applicable provisions of the BIT. In most of the cases the notice of intent serves as the submission triggering the commencement of the cooling-off period incorporated in the same BIT. It is not a common practice for the BITs to stipulate the content requirements of particular notice of dispute. However, with regard to the purpose a function of the institute, it may be deduced that the notice of dispute should state adequate amount of information on the identity of the foreign investor, the investment conducted under the BIT, the factual and legal basis of the dispute and indication that the obligations under the BIT have been breached.[113]

As both cooling-off periods and notices of intent have a form of legal obligation imposed on the eligible foreign investor by particular provisions of the BIT and represents institutes closely connected to the procedural and jurisdictional aspects of the dispute resolution mechanism incorporated in the particular BIT, it is questionable what kind of impact would have non-compliance of the foreign investor with such obligations. The issue to be considered within this elaboration is the nature of the requirements imposed on the foreign investor, *i.e.* whether the requirements shall be considered as jurisdictional or procedural. Jurisdictional nature of the requirements would lead to conclusion that non-compliance with these requirements by the foreign investor would lead to declining of the jurisdiction of the arbitral tribunal in subsequent arbitration proceedings. In contrast, the mere procedural character of the requirements would not lead to exclusion of the jurisdiction, but rather to suspension of the proceedings.[114] The approaches of arbitral tribunals towards the legal effects of non-compliance with cooling-off periods and notices of intent has not been united.

In majority of the cases, where the foreign investor initiated the arbitration proceedings significantly earlier before the expiration of the cooling-off period provided in the particular BIT, the arbitral tribunals held that the requirement of attempting to amicably settle the dispute between the parties for prescribed period of time is not of a jurisdictional nature and thus its non-satisfaction cannot deprive the arbitral tribunal of jurisdiction over particular dispute. In *Lauder v Czech Republic*[115] the BIT between the United States and the Czech Republic provided cooling-off period of six months and the investor from the United States instituted

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[113] Ius Mundi (2021). *Trigger Letter* (https://jusmundi.com/en/document/wiki/en-trigger-letter-formal-notice, last accessed on 15 May 2021).

[114] SCHREUER, Christoph (2004). *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road.* The Journal of World Investment & Trade, Vol. 5, No. 2, p. 232.

[115] *Ronald S. Lauder v. Czech Republic*, UNCITRAL, 9 ICSID Rep 66, Final Award, 3 September 2001.

the arbitration proceedings seventeen days after the commencement of the cooling-off period. Nevertheless, the arbitral tribunal held that the jurisdiction of the arbitral tribunal cannot be derogated by six months long cooling-off period, as the requirement has rather procedural character. The reasoning of the tribunal was based on the assumption that the negotiations would not result in any amicable settlement and declining of jurisdiction of the tribunal in order to induce the parties to negotiate would represent an excessive formalistic approach not protecting any legitimate interests of the parties to the dispute.[116] Similar approach was followed by the arbitral tribunal in *SGS v Pakistan*[117], in which the BIT concluded between Switzerland and Pakistan established cooling-off period of twelve months. The Swiss investor initiated the ICSID arbitration proceedings two days after the commencement of the cooling-off period. The arbitral tribunal refused jurisdictional implications of non-compliance with the cooling-off period and affirmed the jurisdiction over the dispute. The arbitral tribunal also based his conclusion on probable unsuccessfulness of the negotiations and additionally pointed out that insisting on such procedural requirement would be highly cost-effective as the foreign investor would be forced to re-submit his claim to arbitral tribunal. The arbitral tribunal clearly stated that the requirement of cooling-off period cannot amount to condition precedent for establishment of the jurisdiction of the arbitral tribunal.[118] Another practical reason supporting the procedural character of the requirement to comply with the cooling-off period was stated by the arbitral tribunal in *Wena Hotels v Egypt*[119]. In *Wena Hotels v Egypt* the BIT between United Kingdom and Egypt provided for three months long cooling-off period that was not complied with on behalf of the investor from the United Kingdom. The Egypt subsequently withdrew his jurisdictional objection based on non-compliance of the investor with the cooling-off requirement. The arbitral tribunal commented on the withdrawal stating that if the jurisdictional objection was granted, it would only interrupt the arbitration proceedings and most likely not have any other practical effects. Moreover, the tribunal noted that affirming the jurisdictional effect of the cooling-off period would merely result in re-institution of the arbitral proceedings, as the three months

[116] *Lauder v Czech Republic,* Final Award, 3 September 2001, paras. 187-191.

[117] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003.

[118] *SGS v Pakistan*, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para. 184.

[119] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction, 25 May 1999.

cooling-off period would elapse even before the arbitral tribunal would render its decision on jurisdiction.[120]

In contrast with the majority of arbitral tribunals that ruled in favour of the sole procedural effects of the cooling-off periods, some of the arbitral tribunals assigned at least some procedural responsibility to the foreign investor for his non-compliance or even attributed the cooling-off periods the jurisdictional affects in contradiction to majority of decisions. In *Ethyl v Canada*[121] the NAFTA provided for the cooling-off period of six months commencing at the moment of occurrence of the events that give rise to the dispute. The foreign investor initiated the arbitration proceedings against Canada five days after the commencement of the cooling-off period. The arbitral tribunal affirmed his jurisdiction over the dispute and excluded the jurisdictional effects of non-compliance with the cooling-off period reasoning that the negotiations are likely to be unsuccessful and there is no purpose in suspending the right of the investor to proceed with the claim. However, the arbitral tribunal noted that the investor by non-compliance with the requirement to negotiate prior to filing the Notice of Arbitration conducted gun-jumping and thus forced the tribunal to rule on jurisdictional aspects of the dispute. For these reasons the arbitral tribunal imposed obligation on the foreign investor to bear the costs of the proceedings for the part of proceedings dealing with jurisdictional issues.[122]

The minority view supporting the jurisdictional effects of the cooling-off periods were held by arbitral tribunals in cases *Goetz v Burundi*[123], *Enron v Argentina*[124] and *Guaracachi v Bolivia*[125]. Even though both of these tribunals attributed the cooling-off periods the ability to deprive the tribunal of the jurisdiction over the dispute,

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[120] *Wena Hotels v Egypt*, Decision on Jurisdiction, 25 May 1999, 41 I.L.M. 881 (2002), p. 891.
SCHREUER, Christoph (2004). *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road.* The Journal of World Investment & Trade, Vol. 5, No. 2, pp. 235-236.

[121] *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998, 38 I.L.M. 708 (1999).

[122] *Ethyl v Canada*, Award on Jurisdiction, 24 June 1998, 38 I.L.M. 708 (1999), paras. 84-88.
SCHREUER, Christoph (2004). *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road.* The Journal of World Investment & Trade, Vol. 5, No. 2, pp. 234-235.

[123] *Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999.

[124] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004.

[125] *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, 31 January 2014.

the reasoning and factual context of both cases were significantly different. In *Goetz v Burundi* the BIT concluded between Belgium and Burundi provided very peculiarly and detailed wording of the cooling-off period. Firstly, the BIT specifically stated the requirements on content of the notice of intent that should have been submitted to the host state together with memorandum sufficiently in detail describing the situation. The provision further established three months long cooling-off period during which the foreign investor and the host state should undertook steps towards amicable settlement. If not successful, the provision instructed the contracting parties to the BIT, *i.e.* the host state and the home state of the investor, to conduct diplomatic negotiations. Given the very uncommon requirement of diplomatic negotiations that require the negotiation procedures between two states, not being the parties to the investment dispute, the arbitral tribunal declined its jurisdiction over the supplementary claim, attributing to such specifically worded cooling-off period jurisdictional effect.[126] On the other hand, in *Enron v Argentina*, the BIT between the United States and Argentina established six months long cooling-off period. The investor from the United States complied with the cooling-off period and the jurisdiction of the tribunal has been confirmed, nevertheless the arbitral tribunal seized the opportunity to present his opposing view on the nature of the cooling-off period requirement in its *obiter dictum*. The arbitral tribunal stated that non-compliance with the requirement of the cooling-off period shall be assessed as jurisdictional obstacle depriving the arbitral tribunal of jurisdiction over the investment dispute.[127] Similar conclusion was followed by the arbitral tribunal in *Guaracachi v Bolivia*, the investment dispute based on the BITs between the United Kingdom and Bolivia and the United States and Bolivia. The BIT between the United Kingdom and Bolivia contained the cooling-off period of six months commencing on the date of submission of the notice of intent to arbitrate the alleged investment dispute. The arbitral tribunal adopted a firm stance towards the nature of obligation to comply with the cooling-off period and ruled that even though the six months negotiations are unlikely to lead towards any amicable settlement between the parties, the foreign investor is not entitled to deliberately omit his compliance with such obligation. The arbitral tribunal pointed out, that the cooling-off period obliges the foreign investor as to the means and not the result, *i.e.* the investor is

[126] *Groetz v Burundi*, Award, 10 February 1999, paras. 90-93.

[127] *Enron v Argentina*, Decision on Jurisdiction, 14 January 2004, para. 88.
SCHREUER, Christoph (2004). *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road.* The Journal of World Investment & Trade, Vol. 5, No. 2, pp. 237-238.

not obliged to reach an amicable settlement within the waiting period, but rather obliged to give a chance to the other party to negotiate. Any anticipated unsuccessfulness of the negotiations cannot override the obligation of the investor to comply with the cooling-off period. Moreover, the arbitral tribunal step even further in the assessment of the jurisdictional effects of the cooling-off period and concluded that non-compliance with such obligation constitutes jurisdictional obstacle as it disrupts the jurisdiction *ratione voluntatis*. The offer of the host state to arbitrate incorporated in the BIT is subject to all provisions contained in the BIT, including the cooling-off period, and the foreign investor must accept such offer in its entirety and comply with all requirements set by the BIT, otherwise the consent of the host state to arbitrate is not given. The tribunal concluded that the foreign investor is not entitled to decide which of the BIT provision is he going to comply with, and which is he going to omit, as the foreign investor is not entitled to unilaterally amend neither the offer of the host state to arbitrate nor the wording of particular provisions incorporated in the BIT.[128]

Very frequent occurrence of the cooling-off periods in the BITs accents the general intention of the parties to preferably amicably settle the arisen investment dispute. However, the decision-making practice has not been unified as to the nature of the obligation to seek an amicable settlement for prescribed period of time. Even though the vast majority of the tribunals concluded that such obligation can merely have procedural effect and thus can be remedied by subsequent conduct of the investor, allowing the foreign investors to deliberately omit the obligation imposed on them by the BIT should not stay without any consequences and should be punished at least by partial attribution of costs of proceedings.[129] However probable the unsuccessfulness and futility of the negotiations may seem, such argument should not be sufficient to override the application of the cooling-off period as such. The purpose of the cooling-off period is to provide reasonable amount of time for the host state and the foreign investor to take steps towards amicable settlement of the dispute without any pressure stemming from initiated arbitration proceedings. According to some decisions of arbitral tribunals, the non-compliance with the cooling-off period on behalf of the foreign investor may have significant jurisdictional effects,

[128] *Guaracachi v Bolivia*, Award, 31 January 2014, paras. 388-390, 392.
BALTAG, Crina (2017). *Not Hot Enough: Cooling-Off Periods and the Recent Developments under the Energy Charter Treaty*. Indian Journal of Arbitration Law, Vol. 6, No. 1, pp. 191-192.

[129] DOUGLAS, Zachary (2009). *The International Law of Investment Claims* (Cambridge: Cambridge University Press), p. 160.

including incomplete acceptance of the offer to arbitrate incorporated in the particular BIT. Inconsistent rulings of various arbitral tribunals suggest that the cooling-off period may represent a jurisdictional requirement incorporated in the offer to arbitrate, where non-compliance with such requirement may remove the consent of the host state to arbitration and deprive the arbitral tribunal of jurisdiction *ratione voluntatis* over the dispute.

The offer and acceptance model comprising the foundations of any arbitration agreement essential to jurisdiction of any arbitral tribunal in ICSID Convention arbitration proceedings described in detail in previous sections of the study represents jurisdictional requirements that need to be satisfied under regular circumstances. However, once the host state decides to denounce the ICSID Convention, the regular offer and acceptance model collides with the unilateral act of the host state aimed to terminate rights and obligations of the host state stemming from the ICSID Convention. Subsequent sections of the study will firstly elaborate the denunciation of the ICSID Convention by a contracting state and subsequently analyse the jurisdiction of the ICSID Tribunals within the six-month time lag following the date of denunciation and the jurisdiction of the ICSID Tribunals after six-month time lag elapses.

