BLOWING HOT AND COLD: STATE COMMITMENTS TO ARBITRATE INVESTMENT DISPUTES

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I. INTRODUCTION

Lord McNair, the British jurist and ICJ judge, famously opined that it was "reasonable" to expect international parties to live by the maxim *allegans contraria non est audiendus*, or "You cannot blow hot and cold."[1] International law, he wrote in 1961, was "develop[ing]" this principle, akin to "estoppel" as understood in English law. Barely a year after those words were published, the ICJ decided the *Temple of Preah Vihear* case, holding that Thailand was bound to accept a boundary line drawn in 1907, to which it had failed to object over many years.[2] That case has been said to evidence a principle of "estoppel" in international law.[3]

Lord McNair's phrase captures the indignation that parties typically feel when faced with inconsistent or inequitable conduct. One such context involves arbitral jurisdiction; in particular, whether a state, or indeed a private party, may be permitted to resile from previous commitments to resolve investment disputes in a given arbitral forum. This article explores a number of decisions where parties have appeared to blow "hot and cold" with respect to arbitration commitments, and the role "estoppel" and related concepts have played in those cases.

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[1] LORD MCNAIR, THE LAW OF TREATIES 485 (1961).

[2] Temple of Prear Vihear (Thai. v. Cambodia), 1962 I.C.J. 6, 26-27 (June 15) [hereinafter "*Temple of Preah Vihear*"].

[3] *See generally* Tomas Cottier & Jörg Paul Müller, *Estoppel* ¶ 1, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2013).

II. "ESTOPPEL" AND INCONSISTENT STATE ACTIVITY: BACKGROUND

A. *Estoppel and Related Doctrines*

"Estoppel" is a term familiar to those in the common law system: it potentially operates to preclude a party from adopting inconsistent positions, particularly if the opposing party has relied upon such positions and would suffer prejudice if they were to change.[4] Doctrinally, it is sometimes associated with the maxim *venire contra factum proprium* ("no one may set himself in contradiction to his own previous conduct") as well as the general principles of good faith and *pacta sunt servanda.*[5] One commentator has said that these concepts are often "pled interchangeably" to "maximize . . . impact" in any particular case.[6]

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[4] *See* I.C. MacGibbon, *Estoppel in International Law*, 7 INT'L & COMP. L.Q. 468, 468-69 (1958).

[5] *See id.* at 469 ("[Estoppel] may be, and often is, grounded on considerations of good faith."); *e.g.*, Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru, ICSID Case No. ARB/03/28, Award, ¶ 231 (Aug. 18, 2008) (observing, in the context of a contractual relationship: "One of the fundamental facets of good faith within Peruvian law is the *doctrina de los actos propios*. This key aspect of good faith – known in various legal systems as *venire contra factum proprio non valet*, *la doctrina de los actos propios*, *allegans contraria non est audiendus*, estoppel or the principle of consistency – has also been universally applied as a general legal principle, both in civil and international law, to prohibit a State from taking actions or making representations which are contrary to or inconsistent with actions or representations it has taken previously to the detriment of another."); Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listruik Negara, UNCITRAL, Final Award, ¶ 188 (May 4, 1999) ("The fundamental principle of pacta sunt servanda forms the bedrock of the civil law of obligations everywhere."), *reprinted in* 25 Y.B. Comm. Arb. 13, 58-59 (2000); Desert Line Projects LLC v. Republic of Yemen, ICSID Case No. ARB/05/17, Award, ¶¶ 205-06 (Feb. 6, 2008) (observing that *pacta sunt servanda* is one "of two basic rules having paramount place within the [host state's] legal order and shared by all other systems of law as well as by international law").

[6] Cottier & Müller, *supra* note 3, at ¶ 8. Although it is difficult to draw up a list of all concepts that are akin to, or related to, estoppel, suffice it to say that: (i) some commentators have also identified "acquiescence" as a separate principle of international law, *see generally* D.W. Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence*, 1957 BRIT. Y.B. INT'L L. 176; Sir Ian Sinclair, *Estoppel and Acquiescence*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 104 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996); (ii) the concepts of "collateral estoppel" and

In *Temple of Preah Vihear*, the case most often associated with "estoppel," Thailand's occupation of a historic temple was ruled invalid after Cambodia was able to show that Thailand had agreed to a 1904 boundary treaty with Cambodia, and that a 1908 map (showing the temple to lie within Cambodia) had been approved by Thailand shortly thereafter as reflecting the proper boundary. This, it held, formed part of the treaty.[7] Even were this not the case, the ICJ observed, Thailand would have been precluded by reason of its long adoption of the map:

> Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only

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"issue estoppel," which are usually associated with *res judicata*, have also found recognition in international law, *see generally Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 1954 I.C.J. 47, 53 (July 13) ("According to a well-established and generally recognized principle of law, a judgment rendered by such a judicial body is res judicata and has binding force between the parties to the dispute."); Laguna del Desierto Award (Chile v. Arg.), 113 I.L.R. 1, 43 (1994) ("This is a fundamental principle of the law of nations repeatedly invoked in the jurisprudence, which regards the authority of *res judicata* as a universal and absolute principle of international law."); (iii) some other concepts, such as laches/preclusion, have parallels with "estoppel," *see generally* Canfor Corp. v. United States, NAFTA, Order of Consolidation Tribunal, ¶¶ 164-65, 168 (Sept. 7, 2005) (discussing whether laches/preclusion is a rule of international law); and (iv) as a practical matter there are a variety of other circumstances in litigation where shifting tactics, dilatory conduct or inconsistent positions (by commission, omission, or waiver of other means) may bring adverse consequences. Changes in position, however, are sometimes perfectly plausible. *See* Chevron Corp. & Texaco Petroleum Corp. v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, ¶¶ 349-53 (Mar. 30, 2010) (holding that the investor was not subject to "estoppel" by reason of having taken a prior inconsistent position in past U.S. litigation, namely, that the courts of Ecuador were the right place to decide a given dispute, finding, as a factual matter, that the earlier statements about the adequacy of the Ecuadorian courts were made prior to "the significant changes that took place in Ecuador in 2004, affecting the Ecuadorian judiciary"). Lord Keynes's quip that "When the facts change, I change my mind – what do you do, Sir?" may be appropriate in some situations.

[7] *See Temple of Preah Vihear*, *supra* note 2, at 26-34.

> the benefit of a stable frontier. France, and through her Cambodia, relied on Thailand's acceptance of the map. Since neither side can plead error, it is immaterial whether or not this reliance was based on a belief that the map was correct. It is not now open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it.[8]

The individual opinions analyzed this point in greater detail:

- Vice-President Alfaro considered "a State must not be permitted to benefit by its own inconsistency to the prejudice of another State."[9] The Amco tribunal embraced this "general principle" as "applicable in international economic relations where private parties are involved," adding "the whole concept is characterized by the requirement of good faith."[10]
- Sir Percy Spender, in dissent, described a rule more in line with common law precepts:

> [T]he principle [of estoppel] operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result the other State has been prejudiced or the State making it has secured some benefit or advantage for itself.[11]

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[8] *Id.* at 32.

[9] *Id.* at 40 (separate opinion of Alfaro, V.P.).

[10] Amco Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1, Award on Jurisdiction, ¶ 47 (Sept. 25, 1983), *reprinted in* 23 I.L.M. 351, 381 (1984); *accord* Nova Scotia Power Inc. v. Bolivarian Republic of Venezuela, UNCITRAL, Award on Jurisdiction, ¶ 141 & n.149 (Apr. 22, 2010) ("*Nova Scotia I*") (quoting *Amco Asia*, *supra*, at 381).

[11] *Temple of Preah Vihear*, *supra* note 2, at 143-44 (Dissenting Opinion of Sir Percy Spender); *see, e.g.*, *Chevron*, *supra* note 6, at ¶¶ 350-51 (agreeing with Spender's "formulation of the elements necessary for the application of estoppel"). A similar formulation was adopted in at least two ICJ cases in

Although both formulations (as well as the ICJ's remarks about "preclusion") look to deter "inconsistent" conduct, some have said that it would "overstate" matters to suggest that there is a rule "prohibit[ing] any modification of conduct, statement or representation."[12] Those reluctant to embrace such a rule might cite the observations of Sir Percy Spender:

> The principle of preclusion is a beneficent and powerful instrument of substantive international law. Based as it is upon the necessity for good faith between States in their relations one with another, it is not to be hedged in by artificial rules. It should not however be permitted to become so indefinite as to acquire the somewhat formless content of a maxim. And since the principle, when it is applicable to any given set of facts, substitutes relative truth for the judicial search for the truth, it should be applied with caution.[13]

Other cases suggest that, while a state indeed can be barred from asserting inconsistent positions, this is not always expressed to be due to "estoppel":

- In *Arbitral Award Made by the King of Spain*, the ICJ dismissed Nicaragua's challenge to an award rendered almost 50 years previously, holding that, because it had

denying a claim of "estoppel." *See* Land, Island & Maritime Frontier Dispute (El Sal. v. Hond.), Application to Intervene: Judgment, 1990 I.C.J. 92, 118-19 (holding that the two disputants were not precluded from contesting a third state's right to intervene, describing some of the "essential elements required by estoppel [as] a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it"); North Sea Continental Shelf (Ger./Den., Ger./Neth.), 1969 I.C.J. 3, 26-27 (observing that "estoppel" could not overcome, in that case, the absence of a binding treaty or customary law rule concerning continental shelf delimitation); Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J 246, 308-10 (in a delimitation case, denying attempts to rely upon a supposedly inconsistent statement by a State Department official).

[12] Cottier & Müller, *supra* note 3, at ¶ 3.

[13] *Temple of Preah Vihear*, *supra* note 2, at 143 (Dissenting Opinion of Sir Percy Spender).

not previously objected to "the designation of the King of Spain as arbitrator," and had "fully participated in the arbitral proceedings," it was "no longer open to Nicaragua to rely on either of these contentions as furnishing a ground for the nullity of the Award."[14] This holding might be based on preclusion or acquiescence or perhaps just an application of plain common sense.

- In the *Nuclear Tests* decisions, it was held that France would be legally bound by its public undertaking to cease atmospheric testing of nuclear weapons. This, the ICJ held, was because certain statements, known as "unilateral declarations" – unequivocal statements, made by a state with the intention of being legally binding – could assume the status of a stand-alone international obligation.[15] This, it held, was rooted in "the principle of good faith."[16]

- In *Nicaragua*, as discussed below, the U.S. was precluded, through consideration of "good faith," from unilaterally truncating the termination period in its 1946 Optional Clause declaration, by which it had agreed to be bound by the ICJ's compulsory jurisdiction.[17]

- In the 1988 *Taba* arbitration, an international tribunal refused to allow argument over the demarcation of a particular boundary point, observing that "where the States concerned" had, "over a period of more than fifty years, identified a marker as a boundary pillar and acted upon that basis," it was "no longer open to one of the

[14] Arbitral Award Made by the King of Spain on 23 Dec. 1906 (Hond. v. Nicar.), 1960 I.C.J. 192, 209. The ICJ also observed that Nicaragua, by express declaration and by conduct, had recognized the Award as valid and thus could not subsequently challenge the validity of the Award. *Id.* at 213.

