DISSENTING OPINION, HOWARD MANN, ARBITRATOR

1 INTRODUCTION

1. After careful consideration of the arbitration file prior to joining the Tribunal, and of course the pleadings, exhibits and oral hearings, I have determined that the only course of action that reflects my analysis is to dissent fully from the majority decision of my colleagues. As a result, all references in the majority decision to "the Tribunal" should be understood as the majority of the Tribunal only, with my dissent applying across the board.

2. While I do not disagree with every single finding of my colleagues, among the more critical findings of my colleagues that I disagree fundamentally with are the interpretations of the ICSID Convention and the Venezuela-Netherlands BIT relating to jurisdiction *ratione voluntatis,* the question of admissibility, and the related issue of proof of actual damages to the Claimant. Each of these issues is discussed below.

3. I will focus on the jurisdictional issues in my substantive comments, and primarily on the issue of jurisdiction *ratione voluntatis*, where I believe my colleagues have erred most significantly in their award, and in a manner with implications well beyond this present award. In my view, the errors my colleagues have made are patent and have resulted in a manifest excess of the powers of the Tribunal. I also raise issues that combine jurisdictional questions and admissibility questions, including the risk that the majority award amounts to a circumvention of the need to identify the actual damages to this specific Claimant in this arbitration. This is followed by some additional concerns stemming originally from the decision of the Tribunal on bifurcation.

2 DOES THE TRIBUNAL HAVE JURISDICTION *RATIONE VOLUNTATIS*

4. I will focus first on the issues concerning jurisdiction *ratione voluntatis*: Simply put for present purposes, is there valid and timely consent by both arbitrating parties for this Tribunal to have jurisdiction?

2.1 Preliminary notes

5. As my colleagues have noted, this question raises issues of the nature of consent, means of consent and timing of consent under two instruments, the Venezuela-Netherlands BIT and the ICSID Convention. In my view, two primary legal elements must be satisfied:

(1) The host and home State of the foreign investor must be subject to the application of the ICSID Convention at the time of consent.[1] The Convention must be "applicable" to both host and home states when consent is given by both arbitrating parties. Note that I say "applicable" as opposed to "in force", as in some instances a State may no longer be party to the Convention (*i.e.* the Convention is no longer "in force" for that ex-party) but the Convention may remain applicable to it in whole or in part. The extent to which this caveat applies is a core question here.

(2) The consent to ICSID arbitration must also be validly constituted under a second and separate instrument, as the Convention itself does not provide consent to arbitration by a member State or by an investor. Indeed, quite the opposite:

> ***Declaring*** *that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.*[2]

6. While the preambular paragraph makes clear that the ratification, acceptance or approval of the ICSID Convention results in no obligation to arbitrate at ICSID under the Convention, the Claimant appears to argue, in effect, that the act of renunciation of the Convention by Venezuela can create an obligation to arbitrate for Venezuela after it is no longer party to the Convention.

7. In the present instance, the instruments of consent claimed to be applicable by the Claimant are the Venezuela-Netherlands BIT for consent of the Respondent, combined with one or both of the September 2011 letter from Claimant and its own 100% owner, Smurfit Kappa Group; and/or the filing of the claim to arbitration by Smurfit in 2018 that initiated these proceedings.

8. This dual basis for jurisdiction is core to the ICSID process, and flows from the fact, which all parties acknowledge, that the ICSID Convention does not provide for mutual or unilateral consent to arbitration between a foreign investor and the host State per se. Rather, it is "the parties" to the individual ICSID arbitrations that must consent to such arbitration. It provides only for State membership within the ICSID system, which in turn is a mandatory element for arbitrating parties to access ICSID arbitration, subject to the specific rules on withdrawal by a State from the ICSID Convention.

[1] The ICSID Additional Facility Rules raise alternative issues that are not relevant to this arbitration and thus are not included in this analysis.
[2] ICSID Convention Preamble, para. 7.

9. Consent to arbitrate must come from one or more separate legal instrument(s) that establish consent between the two arbitrating parties under ICSID – the host State and the foreign investor – as opposed to the two states constituting the home and host states. In short, both the ICSID Convention and the instrument(s) of actual consent between the investor and the host State must be valid and applicable for an ICSID Tribunal to exercise jurisdiction. This is not a new view. Indeed, my colleagues and I agree with the parties before us that "the jurisdiction of an ICSID tribunal should be tested both against the BIT and the ICSID Convention."[3] Nor is it new to ICSID jurisprudence, as per the finding in *Fábrica v. Venezuela:*

> *...the conditions for resorting to ICSID arbitration are set out in two separate and wholly independent international legal instruments and* ***both must be satisfied*** *for the Tribunal to have jurisdiction in this case*.[4] (Emphasis added)

10. As further stated by the tribunal in *Fábrica,* in addressing the exact same legal issues as here,

> *The Tribunal notes at the outset that consent to ICSID arbitration has a different juridical character than consent to other forms of arbitration for a simple reason: ICSID arbitration is directly regulated by a multilateral treaty. The multilateral treaty in question – the ICSID Convention –* ***has a legal existence entirely separate from the BIT****. The ICSID Convention has its own provisions for determining how and when it is to comes into force, how and when amendments are to be made to it and are to become effective, and how and when a Contracting State may withdraw from the treaty and no longer be bound by the obligations thereunder.*[5] (Emphasis added)

11. This is re-enforced a few paragraphs later in the same award:

> *ICSID arbitration is only available if the conditions for access to ICSID arbitration in the investment treaty* ***and*** *the ICSID Convention have been satisfied.*[6] (Emphasis added)

12. This is perfectly consistent with the *Tenaris v. Venezuela* award, speaking specifically about another element of jurisdiction, *ratione personae*, but equally applicable to jurisdiction *ratione voluntatis*:

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[3] Respondent's Second Post-Hearing Brief, para. 11.
[4] **RL-0021**, *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Award, 13 November 2017, para. 262 [hereinafter: *Fábrica v. Venezuela*].
[5] *Fábrica v. Venezuela*, para. 258.
[6] *Id*, para. 261.

> *In order for an ICSID tribunal to have ratione personae jurisdiction, it is necessary for the requirements laid down in Article 25 of the Convention and those established in the relevant BIT to be* ***cumulatively*** *satisfied.*[7] (Emphasis added)

13. Of course, the results of the individualized interpretation of each instrument can have implications for the application of the other. But the interpretation of each individual instrument cannot be fashioned by an interpretation or objective ascribed to the other. As set out in *Fábrica* and *Tenaris*, neither instrument dominates over the other for this purpose: both remain independent and the conditions for consent to arbitration, the key issue in this instance, must both be independently and cumulatively satisfied for ICSID jurisdiction to exist. In the present instance those requirements are set out in the provisions in each treaty on jurisdiction, consent, denunciation and termination, and including the sunset provisions in the BIT.

14. While my colleagues have quoted the same sentence I have quoted from *Fábrica* above,[8] it is my view that they have failed to act in accordance with it. Indeed, they appear to quote it and then actually reject its premise and the necessary conclusion that each treaty text must be treated first independently and then cumulatively:

> *There is no hard and fast rule to determine whether consent exists in this case and the Tribunal is cognizant of the complexities involving this inquiry. Determining whether Venezuela has consented to submit a dispute to arbitration should be a function of a holistic interpretative exercise, in accordance with the general rule of interpretation of the Vienna Convention,*[9] *of all relevant provisions of both instruments, namely those provisions related to jurisdiction, consent, denunciation/termination and sunset.*[10]

15. First, as illustrated by the awards quoted above, there is a hard and fast rule expressed in the existing related cases: the treaties are to be interpreted individually and the conditions in both must be met cumulatively. Second, I disagree that the issues are particularly complex such as to require

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[7] **CL-0182**, *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Award, 12 December 2016, para. 165. Tribunal's Translation.

[8] Majority Award, para. 312.

[9] Majority Award, para. 275. Original footnote: "*Both Parties agree as to the applicability of the Vienna Convention. 'Relevant principles of public international law inform and complement the content of the Treaty, including the customary international rules on treaty interpretation as codified in the Vienna Convention on the Law of Treaties (Vienna Convention).*'" Claimant's Memorial, para. 179*;* '*Pursuant to Article 31 of the Vienna Convention on the Law of Treaties (VCLT), treaty terms such as those of the Treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose*.' Request for Bifurcation, para. 47."

[10] Majority Award, para. 275.

new approaches to interpretation to reach a conclusion: test each purported consent to jurisdiction against the terms of each agreement. It is what arbitrators do every day in my view, and no more complex in my view than most other issues. I provide my attempt to do so below.

16. Moreover, by turning the interpretative exercise into an integration exercise, as it appears in the above quotation, this results not in the interpretation of each instrument, but an attempt to create a third integrated instrument which in fact does not exist. The Tribunal, in my view, does not have the jurisdiction to articulate a new integrated instrument, a task that would belong to treaty makers, not treaty interpreters. My colleagues argue that this approach is "*in accordance with the general rule of interpretation of the Vienna Convention."* Respectfully, I disagree. The VCLT, Art. 31, states that:

> *31(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

17. While considering other legal instruments may allow for context and subsequent interpretational practice by the parties to be brought to bear on a text, this does not establish a basis for a holistic integration of separate texts, converting two individual text interpretation exercises into a single holistic process. With all due respect to my colleagues, in my view this is neither endorsed by nor consistent with the VCLT itself, which consistently speaks of interpretation of a treaty in a singular context and never in a blended context, nor the practice and understanding in relation to existing ICSID cases on this point.

18. In the end, I find that my colleagues argument that the BIT creates a legal "bridge" to the ICSID Convention that in turn creates a prohibition or limitation on the exercise of the right to denounce the Convention, contained in Art. 71 of the Convention, is not simply an integrated interpretation, but is in practice a backdoor way to amend the Convention. Nothing in the Convention says a key right of States to denounce a treaty can be amended or removed by a BIT, and nothing in the BIT says it is seeking to amend the Convention as between the parties to the BIT. Such a route to effectively amending the Convention to prohibit or limit the right to denounce it by a State party cannot be created by arbitrators who have a singular power to interpret a treaty text before it, but not to amend it. The latter is, in my opinion, manifestly an excess of jurisdiction by an arbitrator. Arbitrators must interpret what treaty drafters draft. Only authorized State officials get to redraft it or amend it.

19. Specifically in relation to a bilateral treaty amending a multilateral treaty, the VCLT, Art. 41, *Agreements to modify multilateral treaties between certain of the parties only*, sets out the required conditions needed to do so.[11] Certainly if the power to amend the ICSID Convention is contained in the BIT, my colleagues have failed to elucidate it, and I have failed to see it. Thus, the results posited by my colleagues in the majority award, in my view, are outside their jurisdiction and outside the legitimate application of the VCLT.

20. At the core of the main issue of jurisdiction *ratione voluntatis* is whether the consent of both arbitrating parties validly exists under both instruments, and if so when such consent became mutual or "perfected". The issues are made somewhat more complicated than in some other instances due to the withdrawal of Venezuela from both the BIT between itself and the Netherlands and from the ICSID Convention itself. There is no dispute between the Parties here that Venezuela has validly terminated its party status for both these instruments. There is a considerable dispute between them as to whether consent to arbitrate validly exists between them despite Venezuela's termination of its party status to both these instruments.

2.2 Key documents and provisions

21. The Claimant posits two bases for the validity of consent: its primary basis is the letter from the Claimant and its controlling owner Smurfit Kappa Group of September 2011 to the government of Venezuela, prior to the Republic's termination of its ICSID membership and during the post-termination sunset period under the BIT; and its submission of the dispute to ICSID arbitration in 2018, purportedly in accordance with ICSID Convention Articles 25, 71 and 72. Each will be examined in turn below.

22. My colleagues have set out the relevant timelines, which I summarize here for convenience:

    (1) The BIT between the Netherlands and Venezuela (the **"BIT"**) was signed on 22 October 1991 and entered into force on 1 November 1993. On 21 April 2008, pursuant to Art.

[11] VCLT, Article 41, *Agreements to modify multilateral treaties between certain of the parties only: 1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: (a) the possibility of such a modification is provided for by the treaty; or (b) the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole. 2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.*

14(2), Venezuela notified its decision to terminate the BIT, which became effective on 1 November 2008.

(2) Venezuela became a member of the ICSID Convention on 1 June 1995, following its signature of the Convention on 18 August 1993 and the deposit of its instrument of ratification on 2 May 1995. On 24 January 2012, Venezuela denounced the ICSID Convention, such denunciation becoming effective on 25 July 2012.