3.2. Denunciation of the ICSID Convention by a contracting state

The ICSID Convention is exclusively procedural multilateral international treaty that establishes the most commonly used dispute settlement forum for international investment disputes. With regard to principles of state sovereignty and autonomy to enter into treaty obligations, any contracting state to the ICSID Convention has a right to denounce the ICSID Convention. However, as elaborated in previous parts of this study, the international investment disputes based on the BITs and subject to ICSID Convention arbitration proceedings are concerned with complex structure of legal relationships between the host state, the home state of the foreign investor and the foreign investor himself. Rights and obligations originating from these legal relationships are usually stemming from three mutually independent legal instruments: (i) the BIT concluded between the host state and the home state of the investor; (ii) the ICSID Convention which contracting states are both the host state and the home state of the investor; and (iii) the arbitration agreement concluded between the host state and the foreign investor that is most commonly implied from the offer and acceptance model applicable to investment arbitration disputes. Given the intertwined nature of the rights and obligations stemming from these three legal instruments, it is undisputable that

any withdrawal of the party from either the ICSID Convention or the BIT will adversely affect the rights and obligations in the rest of the legal relationships within the complex international investment dispute.

The ICSID Convention contains specific provisions governing the denunciation by any of its contracting states.[130] Nevertheless, on closer examination of wordings of denunciation provisions it may be seem that the provisions by themselves do not provide clear and unambiguous interpretation of the denunciation process including the rights and obligations concerned with unilateral withdrawal of the state from the ICSID Convention regime. The decision-making practice of the arbitral tribunals have not been unified as to the interpretation of the denunciation of the ICSID Convention by the host state and its effects on jurisdiction of the ICSID Tribunals in particular investment disputes. Such split decision-making practice of the arbitral tribunals gave rise to contradictory decisions on jurisdiction of the ICSID Tribunals rendered in cases concerned with the denunciation of the ICSID Convention by the host state.

Prior to detailed analysis of the denunciation provisions of the ICSID Convention, a reasonable amount of emphasis should be put on the fundamental jurisdictional provisions of the ICSID Convention, being the corner stone and interpretative basis for any elaborations on jurisdictional requirements of ICSID arbitration proceedings. In compliance with a principle of consensual nature of arbitration proceedings, the Preamble of the ICSID Convention declares that mere ratification, acceptance or approval of the Convention cannot suffice neither to obligation of the state to refer an investment dispute to the ICSID arbitration, nor to compel the state to submit to arbitration proceedings.[131] The preamble affirms that requirement of the consent given by both parties to the investment dispute is essential to any ICSID arbitration proceedings and the bare membership of the state to the ICSID Convention can never replace the requirement of given consent to particular ICSID arbitration proceedings.[132] This declaration is subsequently evolved and rendered legally binding and enforceable via art. 25 of the ICSID Convention, being considered the fundamental provision on jurisdiction of the ICSID Centre.

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[130] Arts. 71 and 72 of the ICSID Convention.

[131] The ICSID Convention, Preamble, para. 7.

[132] DOLZER, Rudolf, SCHREUER, Christoph (2008). *Principles of International Investment Law* (New York: Oxford University Press), pp. 223, 238.

Art. 25(1) of the ICSID Convention states:

> *(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*

The wording of the art. 25(1) of the ICSID Convention establishes jurisdictional requirements *ratione materiae, i.e.* referring to the nature of the investment dispute, and *ratione personae, i.e.* referring to the parties of an investment dispute. The provision also provides basis for jurisdiction *ratione voluntatis, i.e.* the consent to arbitrate of parties to the investment dispute.[133] With regard to the jurisdiction *ratione voluntatis*, the main subject of elaborations in this study, the art. 25(1) of the ICSID Convention expands the aforementioned declaration stated in the Preamble of the ICSID Convention and introduces the consent of the parties to the dispute as the essential requirement of the jurisdiction of any ICSID Tribunal. The *ratione voluntatis* is entirely subjective criterion in comparison to other requirements that are based on objective nature.[134] Even though the contracting states accede the ICSID Convention in order to gain access to the ICSID arbitration forum, the ratification of the ICSID Convention by itself does not oblige the contracting state to consent to the jurisdiction of any ICSID Tribunal in any investment dispute. Similarly, the accession of the contracting state to the ICSID dispute settlement system cannot give rise to any expectations that such consent of the contracting state in any particular investment dispute will be given. Providing consent to arbitration in every particular case remains at the sole discretion of a contracting state and in majority of cases is provided indirectly via the offer incorporated in the particular BIT. However, once a contracting state validly consents to ICSID arbitration proceedings, his consent extends to all rights

[133] SCHREUER, Christoph, MALINTOPPI, Loretta, REINISCH, August, SINCLAIR, Anthony (2009). *The ICSID Convention: A Commentary. Second edition* (Cambridge: Cambridge University Press), p. 82.

[134] *Ibid.*, p. 82.

and obligations stemming from the ICSID Convention and the ICSID Centre rules and regulations.[135]

The art. 25(1) of the ICSID Convention prescribes the requirement of written form. Compliance with this requirement usually does not raise many issues as the offer of the host state incorporated in the particular BIT inherently takes written form and the acceptance of the foreign investor is usually conducted via filing of Request for Arbitration and subsequent initiation of arbitration proceedings.

The importance of ascertainment of whether the consent to arbitration was given and at what particular time the consent was perfected, plays crucial role especially in connection with denunciation of the ICSID Convention and termination of the BITs. The moment of perfection of the consent gives rise to substantial legal consequences consisted of rights and obligations vested in the parties to the ICSID arbitration proceedings. The parties to the dispute will no longer be able to invoke other remedies[136], such as pursuing the investment claim in national courts or submitting the investment claim to other arbitration forum. Moreover, the foreign investor can no longer avail himself of the diplomatic protection provided by his home state.[137] Once such significant legal consequences arise and the corresponding rights and obligations are constituted, no party shall be entitled to unilaterally withdraw its consent and thus reverse the emerged arrangement of rights and obligations. In order to maintain the impacts of perfected consent and secure the division of rights and obligations necessary for proper conduct of ICSID arbitration proceedings, the art. 25(1) of the ICSID Convention prohibits a party from unilateral withdrawal of its given consent. However, it should be noted that such irrevocability of the consent is only applicable to consent that has already been perfected, *i.e.* where the arbitration agreement between the parties of the particular investment dispute has been concluded. In the investment cases based on breach of the BIT, where the existence of jurisdiction of the arbitral tribunal is assessed using the offer and acceptance model, in order for the arbitration agreement to be constituted, the offer of the host state incorporated in the BIT has to be accepted by the eligible foreign investor. The stand-alone offer of the host state by itself does not constitute the perfected consent within the meaning of art. 25(1) of the ICSID Convention and the host state has a right to unilaterally withdraw his offer at any time prior to the acceptance made by the foreign

[135] *Ibid*., pp. 190-191.

[136] Art. 26 of the ICSID Convention.

[137] Art. 27(1) of the ICSID Convention.

investor. If the foreign investor wishes to render the consent of the host state irrevocable, he must duly accept the valid offer of the host state to arbitrate and in this way create the perfected consent to ICSID arbitration proceedings. It should be highlighted that the prohibition of the withdrawal of perfected consent is restricted only to unilateral withdrawal of consent. Should the parties to the dispute enter into mutual agreement to terminate their provided consents to arbitration, such mutual withdrawal of consents is permitted, as the parties consensually agree to depart from ICSID arbitration proceedings in particular investment dispute.[138]

The ICSID Convention provides two specific provisions governing the process of denunciation of the ICSID Convention by a contracting state including the consequences and limits of such denunciation. The art. 71 of the ICSID Convention provides:

> *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.*

The second provision further governing the denunciation of the ICSID Convention is art. 72 that states:

> *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.*

In order for the denunciation to be valid, art. 71 of the ICSID Convention prescribes the mandatory requirements of the notice of denunciation, *i.e.* the written form of the notice and addressee of the notice. The notice of denunciation shall be addressed to the World Bank, the depositary of the ICSID Convention under art. 73 of the ICSID Convention, which has

[138] SCHREUER, Christoph, MALINTOPPI, Loretta, REINISCH, August, SINCLAIR, Anthony (2009). *The ICSID Convention: A Commentary. Second edition* (Cambridge: Cambridge University Press), pp. 218-220, 254-255.

an obligation to notify[139] all signatory states of the ICSID Convention of the notice.[140] The decisive moment related to the denunciation of the ICSID Convention triggering significant legal consequences corresponds to the day of the receipt of the notice by the depositary. According to the art. 71 of the ICSID Convention the date of the receipt of the notice of denunciation denotes the commencement of the six-month period, which expiry renders the denunciation effective.

The rights and obligations of the state stemming from its accession to the ICSID Convention and adherence to the ICSID arbitration proceedings represents two distinct groups of rights and obligations. Both groups are substantially different in nature, as one of them is connected to the membership of a contracting state to the ICSID Convention and the other encompasses procedural rights and obligations associated with ICSID arbitration proceedings. Bearing in mind the complexity and interconnection of both groups of rights and obligations, the denunciation of the ICSID Convention may impact rights and obligations of each of the groups in different ways. In legal theory and practice emerged distinctive views on the meaning and purpose of the six-month time lag set by art. 71 of the ICSID Convention, especially concerned with the scope of applicability of stated time lag on different groups of rights and obligations. Such diversification of approaches was primarily induced by the wording of art. 72 of the ICSID Convention that limits the effects of denunciation in relation to the procedural rights and obligations associated with ICSID arbitration proceedings.

The denunciation of the ICSID Convention may adversely affect the ICSID arbitration proceedings to which the parties to the dispute already provided their consents. Once the arbitration agreement in particular investment dispute has been formed and the perfected consent to ICSID arbitration proceedings becomes irrevocable, additional safeguards need to be established so as to prevent the denunciation of the ICSID Convention from overriding the irrevocability of perfected consent. The art. 72 of the ICSID Convention was primarily designed to limit such effects of the denunciation and thus prevent the state from indirectly withdrawing his validly provided consent to arbitration.[141] Nevertheless, since the wording of art. 72 of the ICSID Convention refers to the group of procedural rights

[139] Art. 75(f) of the ICSID Convention.

[140] SCHREUER, Christoph, MALINTOPPI, Loretta, REINISCH, August, SINCLAIR, Anthony (2009). *The ICSID Convention: A Commentary. Second edition* (Cambridge: Cambridge University Press), p. 1278.

[141] *Ibid*., p. 257.

and obligations associated with the ICSID arbitration proceedings, particular discrepancies arise in interpretation of art. 72 in conjunction with art. 71 of the ICISID Convention. The wording of both provisions allows different interpretations leading to substantially diverse conclusions on the effects of denunciation of the ICSID Convention. The core of contradictive interpretations subsists in the scope of application of the six-month period introduced by art. 71 of the ICSID Convention. By application of different interpretation methods, some of the arbitral tribunals concluded that the six-month time lag applies to both groups of rights and obligations, whereas some of the arbitral tribunals restricted the application of six-month time lag only to the procedural rights and obligations associated with ICSID arbitration proceedings.

The choice of the arbitral tribunal among distinct interpretation approaches of the arts. 71 and 72 of the ICSID Convention has immense impact on the jurisdiction of the ICSID Tribunal in the particular investment dispute and therefore may deprive the foreign investor of the ICSID arbitration forum in relation to particular investment claim. The other adverse effect of the diverse interpretation approaches is the risk of inspiring the contracting states to denounce the ICSID Convention in order to release themselves from obligation to submit to ICSID arbitration proceedings in particular investment case. Both ways of interpretation of the key provisions governing the process and effects of denunciation of the ICSID Convention altogether with underlying decisions of ICSID Tribunals will be elaborated in following sections of the study.