[15] *See* Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 268-70, ¶¶ 43-52; Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457, 472-75, ¶¶ 46-55.

[16] *Nuclear Test (Austl. v. Fr.)*, *supra* note 15, at 268, ¶ 46; *accord Nuclear Tests (N.Z. v. Fr.)*, *supra* note 15, at 473, ¶ 49.

[17] *See Military* and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392 [hereinafter "*Nicaragua*"].

> Parties or to third States to challenge that long held assumption on the basis of an alleged error."[18]

Context, indeed, is key: the *King of Spain*, *Temple of Preah Vihear*, and *Taba* cases can be viewed as being influenced, in part, by a policy of preserving the stability of state boundaries, whereas the *Nuclear Tests* cases need to be understood in the context of the movement, in the 1960s and 1970s, towards nuclear nonproliferation.[19] Even in the situation that originally drove McNair to advance a principle of "estoppel" – the 1923 occupation by Belgium and France of the German Ruhr district, in potential breach of the 1919 Treaty of Versailles, but which the UK had condoned[20] – arose in the context of a treaty system where the interests of the Allied powers were closely interrelated.

B. *The 1986 Nicaragua Decision: Good Faith in Connection with Dispute Clauses*

As regards a commitment to resolve disputes in a given system, the *Nicaragua* case may be particularly instructive. The origins of that case lie in a 1946 Optional Declaration made by the U.S. pursuant to Article 36 of the Statute of the ICJ,[21] accepting the

[18] Certain Boundary Pillars between Egypt and Israel (Egypt v. Isr.), Award, ¶ 235 (1988), *reprinted sub nom. Egypt-Israel Arbitration Tribunal: Award in Boundary Dispute Concerning the Taba Area*, 27 I.L.M. 1421, 1489-90, ¶ 235 (1988). Other arbitral cases, particularly ICSID cases, are discussed further below. As to the application of "estoppel" or related concepts in PCIJ jurisprudence and older arbitral authorities, *see generally* MACGIBBON, *supra* note 4, at 485-86. One specific instance, the jurisdictional decision in *Chorzów Factory*, is discussed in detail below.

[19] *See generally* Timothy G. Nelson, *Blast From the Past: The French Nuclear Test Cases, and their Relevance to 21st Century Arbitration*, 2014 PARIS J. INT'L ARB. 479.

[20] *See* Arnold D. McNair, *The Legality of the Occupation of the Ruhr*, 1924 BRIT. Y.B. INT'L L. 17, 36 ("[T]he broad view seems to be that Great Britain has been guilty of inconsistency upon the question of the legality of the occupation of Germany east of the Rhine, even in one case on a pure question of reparation, and also upon the interpretation of [a particular treaty provision]; and that an international tribunal could hardly fail to be unfavourably impressed by those inconsistencies in the event of a direct juridical issue being raised between Great Britain and France.").

[21] ICJ Statute, art. 36.

jurisdiction of the ICJ over broad categories of disputes,[22] with the proviso that this submission would "remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration."[23] On April 6, 1984, at the height of its support for the "Contra" movement in Nicaragua, amid reports that the U.S. would soon be the subject of an ICJ claim by Nicaragua's Sandinista government, Secretary of State George Schultz issued a "proviso" that purported to suspend the effect of the U.S. Optional Clause declaration in respect of any "disputes with any Central American State or arising out of or related to events in Central America."[24] The declaration further stated that it "shall take effect immediately."[25] Nicaragua filed suit against the U.S. three days later, on April 9, 1984.

The ICJ held that Optional Clause declarations, "even though they are unilateral acts, establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction, in which the conditions, reservations and time-limit clauses are taken into consideration."[26] It stated that, "[i]n the establishment of this network of engagements, which constitutes the Optional-Clause system, the principle of good faith plays an important role; the Court has emphasized the need in international relations for respect for good faith and confidence in particularly unambiguous terms."[27] For these reasons, although the U.S. "retained the right to modify" or "terminate" its declaration, it "nevertheless assumed an inescapable obligation" to be bound by the terms of its 1946 Clause, including its six-

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[22] The 1946 U.S. Declaration excluded "domestic" disputes, as well as disputes under a "multilateral" treaty unless all parties to the treaty were parties to the ICJ claims and disputes that had been entrusted to other tribunals. *See* Declaration Recognizing as Compulsory the Jurisdiction of the Court, in Conformity with Article 36, Paragraph 2, of the Statute of the International Court of Justice, U.S., Aug. 14, 1946, 1 U.N.T.S. 9, 10.

[23] *Id*. at 12.

[24] Declaration, U.S., Apr. 6, 1984, 1354 U.N.T.S. 452, 452 & n.1.

[25] *See Nicaragua*, *supra* note 17, at 398, ¶ 13.

[26] *Id*. at 418, ¶ 60.

[27] *Id*.

month notice period.[28] Thus the 1984 notification was insufficient to "override the obligation of the U.S. to submit to the compulsory jurisdiction of the Court vis-à-vis Nicaragua, a State accepting the same obligation."[29]

At the time, this feature of *Nicaragua* was criticized by some because it failed to apply strict criteria for estoppel, *i.e.*, that there be "unequivocal" conduct by one state, followed by "reliance" by the other party, such as to render it "inequitable" to deny the previously-articulated position.[30] But the *Nicaragua* decision did not explicitly base itself on a rule of "estoppel." Read on its own terms, *Nicaragua* can be seen as applying principles of "good faith" and *pacta sunt servanda* to state conduct within a pre-existing dispute-resolution framework.

Another case dealing with state conduct and arbitral jurisdiction was the *Chorzów Factory* case. In that dispute, the German government claimed, on behalf of German nationals who owned a factory in Polish territory, that Poland had improperly seized the factory in Upper Silesia. It was held that the seizure violated a 1922 treaty (the "Geneva Convention") prohibiting seizure of German nationals' property, except upon fulfillment of certain fixed criteria (including notice to the investor). Had the Geneva Convention been followed, the investor could have pursued remedies either to have the seizure declared invalid or (if held valid) to receive compensation via an agreed formula. When Germany took the matter to the PCIJ, Poland challenged jurisdiction, including on the ground that the matter should have gone to the mixed tribunal. The PCIJ held that Poland's seizure (and its failure to give notice) was wholly outside the procedures envisaged in the Geneva Convention – and, indeed, if the convention's rules had been followed, there might not even have been a seizure. It added:

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[28] *Id.* at 419, ¶ 61.

[29] *Id.* at 421, ¶ 65.

[30] *See, e.g.*, Megan L. Wagner, *Jurisdiction by Estoppel in the International Court of Justice*, 74 CALIF. L. REV. 1777, 1803-04 (1986) (arguing that the ICJ's ruling represented a "gratuitous" use of estoppel without actually identifying a "clear and unambiguous statement" upon which the other party had "relie[d]").

> It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him.[31]

This statement has been said to express a "principle of estoppel."[32] It strongly resonates in some of the Argentine cases dealing with the 18-month rule, discussed below.

Within investor-state arbitration, ICSID/BIT tribunals likewise have construed that acts "formulated in the framework and on the basis of a treaty" (such as jurisdictional declarations under the ICSID Convention or ICJ Statute) belong in a "different" category from "other [acts formulated] by States in the exercise of their freedom to act on the international plane."[33] And, while

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[31] Factory at Chorzów (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 31 (July 26).

[32] MACGIBBON, *supra* note 4, at 480.

[33] CEMEX Caracas Investments B.V. & CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/15, Decision on Jurisdiction, ¶¶ 81-82 (Dec. 30, 2010); *see also* Mobil Corp v. Bolivian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 90 (June 10, 2010); OPIC Karimun Corp. v. Bolivian Republic of Venezuela, ICSID Case No. ARB/10/14, Award, ¶¶ 78-79 (May 28, 2013); ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. & ConocoPhillips Gulf of Paria B.V. v. Bolivian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, ¶ 236 (Sept. 3, 2013). One result of this, in the "article 22" cases, has been that unilateral offers to arbitrate are not to be subject to "restrictive interpretation." *Mobil*, *supra*, at ¶ 88; *CEMEX*, *supra*, at ¶ 82; *see also* Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB 84/3, Decision on Jurisdiction, ¶ 63 (Apr. 14, 1988) ("[T]here is no presumption of jurisdiction – particularly where a sovereign State is involved . . . [and] jurisdiction in the present case exists only insofar as consent thereto has been given by the Parties. This is not to say, however, that there is a presumption against the conferment of jurisdiction with respect to a sovereign State or that instruments purporting to confer jurisdiction should be interpreted restrictively."), *reprinted in* 3 ICSID Rep. 189 (1995); Tidewater Investment SRL & Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Jurisdiction, ¶ 99 (Feb. 8, 2013) ("[D]eclarations of a state that fall for assessment in terms of whether they produce effects within the context of a treaty framework – and in particular the effect of submission to the

"estoppel," preclusion, good faith, and similar doctrines have been invoked, or applied, in a variety of contexts in ICSID/BIT arbitration, with a variety of outcomes,[34] if one examines cases dealing with a commitment to arbitrate, one can observe more consistent themes emerging.

III. A STATE'S COMMITMENT TO ARBITRATE BIT/FTA DISPUTES

A. *Commitments to Arbitrate Contained in BITs or FTAs*

A bilateral investment treaty ("BIT") or investment chapter of a free trade agreement ("FTA") typically contains assurances about the kind of treatment that investors will receive within the host state (*e.g*., safeguards against expropriation and assurances of fair and equitable treatment), along with a commitment to arbitrate disputes in a neutral international forum such as the International Centre for Settlement of Investment Disputes ("ICSID"), the ICSID "Additional Facility," or a tribunal established under the arbitration rules of the UNCITRAL. Sometimes, the BIT or FTA will contain an array of possible arbitral fora, either as a "menu" of alternatives or as a hierarchy (*e.g*., allowing for ICSID Additional Facility arbitration if the ICSID Convention is inapplicable).

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jurisdiction of an international tribunal – are not subject to the restrictive approach to be taken for other kinds of unilateral declarations.").

[34] *See, e.g.*, *Canfor*, *supra* note 6, at ¶¶ 167-69 (rejecting a plea that the United States should be estopped from requesting consolidation of a series of related arbitral claims, holding that although "estoppel is a recognized general principle of law that has been applied by many international tribunals," its "essence . . . is detrimental reliance by one party on statements of another party, so that reversal of the position previously taken by the second party would cause serious injustice to the first party," and finding that no such conduct or reliance could be established); Pope & Talbot, Inc. v. The Government of Canada, NAFTA/UNCITRAL, Interim Award, ¶¶ 111-12 (June 26, 2000) (rejecting the host state's claim that the U.S. investor's attendance at certain trade association meetings could preclude it from complaining about certain measures later adopted by Canada in connection with the export of softwood lumber); Hassan Awdi, Enterprise Business Consultants, Inc. & Alfa El Corp. v. Romania, ICSID Case No. ARB/10/13, Decision on Admissibility of the Respondent's Third Objection to Jurisdiction and Admissibility of Claimants' Claims, ¶ 72 (July 26, 2013) (holding that because Romania had represented that a pending criminal investigation would not affect the issue of ICSID jurisdiction over the investor's claim, Romania would be "estopped" from later using the results of that probe to challenge jurisdiction).