23. Thus, Venezuela terminated first the Venezuela-Netherlands BIT, and four years later denounced the ICSID Convention.

24. Again, my colleagues have appropriately identified the critical provisions of the instruments involved as Arts. 25, 71 and 72 of the ICSID Convention, and Articles 9 and 14 of the Venezuela-Netherlands BIT, as follows:

25. Art. 25 ICSID Convention reads:

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

26. Art. 71 of the ICSID Convention reads:

> *Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.*

27. Art. 72 of the ICSID Convention reads:

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

28. Art. 9 of the BIT reads, in its most relevant parts for this purpose:

> *1. Disputes between one Contracting Party and a national of the other Contracting Party concerning an obligation of the former under this*

> *Agreement in relation to an investment of the latter, shall at the request of the national concerned be submitted to the International Centre for the Settlement of Investment Disputes, for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March 1965.*
>
> *4. Each Contracting Party hereby gives its unconditional consent to the submission of disputes as referred to in Paragraph 1 of this Article to international arbitration in accordance with the provisions of this Article.*

2.3 Jurisdiction under the Letter of 29 September 2011[12]

29. Into the above legal landscape enters the September 2011 letter from Smurfit and its 100% owner, Smurfit Kappa Group (SKG), based in Ireland. It is addressed to The Honorable Nicolás Maduro in his capacity as Minister of Foreign Affairs, as he then was, and to Dr. Carlos Escarrá, Esq., then Attorney General of the Republic. In its most relevant part it reads:

> *Smurfit hereby consents to resolve any dispute with the government, including any dispute it may have in the future, with respect to any of its investments in Venezuela before the International Centre for the Settlement of Investment Disputes pursuant to the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela. Given recent events, we wish to note that any actions taken by the government of Venezuela that adversely affect any investments or assets of SKG and Smurfit would compel us to vindicate our rights under the applicable investment treaties.*

30. Claimant submits that this paragraph of the September, 2011 letter, which comes after the denunciation of the BIT but within the survival period, and is prior to the denunciation of the ICSID Convention by Venezuela, constitutes valid and timely consent by the Claimant both in relation to the ICSID Convention and under the BIT. I examine each claim in turn.

2.3.1 Is the September 2011 letter consistent with the ICSID Convention?

31. In this sub-section I examine whether the letter is consistent with the ICSID Convention. In the next sub-section I consider the second part of the analysis, whether it is consistent with the BIT.

32. I agree with the Claimant and my colleagues that this type of letter with a generalized consent could, in theory, be consistent with the ICSID Convention. The Convention only requires that

[12] **C-0096-ENG**.

consent be in writing, and leaves the form, procedure and scope for consent open to the parties to that consent to determine.[13] As consent to arbitrate does not come from the ICSID Convention, the Convention itself does little to regulate how consent is offered or perfected, other than provide that it must be in writing. Thus, regulation of the form, timing, procedure, and scope of consent is left for the parties to determine in the instrument(s) that provide for consent. As stated by the tribunal in *Fábrica v. Venezuela* in relation to very similar issues,

> *In other words, the ICSID Convention does not purport to regulate the manner in which an arbitration agreement can come into existence; the rights and obligations set out in the ICSID Convention simply do not come into play unless and until it is in existence.*[14]

33. The text of Art. 25 does not qualify the timing, type or form of consent but rather refers to an action (or actions) where both parties to a dispute "have given their consent" in writing. For the purpose of this ICSID Convention analysis only (the analysis of consistency with the BIT to follow), I do agree that consent can predate a dispute as it often does in investment contracts between states and foreign investors, be given in more general terms as many early generation BITs did and some investment laws still do, or otherwise have a broad form. It need not be specific to an extant dispute, or even to an imminent and identifiable dispute. Consequently, for ICSID Convention purposes, this type of September 2011 letter could potentially constitute a valid consent to arbitration in the present instance under the Convention text. However, let us recall that the consent must be valid under both the Convention and the BIT, and jurisdiction under the ICSID Convention will only be founded if there is valid mutual consent through another instrument (or instruments). In other words, while consent under the ICSID Convention is theoretically available to the parties in diverse forms, consent under the ICSID Convention cannot be determined as a matter of law until the consent under the source of that putative consent is examined. If that source of putative consent fails for whatever reason to yield an agreed mutual consent, then there is also no valid consent under the ICSID Convention. This is a simple consequence of the Convention leaving the means of consent to other instrument(s), supplemented by the legal requirement that both the Convention, and in this case the Venezuela-Netherlands BIT, needing to be cumulatively satisfied.

[13] **CL-0056**, C. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: A Commentary* (2nd ed), 2009, para. 379 [hereinafter: *Schreuer*].
[14] *Fábrica v. Venezuela*, para. 302.

2.3.2 Is the September 2011 letter consistent with the Venezuela-Netherlands BIT so as to qualify as consent under the BIT?

34. Both Parties and all members of the Tribunal acknowledge that there is a 15-year "survival" period in Art. 14 of the Venezuela-Netherlands BIT, where arbitrations can be initiated by a covered investor for 15 years after the BIT is terminated. Timewise, the September 2011 letter clearly falls within this window. Thus, it is necessary to consider what, if any, the other requirements for consent are in the BIT to see if the September 2011 letter is consistent with them. My colleagues have apparently concluded that there are no other consent requirements under the BIT, that the consent of Venezuela and the Netherlands is completely open-ended and unconditional in their view.[15] I fundamentally disagree on this point, and conclude that there are other requirements and that they have not been met. In a nutshell, I find that the Claimant's September 2011 letter is not materially consistent with or responsive to the conditions and requirements in the BIT, and thus fails to qualify as consent under the BIT.

35. To begin the analysis, and as the Respondent and Claimant both acknowledge, for a purported consent to be valid when it is contained in two separate and sequential instruments as is the case here and in most every BIT situation, (the BIT of 1993 and the September 2011 letter in this case), there must be a level of consistency between the initial consent/offer to arbitrate by one party and the acceptance of that offer in the consent of the second arbitrating party. Claimant, for example, uses words such as "mirror image" and "terms that mirror the offer" to express this requirement: "The ICSID Convention places no limitation on investors' ability to consent to ICSID arbitration ***in terms that mirror*** those of the host State in the Treaty."[16] I agree with the Parties on this point. This is also supported in the writing of Prof. Schreuer reviewed in some detail below.

36. This is supported in other recent arbitral awards, for example *Caratube v. Kazakhstan*:

> *If a tribunal's jurisdiction is based on an investment treaty, claimant does not negotiate an individual agreement with the host State but* ***accepts a non-negotiable offer addressed to persons or entities that fulfil its conditions.*** *That offer is contained in an investment treaty and its conditions are agreed between the parties to that investment treaty. Unlike in the context of investment contracts, the acceptance of an offer contained in an investment treaty cannot*

[15] *E.g.,* paras. 279 et seq of the Majority Award.
[16] Claimant's Reply Memorial, para. 495, and again at para. 497. In the same Memorial, Claimant uses the language of investor's providing their "reciprocal" consent in "similar" terms, para. 34. This is then reiterated in the Second PHB, para. 85.

> *create an assumption that the claimant fulfils the conditions of that offer.*[17] (Emphasis added)

37. In a more recent case made public after the evidence in this case was closed, *Kimberly-Clark v. Venezuela*, the Tribunal of Gabrielle Kaufmann-Kohler, David Haigh and Brigitte Stern state, in relation to the offer to arbitrate in the same Dutch-Venezuela BIT:

> *In this context, the Tribunal notes KCN's argument that investors would be left without any access to arbitration should the Respondent's interpretation be adopted, which would be inconsistent with the Dutch BIT's purpose to promote foreign investments flows between the Contracting States. While empirical evidence leads to divergent conclusions about the connection between the availability of investor-state arbitration and the level of investment flows into a country, one understands the argument, which is probably the reason why the Contracting States have included an offer to arbitrate in Article 9 of the Dutch BIT. Yet, doing so, they have circumscribed the scope of their offer. More specifically, they have restricted the access to arbitration under the AF Rules to the period prior to Venezuela's accession to the ICSID Convention. Policy considerations based on the BIT's purpose cannot expand the offer beyond the scope agreed by the Contracting States.*[18]

It goes without saying that the "purpose" or preambular paragraphs of the Convention similarly cannot be used to expand the scope of an offer beyond what was agreed in the terms of the BIT.

38. Although Claimant itself employs the language of "mirror image" and similar, I think it is important to set out my view of an appropriate test of consistency between the two sequential purported instruments of consent. While I do not find it necessary to hold that the sequential consents (or offer/acceptance in some analyses) of each party must be in precisely identical words (or a precise "mirror image" in Claimant's words), I do find that they must be materially consistent with each other in terms of the form, structure, timing, procedure, scope, etc. In this regard and in the context of an offer to arbitrate in a BIT, it is the BIT that will be controlling of these issues simply because it creates the offer to arbitrate that must subsequently be accepted by an investor for consent to be perfected. In short, there must be a high degree of material consistency between

[17] **RL-0018**, *Caratube International Oil Company LLPv. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012, para. 331 [hereinafter: *Caratube v. Kazakhstan*]. The arbitrators were Prof. Dr. Karl-Heinz Böckstiegel, President, Dr. Gavan Griffith KC, and Dr. Kamal Hossain.

[18] *Kimberly-Clark Dutch Holdings, B.V., Kimberly-Clark S.L.U., and Kimberly-Clark BVBA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/18/3, Award, 5 November 2021, para. 151. To be clear, as this case is not part of the pleadings I do not rely on it as determinative in any way, but simply to illustrate that this approach continues to be applied by the most seasoned of arbitrators. The same restriction is in Art. 9(2) of the BIT, and is another condition on arbitration in Art. 9 though not relevant to the present case.

the consent or offer to arbitrate of the State party giving its consent first in the BIT, and the acceptance of that offer by way of the consent of the second party, the foreign investor in this and most instances.

39. There is no doubt that, as my colleagues argue, the September 2011 letter sets out the investor's consent in general and future-looking terms, rather than referencing any existing disputes, initiating a specific arbitration, or otherwise establishing any specificity. Phrased a bit differently, the letter evidences no existing or specifically anticipated dispute that is being submitted to arbitration by virtue of the letter. Indeed, it was not until seven years later that a dispute was actually initiated by the Claimant. Claimant itself takes the same position, and makes a point of arguing that the consent to arbitration can be in general terms and future looking. I agree that, *in some instances*, the acceptance of a State's consent or offer to arbitrate in a BIT can be in general and forward-looking terms. But this is so only when the offer to arbitrate is actually in similarly general or broad terms, as suggested by the very notion of "mirror images" used by the Claimant. Thus, some instances will allow for a generalized acceptance and giving of consent. However, because some instances may allow for a general acceptance does not mean that *all* acceptances of consent can be in general and forward-looking terms. Claimant (and my colleagues) try to get through this limitation by arguing that the States' offer in the BIT is somehow similarly open-ended and unconditional by focusing on one word, "unconditional", in Art. 9(4). In light of the full text of Art. 9(4) and the rest of Art. 9, and contemporaneous drafting history of this and other BITS during the early 1990's time period, I find myself unpersuaded by these arguments.

40. The question that I believe must be examined is whether the consent, or offer to arbitrate, of Venezuela in the 1993 Venezuela-Netherlands BIT is an instance that allows for such a broad acceptance. In more specific terms, the question facing this Tribunal is whether the BIT jurisdiction clause in Art. 9 is more narrowly and specifically drawn so as to prevent the offer and acceptance or the acts of consent of the State and the investor in this case, from being materially consistent with each other so as to create a perfected consent together.

41. This approach is consistent with the approach expressed by Prof. Schreuer, whom both the Claimant and Respondent reference multiple times. Prof. Schreuer states,

> *The investor may accept the host State's offer of consent contained in legislation or a treaty at any time prior to a notice under Art. 70 or 71. In other words, the investor may perfect consent not only once a dispute has arisen through the institution of proceedings.* ***Subject to the terms of the offer of consent in the legislation or treaty****, the investor may perfect consent at an early*

> *stage by accepting the offer of consent in general terms.*[19] *(see Art. 25, paras. 416-426, 447-455)* (Emphasis added)

42. The proviso highlighted above, "[s]ubject to the terms of the offer of consent in the legislation or treaty", is critical. Prof. Schreuer does not say unconditionally here that all general consents by an investor are valid under every BIT. Rather, the validity is subject to review based on the terms found for consent, if any, in the BIT or the domestic law, "***the terms of the offer of consent in the legislation or treaty***." This is precisely what is meant above in framing what I believe is the key question for this Tribunal: do the terms of the Netherlands-Venezuela BIT provide for or otherwise allow for a generalized consent or do they require something entirely more specific and formalistic? If they do provide for general consent, the September 2011 letter will be a valid consent. If they do not, then the letter will not constitute a valid consent.

43. Prof. Schreuer adds in his text on consent for UNCTAD:

> *Where ICSID's jurisdiction is based on an offer made by one party, subsequently accepted by the other,* ***the parties' consent exists only to the extent that offer and acceptance coincide****. For instance, the host State's investment legislation or its BIT with the investor's home State may provide for the Centre's jurisdiction in the most general terms. If the investor accepts ICSID jurisdiction only with regard to a particular dispute or in respect of certain investment operations, the consent between the parties will be thus limited. It is evident that the investor's acceptance may not validly go beyond the limits of the host State's offer. Therefore, any limitations contained in the legislation or treaty would apply irrespective of the terms of the investor's acceptance. If the terms of acceptance do not correspond with the terms of the offer there is no perfected consent.*[20] (Emphasis added)

44. Prof. Schreuer highlights the need for material consistency between the offer in the BIT and the acceptance of that offer by the investor for consent to be perfected and thus create the basis of jurisdiction. It could not be clearer nor any more consistent with the cases cited above: "[i]f the terms of acceptance do not correspond with the terms of the offer there is no perfected consent." If the investor goes outside the offer of consent in the BIT in a material way, the putative acceptance, or investor's consent, will not be valid and there will be no perfected consent that forms an agreement to arbitrate for purposes of the BIT, and by extension for the purposes of the ICSID Convention.