3.3. Jurisdiction of ICSID Tribunal during the six-month time lag

Receipt of the written notice of denunciation of the ICSID Convention by the depositary denotes the commencement of significant legal consequences associated with the process of denunciation of the ICSID Convention. The most significant legal consequence triggered by the receipt of the notice is the starting date of the six-month period established by art. 71 of the ICSID Convention, after which expiry the denunciation shall take effect. Nevertheless, art. 72 of the ICSID Convention contradicts the wording of art. 71 and seems to restrict the application of the six-month time lag on group of procedural rights and obligations associated with ICSID arbitration proceedings.

From practical point of view, the most substantial controversy arises in situations, where the host state provided opened offer to arbitrate in the particular BIT and subsequently

denounced the ICSID Convention before the eligible foreign investor managed to accept the offer of the host state to arbitrate. By following the contradictory interpretation approaches of arts. 71 and 72 of the ICSID Convention, each approach leads to completely opposite conclusion regarding the ability of the foreign investor to accept the offer of the host state to arbitrate during the six-month time lag. Therefore, the core of the interpretation controversies subsists in effect and implications of the notice of denunciation on the offer of the host state to arbitrate investment disputes in ICSID arbitration forum. For these reasons, the effect and implications of the notice of denunciation on the consent of the host state to ICSID arbitration incorporated in the particular BIT is subject to ongoing legal discussions.[142] Since the consent of the host state to ICSID arbitration belongs to the group of procedural rights and obligations of the state associated with the ICSID arbitration proceedings, it is much distinguishable from the group of rights and obligations of the state arising from its membership to ICSID Convention. The ICSID Convention does not provide specification on which of stated groups of rights and obligations of the denouncing state remains in existence during the prescribed six-month time lag and which ceases to exist at the moment of the receipt of notice of denunciation by the depositary. As stated in previous section of this study, two main contradictory approaches emerged in recent decisions of ICSID Tribunals that were concerned with situations, where the states in the Latin America have denounced the ICSID Convention, exposing the foreign investors to the risk of losing the ICSID arbitration forum originally designated for resolving their investment disputes with the host state.

3.3.1. *Venoklim* approach affirming the jurisdiction of the ICSID Tribunal during six-month time lag despite the denunciation of the ICSID Convention

In January 2012 the Bolivarian Republic of Venezuela addressed a written notice of denunciation of the ICSID Convention to the World Bank, the depositary of the ICSID Convention.[143] Some of the foreign investors entitled under particular BITs

[142] SCHREUER, Christoph (2010). *Denunciation of the ICSID Convention and Consent to Arbitration*. In: WAIBEL, Michael, KAUSHAL, Asha, LIZ CHUNG, Kyo-Hwa and BALCHIN Claire (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality* (London: Kluwer Law International), pp. 354-355.

[143] International Centre for Settlement of Investment Disputes (2021). *News & Events. News Releases. Venezuela Submits a Notice under Article 71 of the ICSID Convention* (https://icsid.worldbank.org/news-and-events/news-releases/venezuela-submits-notice-under-article-71-icsid-convention, last accessed on 22 May 2021).

to have their investment claims against Venezuela resolved in ICSID arbitration proceedings, accepted the offer of Venezuela contained in particular BIT and thus initiated ICSID arbitration proceedings during the six-month period following the submission of notice of denunciation. The ICSID Tribunals in cases *Blue Bank v Venezuela*[144] and *Venoklim v Venezuela*[145] were concerned with this particular scenario. As both of the ICSID Tribunals held that Venezuela did not revoke its offer to arbitrate at the moment of submitting the notice of denunciation and her offer to arbitrate remained opened for acceptance until the expiration of the following six-month time lag, the foreign investors were entitled to accept the offer to arbitrate during the six-month period. By affirming the jurisdiction of the ICSID Tribunals within the six-month time lag, despite the prior denunciation of the ICSID Convention by the host state, decisions of ICSID Tribunals in *Blue Bank v Venezuela* and *Venoklim v Venezuela* represent two most significant decisions that adopted the first interpretation approach.

The ICSID Convention, as procedural multilateral international treaty is subject to well-established rules governing international treaties contained in customary international law and the VCLT. In conformity with general rules on termination of international treaties, particularly art. 54(a) of the VCLT, the ICSID Convention establishes its own *lex specialis* rule in art. 71, by which it governs the process of denunciation by a contracting state. The art. 71 of the ICSID Convention states that a contracting state may denounce the ICSID Convention by written notice to the depositary of the ICSID Convention and the denunciation becomes effective six months after the receipt of the notice. In order to interpret the wording of the art. 71 of the ICSID Convention, the Tribunal shall apply rules of interpretation of international treaties incorporated in art. 31 of the VCLT, encompassing the customary rules of international treaty interpretation. Following the general interpretation rule of art. 31 of the VCLT, the terms in a treaty shall be interpreted in accordance with the ordinary meaning given to them, in their context and in the light of the object and purpose of the treaty.[146] In *Blue Bank v Venezuela* the ICSID Tribunal conducted grammatic analysis

[144] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/12/20, Award of the Tribunal, 26 April 2017.

[145] *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Award of the Tribunal, 3 April 2015.

[146] The VCLT, art. 31(1).

of the art. 71 of the ICSID Convention and concluded that the article consists of mandatory language, *i.e.* uses the term "shall", when describing the moment when the denunciation of the ICSID Convention becomes effective. On a plain reading of the art. 71 of the ICSID Convention, the denunciation becomes effective only after the expiry of six-month time lag commenced at the date of receipt of the notice of denunciation by the depositary.[147] According to the principle of *effect utile,* the rule of effectiveness, the unwritten rule of interpretation of international treaties emerged from international practice, by interpreting the provisions of a treaty, the complete weight and effect must be given to each term of a treaty, allowing all of the terms of a treaty to provide their full reason and meaning. Following the decisions of ICJ *Spain v Canada*[148] and *Georgia v Russian Federation*[149], such interpretation of any provision of a treaty that would deprive the provision of any meaning or any effect, would contravene the well-established rule of effectiveness.[150] Therefore, any interpretation disregarding the six-month time lag established by art. 71 of the ICSID Convention and attribute the denunciation of the ICSID Convention to become effected at the moment of filing the notice of denunciation would deprive the six-month time period of any effect.[151]

With regard to the reason and meaning of the six-month waiting period, it should be noted that the multilateral international treaties usually provide a designated time period commencing at the date of the act of denunciation of the treaty and finishing within prescribed period of time, rendering the denunciation effective. Institute of waiting periods associated with effectivity of the denunciation is primarily aimed to safeguard legal certainty between the denouncing state and rest of the contracting states, protect their legal interests and provide for space for further negotiations.[152] The application of the waiting periods associated with process of denunciation of the international treaties was also elaborated by the ICJ in case

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[147] *Blue Bank v Venezuela*, Award of the Tribunal, 26 April 2017, para. 119.

[148] *Fisheries Jurisdiction (Spain v Canada)*, Judgement of 4 December 1998, ICJ Rep 432, para. 52.

[149] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Preliminary Objections, Judgement of 1 April 2011, ICJ Rep 70, paras. 133-134.

[150] DÖRR, Oliver, SCHMALENBACH, Kirsten (2012). *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer-Verlag Berlin Heidelberg), p. 539.

[151] *Blue Bank v Venezuela*, Award of the Tribunal, 26 April 2017, para. 119.

[152] VILLIGER, Mark Eugen (2009). *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff Publishers), p. 704.

Nicaragua v Colombia[153]. In *Nicaragua v Colombia* the art. 56 of the American Treaty on Pacific Settlement[154] entitled a contracting state to denounce the treaty by addressing a notice of denunciation to the Pan American Union, with the denunciation becoming effective upon expiry of one-year period following the submission of a notice. Nicaragua initiated the proceedings before the ICJ within the one-year time lag following the notice of denunciation submitted by Colombia. Colombia preliminary objected the jurisdiction of the ICJ based on argumentation that the notice of denunciation had immediate effect. The ICJ rejected the jurisdictional objection of Colombia and affirmed the jurisdiction over the dispute, reasoning that denunciation shall take effect upon expiry of one-year time lag after the notice of denunciation and any other interpretation of the art. 56 resulting in decline of jurisdiction would be contrary to the object and purpose of the American Treaty on Pacific Settlement as a whole.[155] By rendering this conclusion the ICJ confirmed the general object and purpose of the waiting period associated with denunciation incorporated in the wording of a treaty itself.

Moreover, the ICJ further enlarged the relevance and meaning of the time lags connected to the process of denunciation of international treaties. The ICJ held that even though the international treaty does not incorporate in its wording any specific waiting period postponing the effectiveness of the notice of denunciation, it is a general rule of international customary law that reasonable time period shall be applied rendering the denunciation of a treaty effective.[156] In the case *Nicaragua v United States*[157] the ICJ concluded that granting a reasonable time period for process of termination of an international treaty that does not contain any provision governing this matter represents the requirement of the principle of good faith.[158]

In line with the approaches and reasonings provided by the ICJ, the ICSID Tribunal in *Venoklim v Venezuela* concluded that the six-month time lag established

[153] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)*, Preliminary Objections, Judgement of 17 March 2016, ICJ Rep 100.

[154] American Treaty on Pacific Settlement (Pact of Bogota), signed 30 April 1948, in force 6 May 1949.

[155] *Nicaragua v Colombia*, Preliminary Objections, Judgement of 17 March 2016, para. 46.

[156] DÖRR, Oliver, SCHMALENBACH, Kirsten (2012). *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer-Verlag Berlin Heidelberg), pp. 986-987.

[157] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgement of 26 November 1984, ICJ Rep 392.

[158] *Nicaragua v United States,* Jurisdiction and Admissibility, Judgement of 26 November 1984, para. 63.

in art. 71 of the ICSID Convention was originally designed to protect the foreign investors from the adverse jurisdictional impacts of the denunciation of the ICSID Convention by the host state. The ICSID Tribunal emphasized the safeguarding character of the six-month time lag preventing the host state from misusing the institute of denunciation particularly in cases of unpredictable denunciations, where the foreign investors could not have predicted such act of the host state.[159]

As the object and purpose of the six-month period established in art. 71 of the ICSID Convention has been interpreted in previous paragraphs, further elaborations should be provided on the effects of such six-month time lag on the offer of the host state to arbitrate and its provided consent to ICSID arbitration proceedings. In both cases *Blue Bank v Venezuela* and *Venoklim v Venezuela* the host state unilaterally consented to the ICSID arbitration proceedings via incorporation of the offer to arbitrate in respective BITs. As elaborated in previous sections of the study, such opened offer of the host state represents general unilateral consent to arbitrate the investment disputes in ICSID arbitration forum opened for acceptance of any eligible foreign investor under the respective BIT. In order for the arbitration agreement to be formed and thus jurisdiction of the ICSID Tribunal established in particular investment dispute, the offer of the host state must be duly accepted by the foreign investor.

In cases *Blue Bank v Venezuela* and *Venoklim v Venezuela* the ICSID Tribunals analysed the art. 72 of the ICSID Convention as the provision prescribing the effect of denunciation of the ICSID Convention on consent given by the host state. The key issue to consider within this interpretation was the term "consent" used in art. 72 and ascertaining whether the term shall be interpreted as the unilateral or perfected consent of the parties to ICSID arbitration proceedings. The term "consent" within its general meaning may address either the unilateral consent, *i.e.* consent given by one party to ICSID arbitration proceedings, or perfected consent, *i.e.* consents given by both parties to the ICSID arbitration proceedings that jointly forms the arbitration agreement.[160] Following the general rules of interpretation of the international treaties enshrined in art. 31(1) of the VCLT, the grammatical interpretation of term "consent" leads to ambiguous conclusion, the term shall be interpreted

[159] *Venoklim v Venezuela*, Award of the Tribunal, 3 April 2015, paras. 63 and 65.

[160] GARNER, Bryan A., BLACK, Henry Campbell (2009). *Black's law dictionary. Ninth edition* (St. Paul: West), p. 346.

within the context and with regard to the object and purpose of the provision containing the analysed term.[161] Within the contextual elaboration of art. 72 of the ICSID Convention, the wording "given by one of them" implies that the term "consent" refers to rather unilateral consent given by one of the parties to the dispute, *i.e.* the host state or the foreign investor.[162] This interpretation may also be supported by the wording of art. 25 of the ICSID Convention, the corner stone jurisdictional provision of the entire ICSID Convention, which explicitly refers to the "consent by both parties", *i.e.* the perfected consent. It may be argued that once the ICSID Convention expressly qualifies the term "consent" as the perfected one in one of its provisions, it would make such qualification also in other provisions. Since the wording of art. 72 of the ICSID Convention does not explicitly refer to the perfected consent, the interpretation of the term "consent" should rather lead to the unilateral consent.