BITs or FTAs sometimes also contain certain pre-conditions to arbitration, *e.g.*, "fork-in-the-road" clauses that preclude recourse to the local courts or, conversely, clauses that contemplate that the investor will attempt (at least initially) to obtain justice in the courts of the host state. Both varieties of clause can be found in the various BITs to which Argentina is party, and both have given rise to decisions dealing with preclusion or estoppel.

B. *Cases Involving Argentina*

In *Pan American*,[35] three U.S. companies owned shares in "Dock Sud," a thermal energy plant in Argentina. In 2001, these companies were subject to "pesification" regulations (abolishing guaranteed dollar tariffs and converting them into pesos) that impaired their value. In 2003, the U.S. investors commenced ICSID arbitration, alleging that the measures had violated the U.S.-Argentina BIT. Article VII of that BIT provided for ICSID arbitration of investor-state disputes, subject to a "fork-in-the-road" clause, requiring an investor to make an irrevocable choice between pursuing its rights in BIT arbitration or in the Argentine domestic courts.[36] Objecting to jurisdiction, Argentina claimed that certain of Dock Sud's affiliates had earlier instituted litigation in the courts of Argentina. This, it contended, violated the "fork-in-the-road" clause. In the alternative, Argentina argued that the investors, having allowed their affiliates to litigate in the courts of Argentina, should be estopped from seeking arbitration.[37]

Rejecting both submissions, the *Pan American* tribunal held first that the fork-in-the-road provision had not been violated because the Argentine domestic litigation did not involve either the same parties or the same cause of action as the ICSID/BIT proceedings.[38] It then held that although "estoppel" was a "recognized general principle of law that has been applied by

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[35] Pan American Energy LLC & BP Argentina Exploration Co. v. Argentine Republic, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (July 27, 2006).

[36] Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. VII, Nov. 14, 1991, S. TREATY DOC. NO. 103-2.

[37] *Pan American*, *supra* note 35, at ¶ 144.

[38] *Id.* ¶ 157.

many international tribunals," its application depended upon a showing that there was a "detrimental reliance by one party on statements of another party, so that reversal of the position previously taken by the second party would cause serious injustice to the first party."[39] Since no such conduct or reliance were present in this case, there was no basis for "estoppel."[40]

Other "pesification" cases have applied preclusionary concepts, but with results adverse to Argentina. In *BG Group*,[41] for example, a UK investor sought to redress the effect of the 2001-02 "pesification" laws as they affected its investments in two Argentine companies by bringing an arbitration under the UK-Argentina BIT.[42] Under that BIT, an investor was permitted to seek international arbitration – either before ICSID (if Argentina agreed to this) or, failing such agreement, before an UNCITRAL tribunal. Importantly, however, the BIT contained a "home court" requirement that contemplated that the investor would only seek international arbitration if it had first sought redress within the "competent tribunal" of Argentina, for at least 18 months.[43]

The practical problem for BG, however, was that the 2001-02 "pesification" legislation included a law staying "all suits brought by those whose rights were allegedly affected by the emergency measures adopted by the government."[44] Faced with this blockage, and also having failed to obtain Argentina's agreement

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[39] *Id.* ¶ 159 (citing BOWETT, *supra* note 6, at 183-84); *see also id.* ¶¶ 150-51 (endorsing the claimants' interpretation of *Temple of Preah Vihear* as requiring a showing of "(i) a clear statement of fact by one party which (ii) is voluntary, unconditional and authorised; and (iii) reliance in good faith by another party on that statement to that party's detriment or to the advantage of the first party").

[40] *Id.* ¶¶ 159-60.

[41] BG Group Plc. v. The Republic of Argentina, UNCITRAL, Final Award (Dec. 24, 2007).

[42] Agreement for the Promotion and Protection of Investments, U.K.-Arg., Dec. 11, 1990.

[43] *Id.* at art. 8(2)(a). Notably, the BIT did not require that the Argentine courts actually adjudicate the matter; it simply required that there be a case pending for 18 months.

[44] *BG Group*, *supra* note 41, at ¶ 149.

to ICSID arbitration, BG instituted an UNCITRAL arbitration in 2003 *without* having attempted to use the Argentina courts.[45]

One of Argentina's jurisdictional objections before the UNCITRAL tribunal was whether BG had failed to comply with the "home court" requirement, which it characterized as a pre-condition to arbitration. BG responded that, because the Argentine government had effectively blocked recourse to the Argentine courts, it had effectively prevented the fulfillment of this "pre-condition," and thus should be precluded from relying upon it. In its 2007 jurisdiction and merits award, the *BG Group* tribunal accepted BG's argument: it held that the emergency "pesification" legislation (and the mandatory stay of any judicial challenges to it) had the effect of "directly interfering with the normal operation of [Argentina's] courts," thus rendering it unreasonable for Argentina to insist upon investors conducting litigation in those courts for 18 months before seeking international arbitration under Article 8.[46] The tribunal "consequently" found BG's claims "admissible,"[47] found the measures to have violated the FET standard, and awarded $185 million in damages.[48] The award was eventually upheld by the U.S. Supreme Court.[49] At least one other "pesification" case has had a similar result.[50]

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[45] *Id.* ¶¶ 3-4. A tribunal was constituted in June 2004, and, in June 2005, directed that jurisdiction be adjudicated together with the merits. *Id.* ¶ 12.

[46] *Id.* ¶¶ 155-56.

[47] *Id.* ¶ 157. This holding rendered it unnecessary for the tribunal to address BG Group's alternative argument that the MFN clause in Article 3 of the UK-Argentina BIT allowed it to invoke dispute clauses in other BITs signed by Argentina, which did not have the "18-month home court" requirement. *Id.*

[48] *Id.* ¶¶ 362-66, 457.

[49] In the high-profile controversial post-award litigation that ensued, the award was initially vacated in its entirety based on this very point (the alleged failure to observe the 18-month litigation rule in Article 8 of the BIT), *see* Republic of Argentina v. BG Group PLC, 665 F.3d 1363, 1369-71 (D.C. Cir. 2012), *rev'd*, 134 S. Ct. 1198 (2014), but reinstated in 2014 by a 7-2 decision of the United States Supreme Court. The Supreme Court held that the "jurisdiction" to decide whether Article 8's pre-conditions had been satisfied or excused lay with the BG Group tribunal, not the D.C. courts. *Id*.

[50] *See* Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26, Decision on Jurisdiction, ¶ 202 (Dec. 19, 2012) (Argentina was barred from relying upon

Preclusion also applied in Argentina's "sovereign bond" cases. In 2005 and 2010, Argentina – which had been in default of sovereign bond obligations in the wake of the 2001-02 currency crisis – implemented sovereign bond legislation to facilitate an "exchange" of defaulted debt (which entailed acceptance of a significant discount to face value). Along with this legislation came laws (the "Lock Laws") under which holders of debt who had *not* accepted the "exchange" were thenceforth barred from challenging the Lock Laws (or the default) in Argentina's courts. Certain bondholders brought BIT claims, contending that the Lock Laws were a treaty violation. In those cases, it was held that Argentina could not invoke the 18-month court rule in the Italy-Argentina BIT to bar the investor's claims: compliance with that law was "futile" given the legislation barring any effective remedy in the Argentine courts.[51]

Other tribunals have approached the matter somewhat differently: some tribunals have upheld the 18-month rule,[52] while others have treated the rule as inapplicable by reason of the "Most Favored Nation" clause in the treaty in question – a possibility that the *BG Group* tribunal considered but did not reach.[53] All the same, it remains accurate to say that the four

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the 18-month domestic court litigation provision of the Spain-Argentina BIT because "none of the various possible alternative means" of litigating in Argentina were open to claimants, adding that it would be "useless and unfair" to impose this provision).

[51] *See* Ambiente Ufficio S.p.A. & others v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, ¶¶ 615-28 (Feb. 8, 2013); Abaclat & Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 568, 585-90 (Aug. 4. 2011).

[52] *See* Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, ¶¶ 115-118, 172, 197-98 (Dec. 8, 2008) (Germany-Argentina BIT upholding 18-month rule as jurisdictional requirement and dismissing claim as claimant had failed to comply with it); *accord* Daimler Financial Services. AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award, ¶¶ 204, 281, 286 (Aug. 22, 2012) (majority opinion); ICS Inspection & Control Services Ltd. v. Argentine Republic, UNCITRAL, PCA No. 2010-9, Award on Jurisdiction, ¶¶ 321-27 (Feb. 10, 2012) (similar holding under UK-Argentina BIT). The *Daimler* decision was accompanied by a lengthy and spirited dissent by Judge Charles Brower.

[53] *See, e.g.*, Hochtief Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/07/31, Decision on Jurisdiction, ¶¶ 75-99 (Oct. 24, 2011) (holding by

decisions on futility (*BG Group*, *Urbaser*, *Abaclat*, and *Ambiente*) do involve a preclusionary rule that emphasizes the commitment to arbitrate, and strongly echo *Chorzów Factory*'s holdings concerning state action that impedes access to a designated tribunal.

C. *The Murphy v. Ecuador Cases*

In the decades leading up to 2007, Ecuador ratified over 25 BITs, most of which stated that future disputes could be subject to arbitration under the ICSID Convention (which it ratified in 1986). As noted previously, this is a typical feature of many BITs.

For ICSID jurisdiction to be established, Article 25 of that convention requires that there be a demonstrable "consent" to arbitrate, manifested by both the host state and the investor. In BIT cases, such consent is usually manifest in: (i) the BIT clause expressing the host state's willingness to arbitrate investment disputes; and (ii) a subsequent action by the investor accepting ICSID jurisdiction. Article 25 further provides that, once both parties have manifested their consent, it cannot subsequently be withdrawn. The *Murphy* cases represented an attempt by

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majority that a German investor could invoke the MFN clause in the Germany-Argentina BIT and thus rely upon the dispute resolution provisions of the Chile-Argentina BIT as a means of avoiding the strict application of the 18-month domestic litigation rule); Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶ 109 (Aug. 3, 2004) (same holding); Teinver S.A. & others v. Argentine Republic, ICSID Case No. ARB/09/1, Decision on Jurisdiction, ¶¶ 149, 186 (Dec. 21, 2012) (similar majority holding with respect to the Spain-Argentina BIT; investor entitled through MFN clause to invoke Australia-Argentina BIT); Telefónica S.A. v. Argentine Republic, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 102-08 (May 25, 2006) (similar holding); Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Award, ¶¶ 95-108 (June 21, 2011) (similar holding under Italy-Argentina BIT); Emilio Augustin Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 34-37, 64 (Jan. 25, 2000) (similar holding, Spain-Argentina BIT); Gas Natural SDG, S.A. v. Argentine Republic, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, ¶¶ 29-31 (June 17, 2005) (same); Suez, Sociedad General de Aguas de Barcelona S.A. & Interaguas Servicios Integrales de Aguas S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on Jurisdiction, ¶¶ 57-60, 66-67 (May 16, 2006) (same holding under Spain-Argentina and France-Argentina BITs); National Grid plc v. Argentine Republic, UNCITRAL, Decision on Jurisdiction, ¶¶ 53, 93 (June 20, 2006) (same holding under UK-Argentina BIT).