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[19] *Schreuer*, p. 9, quoted by Claimant at para. 496 of their Reply Memorial.
[20] **CL-0199**, *United Nations Conference on Trade and Development, Dispute Settlement, "Consent to Arbitration"*, p. 30 [hereinafter: *Consent to Arbitration*].

45. In order for the Claimant to make its case that the consents are "mirror images", or "materially consistent" as I have used that phrase, Claimant argues that the consent of Venezuela is also general and unconditional. In a nutshell, the Claimant argues that:

> *While the Treaty specifies the types of disputes that can be submitted to ICSID, ie disputes relating to Venezuela's obligations under the Treaty in relation to qualifying Dutch investments, the Treaty contains no limitations or conditions on the timing or manner in which consent can be expressed. Indeed, Venezuela's consent was expressly "unconditional".* [21]

46. Two paragraphs later, Claimant continues:

> *Venezuela further argues that Smurfit's 2011 Letter did not constitute valid consent because it does not allege any specific treaty breaches. However, neither the Treaty nor the ICSID Convention require the investor to allege specific treaty breaches when consenting to submit future disputes to ICSID arbitration.*[22]

47. The difference between the Respondent and Claimant cannot be starker. Respondent asserts that:

> *In short, Smurfit Holdings BV is attempting to do against the Republic something that has never been condoned before in international investment arbitration. The Republic cannot be deemed to have consented to ICSID's jurisdiction in relation to Smurfit Holdings BV by virtue of a letter sent almost eight years before the Request for Arbitration, in which no investment is identified, no provision of the relevant treaties is invoked, and no dispute is described.*[23]

48. My colleagues have agreed with the Claimant. Respectfully, I do not. My colleagues note and I fully acknowledge that the recent decision in the *Fábrica v. Venezuela* award found the same clause in the BIT to be "unconditional":

> *It is manifest from the express terms of Article 9 that the Respondent's consent to ICSID arbitration is "unconditional" and there is no ambiguity attaching to that consent. The question is, rather, what effect in law does Venezuela's denunciation of the ICSID Convention have on Venezuela's consent to ICSID arbitration in the BIT?*[24]

49. I note two things. First, the principal question raised by the *Fábrica* tribunal was not actually impacted by whether the consent was conditional or unconditional. It is only relevant in the present instance due to the question of whether there is material consistency between the two consents

[21] Claimant's Reply Memorial, para. 500. Footnote reference to Art. 9(4) omitted.
[22] *Id.*, para. 502. Footnote omitted.
[23] Respondent's Counter-Memorial, para. 176
[24] *Fábrica v. Venezuela*, para. 257.

here, as discussed above. This was not an issue in *Fábrica*, where there was no similar letter at play as a putative acceptance of consent. Second, the tribunal in *Fábrica* undertook no analysis of the key paragraph or the related paragraphs in Art. 9 in reaching their conclusion that the offer was unconditional, or to examine the scope of that "unconditionality". Indeed, these are entirely unassessed. In practical terms, they did not need to make either such assessment as there was no consequence flowing from this finding in their analysis, the issue of materially consistent consents not being relevant to them as it is here. In addition, and directly contrary to the finding of my colleagues, they rejected jurisdiction based on their interpretation of Arts. 71 and 72 of the ICSID Convention, having undertaken the most extensive analysis of those provisions to date in an arbitral award. Remarkably, they reached this ultimate finding despite having found that the offer of the Contracting States was unconditional.

50. To make its argument, Claimant (and my colleagues) disassembles the text of Art. 9 of the BIT, and focusses its point on the word "unconditional" in Art. 9(4), which sets out part of the offer of consent by Venezuela and the Netherlands:

> *4. Each Contracting Party hereby gives its* ***unconditional consent*** *to the submission of disputes as referred to in Paragraph 1 of this Article to international arbitration in accordance with the provisions of this Article.* (Emphasis added)

51. The focus on "unconditional" is repeated too many times by the Claimant to make examples necessary. Indeed, it is plainly the core of the argument put forward by Claimant for accepting the September letter as an effective consent in reply to the offer in the BIT. In my opinion, however, accepting this argument requires one to wholly ignore most of the words that precede and follow the word "unconditional" in the rest of Art. 9. Indeed, it is impossible, in my view, to read out the words and conditions that are clearly set out in Art. 9 and remain true to the requirements of Art. 31 of the Vienna Convention on the Law of Treaties that requires us to read and interpret and apply all of the words of the treaty text, and not just rely on one word that best suits a desired interpretation. Let us turn to the analysis of Art. 9(4) as whole:

> *4. Each Contracting Party hereby gives its unconditional consent to the submission of disputes as referred to in Paragraph 1 of this Article to international arbitration in accordance with the provisions of this Article.*

52. The first element that conditions the consent set out here is that it is consent "to the submission of disputes". Thus, by its own plain terms, it is not a generalized open consent to jurisdiction for any and all disputes through any future submission to arbitration, but a consent tied expressly to the

actual submission of a dispute. The September 2011 letter makes no reference to any actual dispute even existing, and does not submit or seek to submit any dispute to arbitration. It is, as Claimant says it is, an open and generalized consent to submit future disputes, should they arise, and should the investor then elect to do so, to ICSID arbitration, and in fact to "ICSID arbitration or conciliation", as per the text of Art. 9(1).[25] But in itself, the September 2011 letter makes no such submission and identifies no actual dispute.

53. The second conditioning element is that it must be consent to the submission of the dispute "as referred to in Paragraph 1 of this Article". The tie into Art. 9(1) makes it clear that the **"dispute"** must be one that can be submitted to ICSID, and so it must be individualized or particularized for this purpose. There is no other way to submit a dispute to ICSID. This is an inescapable result of initiating an arbitration claim at ICSID. A third and related condition is that it be "submission of the dispute" to "international arbitration in accordance with the provisions of this Article". This, of course, must include all of Art. 9, and not just one word within it.

54. Claimant's September 2011 letter consents to resolve "any dispute with the government, including any dispute it may have in the future, with respect to any of its investments in Venezuela…." The use of the term "any dispute with the government" is vastly different from what is found in the Treaty text, which in Art. 9(1) imposes clear restrictions on what consent can pertain to, to wit disputes specifically concerning an alleged breach of the BIT itself. It could be argued that the reference to "pursuant to the" BIT contained in the same sentence allows for some consistency to emerge, but that would not cover the fact that no submission of any type was made in 2011, and indeed not until 2018. Thus, there is no consistency of scope and process here between the offer and purported acceptance.

55. Claimant argues that Art. 9(1) simply highlights what type of disputes may be submitted to arbitration, not a mandatory process or procedure for submitting such disputes, and is not part of its consent to jurisdiction, which is only in Art. 9(4).[26] However, the types of disputes do, by their nature, create a condition if those disputes are to be specific, and more to the point, are to be submitted to ICSID under the offer. Either way, in my respectful view, this paragraph sets a significant condition on what the Claimant labels an unconditional consent in the treaty.

[25] Indeed, while my colleagues seek to argue that submission of a dispute to ICSID arbitration is somehow "mandatory" under the BIT, it is clear that it remains, under the text of the BIT, optional and discretionary depending on the choices or direction of the potential claimant.
[26] *E.g.*, Claimant's Post Hearing Brief, paras. 167-168.

56. At the time this treaty was completed, and continuing since then, there were and are multiple scopes of consent to arbitration in investment treaties. These range from any dispute between an investor and the host State, to disputes concerning an alleged breach of an obligation in the BIT, to specific disputes concerning only specific obligations (but not all obligations) in a BIT. It is worth noting the scope of the Claimant's September 2011 letter again:

> *Smurfit hereby consents to resolve any dispute with the government, including any dispute it may have in the future, with respect to any of its investments in Venezuela before the International Centre for the Settlement of Investment Disputes pursuant to the Agreement on the Encouragement and reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela.*

57. On its face, this consent materially outstrips what was on offer, which is disputes only related to alleged breaches of this BIT. And it fails to undertake the specifically required action to accept the offer: the submission of a dispute. By requiring a submission to arbitration of a specific dispute, this condition combines both a substantive and a procedural element designed to support a targeted consent and related process for arbitration. The letter simply does not respond to this requirement for a targeted acceptance of the offer.

58. While I again agree with my colleagues and the Claimant that consent to jurisdiction and the submission of a claim to arbitration can be two very different things, it is also possible that the acceptance of an offer to arbitrate can be tied to the act of submitting a specific claim to arbitration. In my view, the actual language makes it clear that this is exactly what is being done in Art. 9. I see no other way to read it as a whole.

59. There is another compelling rationale, in my view, to carefully consider whether the contracting States Party to the BIT intended the result the Claimant's and the majority argue for, especially as they seek to divide up consent to jurisdiction versus consent to submission as a "what" and a "how", instead basically of two different elements of "what" is being consented to. Specifically, no part of the BIT text in Art. 9 uses the word "jurisdiction" or any general language of consent to jurisdiction – the word jurisdiction is simply not found in the text of Art. 9. Yet what Claimant and my colleagues argue in the end is that the two parties to the BIT have set out a general consent to jurisdiction of ICSID without ever using the words. All of Art. 9 that is relevant to this discussion relates to one thing, the submission of a dispute, and never to a general submission to jurisdiction.

60. For the sake of completeness, among the other conditions in Art. 9 are a temporary alternative use of the ICSID Additional Facility prior to Venezuela becoming a member of ICSID (Art. 9(2)),

which is the subject of the *Kimberly-Clark v. Venezuela* decision referenced above. It is noteworthy that this provision sets out rules for arbitration before Venezuela becomes a member State of ICSID, but excludes any reference to any similar remedy if either Venezuela or the Netherlands were to leave ICSID subsequently. The *Kimberly-Clark* tribunal refused to read in a rekindling of the Additional Facility Rules after Venezuela denounced the ICSID Convention, thus leaving the claimant with no basis in jurisdiction for its claim. As I have indicated earlier, this case was not part of the briefs. It is used here only as an illustration of another strict reading of the offer to arbitrate in a treaty text, and not as a determinative award. Art. 9(3) also states the scope of what a tribunal established further to consent under this BIT can do, including the substantive limits of any findings and the limits on awarding damages.[27] All of these are procedural or substantive limits that condition the offer by the Netherlands and Venezuela to arbitrate or conciliate disputes at ICSID.

61. Thus, it is readily evident, in my view, that the offer of the Contracting Parties to the BIT is conditional and specific as to both form and scope. It is not unlimited, open ended and, indeed even unconditional. The best that can be said is that the consent of the two states in the BIT is unconditional if the conditions in Art. 9(1), 9(2), 9(3) and 9(4) are met, as needed. At that point it becomes unconditional, but of course to say this is to highlight that the consent is accompanied by several conditions, and is thus far from unconditional. While I understand the desire for a simplistic argument based solely on one word in a lengthy text, the remaining words in that text belie the effort to raise such simplicity to a legal conclusion.

62. Implicit in the above is that the consent required for acceptance of the offer of arbitration in the BIT has a clearly required form – through the submission of a specific dispute to ICSID. This is manifestly not complied with by the September 2011 letter. In my view, this is again a material difference from the generalized consent to arbitration or conciliation of some unknown disputes in the future, and the specific offer that requires the submission of a case to arbitration to trigger the acceptance.

63. Given this, and given the description of Prof. Schreuer set out above, as well as the standard expressed by Claimant and Respondent alike that the offer and acceptance of consent must be

[27] Art. 9(3) reads: "The arbitral award shall be limited to determining whether there is a breach by the Contracting Party concerned of its obligations under this Agreement, whether such breach of obligations has caused damages to the national concerned, and, if such is the case, the amount of compensation." The Article, as one example, excludes the potential of the Tribunal to consider an alleged breach of customary international law not tied to the treaty.

"mirror images" in the language of Claimant, or materially consistent as I have suggested, I find that the September 2011 letter does not constitute an agreement to arbitrate consistent with the BIT. Consequently, it cannot constitute a valid consent for ICSID arbitration purposes either.