When analysing the object and purpose of the art. 72 of the ICSID Convention, the ICSID Tribunal in *Venoklim v Venezuela* hold that the purpose of the art. 72 is the protection of group of procedural rights and obligations of parties to the investment dispute that arise out of their provided consents to arbitration. As host state incorporated its valid offer to arbitrate in the particular BIT, it has obligation to submit to the ICSID arbitration proceedings once his offer to arbitrate was duly accepted by the foreign investor.[163] Such obligation of the host state to abide by the ICSID arbitration proceedings shall last until the offer of the host state is lawfully withdrawn, in order to reflect the *pacta sunt servanda* principle together with principle of good faith. Even though the denunciation of the ICSID Convention may eventually result in withdrawal of the offer of the host state to arbitrate, the denunciation of the ICSID Convention takes effect upon the expiry of the six-month time lag following the notice of denunciation. Therefore, the offer of the host state to arbitrate remains opened for acceptance by the eligible foreign investor during the six-month period after the receipt of the notice of denunciation by the depositary.[164] Such procedural rights and obligations of the host state stemming from the provided unilateral consent of the host state to the ICSID arbitration proceedings cease to exist upon the expiry of the six-month time lag.

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[161] DÖRR, Oliver, SCHMALENBACH, Kirsten (2012). *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer-Verlag Berlin Heidelberg), p. 543.

[162] *Blue Bank v Venezuela*, Award of the Tribunal, 26 April 2017, para. 98.

[163] *Venoklim v Venezuela*, Award of the Tribunal, 3 April 2015, para. 66.

[164] *Ibid*.

The ICSID Tribunal in *Venoklim v Venezuela* stated that any other interpretation of the art. 71 and 72 of the ICSID Convention would result in undue burden imposed on the foreign investor. The foreign investor would have to anticipate the submission of the notice of denunciation by the host state and in order to safeguard his access to ICSID arbitration forum, the foreign investor would have to accept the offer of the host state to arbitrate prior to any such receipt of the notice of denunciation by the depositary. In violation of the basic principle of legal certainty, the host state would be free to strategically denounce the ICSID Convention at any time convenient and allowed to terminate at his sole discretion the obligation to abide by the ICSID arbitration proceedings.[165] Such interpretation may ultimately lead to evasion of responsibility for breaches of the BIT on behalf of the host state, depriving the ICSID Tribunal of the jurisdiction and leaving the foreign investor without possibility to have his investment dispute resolved in previously mutually agreed arbitration forum.

The first interpretation approach of the arts. 71 and 72 of the ICSID Convention followed by the arbitral tribunals in cases *Blue Bank v Venezuela* and *Venoklim v Venezuela* excludes the immediate effect of the notice of denunciation of the ICSID Convention on the offer of the host state to arbitrate incorporated in respective BIT and thus allows the foreign investor to accept the offer to arbitrate. The argumentations in both ICSID cases are mainly based on the general object and purpose of the waiting periods associated with denunciation of the international treaties, the rule of effectiveness, *pacta sunt servanda* principle and legal certainty. The underlying basis of this interpretation approach is the protection of the foreign investor from strategic denunciation of the ICSID Convention by the host state that could otherwise deliberately evade his legal obligation to submit to the ICSID arbitration proceedings to which he consented in his offer to arbitrate in particular BIT and thus avoid potential responsibility for his unlawful conduct.

3.3.2. *Favianca* approach excluding the jurisdiction of the ICSID Tribunal during six-month time lag given the denunciation of the ICSID Convention

Submission of the notice of denunciation by Bolivarian Republic of Venezuela in January 2012 affected large number of foreign investors entitled under respective BITs

[165] *Ibid*., paras. 63, 65 and 66.

to submit their investment disputes against Venezuela to ICSID arbitration forum. However, not all of the ICSID Tribunals were united in respect of their interpretation approach of the effects of denunciation on the jurisdiction of the arbitral tribunal. The most significant case in which the foreign investor accepted the offer of the host state to arbitrate during the six-month time lag and the arbitral tribunal concluded that the notice of denunciation immediately excluded the jurisdiction of the ICSID Tribunal, was the case *Favianca v Venezuela*[166]. In *Favianca v Venezuela* the arbitral tribunal significantly departed from previous decisions of the ICSID Tribunals elaborated in previous section of the study. However controversial this decision may seem, its reasoning is strongly rooted in interpretation approach emerging from legal theory and supported by renowned scholars. The second interpretation approach is based on division of groups of rights and obligations affected by the denunciation of the ICSID Convention, where group of rights and obligations is affected by immediate effect of the notice of denunciation, whereas the other group of rights and obligations is concerned with the effects of denunciation after expiry of the six-month time lag.

In order to establish jurisdiction of any arbitral tribunal in ICSID Convention arbitration proceedings, the parties to the investment dispute must comply with fundamental requirements set in art. 25 of the ICSID Convention. The art. 25 of the ICSID Convention requires the parties to consent to submission of any investment dispute in writing to the ICSID Centre. Once both parties provided their consents to ICSID arbitration proceedings, no party may withdraw its provided consent unilaterally. Applying the general rules of interpretation of international treaties enshrined in arts. 31 and 32 of the VCLT on the wording of art. 25 of the ICSID Convention, both grammatical and contextual method of interpretation suggest that the art. 25 of the ICSID Convention refers to the requirement of perfected consent of the parties to the investment dispute. This conclusion may also be supported by the wording contained in the Preamble to the ICSID Convention, stating that the contracting states to the ICSID Convention recognise that mutual consent given by the parties to submit the disputes to arbitration constitutes a binding agreement.[167] The Preamble to the ICSID Convention indicates that the perfected consent provided

[166] *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Award of the Tribunal, 13 November 2017.

[167] The ICSID Convention, Preamble, para. 6.

by both parties to the investment dispute forms an underlying object and purpose of the ICSID Convention, represents *sine qua non* of any ICSID Convention arbitration proceedings and thus operates as fundamental condition to jurisdiction of any ICSID Tribunal.[168]

Given the peculiar character of the international investment arbitration being termed as "arbitration without privity", the consent of both parties to the investment dispute does not have to be contained in one document, but it is rather very common for the consents to be incorporated into separate documents, *i.e.* the offer of the host state and the acceptance of the foreign investor. Once both consents of the parties are duly provided, they jointly constitute the perfected consent and thus give rise to arbitration agreement. Nevertheless, in order for the foreign investor to duly accept the offer of the host state to arbitrate incorporated in the particular BIT, the standing offer must be still valid and opened by the time of the acceptance. If the investor attempts to accept the offer not in a timely manner, no consent will be provided on behalf of the host state that would result in creation of the perfected consent and lead to satisfaction of the fundamental requirement for establishing jurisdiction of the ICSID Tribunal in particular case.

The ICSID Tribunal in the case *Favianca v Venezuela* concluded that the notice of denunciation of the ICSID Convention by itself withdraws the standing offer of the host state to ICSID arbitration proceedings incorporated in particular BIT.[169] The starting point of the interpretation approach leading to such conclusion subsists in special nature of the ICSID arbitration that is governed by set of rules contained in two mutually independent international treaties, *i.e.* the ICSID Convention and the particular BIT. Both of the international treaties prescribe different set of rules and conditions that need to be jointly satisfied in order for the ICSID Tribunal to establish its jurisdiction over particular investment dispute. Once some of the rules and conditions stemming from one of the stated treaties are not satisfied, the ICSID Tribunal cannot have a jurisdiction over the particular dispute.[170] Therefore, the acts of the parties to the dispute are reflected in the fulfilment of rules and conditions stemming from both ICSID Convention and particular BIT. If the host state denounces the ICSID Convention, the offer of the host state may be adversely affected by the act

[168] *Favianca v Venezuela*, Award of the Tribunal, 13 November 2017, para. 277.

[169] *Ibid*., paras. 292 and 295.

[170] *Ibid*., paras. 258 and 261.

of denunciation conducted by the host state within its position as a contracting state to the ICSID Convention. Once the host state submits the notice of denunciation of the ICSID Convention, the requirement under one of the treaties, the ICSID Convention, ceases to be satisfied, which ultimately deprives the standing offer of the denouncing host state of its legal effects.

In line with the well-established principle of international law on treaties, a contracting party to the international treaty may withdraw from international treaty in conformity with the specific provisions of the treaty governing the process effects of such withdrawal.[171] The ICSID Convention denunciation regime is governed by arts. 71 and 72 of the ICSID Convention. Art. 71 of the ICSID Convention entitles a contracting state to denounce the ICSID Convention by the way of unilateral declaration taking the form of notice of denunciation. Such unilateral declaration terminates the rights and obligations of contracting state stemming from its membership to the ICSID Convention altogether with legal relationships between the denouncing state and the rest of the contracting states to the ICSID Convention.[172] According to the precise wording of the art. 71 of the ICSID Convention, such unilateral withdrawal from the ICSID Convention takes effect six months after the receipt of notice of denunciation to the depositary. Upon expiry of the prescribed six-month time lag the denouncing contracting state ceases to have the group of rights and obligations arising from its position of a party to the ICSID Convention. The ICSID Tribunal in *Favianca v Venezuela* described the group of rights and obligations arising from its position of a party to the ICSID Convention contained in the ICSID Convention as the right of participation in the Administrative Council[173], the right of nomination of individuals as conciliators and arbitrators[174] and the right of proposal of amendments to the ICSID Convention[175]. The obligations of a contracting state stemming from its position as a party to the ICSID Convention the ICSID Tribunal described as the obligation of contribution to the financing of the ICSID Centre[176], the obligation to grant immunities

[171] The VCLT, art. 54(1).

[172] DÖRR, Oliver, SCHMALENBACH, Kirsten (2012). *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer-Verlag Berlin Heidelberg), p. 951.

[173] The ICSID Convention, arts. 4-7.

[174] *Ibid.*, art. 13.

[175] *Ibid.*, art. 65.

[176] *Ibid.*, art. 17.

and privileges to the ICSID Centre within its territory[177], the obligation to not exercise diplomatic protection in favour of its nationals[178] and the obligation of recognition and enforcement of the ICSID awards within its territory[179].[180]

The basis of second interpretation approach affirming the immediate effect of notice of denunciation on the offer of the host state to arbitrate subsists in the division of labour between the arts. 71 and 72 of the ICSID Convention. In *Favianca v Venezuela* the ICSID Tribunal elaborated the scope of application of both provisions imposing distinct effects of denunciation on different group of rights and obligations of a denouncing contracting state to the ICSID Convention. With regard to the ordinary meaning of terms "Any Contracting State may denounce this Convention" used in wording of the art. 71 of the ICSID Convention, the ICSID Tribunal interpreted the art. 71 of the ICSID Convention as prescribing the effects of the denunciation only in respect of group of rights and obligation of the host state stemming from its position as a party to the ICSID Convention. Therefore, the six-month time lag is only applicable to the rights and obligations of the host state arising from its position as a party to the ICSID Convention, which cease to exist upon the expiry of six months following the notice of denunciation. Nevertheless, this conclusion is independent of the effect of notice of denunciation on the offer of the host state to arbitrate, which is independently governed by art. 72 of the ICSID Convention. Therefore, the six-month time lag is not applicable neither to the offer of the host state to arbitrate, nor to the consent of the host state to ICSID arbitration proceedings.[181]

Following the reasoning of the ICSID Tribunal in *Favianca v Venezuela*, the art. 72 of the ICSID Convention creates specific rule related to another group of rights and obligations, *i.e.* the rights and obligations of a contracting state arising out of the consent to the jurisdiction of the ICSID Centre. The art. 72 of the ICSID Convention provides that the notice of denunciation shall not affect the rights and obligations under the ICSID Convention arising out of consent to the jurisdiction given prior to the notice

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[177] *Ibid.*, art. 19.

[178] *Ibid.*, art. 27.

[179] *Ibid.*, art. 54.

[180] *Favianca v Venezuela*, Award of the Tribunal, 13 November 2017, para. 267.