Ecuador to pre-empt matters by withdrawing its consent before the investor was able to reciprocate.

Murphy Oil, like several other private parties, was party to long-term contracts to engage in oil development within the Ecuadorian Amazon. In 2002, the government began renegotiating these contracts; in 2006, the Ecuadorian Congress enacted "Law 42," allocating the government "50% over the so-called" "unforeseen" or windfall profits of hydrocarbon producers[54] and in 2007, Law 42 was amended to increase the windfall tax rate to 99%.[55] This prompted numerous private parties to commence or threaten ICSID/BIT arbitration.

Amid these events, on November 23, 2007, Ecuador attempted unilaterally to limit its exposure to such claims by purporting to give notice under Article 25(4) of the ICSID Convention that it "[would] not consent to submit to the jurisdiction [of ICSID] the disputes that arise in matters concerning the treatment of an investment in economic activities related to the exploitation of natural resources, such as oil, gas, minerals or others."[56]

In this respect, Article 25(4) of the ICSID Convention provides:

> Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).[57]

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[54] Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction, ¶ 39 (June 2, 2010).

[55] *Id.* ¶ 45.

[56] *Notifications Concerning Classes of Disputes Considered Suitable or Unsuitable for Submission to the Centre* (2014) (available on ICSID website).

[57] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25(4), Mar. 18, 1965, 575 U.N.T.S. 159 ("ICSID Convention").

Earlier case law dealing with contractual disputes had indicated that Article 25(4) did *not* furnish a basis for disavowing jurisdiction where a state had previously contracted to arbitrate disputes before ICSID.[58] The *Murphy* case was to test whether the same principle applied to a commitment to arbitrate in a BIT.

In March 2008, Murphy filed an ICSID arbitration ("*Murphy I*") against Ecuador, claiming that Law 42 violated its rights under the U.S.-Ecuador BIT.[59] Ecuador objected to jurisdiction on the grounds, among other things, that its Article 25(4) declaration – made months prior to Murphy's "consent" to ICSID arbitration – had the effect of precluding ICSID jurisdiction.[60] Rejecting this argument, an ICSID tribunal noted that Article 25(4) only served as a means for states to indicate "the class of disputes they would submit to the jurisdiction of the Centre *in the future.*"[61] Thus:

> [A]n Article 25(4) notification may not unilaterally modify the consent given in another treaty. The consent of the State in this case is given in a treaty between two sovereign States (the BIT between Ecuador and the United States of America) granting rights to the investors of both States. The *pacta sunt servanda* principle requires good faith compliance with all obligations under the BIT. In this sense, Article 26 of the Vienna Convention on the Law of Treaties, under title "*Pacta sunt servanda*" provides that "[e]very treaty in force is

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[58] *See* Alcoa Minerals of Jamaica, Inc. v. Jamaica, ICSID Case No. ARB/74/2, Decision on Jurisdiction (July 6, 1975), *in* 4 Y.B. Comm. Arb. 206, 208 (1979) (holding that once Jamaica had signed a contract providing for ICSID arbitration, it could not use an Article 25(4) "notification" in order to abrogate the clause: "This consent having been given could not be withdrawn. The notification under Article 25 only operates for the future by way of information to the Centre and potential future investors in undertakings concerning minerals and other natural resources in Jamaica."; and adding that, to decide otherwise "would largely, if not wholly, deprive the Convention of any practical value").

[59] *See* Murphy Exploration & Production Co. v. Republic of Ecuador, ICSID Case No. ARB/08/4, Award on Jurisdiction, ¶ 41 (Dec. 15, 2010) ("*Murphy I*").

[60] *See id*. ¶ 53.

[61] *Id.* ¶ 72.

> binding upon the parties to it and must be performed by them in good faith."[62]

Ecuador had argued that because Murphy only "consented" to arbitrate when it filed its claim in 2008, no mutual "consent" existed at that time, and that the Article 25(4) notice thereafter "excluded the possibility of perfecting mutual consent with regard to disputes."[63] Rejecting this proposition, the *Murphy I* tribunal held:

> [T]he offer of consent to ICSID jurisdiction by the signatory States of bilateral investment treaties may not be withdrawn or revoked other than by the mechanisms expressly agreed upon by the parties. Article 25(4) notifications are useful to alter those mechanisms in the future only and in absence of another legal instrument as the BIT which make them mandatory.

It elaborated:

> [N]either the ICSID Convention nor the BIT allows parties to withdraw from its application with immediate effect. Therefore, Ecuador is not authorized to unilaterally modify any of those treaties with immediate effect. Moreover, the Tribunal believes that since there is no agreement between the parties [to the BIT], it is not possible to extinguish the obligations of a treaty by withdrawal, termination or unilateral modification of such instrument.[64]

This, however, did not mean the case could proceed because there was another jurisdictional issue: that Murphy had failed to attempt to engage in negotiation for six months prior to instituting proceedings, as required by Article VI of the U.S.-Ecuador BIT. By majority, the *Murphy I* tribunal dismissed the

[62] *Id.* ¶ 73.

[63] *Id.* ¶ 75.

[64] *Id.* ¶¶ 80, 86-87.

case on this ground.[65] Murphy then apparently served the required notice seeking negotiations, but no settlement ensued.[66]

In September 2011, Murphy commenced a second arbitration, this time pursuant to the UNCITRAL rules, as Articles VI(2) and (3) of the U.S.-Ecuador BIT allowed an investor to choose between various "alternative" arbitral venues, including UNCITRAL.[67] Ecuador *again* challenged jurisdiction, arguing "Murphy had already chosen ICSID arbitration, and had now exhausted the possibilities of dispute settlement under the BIT through that irrevocable choice, leaving the new UNCITRAL tribunal with no jurisdiction."[68]

By majority, the *Murphy II* tribunal rejected these contentions, holding that Article VI(2) allowed an investor to make an irrevocable choice between three kinds of dispute mechanism: "local courts, previously agreed procedures, or arbitration."[69] Once an investor "irrevocably chose[] arbitration," Article VI(3) then allowed the investor to choose between arbitral systems.[70] But "if the investor had not received a decision on the merits through its first choice of arbitral mechanism," then the "*effet utile* principle" dictated that the "second choice of mechanism must be available."[71] Indeed, according to the majority, any interpretation leaving Murphy without access to international arbitration would

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[65] *Id.* ¶ 161.

[66] Jarrod Hepburn, *UNCITRAL Tribunal Rejects Jurisdictional Objection Relating to Earlier ICSID Claim in Ecuador Windfall Levy Dispute*, IA REPORTER, Jan. 2, 2014, http://www.iareporter.com/articles/20140102_1.

[67] *See* Luke E. Peterson, *Will Eight Arbitrators be Enough to Draw a Line Under U.S. Oil Company's Windfall Levy Dispute With Ecuador*, IA REPORTER, June 19, 2012, http://www.iareporter.com/articles/20120619_3.

[68] Hepburn, *supra* note 66 (in particular, Ecuador argued that, although Article VI allowed a series of "alternatives" of ICSID, ICSID Additional Facility, "or" UNCITRAL arbitration, "the word 'or' indicated an exclusive, irrevocable choice; once one dispute settlement option was chosen, all others were permanently foreclosed").

[69] *Id.*

[70] *Id.*

[71] *Id.*

be "manifestly absurd and unreasonable"[72] The case has now proceeded to the merits.

D. *Nova Scotia v. Venezuela*

In *Nova Scotia I*, a Canadian investor ("NSP") brought a claim against Venezuela for alleged violations of the Canada-Venezuela BIT as regards a coal-supply contract between the claimant and a state-owned enterprise. The BIT allowed an investor to commence arbitration under the ICSID Additional Facility, and further stated that if this forum was not available, the investor could commence UNCITRAL arbitration.

NSP, however, bypassed the ICSID Additional Facility and went straight to UNCITRAL arbitration.[73] It argued that ICSID Additional Facility arbitration was not "available" because the Additional Facility Rules required the ICSID Secretary-General to "approve" the relevant arbitration agreement pursuant to Article 4(2) of the ICSID Additional Facility Rules, and NSP had not sought such approval.[74] The *Nova Scotia I* tribunal rejected this argument as unsupported by those rules.[75]

As a fallback argument, NSP argued that Venezuela should be "estopped" from asserting that ICSID Additional Facility arbitration was "available" because of the position it took previously in a prior ICSID Additional Facility case:

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[72] *Id.* Arbitrator Georges Abi-Saab issued a separate opinion that accepted some of Ecuador's argument concerning the meaning of the word "or," ultimately agreeing with his colleagues on their alternative argument. As the majority had found, Abi-Saab considered that Murphy had not yet made any valid choice of arbitration, since its first choice was ineffective. *Id*.

[73] *See Nova Scotia I*, *supra* note 10, at ¶¶ 1, 7-8. It was common ground that arbitration pursuant to the ICSID Convention was not "available" because Canada, at that time, was not an ICSID member state. *See id*. ¶ 105.

[74] *Id.* ¶¶ 44-50, 61-73.

[75] *Id.* ¶ 102. The tribunal held that Additional Facility arbitration could be regarded as "not available" only upon proof that "there is no reasonable prospect that the Secretary-General would approve the arbitration agreement" contained in the BIT and timely register a BIT proceeding, which was not the case. *See id.* ¶¶ 115-16.

> [NSP] submits that "a man shall not be allowed to blow hot and cold," and that the Tribunal should hold Venezuela to the position it adopted in argument in the *Vannessa Ventures* case.[76]

In that prior case (*Vannessa Ventures v. Venezuela*), Venezuela had apparently argued that Additional Facility arbitration was only available when both parties to a dispute jointly requested that ICSID register the case. However, the tribunal did not find this argument convincing either. On the law, it stated:

> The existence of a doctrine of estoppel, or the prohibition of *venire contra factum proprium*, is well established in public international law, even if its existence as a general principle of law or a rule of customary international law remains open to debate. The consensus further covers the origin of the doctrine, which in public international law may be seen as being connected to the principle of good faith. Its applicability has long been recognized in investment arbitration. The precise scope of the doctrine remains subject to considerable debate. Notwithstanding this discussion, there is general agreement that the doctrine can be applied to the behaviour of States in judicial or arbitral proceedings. In these situations, if there is an inconsistency between a State's present claims or allegations and its previous conduct, such divergence violates the principle of good faith, to which all the State's action must submit, and more specifically the prohibition of *venire contra factum proprium*. Consequently, the State should be estopped from adopting this new stance.[77]

This principle, the tribunal held, could not be invoked here because "estoppel" required a showing that one party had "relied" on the actions of the other:

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[76] *Id.* ¶ 138 (footnote omitted).

[77] *Id.* ¶ 141 (footnotes omitted) (citations omitted).