64. It is worth noting that Prof. Schreuer, in his UNCTAD published text on Consent, as elsewhere in his writings, notes several different ways for investors to consent to an offer to arbitrate in a BIT, subject to the provisions of the treaty itself. These include the acceptance by instituting proceedings; acceptance of the offer prior to instituting proceedings; and in some BITs a requirement for an earlier acceptance.[28] This is consistent with what we see, in fact in other BITs. For example, the tribunal in *Fábrica v. Venezuela*, for example, notes the text of NAFTA's Art. 1122, "Consent to Arbitration":[29]

> *For example, Article 1122 of NAFTA, entitled "Consent to Arbitration", reads:*
>
> *1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.*
>
> *2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:*
>
> *(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;*
>
> *(b) Article II of the New York Convention for an agreement in writing; and*
>
> *(c) Article I of the InterAmerican Convention for an agreement.*

65. The *Fábrica* tribunal then states, while highlighting that the acceptance of an offer to arbitrate by a covered foreign investor is not the same as a unilateral offer of consent by the State, but is an act in response to the offer that must, in turn, correspond to the offer. The acceptance by the investor of an offer to arbitrate must be *responsive* to the offer itself, and not simply go off in its own direction:

> *This provision differentiates between the unilateral consent of the State Parties of NAFTA to arbitration and* ***the manifestation of the investor's consent by the submission of a claim to arbitration.*** *It confirms that the conjunction of these two different manifestations of consent (i.e. "offer-and-acceptance") satisfies the requirement "written consent of the parties" (i.e. an arbitration agreement) in Article 25 of the ICSID Convention and for the existence of an arbitration agreement under the New York Convention and the InterAmerican Convention. This provision also confirms, if confirmation were really*

[28] *Consent to Arbitration*, p. 22.
[29] *Fábrica v. Venezuela*, para. 303.

> *necessary,* ***that investment treaty arbitration is just as dependent on the existence of an arbitration agreement as every other form of international arbitration***.[30]

66. In my view, the language seen in Art. 9(4) and 9(1) of the BIT have the same legal effect as in NAFTA Art. 1122. NAFTA says, "[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement." The Venezuela-Netherlands BIT says: 9(4): "[e]ach Contracting Party hereby gives its unconditional consent to the submission of disputes as referred to in Paragraph 1 of this Article to international arbitration in accordance with the provisions of this Article." In my opinion, there is no material difference between saying "in accordance with the procedures set out in this Agreement" as in NAFTA and "in accordance with the provisions of this Article" as in the present text when the provisions in the Article encompass both substantive and procedural requirements and conditions.

67. It is also worth noting that these are largely contemporaneous provisions: NAFTA negotiations on the Investment Chapter 11 were concluded in 1991-1992, though NAFTA entered into force only in 1994. These treaties reflect a direction in jurisdictional articles of investment treaties that moved away from broad, open-ended consent to jurisdiction provisions to more carefully drafted consent to the submission of a claim to arbitration. To the extent that the Claimant argues that there is a distinction to be made between an offer of consent to jurisdiction and the procedure for submitting a claim to arbitration, what we see here is that there is no offer of general consent for acceptance by an investor, but only an offer for covered investors to submit what must necessarily be a specific claim to arbitration. There is no offer of general consent to ICSID arbitration here, it simply does not exist in those terms.

68. These are not, as Claimant and my colleagues would seem to suggest, just additional and inconsequential procedural matters. In NAFTA and in the present instance, these are the scope of what the States Party to the BIT consent to substantively **and** the procedure to act on this consent. They are texts that deliberately restricted the breadth and form of consent in order to ensure more knowledge and awareness of the States Party to the BIT as to the wherefore and why they are facing a claim to arbitration. They cannot, under the VCLT, be given a lesser role in the interpretation and application of Art. 9 when compared to any other part of Art. 9.

69. The Claimant also makes an apparent argument that the silence of the Respondent after the September 2011 letter was received – it appears it was neither accepted nor challenged in any

[30] *Id.*, para. 304. Emphasis added.

manner – is evidence that such a letter was not surprising or unusual. It is not immediately obvious why what the Claimant defines as a non-response should be taken to mean its acceptance or that the Government was not surprised or saw nothing unusual. A non-response is simply that, a non-response. At a lower level, my colleagues note that this silence creates a "risk" of a perception of acceptance, but appear not to decide on the matter, making the reference to this issue by them rather meaningless, as in my view it should be in any event. To be clear, I reject the notion that this silence is evidence of any sort, and it most certainly does not rise to the level of demonstrating State practice by Venezuela that such a letter was a commonly accepted basis for creating jurisdiction at ICSID.

70. As a result of the above, I dissent from my colleagues findings on jurisdiction arising from the September 2011 letter, and find that this letter is neither responsive to, nor materially consistent with, the offer to arbitrate specific claims in the BIT, and thus does not create consent for the purposes of the BIT nor the Convention.

3 THE SUBMISSION OF THE DISPUTE TO ICSID IN 2018: IS IT TIMELY ENOUGH FOR ICSID JURISDICTION?

71. The preceding analysis on the September 2011 letter does not, however, end the differences of opinion over jurisdiction. Claimant also makes a second argument, though one that was not raised until Claimant's Rejoinder. (I will return to this point below.) While my colleagues address this as their first grounds for accepting jurisdiction, Claimant itself argues that this is their second argument and it need only be considered if its primary reliance on the September 2011 letter is rejected by the Tribunal. This is the order I have chosen to follow. As my colleagues have accepted this argument, I must address it here as well.

72. The key question on this issue, in my view, is whether the fact of the submission of the present arbitration to ICSID in 2018 meets the requirements of the ICSID Convention **and** the BIT for the Tribunal to have jurisdiction based on this 2018 action. On this issue, I reverse the order of my analysis above and consider first whether the 2018 submission to ICSID is consistent with the BIT, and second whether it is consistent with the ICSID Convention.

3.1 Is the 2018 submission to ICSID consistent with the Netherlands-Venezuela BIT?

73. There is no real dispute between the Parties on this point. Due to the 15-year survival clause in Art. 14 of the BIT, there is no disagreement between the Parties that the submission to arbitration at

ICSID in 2018 would be within the survival clause period, and would meet the requirements in Art. 9(1) of submitting a specific dispute to the designated arbitration forum. The Tribunal agrees that this submission complies with the BIT and would thus, under the BIT, be valid consent by both Parties. However, as I have noted above, the consent must be valid under both the BIT and the ICSID Convention.

3.2 Is the 2018 submission to ICSID consistent with the ICSID Convention?

74. There is no doubt that the filing of the arbitration claim in 2018 would normally meet the requirements of the ICSID Convention for perfecting consent, and thus support jurisdiction *ratione voluntatis*. However, the issue is that Venezuela had denounced the ICSID Convention on 24 January 2012. In summary terms, the question that the Tribunal must answer is whether an investor's consent under the BIT given 6 plus years after Venezuela's denunciation of the ICSID Convention (but still within the survival period of the BIT) can still be binding on Venezuela under the Convention.

75. More specifically, the issues surround the interpretation of Arts. 25, 71 and 72 of the ICSID Convention, over which the parties significantly disagree. For ease of reference:

> *Article 25 of the ICSID Convention reads:*
>
> *The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*

> *Article 71 of the ICSID Convention reads:*
>
> *Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.*

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

76. As a preliminary point, in the course of the analysis by the Claimant and my colleagues, much ink has been spilled over the argument that the ICSID Convention does not use the term "perfected consent" anywhere. This is true but in my view legally irrelevant. There is no doubt that the Convention repeatedly and consistently speaks of arbitration agreements, and that when it does so it is a reference to agreements to arbitrate between an investor and an ICSID member State (subject to the issue of post-denunciation application). It is never about an agreement between States, and it must be an actual agreement. The Convention talks about the time of consent as when this agreement is formed. None of that is in dispute. The language of "perfected consent" is simply an accepted shorthand term for the nature or quality of the consent once both arbitrating parties have agreed to arbitrate. The fact these words do not appear in the text is, in my view an irrelevant distraction from the necessary analysis of when an agreement is formed, by whom it is formed, and what is required to do so.

77. The critical issue, I submit, is the interpretation of Art. 72, and whether it requires the timely agreement of both arbitrating parties to become effective or whether a unilateral offer of consent that is not yet (and potentially never will be) accepted by an investor is sufficient to create ongoing obligations under the ICSID Convention binding the State to possible future arbitration consents by an investor after the State has legally denounced the ICSID Convention.

3.2.1 What the Claimant said before adding the Article 72 argument

78. The Respondent notes several times that the Claimant did not raise this argument until its Rejoinder Memorial. This is also what is reflected in the recitation of positions of the Parties in the majority award.[31] But, perhaps in a cautionary tale, a more careful reading of the Claimant's memorials before they started pleading this second ground of jurisdiction shows that Claimant did in fact opine on the key issue of the interpretation of Art. 72 before it made the argument that Art. 72 does not require perfected consent. And because this issue was not then being pleaded, I take those articulated views seriously as more "impartial" statements on their view of the law as it existed immediately prior to them pleading this second ground of jurisdiction for the first time in their Rejoinder.

[31] Section V.4 of the Majority Award.

79. For example, the Claimant, in its original memorial, begins an analysis at para. 278 *et seq* with the title, **B. CLAIMANT HAS FULFILLED ALL OF THE REQUIREMENTS FOR ACCESS TO ARBITRATION UNDER THE ICSID CONVENTION AND THE TREATY.**[32] In relation to Art. 25, Claimant then summarizes the conditions for jurisdiction under the ICSID Convention:

> *Article 25 provides that ICSID has jurisdiction over: (a) legal disputes; (b) that arise directly out of an investment; (c) between an ICSID Contracting State and a national of another Contracting State; and (d)* ***which the parties to the dispute have consented to submit to ICSID arbitration***. [33] (Emphasis added)

80. In the subsequent paragraph, Claimant continues to note that Venezuela was a contracting State to the ICSID Convention on the date of consent by itself in the Venezuela-Netherlands BIT (undisputed here) and the Claimant in the 29 September 2011 letter. While the effectiveness of the latter as "consent" is obviously under dispute, its date of submission is not, 29 September 2011, before Venezuela denounced the ICSID Convention. [34]

81. Then, at paragraph 282, Claimant states:

> *Smurfit consented to submit disputes with Venezuela to ICSID arbitration on 29 September 2011, prior to Venezuela's denunciation of the ICSID Convention.* ***Consequently****, pursuant to Article 72 of the ICSID Convention, Venezuela's denunciation of the ICSID Convention has no effect on ICSID's jurisdiction in relation to the present dispute*.[35] (Emphasis added)

82. In the Claimant's Observations on the Request for Bifurcation, Claimant continues to explain its then position. An initial digression sets the context. At para. 16 of its "Observations" memorial, Claimant states: "[a]ccording to Venezuela, under Article 25 of the ICSID Convention, an ICSID tribunal only has jurisdiction where the Respondent State is a current ICSID Contracting State."[36] While I am not convinced this is the actual position of the Respondent, that is irrelevant for present purposes. What the Claimant continues on to state is relevant in my view, as they distinguish the date of consent from the actual commencement of an arbitration as the key date for jurisdiction. After quoting the full text of Art. 72, the Claimant continues:

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[32] Claimant's Memorial, p. 136.
[33] *Id.*, para. 279.
[34] *Id.*, para. 280(c) and (d), and footnote 602: "Venezuela denounced the ICSID Convention in January 2012, after Smurfit consented to submit disputes with Venezuela to ICSID on 29 September 2011."
[35] *Id.*, para. 282.
[36] Claimant's Observations on the Request for Bifurcation, para. 16. Footnote reference omitted.

> *Thus, under Article 72, a State's denunciation of the ICSID Convention does not affect any rights and obligations arising from consent to ICSID jurisdiction given prior to the denunciation. Venezuela gave its "unconditional consent" to arbitrate disputes with Dutch investors before ICSID in the Treaty. Smurfit, in turn, consented to arbitrate disputes with Venezuela under the Treaty before ICSID in September 2011, some four months before Venezuela delivered its notice of denunciation of the ICSID Convention and some ten months before that denunciation took effect. Accordingly, Venezuela's denunciation of the ICSID Convention could not and did not affect* ***the parties' prior agreement to submit disputes under the Treaty to ICSID arbitration.*** *This is well-established in case law and commentary. Thus, Venezuela's argument that only current ICSID Contracting States can be sued before ICSID has no basis.*[37] (Emphasis added)

83. I agree that a position that only current ICSID parties can ever be sued before ICSID would be incorrect. But the only limitation on such a position that applies, as stated here by the Claimant itself, is when the agreement to arbitrate is formed before the denunciation is made. It is the agreement to arbitrate that trumps the denunciation by a party, and only for the purposes of that (or those in the case of multiple such agreements to arbitrate) agreement to arbitrate. Claimant argues this agreement was completed when the September 2011 letter was delivered to Venezuela. But if that is not accepted, as indeed I have concluded that it should not be, then no agreement to arbitrate will have been formed and the denunciation would take full effect.

84. The Claimant goes on to state, "[t]his is well-established in case law and commentary."[38] It is worth quoting the footnote they associate with this specific statement:

> *See, eg, Blue Bank International & Trust (Barbados) Ltd v Bolivarian Republic of Venezuela (ICSID Case No ARB/12/20) Award 26 April 2017, RL-0008, para 108 ("If, as the majority finds, an agreement to arbitrate was formed between the Claimant and the Respondent before denunciation under Article 71 took effect, there is no reason to inquire further into Article 72, inasmuch as Article 72 deals only with the post-termination survival of certain of a State's rights or obligations"); C. Schreuer et al, The ICSID Convention: A Commentary (2nd ed), 2009 (excerpts)* ***CL-56bis****, p 0007 (p 1279 in original) ("Mr. Broches explained that the intention of [Art 72] was to make it clear that if a State had consented to arbitration, the subsequent denunciation of the Convention by that State would not relieve it from its obligation to go to arbitration if a dispute arose".)*[39]

[37] *Id.*, para. 18. It is noteworthy that the Claimant never argues here that even what it views as an unconditional unilateral consent does not create an exception to the rules it evokes under Articles 25 and 72. Footnotes omitted.
[38] *Id.*, para. 18.
[39] *Id.*, footnote 36, p. 10.