[181] *Ibid.*, para. 269.

od denunciation was received by the depositary. Therefore, the art. 72 of the ICSID Convention governs the effects of denunciation on the rights and obligations stemming from the position of a contracting state as a party in ICSID arbitration proceedings. When elaborating on the potential effects of the denunciation of the ICSID Convention on the position of a contracting state as a party to ICSID arbitration proceedings, the ICSID Tribunal in *Favianca v Venezuela* interpreted the term "consent" in art. 72 as a perfected consent. The most significant argumentation supporting this conclusion of ICSID Tribunal was the proposition that any rights and obligations of the contracting state as a party to ICSID arbitration proceedings can never emerge from unilateral consent, as all of the rights and obligations belonging to this group only emerge at the moment of creation of perfected consent, *i.e.* upon creation of the arbitration agreement. Therefore, the offer of the host state to arbitrate incorporated in the particular BIT constitutes merely non-binding promise that can be withdrawn unilaterally at the sole discretion of the contracting state at any time prior to acceptation by the foreign investor. Such unilateral withdrawal of mere non-binding promise of the host state to arbitrate can never give rise to any liability on behalf of the host state.[182] The art. 72 of the ICSID Convention thus shall be interpreted as preserving rights and obligations that arise out of perfected consent of the host state and foreign investor to the ICSID arbitration proceedings from the effects of unilateral denunciation of the ICSID Convention and only perfected consent persists the notice of denunciation.[183]

The ICSID Tribunal in *Favianca v Venezuela* devoted throughout analysis of the arguments of the foreign investor that were inspired by decisions of ICSID Tribunals upholding the first interpretation approach. The arbitral tribunal in *Favianca v Venezuela* stated that it would be unreasonable to give the term "consent" in art. 72 of the ICSID Convention opposite meaning to the one used in art. 25 of the ICSID Convention, the most fundamental jurisdictional provision of the entire ICSID Convention. The Tribunal further asserted that any adjudication system based on the provided consents of the parties to the dispute is exposed to the risk of withdrawal of such consent by one of the parties. Nevertheless, the art. 72 of the ICSID Convention at least prevents the already perfected consent to ICSID arbitration proceedings from being unilaterally withdrawn. Moreover, the process of denunciation of any multilateral international treaty is usually subject to formal procedure

[182] *Ibid.*, paras. 271 and 275.

[183] *Ibid.*, para. 282.

within the constitutional system of the host state to which usually precedes political debates between state institutions. It is therefore rather unlikely for the foreign investor to face completely unexpected filing of notice of denunciation by the host state.[184]

To conclude the basis of interpretation approach relied on in the case *Favianca v Venezuela*, the arts. 71 and 72 of the ICSID Convention aim to facilitate two completely distinct purposes. The ICSID Convention aimed to govern the complicated process of denunciation by establishing two independent provisions, where the first one is designed to govern the exit of the contracting state as a party to the ICSID Convention, whereas the second one aims to preserve legitimate expectations of the foreign investors who entered into arbitration agreement with the contracting state and thus relied on his provided consent to ICSID arbitration proceedings. Allowing the offer of the host state to remained opened for acceptance by the foreign investor during six-month period following the notice of denunciation could potentially expose the host state to considerable amount of newly emerged ICSID arbitration proceedings, as the foreign investors would be tempted to accept the offer of the host state to arbitrate and try their luck in ICSID arbitration proceedings just before the offer of the host state expires.[185]

The second interpretation approach dividing the effects of the notice of denunciation and prohibiting the foreign investor to accept the offer to arbitrate after the notice of denunciation has been submitted by the host state did not appear for the first time in the case *Favianca v Venezuela*, as it was already formulated by some of the well renowned scholars in the area of investment arbitrations. The reasoning of the ICSID Tribunal was very significantly influenced by the opinions of *Christoph Schreuer*[186]. However the second interpretation approach strictly abides by the principle of the offer and acceptance model in investment arbitration, strongly accents the voluntary nature of any arbitration proceedings and provides more conformed way of interpretation of the denunciation provisions with the fundamental jurisdictional provisions of the ICSID Convention, the *Favianca* approach has been subject to criticism for alleged favouring of the denouncing host states.

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[184] *Ibid.*, paras. 276-278, 287-288 and 290.

[185] *Ibid.*, para. 289.

[186] SCHREUER, Christoph (2010). *Denunciation of the ICSID Convention and Consent to Arbitration*. In: WAIBEL, Michael, KAUSHAL, Asha, LIZ CHUNG, Kyo-Hwa and BALCHIN Claire (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality* (London: Kluwer Law International), pp. 353-368.

3.4. *Söderlund's* opinion supporting jurisdiction of ICSID Tribunal after expiry of the six-month time lag

Previous sections of the study introduced and further elaborated two contractional interpretation approaches towards the effects of denunciation of the ICSID Convention by the host state. Besides the *Venoklim* and *Favianca* approaches another frequently discussed way of interpretation emerged concerned with the effects of denunciation of the ICSID Convention on the jurisdiction of ICSID Tribunals. The interpretation approach was most considerably analysed in the separate opinion of *Christer Söderlund* in the case *Blue Bank v Venezuela*[187]. Although no arbitral tribunal dealing with denunciation of the ICSID Convention by the contracting state ever adopted this approach into its ruling, *Söderlund's* opinion is frequently subject to related legal analyses. According to the *Söderlund's* opinion, the eligible foreign investor has a right to accept the offer of the host state to arbitrate not only within the six-month time lag following the notice of denunciation of the ICSID Convention, but also after the six-month period elapses, provided the BIT, in which the offer of the host state is incorporated, remains in force.

The basis for the interpretation approach in *Söderlund's* opinion subsists in analysis of the offer and acceptance model and its applicability to modern types of ISDS dominantly based on BITs. *Söderlund* notes that at the time of the adoption of the ICSID Convention, the ISDS was dominantly based on direct investment contracts concluded between the host state and the foreign investor, national legislation of the host state or submission agreement. Nevertheless, nowadays the majority of investment disputes is based on the BITs. Therefore, it may be argued that the wording of the ICSID Convention does not reflect the ISDS based on the BITs, as by the time of its drafting, no such mechanism of ISDS existed.[188]

The key issue to consider within the *Söderlund* approach was whether the consent of the host state provided in the particular BIT is prevails withdrawal of the host state from the ICSID Convention. The offer and acceptance model was originally introduced for ISDS based on national legislation of the host state, in light of which was the art. 72 of the ICSID Convention initially worded. *Söderlund* in his opinion challenges the traditional offer

[187] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/12/20, Separate Opinion of Christer Söderlund, 13 April 2017.

[188] *Blue Bank v Venezuela*, Separate Opinion of Christer Söderlund, 13 April 2017, paras. 7, 19 and 20.

and acceptance model and states that the consent to ICSID arbitration proceedings is already perfected by conclusion of the BIT containing the respective dispute resolution clause. The BIT represents independent international treaty creating rights and obligations between the contracting states alongside with the benefits provided to third parties, *i.e.* the foreign investors. As the BIT is concluded between the host state and home state of the investor, the dispute resolution clause represents already provided perfected consent to ICSID arbitration proceedings. The foreign investor is merely a beneficiary of the BIT, not the contracting party to the BIT, and thus is not in a position of an appropriate party to consent to the ICSID arbitration proceedings. The right of the foreign investor to initiate ICSID arbitration proceedings represents merely a procedural right vested with the beneficiary of the BIT.[189] The contracting states to the BIT obliged themselves to the rights and obligations for the duration of the treaty itself. Therefore, the consent incorporated in dispute resolution clause in the particular BIT remains in effect throughout the duration of the BIT. Therefore, the ICSID arbitration forum shall be accessible not only during the six-month time lag following the notice of denunciation, but also after the expiry of such period until the termination of the BIT.[190]

The interpretation approach described in *Söderlund's* opinion argues against the offer and acceptance model used in modern international investment arbitrations based on the BITs and overstretches the jurisdiction of the ICSID Centre over a lifetime of the particular BIT. The *Söderlund's* approach alleges that investment arbitration was not initially concerned with phenomenon known as "arbitration without privity" and the BITs concluded between the host states and home states of the investors provide already perfected consent to arbitration proceedings. Even though membership of the contracting states to the ICSID Convention enables the access to ICSID arbitration forum, denunciation of the ICSID Convention by the host state cannot adversely affect the already established perfected consent in the BIT. In conclusion, the foreign investor is entitled to initiate ICSID arbitration proceedings at any time during the validity of the particular BIT, as such conduct of the foreign investor should not be regarded as acceptation of the offer to arbitrate, but rather procedural right

[189] Kluwer Arbitration Blog (2021). *Denunciation of ICSID Convention: Re-Visiting Mr. Söderlund's Separate Opinion* (http://arbitrationblog.kluwerarbitration.com/2020/05/31/denunciation-of-icsid-convention-re-visiting-mr-soderlunds-separate-opinion/, last accessed on 24 May 2021).

[190] *Blue Bank v Venezuela*, Separate Opinion of Christer Söderlund, 13 April 2017, paras. 39-42 and 45.

stemming from his beneficiary position within the particular BIT. *Söderlund's* interpretation approach represents the most radical depart from the general concept of the ICSID Convention arbitration proceedings applied by the ICSID arbitral tribunals and carries the risk of excessive burden imposed on the host states having no other chance but to submit to every ICSID arbitration proceedings initiated against them at any time during the lifetime of the particular BIT, despite their validly conducted denunciation of the ICSID Convention.

4. UNILATERAL AND CONSENSUAL TERMINATION OF THE BIT

The foreign direct investment conducted by the foreign investor within the territory of the host state may take various forms. With regard to the frequently long-term nature of the foreign investment business, its contributions to the economy of the host state and dependence on the overall political and social climate of the host state, the investment usually requires granting of a long-term protection. In order to provide sufficiently enduring long-term protection for the foreign investors, the instruments of international law took the prime lead within the area of cross-border direct investment. Subsequently, the BITs became the dominantly used instrument in the field of foreign direct investment protection. In comparison to the national legislation of the host state, one of the most significant advantage of the BITs is that they are based on consensual nature and thus cannot be unilaterally amended.[191]

Nevertheless, despite the stable and enduring nature of the BITs, as any other consensual legal instrument, the BITs may be overridden by the intentions of their contracting parties. As any other international treaty, every BIT may be either unilaterally terminated by one of its contracting parties in accordance with the rules on international treaties, or consensually terminated by conclusion of agreement on termination between its contracting parties. The last chapter of the study elaborates the effects of unilateral and consensual termination of the BITs on jurisdiction of the ICSID Tribunal over investment disputes arising out of the terminated BIT.

4.1. Unilateral termination of the BIT

As any other international treaty, the BIT is governed by the public international law rules on international treaties. As elaborated in the second chapter of this study, any international treaty, including the BIT, may be unilaterally terminated by its contracting party in conformity with art. 54(a) of the VCLT. According to the art. 54(a) of the VCLT, the BIT may be terminated in compliance with the provisions of the treaty itself. It is a common practice for the BITs to incorporate provisions governing the termination of the BIT itself.

[191] SUBEDI, Surya P. (2008). *International Investment Law: Reconciling Policy and Principle* (Oxford: Hart Publishing), p. 83.

The termination provision in the BIT may prescribe the fixed term period, upon which expiry either party may terminate the BIT by a notice of termination addressed to the other contracting party. In such case the termination becomes effective after designated period of time following the receipt of the notice of termination. The minority of the BITs provides for another termination mechanism, subsisting in tacit renewal of the BIT. In cases of tacit renewals, the BIT prescribes a period of time during which it remains in force. Short time prior to the expiry of designated time period, any contracting party is entitled to terminate the BIT within prescribed short period of time. If no party terminates the BIT within such designated period of time, the BIT will be tacitly renewed for another term.[192]

The BITs between the host state and home state of the investor are usually concluded for prescribed long period of time, most frequently ranging from ten to twenty years. However, given the long-term nature of the foreign direct investment, it is common for the BITs to contain provisions prolonging the investment protection for another period of time, usually another ten to twenty years, after the termination of the BIT.[193] Such standardised type of provision is known as the "sunset clause" or "survival clause". The ICSID Tribunal in case *UP and CD v Hungary*[194] held that the so-called sunset clauses represent peculiar provision used in international investment agreements that extends the legal rights and obligations related to the protection of the investment for prescribed time period after the termination of the BIT. However, the application of the sunset clause is not entirely unlimited, but by default rather reasonably restricted only to the investments made within the territory of the host state prior to the termination of the BIT, *i.e.* during the time when the BIT was still initially in force, unless the wording of the sunset clause itself provides otherwise.[195] The object and purpose of the sunset clauses is to safeguard legitimate expectations of the foreign investors,

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[192] International Institute for Sustainable Development (2020). *Terminating a Bilateral Investment Treaty.* IISD Best Practices series. Issue: March 2020 (https://www.iisd.org/system/files/publications/terminating-treaty-best-practices-en.pdf, last accessed on 25 May 2021), pp. 2-4.