> [I]t is not sufficient that one party has engaged in inconsistent conduct. It is also necessary to establish that the counterparty was aware of that conduct, relied on it, and acted on the assumption that the first party would not deviate from that original position.[78]

Critically, Venezuela's previous argument in *Vannessa Ventures* was completely unknown to the investor at the time it commenced arbitration in 2008 – indeed, "it could not have been aware of the detailed arguments presented by Venezuela in the *Vannessa Ventures* case, as the contents of Venezuela's [2004 submission] were only disclosed" *after* the commencement of proceedings in *Nova Scotia I*.[79] Furthermore, the "change of position adopted by Venezuela" was readily explicable, such that to apply estoppel "would in effect be punishing Venezuela for adopting the reasonable position of taking into account" the failure of its past arguments.[80]

But, the tribunal added, now that Venezuela had accepted that ICSID Additional Facility arbitration was available, it could not be heard to oppose registration of a future arbitration proceeding if filed by NSP in that forum:

> In the event that such a request is made, *it would be unfortunate if the Respondent were to adopt a different position from that which it has advanced in these proceedings as to the propriety of the dispute that is the subject of this case being referred to arbitration under the Additional Facility Rules*. This matter arose during the hearing held on September 30, 2009. In response to a question from the Tribunal, the Respondent confirmed without qualification that the proper forum for the resolution of this dispute was by arbitration under the Additional Facility Rules . . .

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[78] *Id.* ¶ 143 & n.152 (citing *Pan American*, *supra* note 35, at ¶ 159).

[79] *Nova Scotia I*, *supra* note 10, at ¶ 143.

[80] *Id.* ¶¶ 143-44.

> The Tribunal has taken note of the Respondent's explicit confirmation in this regard. There is no reason to suppose that the Respondent might adopt a different position in any future proceedings under the ICSID Additional Facility Rules, and *the Claimant is entitled to expect that a consistent position is maintained by the Respondent in the face of any future proceedings*.[81]

E. *Lessons from the Investment Treaty Cases*

It is submitted that the investment treaty cases show that:

- In addressing jurisdiction under a BIT or other investment treaty, the terms of the treaty's arbitration clause will generally prevail over other considerations. Thus, in *Pan American* and *Nova Scotia* I, the clear jurisdictional road-rules in the BIT (as enshrined in "fork-in-the-road" and hierarchical forum clauses, respectively) were applied according to their terms. When pleas of "estoppel" were invoked to vary those road-rules, the plea was considered

[81] *Id.* ¶¶ 145-46 (emphasis added). The *denouement* of the dispute, however, revealed that Venezuela's representation (and the scope of any "estoppel" attaching to it) was narrow indeed. NSP instituted an Additional Facility arbitration in Paris concerning its treaty claims, and Venezuela apparently did not oppose registration of that claim. But Venezuela *did* object to another facet of jurisdiction, namely, whether the subject-matter of the dispute (a coal contract) could reasonably be defined as an "investment" for purposes of Article 1 of the Canada-Venezuela BIT. In a jurisdictional decision issued in 2012, an Additional Facility tribunal held that it did not – and dismissed the entire claim. *See* Nova Scotia Power Inc. v. Bolivian Republic of Venezuela, ICSID Case No. ARB(AF)/11/1, Award, ¶¶ 113, 153(a) (Apr. 30, 2014) (excerpts only available through ICSID). Venezuela's prior position in the UNCITRAL arbitration, it was held, did not preclude it from presenting (and prevailing upon) this separate and distinct jurisdictional argument (which it had "reserved" at all times). *See id.* ¶ 44 ("The Tribunal is not convinced that the Respondent's assertion before the UNCITRAL Arbitration that the dispute could not be submitted under the UNCITRAL Arbitration Rules under the tiered dispute resolution mechanism provisions of Article XII(4) of the BIT because arbitration under the Additional Facility was available, determines the jurisdiction of this Tribunal in any way. For the Tribunal, it is clear that the Respondent, in objecting to the UNCITRAL Arbitration as the correct forum, on the basis that the ICSID Additional Facility was available, reserved its rights to object to jurisdiction in this arbitration. The indication of availability did not represent a concession to jurisdiction.") (emphasis omitted).

(and in both cases denied) according to the test set forth in *Temple*.

- By the same token, the decisions in both *Murphy* I and II indicate that arbitration clauses and dispute resolution treaties are interpreted according to principles of good faith and *pacta sunt servanda* and generally will not be interpreted so as to permit a party to undermine or resile from that commitment.
- Likewise, as the tribunal's dicta in *Nova Scotia* I indicate, once a state has adopted an unequivocal position with respect to the interpretation of a treaty (in that case, its commitment to be bound to arbitrate before the ICSID Additional Facility), it will be held to the terms of that commitment. (This principle was not explicitly tied to the principle of "estoppel" as expressed in *Temple*).
- Furthermore, as BG Group shows, where a state has construed a particular series of conditions to arbitration, it may be precluded from relying on those "pre-conditions" when it itself has prevented one of them from being fulfilled.

IV. BLOWING HOT AND COLD WITH INVESTMENT STATUTES: REPEAL AND JURISDICTION

A. *FILs and Jurisdiction*

Investment protection can arise through national investment statutes – unilaterally-enacted legislation, or "Foreign Investment Laws" ("FILs"), that provides BIT-style safeguards in the event of expropriation or adverse measures, as well as the promise of international arbitration (usually ICSID or UNCITRAL).[82] On this basis, an arbitration clause in a FIL might be viewed as containing a legislative "offer," or "consent" to arbitrate, which an investor may "accept"/"perfect" through an act manifesting an intent to arbitrate *e.g.*, a letter expressing such consent or a request for arbitration. In cases governed by the ICSID Convention, Article 25(1) states that "[w]hen the parties have given their consent [to

[82] On this basis, a FIL might be viewed as containing a legislative "offer" to arbitrate, which an investor may "accept" (either through instituting arbitration, or by sending a written communication indicating that it consents).

ICSID jurisdiction under the Convention], no party may withdraw its consent unilaterally."[83]

Because the "offer" to arbitrate is based on a host state statute (the FIL), there remains the specter that the FIL itself might be altered by the host state so as to "repeal" the ICSID clause and thus withdraw the consent. One author (Christoph Schreuer) has argued that:

> The host state may repeal its offer at any time unilaterally as long as it has not been accepted. Therefore, an investor will be well advised to accept the offer of consent to arbitration through a written communication as early as possible.[84]

The issue came to a head in two Kazakhstan cases.

B. *Rumeli*

Rumeli was the first reported case to grapple with the purported "repeal" of the 1994 Kazakhstan FIL. The 1994 FIL, enacted just after the Soviet break-up, included a "stabilization" clause that provided that where changes in legislation caused a "deterioration" in a foreign investor's position, the legislation "in force" at the time of the original investment would continue for a further 10 years.[85] The 1994 FIL furthermore provided (in article

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[83] ICSID Convention, *supra* note 57, at art. 25(1).

[84] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 257 (2d ed. 2012); *accord* CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 259 (2d ed. 2009).

[85] The stabilization clause provided:

> [I]n the case of a deterioration of the position of a foreign investor, which is a result of changes in the legislation and (or) entering into force and (or) changes in the provisions of international treaties, to foreign investments during ten years the legislation shall be applied which had been current at the moment of making the investment, and with respect to the investments which are carried out in accordance with the long-term (more than ten years) contracts with the authorized State bodies, until the expiry of the effect of the contract, unless the contract stipulates otherwise.

27) that foreign investors who qualified for protection of the FIL would have the right to seek, *inter alia*, ICSID or UNCITRAL arbitration. *All* of these provisions, however, were purportedly repealed by a 2003 law, which explicitly stated that the 1994 FIL had "lost force."

In *Rumeli*, an investor made an investment between 1998 and 2000, while the 1994 FIL was extant. It then suffered a series of allegedly prejudicial actions, including certain actions in 2003 and 2004 that were ultimately held to qualify as "expropriation" under the FIL.[86] Rejecting Kazakhstan's jurisdictional objections, the tribunal held that "[t]he fact that the [FIL] was repealed as of January 8, 2003, does not have an impact on ICSID jurisdiction."[87] This was because the "consent" as expressed in Article 27(3) of the FIL needed to be read together with Article 6(1) of the statute, guaranteeing investors against deterioration in the laws for a period of 10 years from the date of the investment (or longer, if the relevant investment contract so provided).[88] Thus, "[t]he relevant investments were made by Claimants from 1998 to 2002, and the Investment Contract entered into between Claimants and Respondent on May 20, 1999, was valid until June 31, 2009, *i.e.*, for a period of more than ten years," and the repeal of the FIL had no impact on the host state's prior expression of "consent" as contained in that FIL.[89]

The *Rumeli* tribunal then added:

> [I]t is also well-established in international law that a State may not take away accrued rights of a foreign investor by domestic legislation abrogating the law granting these rights. This is an application

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Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, ¶ 333 (July 29, 2008) (quoting 1994 FIL, art. 6(1)).

[86] *See id.* ¶¶ 562, 706. These also constituted unfair and inequitable treatment for purposes of the Turkey-Kazakhstan BIT. *Id.* ¶¶ 615-18.

[87] *Id.* ¶ 333.

[88] *Id.*

[89] *Id.* ¶¶ 333-34.

> of the principles of good faith, estoppel and venire factum proprium.[90]

This last sentence has been the subject of further debate and discussion.

C. Ruby Roz

In *Ruby Roz*, a foreign-owned Kazakh company purchased a poultry farm in 1999 when the 1994 FIL was in effect. When a dispute over the treatment of the investment arose almost two decades later, the investor filed an UNCITRAL arbitration in 2010 (purportedly pursuant to arbitration provisions in a contract). It later pled the (repealed) 1994 FIL as an additional basis for jurisdiction. Kazakhstan challenged this assertion on the basis that, among other things, there had been no "consent" to UNCITRAL jurisdiction before the 1994 repeal of the FIL.

The *Ruby Roz* tribunal was skeptical about numerous aspects of the investor's case (including because of doubts as to whether it qualified as a foreign-owned company for purposes of the FIL). It focused, however, on one particular point that it considered preclusive in any event – namely, that the investor had failed to "consent" to UNCITRAL arbitration pursuant to the FIL prior to its repeal. The mere purchase of the investment in 1999, it held, did not create an "accrued right" to "invoke the arbitration clause" in the FIL, but rather:

> [T]he arbitration clause in the FIL calls for the right to arbitration to be perfected by the investor's written consent, not by an investment or by a claim arising. In other words, the claimant had no "accrued right" to arbitration until it accepted in writing the offer of arbitration set forth in the FIL – and this occurred no earlier than the claimant's letter seeking to negotiate the dispute.[91]

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[90] *Id.* ¶ 335.

[91] Ruby Roz Agricol LLP v. The Republic of Kazakhstan, UNCITRAL, Award on Jurisdiction, ¶ 156 (Aug. 1, 2013) (footnote omitted).