85. What Claimant leaves out is the very next sentence: "*An arbitration clause in an agreement with the investor would remain valid for the duration of the agreement.*"[40] This is, therefore, a convenient point to interrupt Claimant's own statements in order to be very clear about the full scope of Prof. Schreuer's positions on this issue:

> *Mr. Broches explained that the intention of the article was to make it clear that if a State had consented to arbitration, the subsequent denunciation of the Convention by that State would not relieve it from its obligation to go to arbitration if a dispute arose. An arbitration clause in an agreement with the investor would remain valid for the duration of the agreement. With respect to a general declaration containing submission of claims to the Centre, Mr. Broches stated that it would not be binding until it had been accepted by an investor. If the State were to withdraw its unilateral statement by denouncing the Convention before it has been accepted by any investor, no investor could later bring a claim before the Centre. If, however, the unilateral offer of the State has been accepted before the denunciation of the Convention, disputes arising between the State and the investor after the date of denunciation would still be within the jurisdiction of the Centre (History, Vol. II, pp. 1009-1010).*[41]

86. Thus, Prof. Schreuer describes the precise applicability of Art. 72 to the present case in so far as the timing of the 2018 consent by submission of a claim by the Claimant is concerned.[42]

87. And Prof. Schreuer goes on the next paragraphs to say:

> *Art. 72 is an expression of the rule, contained in Art. 25(1), that consent, once given, cannot be withdrawn unilaterally (see Art. 25, paras. 596-634, esp. 609-611). The rights and obligations arising from consent to ICSID's jurisdiction are preserved and insulated from later legal developments (see Art. 66, para. 7). In the absence of Art. 72, a host State or an investor's State of nationality* ***could have nullified a consent agreement*** *at any time convenient to it by withdrawing from the Convention or by excluding the territory in question.*
>
> *...*
>
> *It is clear* ***that an existing agreement between the host State and the investor containing consent to jurisdiction*** *will benefit from Art. 72 and will hence not be affected by a subsequent notice of exclusion or denunciation under Arts. 70 and 71. This will be the case if an investment contract contains a consent clause or if an offer of consent in domestic legislation or a treaty was accepted by the investor before the notice under Art. 70 or 71 is received.*
>
> *...*

[40] *Schreuer*, p. 0007 (p. 1279 in original).
[41] *Id.*, p. 0007 (p. 1279 in original), para. 1.
[42] This leaves aside for this purpose the issue of whether the September 2011 letter qualifies as consent, which is unrelated to the discussion here of the 2018 submission to ICSID.

> *Consent to jurisdiction is perfected only after its acceptance by both parties. A unilateral offer of consent by the host State through legislation or a treaty before a notice under Art. 70 or 71 would not suffice for purposes of Art. 72. An investor's attempt to accept a standing offer of consent by the host State that may exist under legislation or a treaty after receipt of the notice of exclusion or denunciation under Art. 70 or 71 would not succeed. In order to be preserved by Art. 72, consent would have to be perfected prior to the receipt of the notice of exclusion or denunciation. In order to benefit from the continued validity under Art. 72, consent must have been given before the denunciation of the Convention or exclusion of a territory.* [43] (Emphasis added)

88. There is no carve out to the above views, no exception for what the Claimant and my colleagues call unconditional offers to arbitrate, and no exception for what, by the time of this writing by Prof. Schreuer, was the well known role of international investment agreements in the consent process. Indeed, rather than any exceptions, Prof. Schreuer makes clear that the ICSID provisions apply in their full scope to consent, and the timing of consent, via such agreements.

89. Returning to the Claimant's own statements, still within the Claimant's Observations on the Request for Bifurcation. At para. 21, Claimant discusses the timing issues as between perfecting an agreement to arbitrate and the denunciation of the ICSID Convention:

> *The drafters of the ICSID Convention explicitly considered and recognized that a dispute could be brought against a State before ICSID years after that State had denounced the ICSID Convention. As explained by Aaron Broches, the legendary chairman of the Legal Committee at the time of the negotiations, "if the agreement with the company included an arbitration clause and that agreement lasted for say 20 years, that state would still be bound to submit its disputes with that company under that agreement to the Centre." While some state delegates discussed limiting Article 72 solely to those rights and obligations that arose from proceedings that were already instituted at the time of the denunciation, this approach was roundly rejected based on the fact that "agreements to arbitration cannot be broken by one of the parties." As Professor Schreuer explains, the ability of an investor to consent to ICSID arbitration in advance is designed to protect investors from the effects of a State's withdrawal from ICSID after they have made their investments.* [44]

90. Continuing the Claimant's own statements, in its Reply Memorial, Claimant states again:

> *Thus, under Article 72, a State's denunciation of the ICSID Convention does not affect any rights and obligations arising from consent to ICSID jurisdiction given prior to the denunciation. Venezuela gave its "unconditional consent" to*

[43] *Schreuer*, paras. 2, 4 and 6.
[44] Claimant's Observations on Bifurcation, para. 21.

> *arbitrate disputes with Dutch investors before ICSID in the Treaty. Smurfit, in turn, consented to arbitrate disputes with Venezuela under the Treaty before ICSID in September 2011, some four months before Venezuela delivered its notice of denunciation of the ICSID Convention and some ten months before that denunciation took effect. Accordingly, Venezuela's denunciation of the ICSID Convention* ***could not and did not affect the parties' prior agreement*** *to submit disputes under the Treaty to ICSID arbitration.*[45]

91. Readers will note that this is essentially a repetition of prior arguments by the Claimant noted above. No further quotation is thus needed. This more or less verbatim repetition continues after the above passage, though we also find some references in subsequent passages to Claimant's mirror image requirement for consistency between the offer and acceptance.[46] Over the course of its argument however, Claimant also introduces what I believe is a new passage from Prof. Schreuer, and ties it to what I take to be the critical issue:

> *496. As explained by Professor Schreuer (an eminent authority on the ICSID Convention also cited by Venezuela), consent can be given to arbitrate existing or future disputes: "[i]f…the unilateral offer of the State has been accepted before the denunciation of the Convention, disputes arising between the State and the investor after the date of denunciation would still be within the jurisdiction of the Centre." Consent to ICSID arbitration can be perfected by accepting the State's standing offer to arbitrate at any time, even before a dispute has arisen:*
>
> > *The investor may accept the host State's offer of consent contained in legislation or a treaty at any time prior to a notice under Art. 70 or 71. In other words, the investor may perfect consent not only once a dispute has arisen through the institution of proceedings.* ***Subject to the terms of the offer of consent in the legislation or treaty,*** *the investor may perfect consent at an early stage by accepting the offer of consent in general terms.* (Note: Footnote omitted, but this is cited to Schreuer, CL-0056-Bis, p.9. Emphasis added)
>
> *497. Thus, Smurfit consented "in general terms" and "at an early stage" to arbitrate future disputes at ICSID, mirroring Venezuela's consent to arbitrate disputes under the Treaty. Once both parties consented to arbitrate disputes under the Treaty before ICSID, an arbitration agreement was formed.*[47]

[45] Claimant's Reply Memorial, para. 491. This is essentially a repeat of the prior arguments, in virtually identical terms. Indeed, the footnotes omitted repeat essentially verbatim the previous references in footnotes cited above to *Blue Bank* and to Prof. Schreuer.
[46] *Id.*, *e.g.* para. 495.
[47] *Id.*, paras 496-497.

92. I agree with this passage through its first two paragraphs. The problem with para. 497, in my view, is that the Claimant relies exclusively on the September 2011 letter to complete the "agreement to arbitrate" prior to the denunciation by Venezuela. As a result, if this fails to qualify as being a mirror image to the offer, as Claimant puts it, then its only basis for having an arbitration agreement prior to denunciation falls away, and Art. 72 applies to the denunciation by Venezuela of the ICSID Convention, thus ending any jurisdiction of the Tribunal on the arguments of the Claimant through to May 2021. I will not repeat the arguments presented above or in the majority award, save to say that in my view the September 2011 letter does not qualify as an acceptance of the offer in the BIT. My colleagues posit that it does. Hence my dissent.

93. I only add at this point that the notion of a general acceptance of jurisdiction is not lost and gone forever, and such clauses in investment contracts are not null and void as appears to have been suggested at some point. Rather, I have found it to be inconsistent and non-responsive to the offer to arbitrate in the BIT at hand. In effect, as states have reduced and made more specific the scope of the offer to arbitrate in investment treaties,[48] and increasingly tied it to the initiation of specific disputes and not generalized statements of jurisdiction, the ability of investors to accept such an offer by a general statement of acceptance in advance of any dispute has been reduced. But to be sure, it has not been eliminated. Many older treaties and domestic investment laws include broad and general acceptance of ICSID jurisdiction that, presumptively,[49] can be accepted in advance and in broad, open terms. Many investor-government investment contracts do so as well. The issue here is not whether, in principle, the Convention allows for a broad jurisdiction clause, but rather whether both arbitrating parties have agreed to one in this instance. Many treaties and contracts and laws do not have such clauses, and in my opinion the present BIT is one that does not, and thus it is not one that can be responded to in that way.

94. A Claimant or Respondent is, of course, entitled to change its mind and its arguments over the course of its presentations, and to offer "in the alternative" positions. That is all fair. However, the Tribunal is also entitled to take note of such changes and assess them in the light of the party's own prior statements. In other words, the Tribunal is well within its realm to give as much or more weight to the arguments made by a party when not contemplating an alternative argument invoking

[48] *See, e.g.*. the review by Prof. Schreuer in his paper for UNCTAD, **CL-0199**.
[49] There is still a need, of course, to assess each instance on its own terms.

the exact opposite arguments. This is especially the case when the new alternative argument has never been accepted by a tribunal before this moment.

3.2.2 Claimant's Rejoinder and post-rejoinder arguments

95. In December 2021, as part of the Claimant's Rejoinder on Jurisdiction, posed the notion that Art. 25 and Art. 72, effectively, do not require perfected consent or an arbitration agreement, but are operative to protect rights of investors to arbitrate based only on a unilateral offer to arbitrate, and ultimately that such a unilateral offer overrides the express right of a State to renounce the ICSID Convention. This is, of course, directly opposite to the positions reviewed above, which state over and over that an agreement to arbitrate, whether one calls this perfected consent or not, is required for Arts. 25 and 72 to become operative.

96. My colleagues, in their Award, provide an extensive recitation of the position of Claimant from its rejoinder onward, that I need not add to.[50]

3.3 Analysis

97. *Fábrica v. Venezuela* is the only arbitral award to examine this issue in detail in a context related to consent given at a much later time after denunciation.[51] It also deals with the same arbitration clause. The *Fábrica* tribunal, composed of Professor Hi-Taek Shin, President, and The Honorable L. Yves Fortier, C.C., K.C., and Professor Zachary Douglas, K.C., Arbitrators, addressed this issue in its November 2017 award on jurisdiction, just a few months before this arbitration commenced. The decision can be summarized as follows, with specific citations set out next below: The *Fábrica* tribunal unanimously declined jurisdiction on the basis that Art. 72 does not create independent rights for States or investors, but only preserves rights already created by the conclusion of an agreement to arbitrate. They found that unilateral offers of arbitration (such as in a BIT), even if defined as unconditional as they found this one to be, did not create any rights or obligations under the ICSID Convention to arbitrate a case, and hence there were no such rights to preserve under Art. 72. This Award, it may be noted, also follows the time period in which several articles

[50] Majority Award, paras. 268 et seq.

[51] Other awards have addressed whether the time period for an investor to consent is the six-month period in Art. 71 for the denunciation of the Convention to take full effect, or the date on which the notice of denunciation is received by the Depositary as per Art. 72. This "6 month" issue is not before us and those cases have not, in my opinion, analyzed Arts. 71 and 72 from the perspective of the specific issue that is before us.

appeared essentially advocating the Claimant's position in this case,[52] such advocacy being rejected by the Tribunal.

98. It is worth tracking key elements of the *Fábrica* tribunal decision in relation to Art. 72 and the issue of unilateral v. perfected consent:

> *Subsection 1 of Article 9 records the Contracting Parties' consent to ICSID arbitration (i.e. arbitration under the ICSID Arbitration Rules and the ICSID Convention), whereas subsection 2 recognizes that such consent cannot be operational until Venezuela takes the necessary steps to become a Contracting State under the ICSID Convention.* ***The basic point is that consent to ICSID arbitration in the BIT is obviously conditional upon actions taken by the Contracting Parties to the BIT in their capacities as Contracting States to the ICSID Convention.*** *And given that reality, the Contracting Parties to the BIT included an alternative route to investor/state arbitration in subsection 2 in Article 9, which is arbitration under the ICSID Additional Facility Rules.*[53] (Emphasis added.)