[193] SUBEDI, Surya P. (2008). *International Investment Law: Reconciling Policy and Principle* (Oxford: Hart Publishing), p. 84.

[194] *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018.

[195] *UP and CD v Hungary,* Award, 9 October 2018, para. 265.
International Institute for Sustainable Development (2020). *Terminating a Bilateral Investment Treaty.* IISD Best Practices series. Issue: March 2020 (https://www.iisd.org/system/files/publications/terminating-treaty-best-practices-en.pdf, last accessed on 25 May 2021), p. 4.

who are commencing their investments within the territory of the host state and their investments are likely to outlive the prescribed lifetime of the BIT, and protect the foreign investors from unpredictable termination of the BIT by one of the contracting parties. The additional period following the unilateral termination, during which is the extended protection of investment is granted, allows the foreign investor to adapt to the situation concerned with adverse effects of the BIT termination.[196]

Unilateral termination of the BIT by a contracting state ultimately brings rights and obligations stemming out of the provisions of the BIT to an end, including the provision of the BIT containing the consent of the host state to ICSID arbitration. Once the unilateral termination of the BIT becomes effective, the consent of the host state is deemed to be withdrawn. Nevertheless, the exception applies in relation to the so-called sunset clauses, which have the ability to extend both substantive and procedural protection of the investment provided under the BIT prior to its termination. In the case *Gavazzi v Romania*[197] it was confirmed that the sunset clause protects the consent of the host state provided in terminated BIT from effects of termination and prolongs the validity of provided consent to ICSID arbitration proceedings for the period of time prescribed in the particular sunset clause. Thus, the foreign investor is entitled to institute ICSID arbitration proceedings at any time within the duration of the sunset clause.[198]

The application of the sunset clause is typically associated with the unilateral termination of the BIT that triggers the application of the sunset clause provision. The key concern associated with unilateral termination of the BIT is the one-sided character of the act of termination leaving the other contracting party without any chance to retain control over the ongoing protection of its investors. The sunset clauses have indisputably irreplaceable role in unilateral terminations of the BITs, nevertheless, their application in the cases of consensual termination of the BITs is subject to contradictory opinions.[199]

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[196] Ius Mundi (2021). *Sunset Clause* (https://jusmundi.com/en/document/wiki/en-sunset-clause, last accessed on 25 May 2021).

[197] *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, 21 April 2015.

[198] International Institute for Sustainable Development (2020). *Terminating a Bilateral Investment Treaty.* IISD Best Practices series. Issue: March 2020 (https://www.iisd.org/system/files/publications/terminating-treaty-best-practices-en.pdf, last accessed on 25 May 2021), p. 4.

[199] TITI, Catharine (2016). *Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law*. Journal of International Arbitration, Vol. 33, No. 5, pp. 436-437.

4.2. Consensual termination of the BIT

Besides the unilateral termination, the BIT may also be terminated consensually, *i.e.* by mutual agreement to terminate the BIT concluded between the parties. Such mutual termination of international treaties is anticipated by the art. 54(b) of the VCLT. Consensual termination of the BIT is substantially different from the unilateral termination, as within the consensual termination the contracting states to the BITs mutually agree to bring their rights and obligations stemming from the concluded treaty to an end. Nevertheless, protection of foreign direct investment originating from the international investment agreements represents complex multilateral relationship between the host states, home states and foreign investors. As the contracting parties to the BIT are the host state and the home state of the investor, any mutual act of termination of the BIT conducted by the contracting parties, however consensual in its nature, will ultimately adversely affect the rights of the foreign investor stemming from the terminated BIT. In cases of unilateral termination, the contracting parties to the BIT tend to balance such discrepancy by incorporation of the so-called sunset clauses aimed to protect the foreign investors of the contracting state, which did not initiate the unilateral termination of the BIT. However, as the institute of sunset clauses is closely connected primarily to the unilateral termination, the scope of its application in cases of consensual termination is highly disputed.[200]

On one hand, consensual termination of the BIT suggests that both contracting states desire to cease to protect the foreign investors coming from one contracting state to the territory of another. Therefore, it may be argued that there is no necessity to provide for any safeguards, such as sunset clauses, preserving the foreign investors of the respective contracting states from the effects of the BIT termination. In practice some of the contracting states[201] to the BITs approached the consensual termination in two steps. Firstly, the contracting states to the BIT agreed on amendment of the BIT explicitly terminating the survival clause. Secondly, the contracting states to the BIT entered into agreement on termination of the BIT in its amended wording, *i.e.* without the sunset clause. By this way the contracting parties took a safe

[200] *Ibid.*

[201] The Czech Republic in relation to consensual termination of BITs with Denmark, Malta, Slovenia and Italy. Argentina in relation to consensual termination of BIT with Indonesia.

approach that guaranteed the inapplicability of the sunset clause on the consensually terminated BIT.[202]

On the other hand, the ICSID Tribunal in case *Magyar v Hungary*[203] elaborated the effects of consensual termination of the BIT on the applicability of sunset clause aiming to protect eligible foreign investors for a designated period of twenty years after the termination of the BIT. The ICSID Tribunal stated that even though the contracting states are masters of the BIT, the international treaty, the mount of control that the contracting states may exercise over the treaty shall be limited by the principle of legal certainty. The observance of the principle of legal certainty is crucial for the protection of foreign investors, who commenced their investments within the territory of the host state under provided treaty guarantees. For these reasons, exclusion of application of sunset clause by consensually terminating the BIT would disrespect the long-term interests of the foreign investors who anticipated the protection prescribed in the BIT with possibility of extension based on the incorporated sunset clause.[204]

The most significant example of the consensual termination of the BITs represents the Agreement for the Termination of BITs Between the Member States of the European Union[205]. The Agreement for the Termination was signed by twenty-three member states of the EU that consensually terminated over 277 BITs between the member states of the EU.[206] The Agreement for the Termination was the ultimate consequence of the decision of the CJEU in case *Slovak Republic v Achmea*[207] concerned with compatibility of the arbitration clauses contained in the BITs concluded between member states of the EU with the EU law. In this case

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[202] TITI, Catharine (2016). *Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law*. Journal of International Arbitration, Vol. 33, No. 5, p. 436.

[203] *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award of the Tribunal, 13 November 2019.

[204] *Magyar v Hungary*, Award of the Tribunal, 13 November 2019, paras. 222-223.

[205] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, signed 5 May 2020, in force 29 August 2020.

[206] MOARBES, Charbel A. (2021). *Introductory note to Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union.* International Legal Materials, Vol. 60, No. 1, p. 99.

[207] *Slovak Republic v. Achmea B.V.*, CJEU Case No. C-284/16, Judgement of the Court (Grand Chamber), 6 March 2018.

the CJEU hold that ISDS mechanism incorporated in the BITs concluded between the EU member states is incompatible with EU law, as it violates autonomy of the EU law and mutual trust between the member states.[208] The CJEU reasoned its judgement by the peculiar nature of the EU law and its interpretation, within which the institute of preliminary ruling plays a crucial role. Given the distinctive adjudicative nature of the ISDS mechanism and investment arbitration proceedings in particular, the CJEU ruled that arbitration tribunals are neither entitled nor obliged to request preliminary ruling in CJEU, which would ultimately lead to allowing arbitral tribunals to interpret questions concerning EU law with binding effect. Therefore, concluding of the BIT between two EU member states with incorporated ISDS mechanism results in situation, where the adjudicative organs that are not part of the EU judicial system would interpret the EU law in a way that does not ensure the full effectiveness of EU law.[209]

In the light of the *Slovak Republic v Achmea* judgement, the EU member states were strongly encouraged by the EU to terminate all BITs concluded with another EU member states. The emerged Agreement for the Termination terminated all BITs between twenty-three EU member states. As most of the terminated BITs contained the sunset clauses capable of prolonging the applicability of investment protection after the termination of the respective BIT and entitling the foreign investors to initiate arbitral proceedings for prescribed period of time following the termination, the Agreement for the Termination explicitly excluded triggering and subsequent application of the sunset clauses in respective BITs. Moreover, the Agreement for the Termination went even further and deprive all sunset clauses currently applicable of their legal effects due to prior termination of the respective BITs.[210] Nevertheless, even though the member states, as the contracting parties to the BITs, are fully entitled to consensually terminate the BITs including the application of the newly triggered sunset clauses, it is highly disputable whether the member states may retrospectively ban the application of already triggered sunset clauses. The latter mentioned group of sunset clauses already provided prolonged substantial and procedural investment protection to the eligible foreign investors. Imposing of such retrospective ban therefore significantly interfere with existing rights of the foreign investors.

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[208] *Slovak Republic v Achmea*, Judgement of the Court (Grand Chamber), 6 March 2018, para. 58.

[209] *Ibid.,* paras. 37-42, 49-59.

[210] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, signed 5 May 2020, in force 29 August 2020, arts. 2 and 3.

The multilateral Agreement for the Termination represents peculiar way of massive withdrawal of offers to arbitrate across EU member states. By explicit exclusion of applicability of sunset clauses, the member states prevented any uncertainties regarding the effectivity of withdrawal of their consents to arbitration. However, it is highly disputable whether the offer of the host state including the consent to arbitrate incorporated in the BIT may be retrospectively withdrawn via abrogation of existing sunset clauses. The amplitude of the reasonability depends on the assessment, whether and at what moment the offer of the host state has already been accepted by the foreign investor, *i.e.* whether and at what moment the perfected consent to arbitration proceedings has been formed. Such arbitration proceedings in which the offer of the host state has been accepted by the foreign investor and the arbitration proceedings have been concluded, *i.e.* the final award has been rendered or the agreement on settlement of the dispute has been concluded, prior to the issue of judgement in the CJEU case *Slovak Republic v Achmea*[211], shall not be affected.[212] On the other hand, any arbitration proceedings that have been initiated on or after the issue of *Slovak Republic v Achmea* judgement, shall not be based on arbitration clauses contained in the terminated BITs.[213] However, the most surprising effect has been imposed on pending arbitration proceedings that have been initiated prior to the issue of *Slovak Republic v Achmea* judgement and are not yet concluded, in which the parties to the arbitration are obliged to follow prescribed transitional procedure consisted of obligatory settlement procedure or structured dialogue.[214] In conclusion, the EU member states by concluding the Agreement for the Termination retroactively withdrew their consents under the BITs back to the moment of issue of the CJEU judgement in *Slovak Republic v Achmea*, depriving all of the foreign investors, including the ones who already accepted the offer to arbitrate, of designated arbitration forums.

[211] 6 March 2018.

[212] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, signed 5 May 2020, in force 29 August 2020, arts. 1(4) and 6.

[213] *Ibid., Arts. 1(6) and 5.*

[214] *Ibid., Arts. 1(5) and 7-9.*
MOARBES, Charbel A. (2021). *Introductory note to Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union.* International Legal Materials, Vol. 60, No. 1, p. 99.

With regard to complexity of legal relationships emerging from foreign direct investment based on BITs and desired long-term nature of protection of investments, termination of the BIT represents substantial intervention into the rights and obligations of the contracting parties and the eligible foreign investors. Given the one-sided nature of the unilateral termination of the BIT, adequate safeguards have emerged within the practice of investment protection, such as incorporation of the so-called sunset clauses into the wording of the BITs. On the other hand, in cases of consensual termination, the applicability of sunset clauses has been largely disputed. It should be noted that however consensually may the mutual termination of the BIT seem, the ultimate decision on termination is conducted by the host state and home state of the investor, and not the foreign investor himself. The most significant plurilateral treaty consensually terminating the BITs between the member states of the EU is an example of how harsh deprivation of rights of foreign investors may be hidden under the consensual veil of the mutual termination.