The tribunal also considered whether the 10-year "stabilization clause" in the 1994 FIL could have the effect of prolonging Kazakhstan's "consent" to UNCITRAL/ICSID arbitration, as also contained in the FIL. It did not: the tribunal held that, even assuming the stabilization period applied, it would have begun in 1999 and expired in 2009.[92] Thus,

> assuming that the provisions of the FIL survived its 2003 repeal for investors who had invested before that date, and that Ruby Roz otherwise could claim the benefit of the FIL, the offer of arbitration in Article 27 expired in 2009, and hence the Claimant cannot rely on the FIL as a basis for jurisdiction of the Tribunal.[93]

Despite the case being distinguishable from *Rumeli*, the tribunal in *Ruby Roz* took issue with some of *Rumeli*'s reasoning. To quote the *Ruby Roz* tribunal:

> [T]he Tribunal disagrees with the ICSID tribunal in Rumeli, which held, as the last of three alternative bases for finding a valid arbitration agreement in that case, "[b]esides Article 6(1), it is also well established in international law that a State may not take away accrued rights of a foreign investor by domestic legislation abrogating the law granting these rights. This is an application of the principles of good faith, estoppel and venire factum proprium." The Rumeli tribunal's view that, independent of Article 6(1), the foreign investor had "accrued rights" to arbitration ignores the fact that prior to having filed its Notice of Arbitration the investor had only an unaccepted offer to arbitrate, an offer that was repealed before it was

[92] *Id.* ¶¶ 157-68. The *Ruby Roz* tribunal also noted that "from the perspective of broader considerations of equity, the stabilisation clause had already been repealed at the time [the investor's apparent principal] made his investment in the project in 2004" and that there was no evidence that its principal had actually studied the FIL or concluded that the stabilization clause was still in effect at the time of his 2004 acquisition. *Id.* ¶ 167.

[93] *Id.* ¶ 168.

> accepted. Ordinarily, in ICSID arbitration, "[a]n offer of consent contained in national legislation . . that had not been taken up by the investor will lapse when the legislation is repealed." Here, too, the Tribunal finds that Kazakhstan's offer to arbitrate in Article 27 was by its terms required to be accepted in writing before it was withdrawn.[94]

This arguably represents a stricter approach to jurisdiction and "repeal risk" than that taken by the *Rumeli* tribunal.

D. *ABCI v. Tunisia*

The case of *ABCI Investments N.V. v. Tunisia* (decided in 2012 but not publicly released until 2014) further discussed "repeal risk" – as well as the implications of *Rumeli's* comments about "good faith, estoppel and *venire factum proprium*."

In 1982, a company called "ABCI Investments" was incorporated in the Cayman Islands. Its beneficial shareholders were said to have included a Saudi Arabian national and a Tunisian national. In 1984, it acquired a 50% equity stake in Banque Franco-Tunisienne ("BFT"), a bank operating in Tunisia. Soon afterwards, however, disagreements arose between it and the Tunisian government, leading to "multiple" civil and criminal actions, as well as a forced insolvency, the arrest of BFT's presiding director, and the 1989 transfer by ABCI Investments of its shares in BFT – a transfer which, it was later claimed, took place "under duress."[95]

In 2003, ABCI Investments underwent a corporate migration and is now registered in Curaçao, in the Netherlands Antilles. A year later, in 2004, it commenced an ICSID arbitration against Tunisia, alleging that its interests in BFT had been wrongly expropriated, and seeking restitution of those interests.[96] It based its claim, and the jurisdiction of ICSID, primarily upon

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[94] *Id.* ¶ 156, n.93 (alterations in original) (citations omitted) (quoting *Rumeli*, *supra* note 85, at ¶ 335; SCHREUER ET AL., *supra* note 84, at 259).

[95] ABCI Investments Ltd. v. Republic of Tunisia, ICSID Case No. ARB/04/12, Decision on Jurisdiction, ¶ 39 (Feb. 18, 2011).

[96] *Id.* ¶ 41.

Tunisia's Law No. 69-35 of June 26, 1969 on Investments (the "Tunisia 1969 FIL"), an investment statute covering all "investments in Tunisia by natural or legal persons, whatever their nationality"[97] and allowing for arbitration of investment disputes through the ICSID Convention.[98]

Challenging jurisdiction, Tunisia pointed to the fact that it had repealed the Tunisia 1969 FIL in 1993, thus extinguishing from that point on any consent to ICSID arbitration in matters relating to the Tunisia 1969 FIL. It argued that ABCI Investments had not "consented" to ICSID arbitration prior to the 1993 repeal, with the consequence that there had been no perfected and mutual "consent" by the parties to ICSID arbitration, as required by Article 25 of the ICSID Convention.[99]

By majority, the *ABCI* tribunal rejected this argument. Although agreeing in principle with the Schreuer view that an "offer" of ICSID arbitration "indeed" could "subsequently be withdrawn by the State" if an "acceptance" of jurisdiction had "not occurred,"[100] the majority held that this contingency did not arise because ABCI Investments actually had manifested its "consent? to arbitration *prior to 1993*. The ICSID Convention, the majority noted, did not prescribe "a unique way to express" consent, thus allowing for "expression of consent" in such manner as evidences "meeting of the minds."[101] The documentary record, it held, was "rich in documents" that evidenced such consent.[102] This included correspondence with the Tunisian government from 1982, which it construed as manifesting a request by ABCI Investment for confirmation that the "safeguards provided by the [Tunisia 1969 FIL]" would apply to its investments.[103] By this

[97] *Id.* ¶ 66.

[98] *Id.* ¶ 69.

[99] *Id.* ¶¶ 70-75.

[100] *Id.* ¶ 93.

[101] *Id.* ¶ 92.

[102] *Id.* ¶ 100.

[103] *Id.* ¶¶ 104-05. The tribunal majority further held that the investment had been "authorized" in the manner required by the 1969 Act. *Id.* ¶¶ 110-12.

"sequence of correspondence" from 1982, showing ABCI Investments seeking and then obtaining confirmation it would receive the "jurisdictional guarantees" of the Tunisia 1969 FIL, the *ABCI* majority concluded that a mutual "consent" to ICSID jurisdiction had been manifest as from 1982 onwards.[104]

Next, the tribunal dealt with Tunisia's argument that the 1993 Act had repealed the statute. Could the *mutual* consent have been "repealed" by the 1993 Act? The answer, held the majority, "is obviously negative."[105] While a state retained "legislative sovereignty," including the right to enact new investment laws, it was "not possible to act against rights acquired before the implementation of the modification or repeal," meaning that "[i]f consent was formed while Article 20 [of the Tunisia 1969 FIL] was in force, the right of the investor to arbitration was acquired for existing or future disputes." The 1993 Repealing Act was not capable of changing "commitments" to "stability" made prior to its "entry into force."[106]

The majority continued:

> The parties also discussed the implication of the *Rumeli* case in this context, especially in light of the tribunal's holding that emphasizes, based on good faith and estoppel, "*it is also well established in international law that a State may not take away accrued rights of a foreign investor by domestic legislation abrogating the law granting these rights*." While it is recognized that in this case, there was not only a legislative provision but a contract which contained a stabilisation type clause, it remains no less certain that the underlying principle concerning prejudice to acquired rights is of general application.[107]

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[104] *Id.* ¶ 116. Other official documents from 1984 were said to buttress this finding. *Id.* ¶¶ 117-18.

[105] *Id.* ¶ 125.

[106] *Id.* ¶ 126.

[107] *Id.* ¶ 127 (footnotes omitted) (quoting *Rumeli*, *supra* note 85, at ¶ 335).

> The conditions required by international law to establish estoppel are strict, in line with the judgment of the International Court of Justice in the case concerning the *Temple of Preah Vihear*, which may make it more difficult to conclude the existence of a case of estoppel in this case. In any event, the underlying principle of good faith certainly plays an important role. While the conclusion in *Rumeli* is qualified as *obiter dictum* by Respondent or as a source to take into account by the Claimant, the fact is that it reflects a well-established principle of law, valid as indicated above both in international law and national law. Repeal may still act as an expression of sovereign power, but if a vested right is affected then the act in question cannot be considered legally valid and gives rise to the consequences of a wrongful act, including restitution and compensation, which relate to the liability of the State for this unlawful act.[108]

Having held that repeal cannot prejudice an acquired right, the *ABCI* tribunal next held that "the guarantee of arbitration of Article 20" was a central guarantee for investments made under the FIL, arguably more so than "other benefits provided."[109] It then turned again to the correspondence from the 1980s and noted that the investor had sought "the ruling." This, it held, "clearly indicates that the investor was seeking, in one way or another, the protection of ICSID arbitration." But "[w]ithout such guarantees, the investment is made without the protection afforded by the [Tunisia 1969 FIL]."[110] Thus, in the face of a pre-existing consent, the 1993 repeal was ineffective to strip ICSID of jurisdiction.

Last, the tribunal majority further noted that, at the time (1982), ABCI was a Cayman Islands company and thus a national of the UK, an ICSID Contracting State.[111] This meant, in its view,

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[108] *Id.* ¶ 128 (footnotes omitted).

[109] *Id.* ¶ 129.

[110] *Id.* ¶ 130.

[111] *Id.* ¶ 134 (noting that the United Kingdom had "extended its acceptance" of

that jurisdiction had validly been established under the Tunisia 1969 FIL.[112]

Dissenting on the issue of mutual consent, Professor Brigitte Stern strongly disagreed with the factual findings of the majority, considering that there was no "consent" to ICSID by the investor prior to the repeal of the 1969 Act (and no "approval" of the investment either).[113] Her dissent thus did not reach the issue of whether consent could be repealed.[114]

E. *Lessons from the FIL cases*

The above FIL cases can be said to be in harmony with the BIT cases in that:

- Where a statute lays down a given set of road-rules, those rules will generally be applied as stated in the legislation (e.g., the *ABCI* majority was careful to analyze whether the investor had met the registration and nationality requirements of the Tunisia 1996 FIL).
- Once a state's commitment to arbitrate become binding, the state cannot take unilateral action to resile from that commitment. Each of the tribunals (Rumeli, Ruby Roz, and ABCI) thus assumed that if an investor "consents" to ICSID jurisdiction before a state repeals an investment statute, then the repeal cannot operate to abrogate the resulting (pre-repeal) consent.

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the ICSID Convention to the Cayman Islands).

[112] *Id.* ¶ 133.

[113] ABCI Investments Ltd. v. Republic of Tunisia, ICSID Case No. ARB/04/12, Dissenting Opinion of Arbitrator Brigitte Stern, ¶¶ 37-63 (Feb. 14, 2011).

[114] ABCI advanced several alternative bases for jurisdiction, including jurisdiction under the Netherlands-Tunisia BIT as well as jurisdiction through direct contractual agreement. These submissions were rejected, however, because: (1) in the unanimous view of all tribunal members, the parties' dispute had already materialized prior to the treaty coming into force – thus making it impossible for a treaty claim to be made. *ABCI*, *supra* note 95, at ¶¶ 177-79; *see also id.* ¶¶ 184-90; and (2) there was insufficient evidence of a direct contractual agreement to submit disputes to ICSID. *Id.* ¶¶ 202-05.

- *Rumeli's* dicta might be read as suggesting that a repeal would be ineffective if it violates principles of good faith and defeat "accrued rights," even in the absence of a perfected consent.