99. While the BIT included an alternative route to arbitration prior to both States party to the BIT being ICSID member States, it included no alternative route in the event that one State then withdrew from ICSID, as both were entitled to do. The tribunal held it was not entitled, in analyzing the BIT text, to create such an alternative route when the BIT parties themselves chose not to do so, or simply failed to do so.

100. The *Fábrica* tribunal continued:

> *The Tribunal thus rejects the Claimants' contention that Venezuela's consent to ICSID arbitration in Article 9(1) of the BIT is impervious to Venezuela's actions taken in respect of its obligations under the ICSID Convention. ICSID arbitration is only available if the conditions for access to ICSID arbitration in the investment treaty and the ICSID Convention have been satisfied.*[54] (Emphasis added.)

101. The *Fábrica* tribunal reinforces the separate analysis of the BIT and Convention that is required here, and the fact that the conditions of both must be fulfilled for jurisdiction to exist. But it also makes clear that, in their unanimous view, the State Respondent's denunciation rights under the

[52] In particular see those by OM Garibaldi (**CL-0209**); and E. Gaillard (**CL-0111**).
[53] *Fábrica v. Venezuela*, para. 260.
[54] *Id.*, para. 261. I have addressed the "unconditional consent" point above. However, the fact that the *Fábrica* tribunal took this view both reinforces the scope of the remainder of their views, and shows it is not necessary to reach the conclusions on Art. 72 issues that my own colleagues have reached because of their determination that the consent was unconditional.

Convention are not constrained by its offer of consent to the submission of claims to ICSID in the BIT.

102. The *Fábrica* tribunal then reinforces this finding, even after bringing in the same idea of unconditional consent espoused by my colleagues:

> *The fact that each Contracting Party to the BIT gave its "unconditional consent" to ICSID arbitration in Article 9(4) is not the end of the inquiry* ***because the Contracting Parties to the BIT cannot in that instrument alter the status or scope of their rights and obligations as Contracting States to the ICSID Convention as a multilateral instrument****.*[55] (Emphasis added.)

103. The *Fábrica* tribunal then considers the scope and role of Art. 71 versus Art. 72 of the Convention:

> *In other words, and for the purposes of this case, Article 71 is addressed to Venezuela as a Contracting State to the ICSID Convention, whereas Article 72 is addressed to Venezuela as a party (or potential party) in ICSID arbitrations. This division of labour is not unique to Articles 71 and 72: the contrast between provisions that are addressed to the Contracting States as parties to an international treaty, and provisions that are addressed to parties in ICSID arbitration proceedings, permeates the entire ICSID Convention.*

104. In this regard, the *Fábrica* tribunal **sets out the principal distinction in the positions of the parties before** it, in terms that mirror the present instance:

> *The principal interpretative disagreement between the parties in respect of Article 72 relates to the phrase "arising out of consent to the jurisdiction of the Centre given by one of them". The Respondent submits that the reference to "consent to the jurisdiction" means an agreement to submit to the jurisdiction of the Centre (in other words to a perfected arbitration agreement), whereas the Claimants argue that the same reference is to a party's own consent to the jurisdiction of the Centre, whether or not that consent has resulted in the formation of an arbitration agreement.* [...] *If the Claimants are correct, then it is Venezuela's "consent" to the jurisdiction of the Centre that counts and that was given in the BIT long before Venezuela sent its notice of denunciation and hence, on that analysis, the Tribunal would have jurisdiction over this dispute.*[56]

And:

> *The starting point is that the ordinary meaning of "consent to the jurisdiction" could encompass either interpretation proffered by the parties because it is perfectly possible to use those words to mean the unilateral act of consenting*

[55] *Id.*, para. 261.
[56] *Id.*, para. 272.

> *(i.e. one party's engagement to submit to the jurisdiction of the Centre which needs to be met by another party's engagement to result in an arbitration agreement) or the multilateral result of consenting (i.e. the one party's engagement to submit to the jurisdiction of the Centre which has been matched by another party's engagement and as thus resulted in an arbitration agreement). The distinction between "unilateral consent" and "perfected consent" encapsulates these different possible interpretations. Once the Tribunal moves to the text of Article 72 as a whole and in the context of the other provisions of the ICSID Convention, however, the meaning of "consent to the jurisdiction" becomes quite obvious.*[57]

…

> *First, if "consent to the jurisdiction" means unilateral consent rather than perfected consent, then there would have been no utility in including the words "any nationals of [the Contracting] State" (and probably the word "agencies") in Article 72. That is because, unlike for the Contracting State itself, it does not make sense to talk about unilateral consent given by nationals of that State that could generate "rights and obligations under [the ICSID] Convention".*[58]

….

> *Second, it is also doubtful whether unilateral consent even given by the Contracting State in an investment treaty or legislation could generate "rights and obligations under [the ICSID] Convention" for the purposes of Article 72.* ***Rights and obligations under the ICSID Convention as a party or potential party to ICSID arbitration only arise at the point of perfected consent, i.e. when there is an arbitration agreement in existence****.* [...] *the Contracting State's unilateral consent in an investment treaty cannot fall within the scope of Article 72 because Article 72 only concerns "consent to the jurisdiction of the Centre" that has given rise to "rights and obligations under [the ICSID] Convention". It follows that the unilateral consent of even the denouncing Contracting State cannot be the object of Article 72.*[59] (Emphasis added.)

105. The tribunal concludes first in relation to how Art. 72 addresses States that are party to, or potentially party to, an arbitration:

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[57] *Id.*, para. 273.

[58] *Id.*, para. 274. A key reason that "*it does not make sense to talk about unilateral consent given by nationals of that State that could generate 'rights and obligations under [the ICSID] Convention*'" is that such consent by a private investor could only come (i) in an investment contract where mutual consent to arbitration is jointly and simultaneously expressed in the contract; or (ii) after an offer of consent is made by the State in a BIT or in its domestic law, and the private party or agency actions are then in response to this offer. Nothing in a BIT or the ICSID Convention has, to my knowledge, ever been applied such that a unilateral "offer" or even statement of consent by a private party before an offer has been made by a state then binds a State to ICSID arbitration.

[59] *Id.*, para. 275.

> *The "jurisdiction of the Centre" is thus founded upon perfected consent and that is hardly surprising as the consent of all parties to ICSID arbitration is the sine qua non of arbitration under the ICSID Convention. At first blush it might be thought that this provision uses the term "consent" in both senses (i.e. to mean perfected consent and unilateral consent). The phrase "consent in writing to submit to the Centre" is equivalent in meaning to an arbitration agreement and thus perfected consent. Is the phrase "no party may withdraw its consent unilaterally" consistent with the idea of unilateral consent? The answer is not in the sense that it has been advanced by the Claimants and that has formed the basis of the Tribunal's discussion thus far. Whilst the phrase "no party may withdraw its consent unilaterally" relates to the possible conduct of one party only, the preceding phrase "[w]hen the parties have given their consent" makes it clear that "consent" in the final phrase is not directed to the idea of unilateral consent that arises where a Contracting State has given its consent to ICSID arbitration in an investment treaty or domestic legislation. In other words, it is not being used to describe the legal situation created by a unilateral engagement of a Contracting State to submit to ICSID arbitration (but before that engagement is relied upon by a national of another Contracting State). The last sentence of Article 25(1) simply means that where there is perfected consent, it cannot be undone by the conduct of one of the parties.*[60]

106. And finally on this issue:

> *The Claimants have placed certain emphasis on the words "given by one of them" in Article 72 as supporting their interpretation that "consent" means a unilateral act of one of the named entities or individuals covered by Article 72. The Tribunal is not persuaded that this inference can be drawn as it would be inconsistent with the Tribunal's foregoing conclusions on the meaning of "consent" in Article 72. Article 72 does not seek to address the rights and obligations of any party that is not the Contracting State which has denounced the ICSID Convention (or one of that Contracting State's own nationals). Put in another way, Article 72 is not addressed to the counterparties (i.e. another Contracting State or the nationals thereof) to the arbitration agreements entered into with the entities and individuals listed in Article 72. It is logical, then, for Article 72 to refer to the consent to the Centre's jurisdiction "given by one of them" (in the sense of any one of either the denouncing Contracting State, its constituent subdivisions or agencies or a national of that State). In other words, "given by one of them" simply confirms that the rights and obligations under the ICSID Convention of the denouncing Contracting State, its constituent subdivisions or agencies or a national of that State* ***that arise out of arbitration agreements*** *to which any of those named entities or individuals has consented are unaffected by that Contacting State's denunciation of the ICSID Convention.*[61] (Emphasis added)

[60] *Id.*, para. 277.
[61] *Id.*, para. 279.

107. The point made above that Art. 72 exclusively talks about the survival of the rights and obligations under the Convention of the denouncing State, **its** subdivisions and agencies, and **its** nationals, none of whom could ever enter into an arbitration agreement under ICSID with their own State. Indeed, Art. 72 never expressly addresses the rights of nationals of any other State, or states that it preserves the rights or obligations of nationals of another State post-denunciation. Nowhere does it ever speak to a right for a national of another State to continued access to ICSID arbitration against a State post denunciation. And this for good reason: It is actually Article 25 that governs such a right by a non-national to continued access to arbitration post denunciation, and that is, in my opinion, self-evidently based on pre-existing and perfected consent at the time of denunciation.

108. The *Fábrica* tribunal notes that the consequences of the interpretation proposed by those claimants would essentially deny States, virtually every ICSID Convention State Party now considering the vast array of BITs and regional investment treaties now in force, of its right to denounce the Convention in an effective manner:

> *If Article 72 were to be interpreted to extend to potential agreements to arbitrate in addition to existing agreements to arbitrate, it would follow that the Contracting State that has denunciated the ICSID Convention could potentially be the respondent party in an unlimited and unforeseeable number of future ICSID arbitrations for decades after its denunciation comes into effect (i.e., as long as its unilateral consent remained binding in investment treaties).*[62]

109. After examining other decisions and the *travaux preparatoires*, the tribunal further concludes:

> *First, it is not permissible, consistently with Article 31 of the VCLT, to dismiss the relevance of the express terms of a treaty on the basis of a supposition that the drafters did not have a particular situation in mind when the ordinary meaning of those terms is clearly capable of extending to that situation. Articles 25 and 72 of the ICSID Convention cannot be emptied of content in relation to investment treaty arbitration, which depends upon the existence of an arbitration agreement between the parties to the dispute no less than any other form of international arbitration. Whilst the manner in which that arbitration agreement comes into existence in investment treaty arbitration may differ from the paradigm of an investment contract (although it is not so different from a situation where the host State's consent is recorded in investment legislation), the end result is the same and the ICSID Convention is only concerned with that end result. In other words, the ICSID Convention does not purport to regulate the manner in which an arbitration agreement can come*

[62] *Id.*, para. 289.

> *into existence; the rights and obligations set out in the ICSID Convention simply do not come into play unless and until it is in existence.*[63]

110. In my view, the *Fábrica* tribunal in its unanimous decision, is 100% correct on these points and should have been followed by my colleagues. This is also consistent with the precise initial statements of the Claimant on these points, as noted above, prior to them shifting their position to the polar opposite position in their Rejoinder.

111. This ruling is also consistent with the views of Prof. Schreuer. Indeed, Prof. Schreuer is unequivocal on the only correct interpretation of Art. 72 as it relates to the present issues, as seen above and reiterated in the following statements:

> *Applied to Article 72 this means that consent must be perfected through an acceptance by the investor before the date of the denunciation in order to preserve rights and obligations under the ICSID Convention. A mere offer of consent to arbitration contained in a treaty or in national legislation cannot have this effect.*[64]

112. Professor Schreuer further states:

> *An interpretation that accepts an offer of consent contained in a treaty as "consent" for purposes of Article 72 would lead to the absurd result that consent can exist before the date of consent as defined in Institution Rule 2.*[65]

113. Rule 2(3) of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings reads: (3) "Date of Consent" means the date on which the parties to the dispute consented in writing to submit it to the Centre; if both parties did not act on the same day, it means the date on which the second party acted. And of course it does, because the ICSID approach has always been based, and exclusively based, on the requirement that both parties to the arbitration must have consented before either is obligated to arbitrate under ICSID. There is no existing precedent that suggests otherwise. My colleagues appear to seek to protect ICSID jurisdiction from states that denounce the Convention. But, I submit, adopting that policy view is for the Member States to do, not for arbitrators addressing the Convention as it is.

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[63] *Id.*, para. 302.
[64] **CL-0212**, C. Schreuer, "*Denunciation of the ICSID Convention and Consent to Arbitration*", p. 361 [hereinafter: "*Denunciation of the ICSID Convention*"].
[65] *Denunciation of the ICSID Convention*, p. 361.