CONCLUSION

International investment agreements provide for both substantive and procedural protection of foreign investment. The characteristic nature of ICSID arbitration proceedings stemming from interconnection between the ICSID Convention, the multilateral procedural international treaty, and the BITs, the bilateral international treaties providing primarily substantive protection of the foreign investments, gives rise to peculiar triangular nature of legal relationships present in international investment dispute. Termination of any international investment agreement by the host state significantly interfere with the rights and obligations arising out of the investment protection provided by the terminated investment agreement. The purpose of the study was to analyse implications of various types of termination of international investment agreements on the jurisdiction of the ICSID Tribunals.

Firstly, within the second chapter of the thesis, the study provided elaboration of the ICSID arbitration proceedings, denunciation and unilateral and consensual termination, in order to establish framework of legal institutes that represent a starting point for any further analyses. The third chapter of the study firstly addressed the first research question, *i.e.* the requirements and conditions for establishment of the jurisdiction of the ICSID Tribunal accompanied with analysis of selected standardised types of BIT clauses that may have adverse effect on the jurisdiction. Moving to the second research question, the third chapter provided analyses of process of denunciation of the ICSID Convention by the host state and its effect on jurisdiction of the ICSID Tribunal. The fourth chapter of the study was dedicated to third research question, *i.e.* the unilateral and consensual termination of the BIT and the effects of these types of termination on jurisdiction of the ICSID Tribunals. Based on the in-depth elaborations conducted throughout the study, the following simplified conclusions may be provided.

The first research question: What are the requirements and conditions for establishment of the jurisdiction of the ICSID Tribunal a what type of clauses in the BITs may adversely affect the jurisdiction?

The peculiar triangular legal relationships between the host state, home state and foreign investor are typical feature of investment arbitration. As the particular BIT is concluded between the host state and home state of the investor, the parties to the subsequently emerged investment dispute arisen from the breach of BIT are the host state and foreign investor. For these reasons, the investment arbitrations are concerned

with phenomenon termed "arbitration without privity", which ultimately results in application of the offer and acceptance model used for elaborations on whether the consent to arbitration has been provided by both parties to the investment dispute, *i.e.* the host state and the foreign investor.

The host state incorporates its consent to arbitrate into provisions of the particular BIT, which constitutes the offer to arbitrate opened for acceptance by any eligible foreign investor under the BIT. However, the foreign investor must be sufficiently careful when assessing the wording of the particular BIT, as the offer of the host state to arbitrate may subject to prescribed conditions or requirements that need to be satisfied prior to the acceptance. Particular attention shall be put on selected standardised types of provisions contained in the BIT, that may significantly condition the offer of the host state to arbitrate. Most typical examples of such provisions are three types of clauses involving national courts of the host state into the dispute resolution, *i.e.* the requirement of exhaustion of local remedies, the obligation to seek remedy before national courts for prescribed period of time and "fork in the road" provisions. Stated types of clauses may either function as conditions precedent to the offer to arbitrate or may ultimately result in exclusion of jurisdiction of ICSID Tribunal. Some types of the clauses capable of affecting the jurisdiction of ICSID Tribunal may be overridden by application of "most favoured nation clause" that has restricted ability to modify the requirements of the offer to arbitrate by transferring another offer of the host state contained in another BIT into present dispute. In order to establish jurisdiction of the ICSID Tribunal, the offer of the host state must be duly accepted by the foreign investor, most frequently by way of institution of arbitral proceedings.

Another standardised provision of the BITs that may impact the ability of the foreign investor to accept the offer to arbitrate are "cooling-off periods" obliging the investor to endeavour to amicably settle the investment dispute prior to institution of the arbitration proceedings.

The second research question: When and under what circumstances does the ICSID Tribunal have jurisdiction over the investment dispute if the host state denounces the ICSID Convention?

By denouncing the ICSID Convention, the host state unilaterally withdraws from multilateral procedural international treaty that provides the contracting states access to ICSID arbitration proceedings. The ICSID Convention by itself governs the process of denunciation in art. 71 by introducing a six-month time lag rendering the denunciation

of the ICSID Convention effective. On the other hand, art. 72 of the ICSID Convention prevents rights and obligations of the denouncing state arising out of consent to jurisdiction from effects of six-month time lag. Given the unclear wording of the arts. 71 and 72 of the ICSID Convention, two main interpretation approaches emerged in decisions of ICSID Tribunals concerned with denunciation of the ICSID Convention by Venezuela.

The *Venoklim* approach affirms the jurisdiction within the six-month time lag that renders the denunciation effective upon expiry of six months and thus prolongs the existence of the offer of the denouncing state to arbitrate until expiry of the six-month time lag. This interpretation approach is reasoned by the rule of effectiveness and general purpose and object of the waiting periods associated with denunciation of the international treaties. On the other hand, *Favianca* approach declines the jurisdiction during the six-month time lag and grants the denunciation immediate effect allowing the denouncing state to withdraw his offer to arbitrate immediately at the commencement of the six-month time lag. The second interpretation approach is reasoned by the division of two groups of rights and obligations. One group of rights and obligations stemms from the position of a contracting state as a party to the ICSID Convention, which shall cease to exist upon expiry of the six-month time lag. The second group of rights and obligations arises out of the perfected consent to the jurisdiction of the ICSID Centre, *i.e.* from arbitration agreement formed by proper acceptance of the valid offer to arbitrate. Rights and obligations belonging to this group shall be immune from any effects of denunciation. Both interpretation approaches lead to opposite conclusions, the *Venoklim* approach allows the foreign investors to accept the offer of the host state to arbitrate within the six-month time lag, whereas the *Favianca* approach deprives the foreign investors of possibility to accept the offer of the host state at any time after the receipt of notice of denunciation by the depositary.

The effects of the denunciation on the jurisdiction of the ICSID Tribunal are highly disputable and represents two substantially different approaches playing with the availability of procedural protection to the investment of the foreign investor. Besides two stated approaches, *Söderlund* offered another alternative interpretation approach allowing the foreign investor to initiate ICSID arbitration at any time throughout the duration of the respective BIT containing the consent to arbitration. Reasoning of this approach is based on criticism of applicability of the offer and acceptance model on investment arbitrations based on the BITs. *Söderlund's* approach represents more radical position declining any effects of the denunciation on the jurisdiction of the ICSID Tribunal.

The third research question: What effect does have the unilateral and consensual termination of the BIT on jurisdiction of the ICSID Tribunal?

By unilateral termination of the BIT the host state one-sidedly terminates the substantive and procedural protection of foreign investment provided by terminated BIT. Even though the unilateral termination withdraws the offer of the host state including consent to arbitrate incorporated in the BIT, the "sunset clause", particular type of standardised provision incorporated in the BIT, has ability to preserve the offer to arbitrate for upcoming stated period of time. The object and purpose of "sunset clauses" is to prevent the foreign investors from adverse effects of unilateral termination of the BIT. As the "sunset clauses" are originally associated with unilateral termination, the practice is not unified regarding the applicability of "sunset clauses" on consensual terminations.

The consensual termination *prima facie* represents more mutual way of termination of investment agreements. Nevertheless, given the complex triangular nature of investment disputes, the consensus on termination of the BIT is reached between the host state and home state of the investor. As the foreign investor is not a contracting party to the BIT, the consensual termination may have similar effects on his investment protection as unilateral termination. Moreover, it is usual practice for the contracting states to agree on exclusion of applicability of "sunset clause" in cases of consensual termination. The most significant example provides collective termination of 277 BITs between the member states of the EU, excluding the applicability of both newly emerged "sunset clauses" and pending "sunset clauses" being already in force. With regard to its retrospective effects, this example of termination of the BITs hidden by deceptive consensual character represents the most radical intervention in procedural protection of the foreign investors in comparison to all of the previously described types of termination.

SOURCES

A. BOOKS AND CHAPTERS IN BOOKS

BALAŠ, Vladimír, ŠTURMA, Pavel (2018). *Nové mezinárodní dohody na ochranu investic* (Prague: Wolters Kluwer ČR).

DOLZER, Rudolf, SCHREUER, Christoph (2008). *Principles of International Investment Law* (New York: Oxford University Press).

DÖRR, Oliver, SCHMALENBACH, Kirsten (2012). *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer-Verlag Berlin Heidelberg).

DOUGLAS, Zachary (2009). *The International Law of Investment Claims* (Cambridge: Cambridge University Press).

GARNER, Bryan A., BLACK, Henry Campbell (2009). *Black's law dictionary. Ninth edition* (St. Paul: West).

KNAPP, Viktor (2003). *Vědecká propedeutika pro právníky* (Praha: Eurolex Bohemia).

KOLB, Robert (2016). *The Law of Treaties*: *An Introduction* (Cheltenham: Edward Elgar Publishing).

SCHREUER, Christoph (2010). *Denunciation of the ICSID Convention and Consent to Arbitration*. In: WAIBEL, Michael, KAUSHAL, Asha, LIZ CHUNG, Kyo-Hwa and BALCHIN Claire (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality* (London: Kluwer Law International), p. 353-368.

SCHREUER, Christoph, MALINTOPPI, Loretta, REINISCH, August, SINCLAIR, Anthony (2009). *The ICSID Convention: A Commentary. Second edition* (Cambridge: Cambridge University Press).

SORNARAJAH, Muthucumaraswamy (2010). *The International Law on Foreign Investment. Third edition* (Cambridge: Cambridge University Press).

SUBEDI, Surya P. (2008). *International Investment Law: Reconciling Policy and Principle* (Oxford: Hart Publishing).

VILLIGER, Mark Eugen (2009). *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff Publishers).

B. JOURNAL ARTICLES

BALTAG, Crina (2017). *Not Hot Enough: Cooling-Off Periods and the Recent Developments under the Energy Charter Treaty*. Indian Journal of Arbitration Law, Vol. 6, No. 1, p. 190-196.

GARCÍA-BOLÍVAR, Omar E. (2004). *Foreign Investment Disputes under ICSID. A Review of its Decisions on Jurisdiction.* The Journal of World Investment & Trade, Vol. 5, No. 1, p. 187-214.

MOARBES, Charbel A. (2021). *Introductory note to Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union.* International Legal Materials, Vol. 60, No. 1, p. 99-137.

PAULSSON, Jan (1995). *Arbitration Without Privity.* ICSID Review - Foreign Investment Law Journal, Vol. 10, No. 2, p. 232-257.

SCHREUER, Christoph (2005). *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, The Law & Practice of International Courts and Tribunals, Vol. 4, No. 1, p. 1-17.

SCHREUER, Christoph (2005). *Consent to Arbitration* (updated 02/2007). Transnational Dispute Management, Vol. 5 (www.transnational-dispute-management.com/article.asp?key=555, last accessed on 27 November 2020).

SCHREUER, Christoph (2004). *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road.* The Journal of World Investment & Trade, Vol. 5, No. 2, p. 231-256.

TITI, Catharine (2016). *Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law*. Journal of International Arbitration, Vol. 33, No. 5, p. 425-440.

WAIBEL, Michael (2014). *Investment Arbitration: Jurisdiction and Admissibility.* University of Cambridge Faculty of Law Research Paper No. 9/2014.

C. DECISIONS OF INTERNATIONAL COURTS

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation), Preliminary Objections, Judgement of 1 April 2011, ICJ Rep 70.

Fisheries Jurisdiction (Spain v Canada), Judgement of 4 December 1998, ICJ Rep 432.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgement of 26 November 1984, ICJ Rep 392.

Nuclear Tests (*New Zealand v France*), Judgement of 20 December 1974, ICJ Rep 457.

Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia), Preliminary Objections, Judgement of 17 March 2016, ICJ Rep 100.

Slovak Republic v. Achmea B.V., CJEU Case No. C-284/16, Judgement of the Court (Grand Chamber), 6 March 2018.

D. DECISIONS OF ARBITRAL TRIBUNALS

Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Ad hoc Committee Decision on the Application for Annulment, 16 May 1986.

Antoine Goetz et consorts v. République du Burundi, ICSID Case No. ARB/95/3, Award, 10 February 1999.

Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, Award of the Tribunal, 26 April 2017.

Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, Separate Opinion of Christer Söderlund, 13 April 2017.

Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on the Objections on Jurisdiction, 25 January 2000.

Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004.

Ethyl Corporation v. The Government of Canada, UNCITRAL, Award on Jurisdiction, 24 June 1998, 38 I.L.M. 708 (1999).

Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/21, Award of the Tribunal, 13 November 2017.

Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award, 16 September 2003.

Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011-17, Award, 31 January 2014.

Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary, ICSID Case No. ARB/17/27, Award of the Tribunal, 13 November 2019.

Marco Gavazzi and Stefano Gavazzi v. Romania, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, 21 April 2015.

Nykomb Synergetics Technology Holding AB v. The Republic of Latvia, SCC Case No. 118/2001, Award, 16 December 2003.

Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN 3467, Final Award, 1 July 2004.

Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania, ICSID Case No. ARB/07/21, Award, 30 July 2009.

Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005.

Ronald S. Lauder v. Czech Republic, UNCITRAL, 9 ICSID Rep 66, Final Award, 3 September 2001.

SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003.

Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004.

Telenor Mobile Communications A.S. v. The Republic of Hungary, ICSID Case No. ARB/04/15, Award, 13 September 2006.

Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009.

UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary, ICSID Case No. ARB/13/35, Award, 9 October 2018.

Venoklim Holding B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/22, Award of the Tribunal, 3 April 2015.

Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision on Jurisdiction, 25 May 1999.

E. TREATIES

American Treaty on Pacific Settlement (Pact of Bogota), signed 30 April 1948, in force 6 May 1949.

Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, signed 5 May 2020, in force 29 August 2020.

The Energy Charter Treaty, signed 17 December 1994, in force 16 April 1998.

Vienna Convention on the Law of Treaties, signed 23 May 1969, in force 27 January 1980.

Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed 18 March 1965, in force 14 October 1966.

F. ARBITRATION RULES

Administrative and Financial Regulations (2006).

Rules of Procedure for Arbitration Proceedings (2006).

Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (2006).

G. MISCELLANEOUS

International Centre for Settlement of Investment Disputes (2021). *About ICSID. Member States. Signatory and Contracting States* (https://icsid.worldbank.org/about/member-states/database-of-member-states, last accessed on 1 April 2021).

International Centre for Settlement of Investment Disputes (2021). *News & Events. News Releases. Venezuela Submits a Notice under Article 71 of the ICSID Convention* (https://icsid.worldbank.org/news-and-events/news-releases/venezuela-submits-notice-under-article-71-icsid-convention, last accessed on 22 May 2021).

International Centre for Settlement of Investment Disputes (2020). *Resources. Rules and Regulations* (https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview, last accessed on 15 November 2020).

International Centre for Settlement of Investment Disputes (2020). *Resources. Rules and Regulations. ICSID Additional Facility Rules* (https://icsid.worldbank.org/resources/rules-and-regulations/additional-facility-rules/overview, last accessed on 17 November 2020).

International Centre for Settlement of Investment Disputes (2020). *Services. Arbitration. Overview of an Arbitration – ICSID Convention* (https://icsid.worldbank.org/services/arbitration/convention/process/overview, last accessed on 25 November 2020).

International Centre for Settlement of Investment Disputes (2020). *The ICSID Case Load – Statistics.* Issue 2020-2 (https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282020-2%20Edition%29%20ENG.pdf, last accessed on 22 November 2020).

International Institute for Sustainable Development (2020). *Terminating a Bilateral Investment Treaty.* IISD Best Practices series. Issue: March 2020 (https://www.iisd.org/system/files/publications/terminating-treaty-best-practices-en.pdf, last accessed on 25 May 2021).

Ius Mundi (2021). *Sunset Clause* (https://jusmundi.com/en/document/wiki/en-sunset-clause, last accessed on 25 May 2021).

Ius Mundi (2021). *Trigger Letter* (https://jusmundi.com/en/document/wiki/en-trigger-letter-formal-notice, last accessed on 15 May 2021).

Kluwer Arbitration Blog (2021). *Denunciation of ICSID Convention: Re-Visiting Mr. Söderlund's Separate Opinion* (http://arbitrationblog.kluwerarbitration.com/2020/05/31/denunciation-of-icsid-convention-re-visiting-mr-soderlunds-separate-opinion/, last accessed on 24 May 2021).

Norton Rose Fulbright (2021). *Thought leadership. Publications. Fork-in-the-Road clauses: Divergent paths in recent decisions* (https://www.nortonrosefulbright.com/en/knowledge/publications/0bd10ad8/fork-in-the-road-clauses#autofootnote3, last accessed on 8 May 2021).

UNCTAD (2020). *Investment dispute settlement navigator. Arbitral rules and administering institution* (https://investmentpolicy.unctad.org/investment-dispute-settlement, last accessed on 16 November 2020).

ABSTRAKT

Mezinárodní arbitráž dle Úmluvy o řešení sporů z investic mezi státy a občany druhých států („ICSID arbitráž“ a „ICSID Úmluva“) představuje dominantně využívaný mechanismus řešení sporů mezi zahraničními investory a hostitelskými státy. Systém mezinárodních investičních rozhodčích soudů autoritativně rozhodující spory z porušení dvoustranných mezinárodních dohod na ochranu zahraničních přímých investic („BITs“) na území hostitelského státu čelí přetrvávající kritice. Vzrůstající neochota hostitelských států k dodržování povinností vyplývajících ze závazných rozhodčích nálezů ve spojení s obecně kritickým přístupem k ICSID arbitráži spustilo mezi státy Jižní Ameriky vlnu vypovídání mezinárodních dohod o ochraně investic. Ukončení mezinárodních dohod o ochraně investic významným způsobem narušuje procesněprávní ochranu zahraničních investic a ve svém konečném důsledku zbavuje investora práva na projednání investičního sporu proti hostitelskému státu před rozhodčím tribunálem.

ICSID arbitráže jsou charakteristické vzájemným provázaným působením několika mezinárodních dohod o ochraně investic. Mezi tyto mezinárodní dohody se řadí ICSID Úmluva a BITs, které ve vzájemné kombinaci vytváří soubor všech náležitostí a podmínek nezbytných k založení jurisdikce ICSID rozhodčího tribunálu v daném investičním sporu. Nezbytnou podmínkou využití jakéhokoli mechanismu řešení sporů je udělení souhlasu k arbitráži stranami sporu. Specifická trojstranná struktura právních vztahů, které ve své kombinaci společně utvářejí komplexní strukturu mezinárodního investičního sporu, však ke zkoumání uděleného souhlasu s ICSID arbitráží vyžaduje aplikaci rozsáhlé právní analýzy. Různé standardizované typy doložek v BITs mohou nepřímo ovlivnit udělený souhlas hostitelského státu s ICSID arbitráží. Standardizované typy doložek v BITs bývají také využívány národními soudy hostitelského státu k uplatnění svého vlivu v daném investičním sporu. Pokud se hostitelský stát úspěšně dovolá uplatnění takovýchto doložek v investiční arbitráži, ve svém důsledku mohou tyto doložky vést až k odepření jurisdikce ICSID rozhodčího tribunálu.

ICSID Úmluva i jednotlivé BITs společně zakládají hmotněprávní i procesněprávní ochranu zahraničních investic, přičemž vypovězení kterékoli ze těchto mezinárodních smluv hostitelským státem může nepříznivě ovlivnit jurisdikci ICSID tribunálu a umožnit tak hostitelskému státu vyhnout se případné právní odpovědnosti ze svého protiprávního jednání. Vlna výpovědí ICSID Úmluvy státy Jižní Ameriky dala vzniknout rozsáhlým diskusím o důsledcích vypovězení Úmluvy především ve vztahu k jurisdikci *ratione temporis*

a *ratione voluntatis*. Protichůdné názory vyústily ve vydávání vzájemně si odporujících rozhodčích nálezů ICSID tribunálů v jurisdikčních záležitostech spojených s výpovědí ICSID Úmluvy. Vlna výpovědí ICSID Úmluvy v Jižní Americe byla nadále doprovázena jednostranným vypovídáním BITs, které dále umocnilo již tak rozporuplné diskuse. ICSID tribunály se ve svých rozhodnutích snaží obtížně balancovat odlišné interpretační přístupy, které buď excesivním způsobem chrání investory před svévolným vypovídáním mezinárodních dohod o ochraně investic ze strany hostitelského státu, nebo naopak dovolují hostitelskému státu jednostranně se vyvázat z ICSID Úmluvy bez jakékoli následků.

Jednostranné vypovídání mezinárodních dohod o ochraně investic sice na první pohled představuje vyšší riziko narušení procesněprávní ochrany zahraničních investic, mezinárodní investiční právo však poskytuje ochranu investorům skrze speciální instituty, které zabraňují nepříznivým důsledkům pramenících z jednostranných výpovědí. Oproti tomu konsenzuální ukončování BITs dohodou stran může zdaleka více nepříznivě ovlivnit ochranu investic než je tomu v případě jednostranného vypovězení, což se projevilo například na nedávných změnách procesněprávní ochrany mezinárodních investic v rámci Evropské Unie. Nejvýraznějším příkladem zavádějícího konsenzuálního charakteru ukončování mezinárodních smluv dohodou stran je kolektivní ukončení více jak 277 BITs uzavřených mezi členskými státy Evropské Unie. Tato konsenzuální dohoda o ukončení ve svém důsledku zbavila zahraniční investory přístupu k arbitrážím ve věcech investičních sporů, a to dokonce s velice spornými retroaktivními účinky.

KLÍČOVÁ SLOVA

ukončení, dohody o ochraně investic, investiční arbitráž

ABSTRACT

The international investment arbitration proceedings under the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID arbitration proceedings" and "ICSID Convention") represents predominantly used mechanism of Investor-state dispute settlement. The adjudicative system of investment arbitration resolving disputes concerning breaches of foreign investment protection within the territory of the host states granted by bilateral investment treaties ("BITs") faces increasing criticism. The reluctance to abide by the binding awards of the arbitral tribunals on behalf of the host states and evolving displeasure towards the ICSID arbitration system triggered the wave of terminations of international investment agreements initiated by the states of the Latin America. Termination of international investment agreements significantly disturbs the procedural protection of foreign investments and ultimately deprives the foreign investors of the right to have their claims against the host states heard in designated arbitration forum.

The ICSID arbitration proceedings are characteristic for the interconnection between international investment agreements, particularly the ICSID Convention and the BITs, jointly imposing various requirements and conditions necessary for establishing of the jurisdiction of ICSID Tribunal over particular investment dispute. The peculiar triangular nature of legal relationships forming the complex international investment dispute requires extensive legal analyses regarding the provided consents of parties to ICSID arbitration proceedings, the *sine qua non* of any dispute settlement mechanism. The provided consent to arbitration may be indirectly influenced by various types of standardised clauses incorporated in the BITs, by which the national courts of the host states strive to interfere in the particular investment dispute. Reliance on such standardised clauses by the host state may in particular cases ultimately abrogate the jurisdiction of the ICSID Tribunal.

As both substantive and procedural protection of foreign investment is governed by the ICSID Convention and the respective BITs, termination of any of the stated international treaties by the host state is able to adversely affect jurisdiction of the ICSID Tribunal and allow the host state to potentially evade his responsibilities arising from his unlawful conduct. Denunciation of the ICSID Convention by states in the Latin America resulted in extensive legal discussions regarding its effects on jurisdiction *ratione temporis* and *ratione voluntatis*, leading to contradictory decisions of the ICSID Tribunals. The wave of denunciations in the Latin America was accompanied by unilateral terminations of the BITs, amplifying

the legal debates even further. The ICSID Tribunals struggle to balance between the divergent approaches that either overprotect the foreign investors from deliberate terminations or enable the host state to exit from the ICSID Convention without any consequences.

Even though the unilateral terminations seem to impose higher risk on procedural protection of the foreign investments, in practice the international investment law provide important safeguard institutes securing the protection of foreign investors from the harsh effects of unilateral termination. On the other hand, as may be illustrated on recent changes in procedural investment protection regime within the European Union, the consensual termination of the BITs may even more adversely affect the protection of investments than any unilateral termination. The most prominent example of deceptive character of consensual termination is collective termination of over 277 BITs between the member states of the EU, depriving the foreign investors of access to arbitration forums with highly disputed retrospective effects.

KEYWORDS

termination, international investment agreements, investment arbitration