V. ATTEMPTING TO CLAIM THAT AN ARBITRATION AGREEMENT WAS IMPROPERLY SIGNED

In some cases, states have attempted to claim that an arbitration agreement is not binding because the official signing it lacked the proper authority to sign it (or that the department or entity signing it had failed to follow the proper internal procedures).

Pleas relating to "signing authority" or *ultra vires* have often been considered with a rule of preclusion. For example, in *SPP v. Egypt*, a claim that a contract with an Egyptian government entity was invalid under Egyptian law was rejected on the grounds that the various state officials responsible for executing it had claimed it was within their authority; thus, given that the contract carried the "mantle" of governmental authority, the government was precluded from denying its validity, even if accomplished outside the limits of officials' competence and contrary to domestic law.[115] Such pleas, however, will not always impact every respect

[115] *Southern Pacific Properties*, *supra* note 33, at ¶¶ 81-83; *see also* RSM Production Corp. v. Central African Republic, ICSID Case No. ARB/07/02, Decision on Jurisdiction and Liability, ¶ 119 (Dec. 7, 2010) (holding that a government could not rely upon supposed internal law "shortcomings" in the process leading to signature of a 1999 contract with the investor); Ioannis Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction, ¶¶ 147-60, 185-92 (July 6, 2007) (holding, with respect to contracts signed by a Georgian state entity, that because Georgian officials had repeatedly and expressly warranted that these instruments complied with Georgian law and that their signatories had authority to sign them, Georgia could not rely on a claim that the state entities lacked internal authorization to execute them); *Himpurna*, *supra* note 5, at ¶¶ 113-14 (rejecting the state-owned enterprise's claim that the contract was illegal under its own national law, observing that the claim "amount[s] to saying that Indonesian officials, acting with actual or at least apparent authority, entered into agreements with a foreign investor that were illegal or otherwise invalid as a matter of Indonesian law"; such arguments "must be treated with great circumspection" because "such a posture puts into question the reliability of the undertakings of the country in question"; adding that "an over-readiness by international arbitrators to accept illegality defences may harm" the mechanism of foreign

of jurisdiction, as under the "well-established principle of autonomy of the arbitration clause," a challenge to the validity of the agreement as a whole will not necessarily result in invalidity of the arbitration clause.[116] Put another way, the doctrine of *kompetenz-kompetenz* potentially preserves the jurisdiction of the tribunal to decide whether the overall contract itself is valid (on the theory that the arbitration clause represents a separate and autonomous agreement whose validity remains intact).

Sometimes it is claimed that an arbitration agreement itself was signed without the requisite state authority. If this incapacity was not apparent at the time the agreement was executed, the investor (or counterparty) can argue that the state has breached its good faith duty to disclose the irregularities. Georges Delaume wrote in 1989:

> Even in cases in which it was shown that not all the procedures required under the State's own law had been fully satisfied, arbitral tribunals have consistently held that the State involved had a duty to disclose in good faith the situation to the other party and that failure to do so estopped the State from subsequently challenging the validity of its undertaking.[117]

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investment); Company Z v. State Org. ABC, Award (1982), 8 Y.B. Comm. Arb. 94, 101-04 (1983) (English text with pseudonymous party names of award published in French as *Framatome, S.A. v. Atomic Energy Org. of Iran*, I.C.C. Case No. 3896, 111 J. DROIT INT'L 58 (1984)) (rejecting claim that a contract was invalid on the ground of non-compliance with Iranian domestic law, finding the "duty . . . incumbent on a foreign co-contractor" to ensure his contract's compliance with Iranian law to be "at least equally incumbent upon the Utopian [Iranian] party itself and upon its organs"); ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 97-98 (2009) ("[H]aving formally or *de facto* recognized the validity of an investment contract by benefiting from it for a certain time, international law precludes a host state from denying, without more, its validity under domestic law and thus escape liability for breach or unilateral termination.").

[116] *RSM*, *supra* note 115, at ¶ 71.

[117] Georges R. Delaume, *The Finality of Arbitration Involving States: Recent Developments*, 5 ARB. INT'L 21, 26 (1989); *see, e.g.*, Supplier v. Republic of X, No. 6474, Partial Award on Jurisdiction & Admissibility ¶¶ 111-15 (ICC 1992), *reprinted in* 25 Y.B. Comm. Arb. 279, 301-02 (2000) (holding as a matter of

Similarly, Gary Born has stated:

> *It is fundamentally contrary to a state's commitment to arbitrate for the state subsequently to invoke its own legislative, constitutional, or administrative acts as qualifications to or limitations on its international arbitration agreement. Such efforts are irreconcilable with the state's obligations of good faith and principles of estoppel . . .; these efforts should have no effect on the validity of the state's agreement to arbitrate.*[118]

A case that presented the issue in particularly stark terms, but never reached a final adjudication, was *ETI v. Bolivia*. This concerned the 2007 expropriation of Empresa Nacional de

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Swiss law that a state could not rely on a claim that its "regulations, formalities or procedures were not followed" at the time of executing the contract when it had neither informed the counterparty nor taken steps to "prevent such irregularities"; adding that "[a]n identical result would moreover be arrived at, in all likelihood, according to general principles (good faith, estoppel, appearance of authority)"); *see also* Theodor Meron, *Repudiation of Ultra Vires State Contracts and the International Responsibility of States*, 6 INT'L & COMP. L.Q. 273, 286 (1957) ("The rules of ratification by conduct and of estoppel with respect to *ultra vires* State contracts can be regarded as specific applications of [the] broad principle [of good faith] and can be expressed by the maxims: *allegans contraria non est audiendus* and *nullus commodum capere de sua injuria propria."*).

[118] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 733 (2d ed. 2014). At an early stage before the Iran-United States Claims Tribunal, Iran attempted to claim that the Claims Settlement Declaration of the Algiers Accords (the instrument establishing jurisdiction) should be construed restrictively because the Iranian signatories only had limited signing authority. The United States countered by citing Article 47 of the Vienna Convention on the Law of Treaties, which mandates that "[i]f the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent." Vienna Convention on the Law of Treaties, art. 47, May 23, 1969, 1155 U.N.T.S. 332. In two early jurisdictional decisions, the Iran-United States Claims Tribunal rejected Iran's position, holding that because Iran's chief negotiator failed to "communicate" to the United States his "understanding" of the limits on his signing authority, this "[could] not be invoked as a valid limit on Iran's consent." Amoco Iran Oil Co. v. Iran, 1 Iran-U.S. Cl. Trib. Rep. 493, 496 (1982); *accord* Phillips Petroleum Co. v. Iran, 1 Iran-U.S. Cl. Trib. Rep. 487, 490 (1982).

Telecommunicaciones Entel, S.A. ("Entel"), a large Bolivian telecommunications company that was 50% owned by E.T.I. Euro Telecom International N.V. ("ETI"), a Dutch affiliate of Telecom Italia.

When nationalization measures were initiated against Entel in early 2007, ETI issued a notice (dated April 30, 2007) alerting Bolivia to the existence of a potential dispute under the Netherlands-Bolivia BIT and inviting Bolivia to engage in "consultations with a view to settling the [d]ispute amicably, in accordance with Article 9 of the BIT."[119] Just one day later, May 1, 2007, Bolivia's Foreign Ministry executed a letter to the ICSID Secretariat announcing Bolivia's withdrawal from the ICSID Convention, effective in six months.[120]

On October 12, 2007 (21 days before Bolivia ceased to be a member of the ICSID Convention), ETI commenced an ICSID arbitration against Bolivia.[121] In this respect, Article 9 of the Netherlands-Bolivia BIT contemplated that investor claims could be submitted either to ICSID Arbitration or *ad hoc* investor-state arbitration.

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[119] Chin Decl. Ex. B, Plurinational State of Bolivia v. E.T.I. Euro Telecom Int'l N.V., No. 1:10-cv-01704-RBW (D.D.C. filed Oct. 5, 2010) (hereinafter "*ETI* D.C. Litigation"), ECF No. 2-3 (letter dated Apr. 30, 2007 from ETI to Bolivia's President Evo Morales). This and the other citations from the *ETI v. Bolivia (ICSID)* case are taken from the publicly filed documents in the *ETI* D.C. Litigation, in particular the Defendant's Motion to Dismiss dated October 28, 2010 and exhibits thereto.

[120] *See Bolivia Denounces ICSID Convention*, 46 I.L.M. 973, 973 (2007) (notice, dated May 1, 2007, from the Bolivian Foreign Affairs Minister informing the President of the World Bank that "the Republic of Bolivia, pursuant to Article 71 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, denounces said Convention"). The letter was received one day later. *See* News Release, ICSID, *Denunciation of ICSID Convention* (May 16, 2007), https://icsid.worldbank.org/ICSID/StaticFiles/Announcement3.html ("On May 2, 2007, the World Bank received a written notice of denunciation of the . . . ICSID Convention . . . from the Republic of Bolivia."),

[121] *See* Chin Decl. Ex. D, ¶ 14, *ETI* D.C. Litigation, *supra* note 119, at ECF No. 2-5 (*ETI v. Bolivia (ICSID)*, Respondent's Mar. 20, 2009 Memorial on Jurisdiction) (hereinafter "Bolivia ICSID Mem. on Jurisdiction").

Bolivia challenged jurisdiction on two bases. First, it claimed that there had been no "consent" to ICSID jurisdiction prior to May 2, 2007 (the date its denunciation was received by ICSID) – a position that necessarily implied that the April 30, 2007 notice of dispute did not "consent" to ICSID jurisdiction because it did not explicitly "consent" to ICSID arbitration.[122]

Second, Bolivia claimed that the provisions of Article 72 of the ICSID Convention – providing that an Article 71 notice "'shall *not* affect the rights or obligations" of a denouncing State in connection with consent "*before*" notice of termination – operated to extinguish any "consent" to ICSID jurisdiction from the date of denunciation forward.[123] This proposition rested on a controversial interpretation of Article 71 of the ICSID Convention, which was at odds with several contemporary predictions of how Bolivia's denunciation would operate.[124] At the same time, Bolivia made clear that ETI still had other arbitral options:

> None of this is to say that ETI is without recourse. Article 9(6) of the BIT was worded conditionally precisely because at the time Bolivia and Netherlands entered it, Bolivia was not yet a party

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[122] *Id.* ¶ 40. Although ETI's Counter-Memorial on Jurisdiction (apparently filed with ICSID on June 24, 2009) has not been made public, there is every reason to believe that it strongly contested Bolivia's interpretation of Article 71 as well as its April 30, 2007 letter.

[123] *Id.* ¶ 39 (citation omitted).