114. And finally, while serving only as one more example of the multiple possible references to Prof. Schreuer's work in this regard,

> *Under Article 72 a denunciation of the Convention will not affect the rights and obligations under the Convention arising from consent given before the date of receipt of the denunciation. If consent is based on a general offer in legislation or in a treaty, the rights and obligations under the Convention remain unaffected if the investor takes up the offer in writing before the notice of denunciation is received. On the other hand, if the investor attempts to take up the prior offer of consent after the date of receipt of the denunciation, the Centre will be without jurisdiction.*[66]

115. It is hard to state this any more clearly. And it is important to note, specifically in reply to my colleagues, that Prof. Schreuer is clear this view applies to general offers in a treaty, a treaty always being an instrument that would generate legal obligations or commitments of the kind that my colleagues point to in their opinion. Despite that, they do not alter the right to denounce the ICSID Convention.

3.4 Conclusion on jurisdiction ratione voluntatis

116. For the reasons expressed above, it is my opinion and I do so hold that the present Tribunal has no jurisdiction over this claim due to the absence of consent that is valid under both the ICSID Convention and the Venezuela-Netherlands BIT. Consequently, the claim, in my opinion, should be fully dismissed. Having reached this view, my disposition would be to dismiss the arbitration claim, with costs against the Claimant as suggested would be appropriate by my colleagues in their majority decision on bifurcation (para. 40). However, as this option is not available due to the decisions arrived at by my colleagues, I support the costs award of President Ramirez in the majority decision.

4 ADMISSIBILITY OF THE CLAIM

4.1 Backdrop to a somewhat "messy" issue

117. A further issue raising questions about the ability of the Tribunal to hear and rule on the merits of this case is raised as an admissibility issue by Respondent. In my view, they focus, at least in significant part, on the question of how control over the Claimant's investment in Venezuela is exercised. In particular, the question is raised as to whether control is exercised by Smurfit BV, the

[66] *Denunciation of the ICSID Convention,* p. 362.

actual Claimant before us, or by SKG's headquarters group, based in Ireland and thus outside the scope of the Netherlands-Venezuela BIT. In practical terms, for reasons explained below, I find this question of control to actually be a hybrid issue of admissibility and jurisdiction. In addition, it has a relationship to the issue of liability for damages due to its direct textual relationship to Art. 9(3) of the BIT. Hence, a somewhat messy issue.

118. The legal backdrop to this issue flows from Art. 1(b)(iii) of the BIT, Ad Art. 1(b)(iii) of the additional Protocol to the BIT, and both in combination with Art. 9(3) of the BIT. Art. 1(b)(iii) reads:

> *1(b) The term "nationals" shall comprise with regard to either Contracting Party:*
>
> *i. natural persons having the nationality of that Contracting Party;*
>
> *ii. legal persons constituted under the law of that Contracting Party;*
>
> *iii. legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii) above.* (Emphasis added)

119. That this test of control is intended to be given effect is made clear by the inclusion of a specific add-on to this article in the text of the Protocol to the Treaty, which on its own terms states that it is "an integral part of this Agreement":

> *Protocol, Article 1(b)(iii)*
>
> *A Contracting Party may require legal persons referred to in Article 1, paragraph (b)(iii) to submit proof of such control in order to obtain the benefits provided for in the provisions of this Agreement. For example, the following may be considered acceptable proof:*
>
> *(a) that the legal person is an affiliate of a legal person constituted in the territory of the other Contracting Party;*
>
> *(b) that the legal person is economically subordinated to a legal person constituted on the territory of the other Contracting Party;*
>
> *(c) that the percentage of its capital owned by natural or legal persons of the other Contracting Party makes it possible for them to exercise control.*

120. Finally on the legal setting, Art. 9(3), again, reads:

> *(3) The arbitral award shall be limited to determining whether there is a breach by the Contracting Party concerned of its obligations under this Agreement, whether such breach of obligations has caused damages* ***to the***

> ***national concerned****, and, if such is the case, the amount of compensation.* (Emphasis added.)

121. The scope of the word "national" is, of course the very issue being defined or conditioned in Art. 1(b)(iii) by the language of "control". Whether "control" is given only a very narrow legalistic framing of shareholder levels, or a broader meaning based on the more common uses of "control", thus becomes a central exercise in determining the scope of coverage of "national" in Art. 9(3), and whether damages to a subsidiary may be claimed for by a national of one party to this BIT.

122. It is important to be clear that what is addressed in this section is not a test for what constitutes an "investment" under Art. 1(a) of the BIT. That test is fully within in Art. 1(a), and my colleagues have considered it in detail. But while Art. 1(a) defines "investment", Art. 1(b) applies so as to define who is a covered "investor" for the purposes of bringing a claim under the BIT, especially when indirect ownership is a factor, even if the language used is the "national" claiming a breach of obligations and damages. It is here that the test of control is added to defining an investor, as a complement to what is found in Art. 1(a) in relation to the definition of an "investment".[67] For a tribunal to have jurisdiction, both the definition of an investment and that of an investor must be satisfied. It is not enough for the test of investment only to be satisfied. This is axiomatic in investment law today.

123. When combined with Art. 9(3), which expressly requires that damages be those of "the national concerned", Art. 1(b)(iii) sets out the test of when extended and indirect ownership chains can still form a basis for a claim to damages to the national concerned under the BIT. Such additional tests on an investor are not unusual or exceptional. For example, a substantial business test is now common in many investment instruments for defining a covered investor. In the specific corporate chain before the Tribunal, the analysis, in my view, requires an understanding of this additional test of "control" on the scope of the Claimant's ability to bring a claim for damages in a case of indirect ownership.

124. I should also address other preliminary points. First, the organizational chart for the Claimant corporation corporate structure is materially incomplete for the purposes of this issue.[68] In practice,

[67] This is acknowledged expressly by the Claimant in the text of footnote 111 of its Observations on Bifurcation.
[68] Annex A of Claimant's Reply Memorial, titled: *Smurfit Holdings BV Ownership of the Investment as at 31 October 2008*. Whether it is also incomplete for other purposes related to the determinations of this Tribunal is a separate issue I do not address here.

what Claimant presents is the organizational chart from Smurfit BV down to the Venezuelan-based companies, but not up from Smurfit BV to its 100% owner, SKG. The record before us is clear that Smurfit BV, the Claimant before us and the only claimant before us, is 100% owned by SKG. There is no factual dispute on this point. For present purposes, we must, in my view, consider this part of the corporate structure as well.

125. Second, I wish to be very clear that nothing in the questions addressed in this section, or the answers I suggest below, calls into question the right of multinational companies to organize and operate themselves as they choose, subject to whatever other rules of national or international law that may be applicable. That right is simply not questioned or addressed here, or in the Treaty before us. The issue that I address here is far more modest and defined: what, if any, are the consequences of the organizational and operational structure they have in fact chosen in relation to the claims before us, based on the specific international legal instruments before us? This is similar to the approach taken in *South American Silver v. Bolivia*, where the tribunal stated, wisely, that "[a]*s the Tribunal has already noted, it is not incumbent upon it to establish a general thesis on so-called indirect ownership, but rather to interpret the Treaty in the present case for the corporate structure on the record."*[69]

126. There is no question that corporate structures can impact different national and international rights of corporations. Indeed, this is generally the purpose behind complex corporate structures, with tax liabilities being the most common goal of corporate structuring to impact. There is no doubt that corporate structures can also impact rights to international dispute settlement processes, and, indeed, this is also often a direct purpose behind the locational choices made within different corporate structures. The question to be addressed here is, therefore, whether the choices made by the company have any impacts on the requirements for jurisdiction or admissibility coming from the provisions of the specific BIT that applies in this case.[70]

127. Finally as a preliminary point, one way to phrase the issue of control before the Tribunal is whether a claimant is entitled to stop anywhere in a lengthy and indirect ownership chain that is legally most helpful to it, or whether the ownership chain must be seen as a whole to its ultimate beneficial

[69] **CL-0136**, *South American Silver Limited v. The Plurinational State of Bolivia,* PCA Case No. 2013-15, Award, 22 November 2018, para. 326.

[70] I focus specifically on the BIT here, but do not as a result discount that the same issue may arise under Article 25(2)(b) of the ICSID Convention, where the issue of foreign "control" also arises. For reasons of some semblance of judicial economy in a dissent that is already too long, I do not analyze the Convention, though the analysis may have wider relevance in due course.

owner? A related question is whether facts are relevant to this issue, or just the technical legal structures? In other words, where a complex multinational chain of ownership exists, can the Tribunal also look to relevant facts to assess actual control within that chain as a whole? Within this sphere of questions, it is important to note that the relevant test in this BIT is control, not ultimate or beneficial ownership.

128. It also cannot be a response to these types of questions that it is the entity that initiates the proceeding that is somehow automatically defined or even presumed as the entity that exercises control. Rather, it is only after the arbitration is initiated by a specific claimant that the Tribunal must apply the appropriate tests to the entity that is the claimant, in order to determine whether these tests are met, free of any assumptions deriving from the fact it initiated the claim. As stated simply and effectively by the tribunal in the *Caratube* arbitration, "[u]*nlike in the context of investment contracts, the acceptance of an offer contained in an investment treaty cannot create an assumption that the claimant fulfils the conditions of that offer*."[71]

4.2 The Respondent's positions on admissibility and control issues

129. The majority decision relies, in my view, on too limited a definition of the issue to address the Respondent's admissibility concerns.[72] In short, while one sees a number of issues raised (which I return to below) in the recitation of Respondent's position, one sees only the kind of classical customary international law position of a foreign investor not being able to claim for a breach of rights of a subsidiary in a foreign State being addressed. Barcelona Traction, for example, is a key case noted in the recitation. However, in my view that is an insufficient reflection of the full scope of Claimant's objections to jurisdiction and admissibility around the issue of "control".

130. Beginning with the Respondent's Summary of Jurisdictional Objections and Request for Bifurcation, the Respondent makes several points on the question of control. At paragraph 34, Respondent argues that the "*Claimant never controlled, managed, supervised, or even intervened in any way in the Smurfit's Venezuelan subsidiaries activities. There is no trace of the Claimant in the taking of major strategic or otherwise significant decisions for such operations, in the approval of expenditures, in the appointment of management, or any other form*."[73] This claim is essentially

[71] *Caratube v. Kazakhstan*, para. 331.
[72] See the summary of Claimant's and Respondent's positions in the Majority Award, paras. 247 et seq and paras. 250 et seq. In my view this recitation is reasonably accurate in terms of the Claimant's positions, but it is an incomplete reflection of the Respondent's positions, and especially leaves out the concerns raised over the relative roles of the Claimant per se and its 100% owner, SKG.
[73] Summary of Jurisdictional Objections and Request for Bifurcation, para. 34.

that the Claimant has provided no evidence of its own presence in the operations of the Venezuelan companies at issue.

131. Respondent goes on to note that the Claimant has no employees, zero.[74] Indeed, this is an uncontested fact based on the Claimant's own documentation. The implication of this point is clear: a company with no employees cannot be said to "control" another company with thousands of employees and millions of dollars in assets.

132. Respondent argues that the Claimant does not appear in any of the domestic Venezuelan documents requiring foreign investors to register.[75] In my view, Claimant has answered this point by noting that Venezuelan law requires the next immediate owner on the corporate chain to register as the foreign owner. Assuming this observation to be correct, this point by the Respondent would not be sufficient, in my view, to impact what all parties agree is an indirect ownership claim in any event, which is allowed under the BIT in question. Therefore, I do not address it further.

133. Respondent continues on to note the absence of any actual records of any business conducted in relation to the Venezuela companies, while this is not the case for SKG plc itself or even other subsidiaries or components of SKG:

> [...] *no financial statement of Smurfit Holdings BV has been produced in this arbitration. In the financial statements that did make it into the record, and which were used by the quantum experts retained by the Claimant in their calculations, there is no reference whatsoever to Smurfit Holdings BV in relation to the operations in Venezuela, even though some subsidiaries of Smurfit Kappa Group plc are mentioned whenever they provided services or performed any economically relevant activities regarding the Venezuelan companies.*[76]

134. The Respondent continues in relation to the issue of control to argue that the Annual Report of 2018 of SKG plc makes it clear that the initiation of the present arbitration was by the HQ company, not by the Claimant: "*The Group has initiated international arbitration proceedings to protect the interests of its stakeholders and seek compensation from the government of Venezuela for its unlawful actions*."[77] Claimant notes in reply that the actual press release announcing the end of control of the Venezuelan entities was issued by SKG and Smurfit BV. In addition, they note that

[74] *Id.*, para. 35.
[75] *Id.*, para. 36-37.
[76] *Id.*, para. 39.
[77] *Id.*, para. 38, citing to Annual Report 2018 (CLEX-10, p. 23).

the actual letter of September 2011 has both companies identified. This is true, but highlights, in my view, the problem: two highly "lawyered" documents (and quite rightly so) include Smurfit the Claimant alongside SKG. But all the other public facing documents identified by the Respondent remain uncontested as showing only SKG statements of control over the Venezuelan enterprises. This is evidence which must, in my view, be weighed.

135. The Respondent includes highlights of two express statements by SKG, as opposed to by the Claimant. From the SKG 2018 Annual Report it notes:

> *For instance, pursuant to SKG's notes to investors in connection with the company's consolidated financial statements for the financial year ended 31 December 2018, SKG remarks expressly that, as a result of the alleged interference with "Smurfit Kappa Carton [sic] de Venezuela's ('SKCV') business and operations", "**SKG plc was no longer able to exercise control over its Venezuelan business and operations**"*[78] (Emphasis added.)