[124] *See, e.g.*, Sébastien Manciaux, *La Bolivie se retire du Cirdi*, REVUE DE L'ARBITRAGE 351, 355 (2007) (expressing the view that a declaration lodged under Article 71 of the ICSID Convention would *not* have the effect of stripping ICSID of jurisdiction over cases commenced during that six-month period, pursuant to an ICSID "consent" in a BIT to which Bolivia was party). Still, Bolivia's counsel accepted that, even under its theory of jurisdiction, a proceeding instituted prior to denunciation of the ICSID Convention remained valid and thus it acknowledged the propriety of ICSID's continuing jurisdiction over the *Quiborax* case, commenced in 2006 pursuant to the Chile-Bolivia BIT. *See* Bolivia ICSID Mem. on Jurisdiction, *supra* note 121, at ¶ 45 (admitting that the "pending ICSID claim against Bolivia, Química e Industrial del Bórax Ltd. v. Bolivia (ICSID Case No. ARB/06/02), brought pursuant to the Bolivia-Chile BIT," remained valid because "claimant's request for arbitration in that case was filed in February 2006 and consent thus perfected at that time," thus "that mutual consent remains binding on Bolivia even though it has ceased to be a Contracting State to the ICSID Convention").

> to the ICSID Convention. Now, the condition has ceased to be fulfilled; consequently, under principles of reasonableness and good faith, the situation must revert to the *status quo ante*.[125]

In other words, Bolivia was prepared to engage in *ad hoc* arbitration pursuant to Article 9(3) of the BIT.

Prior to the ICSID jurisdictional hearing (due to occur in October 2009),[126] ETI changed in strategy: relying upon the above-quoted statement in Bolivia's March 2009 filing, ETI purported to file a *new ad hoc* arbitration pursuant to Article 9(3) of the BIT.[127] ETI and Bolivia's counsel then sought to negotiate a procedural order by which (i) the new arbitration would be governed by the UNCITRAL Rules administered by the PCA; (ii) the same arbitrators as in the ICSID case would serve on the *ad hoc* tribunal, and (iii) briefing on the Netherlands-Venezuela BIT claims would then proceed on the merits.[128]

In October 2009, ETI and Bolivia entered into an arbitration agreement on these lines, providing for withdrawal of the ICSID claim and empowering the *ad hoc* arbitration to hear and determine any claim by Bolivia for the costs of the first (ICSID) arbitration.[129] The agreement was executed by "[t]he Plurinational State of Bolivia ('Bolivia'), represented by the Minister of Legal Defense of the State, Dr. María Cecilia Rocabado Tubert."[130] To quote ETI's counsel:

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125 Bolivia ICSID Mem. on Jurisdiction, *supra* note 121, at ¶ 83; *see also id.* ¶ 88.

126 *See* Motion to Dismiss at 5, *ETI* D.C. Litigation, *supra* note 119, at ECF No. 2.

127 *See id.*

128 *See id.* ("To avoid delay, ETI also proposed the appointment of the same arbitral tribunal already sitting in the ICSID case and the adoption of an accelerated schedule for the exchange of briefing and the final hearing . . . It was Bolivia's own counsel who advocated that the parties execute an ad hoc arbitration agreement . . . in order to expedite the ad hoc proceedings, in exchange for ETI agreeing to discontinue the ICSID arbitration.").

129 *See id.* at 6.

130 *See id.* (alteration in original); *see also* Complaint Ex. 1 at 1, *ETI* D.C. Litigation, *supra* note 119, at ECF No. 1-1 (*Ad Hoc* Arbitration Agreement dated Oct. 16, 2009).

> [a]fter round-the-clock negotiations assisted by the ICSID tribunal, ETI and Bolivia entered into and executed [a] Supplement to the Ad Hoc Arbitration Agreement, which further provided for the conduct of the ad hoc arbitration, to be conducted under the UNCITRAL Rules and administered by the Permanent Court of Arbitration, and requested a final hearing in late 2010 – and was further executed by Minister Rocabado Tubert.[131]

With the parties' apparent blessing, the three members of the ICSID tribunal re-constituted themselves as a new *ad hoc* tribunal and set a schedule for a merits hearing in late 2010, while noting that the ICSID proceedings had been discontinued.[132] This arrangement eliminated a potentially distracting jurisdictional issue and seemingly enabled a prompt merits adjudication.

Only two months later, however, Bolivia changed course: it now claimed that the Minister who signed the arbitration agreement had done so without seeking all necessary internal approvals.[133] On March 4, 2010 – by which time it had defaulted on several deadlines for submitting its defense in the new arbitration[134] Bolivia asserted that, as a result of the Minister allegedly exceeding her authority, the entire *ad hoc* arbitration was void.[135]

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[131] Bolivia ICSID Mem. On Jurisdiction, *supra* note 121, at ¶ 83. As part of these arrangements, the new tribunal was empowered to determine how the costs of the (discontinued) ICSID arbitration should be allocated. Public documents indicate that this was later the subject of briefing (with Bolivia seeking all such costs and ETI denying such liability), but it is not clear whether any ruling was ultimately made. *See* Motion to Dismiss at 6, *ETI* DC Litigation, *supra* note 119, at ECF No. 2; *see also* Compl. Ex. 2 at 2, *ETI* D.C. Litigation, *supra* note 119, at ECF No. 1-2 (Supplement to *Ad Hoc* Arbitration Agreement dated Oct. 20, 2009).

[132] *See* Chin Decl. Ex. H ¶ 3-4, *ETI* D.C. Litigation, *supra* note 119, at ECF No. 2-9 (E.T.I. Euro Telecom Int'l N.V. v. Bolivia, UNCITRAL, PCA No. 2009-16, Procedural Order No. 1 of the Arbitral Tribunal (2009)); Chin Decl. Ex. I ¶ 13, *ETI* D.C. Litigation, *supra* note 119, at ECF No. 2-10 (ETI v. Bolivia (ICSID), Order Taking Note of Discontinuance of Proceedings).

[133] *See* Motion to Dismiss at 7-9, *ETI* D.C. Litigation, *supra* note 119, at ECF No. 2.

[134] *See id.* at 8-9.

[135] *See* Chin Decl. Ex. L, *ETI* D.C. Litigation, *supra* note 119, at ECF No. 2-13 (letter dated Mar. 4, 2010 from Bolivia to PCA); *see also* Chin Decl. Ex. M, *ETI*

At a hearing in April 2010, Bolivia insisted that the new arbitrators' proper remit should be confined to whether ETI should pay the costs of the discontinued ICSID arbitration,[136] prompting one of the arbitrators to point out the "fundamental contradiction" inherent in Bolivia pressing the costs request in front of a tribunal that it had declared void.[137] The tribunal created a schedule to adjudicate *both* the merits issues *and* the new jurisdictional objection.[138] Briefs on the jurisdictional point were exchanged, and ETI's merits and quantum evidence was also received.[139] When Bolivia failed to submit a quantum memorial, the tribunal appointed its own quantum expert.[140] A final hearing was scheduled for November 8-10, 2010 in New York.[141]

At that point, Bolivia opened a new front: on October 5, 2010, it brought an anti-suit injunction in the U.S. District Court for the District of Columbia, seeking to halt the arbitration by having a federal judge declare the arbitration agreement to be invalid by reason of the Minister's lack of authority.[142] In response, ETI argued that the issue of the Minister's authority was exclusively a matter for the UNCITRAL tribunal to decide.

In the end, no injunction was issued: the D.C. court action was voluntarily discontinued by Bolivia, with prejudice, in early

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D.C. Litigation, *supra* note 119, at ECF No. 2-14 (letter dated Apr. 9, 2010 from Bolivia to PCA, repeating same arguments).

136 *See* Chin Decl. Ex. N at 38, *ETI* D.C. Litigation, *supra* note 119, at ECF No. 2-15 (Transcript of the Hearing, *ETI v. Bolivia (UNCITRAL)*).

137 *See id.* at 36, 41-43.

138 *See id.* at 62.

139 *See* Chin Decl. Ex. O, *ETI* D.C. Litigation, *supra* note 119, at ECF No. 2-16 (letter dated May 17, 2010 from Bolivia to the PCA detailing Bolivia's arguments on the invalidity of the draft agreements) (unofficial translation); *see also* Motion to Dismiss at 10, *ETI* D.C. Litigation, *supra* note 119, at ECF No. 2 (discussing merits briefing).

140 *See* Chin Decl. Ex. T, *ETI* D.C. Litigation, *supra* note 119, at ECF No. 2-21 (letter dated July 22, 2010 from PCA to parties).

141 *See* Chin Decl. Ex. W, *ETI* D.C. Litigation, *supra* note 119, at ECF No. 2-24 (letter dated Oct. 12, 2010 from PCA to the parties).

142 *See* Complaint, *ETI* DC Litigation, *supra* note 119, at ECF No. 1.

November 2010,[143] apparently as part of a settlement of the case in which ETI received $100 million in compensation.[144]

It would have been interesting to see what the result of this dispute would have been had Bolivia's *ultra vires* argument been adjudicated by the UNCITRAL tribunal. Perhaps the tribunal would have looked upon Bolivia's arguments with disfavor; this would be broadly consistent with the holdings or dicta in past cases where the various tribunal members had addressed state commitments to arbitrate (*e.g.*, *ABCI v. Tunisia*, *Nova Scotia I*, and *Ambiente*).[145]

VI. CONCLUSION

It should be apparent from all of the scenarios discussed above – treaty-based arbitral commitments, investment statutes, and direct contractual commitments to arbitrate – that once a party has expressly committed to a given mode of dispute resolution, international law will generally disfavor attempts to rescind those rights through unilateral action. Although tribunals will respect the agreed "road-rules" of an arbitration agreement, treaty or statute, this does not mean that gamesmanship will be permitted, and it may mean that a state will be precluded from invoking a particular pre-condition (*e.g.*, the 18-month litigation rule in the UK-Argentina BIT) if it has stymied that provision.

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143 *See* Order, *ETI* D.C. Litigation, *supra* note 119, at ECF No. 5 (taking notice of voluntary discontinuance by Bolivia).

144 *See* Press Release, Telecom Italia, *Telecom Italia: agreement signed with the Bolivian Government on Entel*, Nov. 8, 2010, http://www.telecomitalia.com/tit/en/archivio/media/comunicati-stampa/telecom-italia/corporate/economico-finanziario/2010/11-08.html (noting that the "understanding settles all legal actions between the parties with a US$100 million compensation in favour of ETI and begins a new season of commercial collaboration").

145 The specter of a U.S. court adjudicating an anti-suit injunction, as Bolivia sought in 2010, is a useful reminder that the "menu" options in a BIT might not carry the same protections. Had the case remained with an ICSID tribunal, it would have been "quarantined from legal supervision under the law of the place of arbitration." Waste Management., Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Decision on Venue of the Arbitration, ¶ 5 (Sept. 26, 2001).

The principle of "estoppel," is said to draw support from *Temple of Preah Vihear*, looks to whether a party has relied upon someone's specific prior commitment. Although important, this is by no means the only relevant doctrine when dealing with commitments to arbitrate. Broader considerations, whether expressed in terms of good faith, *pacta sunt servanda*, and *venire contra factum proprium*, may come into play. In that sense, the ICJ's 1984 decision in *Nicaragua* (which emphasized the need to observe "good faith" when participating in a "network of engagements" for dispute resolution)[146] may be relevant in ensuring that parties, including states, are not permitted to "blow hot and cold" with respect to their arbitration commitments.

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[146] *Nicaragua*, *supra* note 17, at 418, ¶ 60.