136. Respondent notes that a similar statement appears in the 2019 Annual Report of SKG plc:

> *During the third quarter of 2018, the Government of Venezuela took control of Smurfit Kappa Cartón de Venezuela's ('SKCV') business and operations. As a result of this action, **SKG plc was no longer able to exercise control over its Venezuelan business and operations**. As a consequence of the Group's loss of control over SKCV, the Group deconsolidated its Venezuelan operations with effect from August 2018 and recorded an exceptional charge of €1,270 million in the Consolidated Income Statement.*[79] (Emphasis added.)

137. In their citation to the Annual Report of SKG, the Respondent goes on to document multiple other references of the control of the Venezuela companies as belonging to SKG itself, and notes there are no references to any role of the actual Claimant in their operations or the decision of SKG to write off those companies and deconsolidate them from the SKG reporting.[80] There are no similar statements emanating from the actual Claimant at any time, notes the Respondent.[81]

138. The Respondent concludes on this specific issue of control:

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[78] *Id.*, para. 41. Respondent provides the citation to the SKG plc Annual Report as follows: *See: SKG plc Annual Report 2018, p. 111 (CLEX-10, p. 113).* The cited statement was made under the heading *"significant accounting judgments" and was then repeated in full under the heading "cost and income analysis" (id., p. 115) (CLEX-10, p. 117).*

[79] *Id.*, para. 42. This is cited to SKG plc Annual Report 2019, p. 110 (Exhibit **R-0012**).

[80] See the extensive references, *supra*, in the footnote 45 of the Summary of Jurisdictional Objections and Request for Bifurcation. Respondent also track a similar pattern in multiple other Annual reports.

[81] *Ibid*.

> *Indeed, the analysis of the evidence in the record indicates that the management, maintenance, enjoyment, and disposal of the investment was never vested in any way in the Claimant, but rather in the Irish parent company of the Group, Smurfit Kappa Group plc ("SKG").*[82]

139. The Respondent's Reply on Jurisdiction and Counter Claim and Rejoinder on the Merits ("Respondent's Reply on Jurisdiction") reiterate many of the preceding points. They seek to highlight their view that the Claimant is basically an Irish company dressing itself up as a Dutch company. They point again to the multitude of documents they produced from SKG plc that refer to its control over the Venezuela entities, and supply again the detailed references.[83] And they repeat the assertion that the claim is stated clearly in the 2018 Annual Report of SKG as being that of SKG plc.[84] They point to the efforts at discovery of financial documents that Claimant, in their view, failed to comply with.

4.3 The Claimant's positions on admissibility and control issues

140. In its Observations on the Request for Bifurcation, Claimant makes several points in relation to the issue of control. An initial point made, with which I have already agreed above, is that the issue of control applies to the question of a covered investor, not to the definition of an investment.[85] It then goes on to question a number of issues raised by the Respondent, and whether they qualify as issues related to the definition of investment, as they appear to be raised by Respondent.

141. Specifically on the test for "control" the Claimant is clear in its position:

> *There is no "control" requirement in the definition of "investment" in the Treaty. The only "control" test in the Treaty relates to the definition of "national" (ie investor) (not "investment"). See Treaty, C-1, Art 1(b)(iii). Article 1(b)(iii) of the Treaty provides that where an entity is incorporated in a third state but is controlled by an entity of the home state, it will be considered a national of the home state. In the present case, there is no third-party claimant entity claiming Dutch nationality. In any event, even where the "control" test does apply for the purposes of jurisdiction ratione personae, proof of a majority stake in a subsidiary – without more – satisfies the "control" test under Article 1(b)(iii) of the Treaty. See Treaty, C-1, Protocol, Ad Art 1(b)(iii). This was confirmed in Mobil v Venezuela, in response to Venezuela's argument that entities incorporated in the US and the Bahamas could not be considered Dutch investors under Article 1(b) of the Treaty because the Dutch holding company that owned them did not exercise any*

[82] Summary of Jurisdictional Objections and Request for Bifurcation, para. 41.
[83] Respondent's Reply on Jurisdiction, e.g., paras. 367-370 and footnotes.
[84] *Id.*, para. 371, with citation to SKG Annual Report 2018, p. 23 (Exhibit **CLEX-10**).
[85] Claimant's Observations on the Request for Bifurcation, at footnote 111.

> *genuine control over them. The tribunal held that since the holding company had majority ownership over the entities, it satisfied the "control" test under the Treaty, and the tribunal did not need to analyze whether control was in fact exercised. See Mobil Corporation, Venezuela Holdings, BV, Mobil Cerro Negro Holding, Ltd, Mobil Venezolana de Petróleos Holdings, Inc, Mobil Cerro Negro, Ltd, Mobil Venezolana de Petróleos, Inc v Bolivarian Republic of Venezuela (ICSID Case No ARB/07/27) Decision on Jurisdiction, 10 June 2010, CL-115, paras 158-160.*[86]

142. I agree that the above passage is an accurate reflection of the *Mobil v. Venezuela* award, found at CL-115 of the materials. For reasons explained below, however, I do not accept that this is a correct application of the Treaty-based test in the present instance, where it would lead to five different corporate entities meeting this test at the same time, and thus raising real questions as to the basic meaning of a test of "control". I return to this below.

143. Claimant argues further that another arbitration award dealing with the issue of control of an investment by a "national" is not relevant to these proceedings:

> *In Caratube v Kazkhastan [sic], the tribunal was tasked with considering whether the claimant, a domestically incorporated entity in Kazakhstan, could bring a claim under the Kazakhstan-US BIT due to foreign "ownership or control" by its parent, a US national. No such treaty-based "control" requirement is applicable here. Consequently, the Caratube holding is not applicable or relevant to this case.*[87]

144. I disagree with Claimant's characterization of *Caratube* as "not applicable or relevant" to this case, and consider it further below. Simply because the language of a treaty differs, does not mean the principle evoked in the decision is irrelevant or inapplicable. In the present case, the test of "control" is shifted from the definition of investment, where it is found in *Caratube*, to the definition of "national" as a stand-in for the definition of investor. However, it is abundantly clear from the vast stores of treaty-based investor State cases that both the definition of investor (national in our case) and of investment apply as jurisdictional tests concerning the relationship of the foreign owner and the local investments in Venezuela.

145. Claimant also addresses the factual issues raised by Respondent in the Request for Bifurcation. Concerning the fact that there are no employees, Claimant queries whether this could be relevant in determining whether Smurfit made a contribution to the investments in Venezuela. This is in

[86] *Ibid*.
[87] Claimant's Observations on the Request for Bifurcation, para. 42(d). And further, footnote 110 (footnotes omitted).

part due to the framing of certain sections in the Respondent's submissions as relating to the scope of an investment. However, to argue that this point relates only to the question of an active contribution to an investment is, in my view, to narrow a reading of the full points made by the Respondent. Notably, Claimant does not deny there are no employees at the Claimant company.[88]

146. On the Respondent's points relating to management control of the Venezuelan entities, Claimant argues that this again does not relate to the making of an active contribution to the investment. That may be so, but the Claimant then goes on, "*In any event, even if a control requirement did apply, the facts that Venezuela references in its brief do not evidence any lack of control on the part of Smurfit.*[89] Aside from the fact that the test in the treaty, is a test of "control" which the Claimant has the burden of proof to prove, and not a test of "lack of control" on the Respondent,[90] Claimant then expands on this:

(1) The fact that Claimant is not specifically named in the foreign ownership forms in Venezuela is based on the domestic law of the State, which requires the immediate owner to be named. As noted above, I accept this and do not consider this issue further.[91]

(2) In relation to the various statements reported by the Respondent on control within the company structure in the annual reports of SKG plc, Claimant notes that the consolidated reporting of the SKG plc that wraps the full chain of subsidiaries into the annual financial reporting of the headquarters company is in keeping with its international accounting standards for its financial reports, and that this has no bearing on whether the Claimant exercises control.[92]

(3) Similarly, concerning SKG's decision to deconsolidate the Venezuelan companies from its annual report, Claimant argues that this decision could only have been taken by the top tier company under international accounting standards, and is thus irrelevant to who exercised control over the Venezuelan companies.[93] Claimant further notes, correctly, that the initial statement on the Smurfit Kappa Group's deconsolidation of its Venezuelan business from its businesses was made by both Smurfit and the Smurfit Kappa Group:

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[88] *Id.*, para. 45.
[89] *Id.*, para. 46.
[90] Though it is clear, despite Claimant's comment, that much of the evidence introduced by Respondent could go to both control by SKG plc and to the lack of control by Smurfit BV.
[91] I recognize that Claimant also argues the point made by Respondent is factually incorrect. But again, I do not rely on this issue in my further analysis.
[92] Claimant's Observations on the Request for Bifurcation, para. 46(b).
[93] *Id.*, para. 46(c).

> *"Smurfit Kappa Group plc and a wholly-owned subsidiary Smurfit Holdings BV (together, 'SKG') confirm that due to the continuing actions and interference of the Government of Venezuela, SKG is no longer able to exercise control over the business of Smurfit Kappa Carton [sic] de Venezuela* [...]."[94]

147. However, and as already noted, this does not address the dozens of remaining instances where it is SKG only that is referred to in multiple public statements as having control, and in the Annual Reports of SKG plc, and the absence of any similar public statements anywhere in the record indicating that Smurfit BV and not SKG plc was in control. With the exception of two documents relating to the legal process, these remain uncontested, it is just their relevance that is contested. What weight to give them, if any, is a separate issue addressed in the analysis below.

148. Claimant then concludes that none of the facts alleged by Respondent support its argument that Claimant lacks a qualifying *investment* under the Treaty. Perhaps, but the facts alleged, and for the most part not contested by Claimant, do, in my view, provide at least *prima facie* support for the claim that the Venezuelan companies are not controlled by Smurfit BV as part of the definition of "national" as a stand-in for the more common definition of investor. I thus return to these issues in the analysis.

149. In its Rejoinder, Claimant continues to set the narrative of the Respondent's concern with control issues as being irrelevant to the issues of jurisdiction over the investment. But as already noted, in my opinion the issue of control is very much related to the status of the "national" who claims to be the investor. I thus consider Claimant's comments in this regard as well, given that Claimant has acknowledged that the test of control could be applicable in the context of the investor, as noted above. In this context, Claimant makes the following summary comment of several cases invoked by Respondent: "***Absent any specific treaty language***, the lack of management control over the investment has been considered irrelevant for the purposes of jurisdiction."[95] I agree that absent any specific treaty language the absence of management control may in some instances not be relevant. But this BIT includes the express language of "control", and thus it becomes this Tribunal's responsibility to determine if it is relevant.

150. The footnote in the quote above is also relevant here:

> *As explained below this [the inclusion of treaty language] could have been done, for example, through a denial of benefits clause. See footnote 195 below.*

[94] *Id.*, footnote omitted.
[95] Claimant's Rejoinder, para. 70. The footnote in the quoted text is discussed next. Emphasis added.

> *See also Valores Mundiales, SL and Consorcio Andino SL v Bolivarian Republic of Venezuela (ICSID Case No ARB/13/11) Award, 25 July 2017, CL-93 para 280 ("In exercising their authority to define consent to ICSID jurisdiction, States may, for example, establish a control or 'effective connection' test of the investor with the other State, or reserve the right to deny protection to claimants that they could otherwise resort to the respective treaty. However, once consent is defined, the Tribunal shall follow it. Therefore, when the nationality test established in the corresponding treaty is that of 'incorporation' – and not one of genuine control or connection, for example, the [Tribunal] should not go beyond the provisions of the treaty, unless some sort of abuse has occurred")* (English translation).[96]

151. In the present instant, as discussed more fully below, it is my view that the test for national (or investor), does include both a place of incorporation test and a control test, and it is thus our job as arbitrators to determine whether or how each applies to the facts at hand.

152. Claimant seeks to reinforce its point by reference to "The tribunal in RREEF v Spain (a case cited by Venezuela) held that:

> *The term 'shell company' is often used as a short-hand reference to a commercial entity that has little or no activity apart from owning or controlling directly or indirectly assets. Unless there is a reason under the relevant municipal law or investment treaty to conclude otherwise, there is no basis under international law to accord such a commercial entity any less entitlement to the protections afforded under an investment treaty than any other commercial entity. There are examples of investment treaties that include within the definition of investor only commercial entities that can demonstrate certain characteristics or activities. There is no such limitation in the ECT or the ICSID Convention. It would not be proper to read such an artificial limitation into the plain meaning of the ECT, the ICSID Convention or into international law generally.*[97]

Again, the question for this Tribunal, in my opinion, is whether the current BIT does include a test for "certain characteristics or activities" of the "national" acting as Claimant, specifically the control test or the place of incorporation test.

153. Claimant then argues again that, "*In any event, even if a control requirement did exist, the facts that Venezuela references in its Rejoinder do not evidence any lack of control on the part of Smurfit.*"[98] Claimant then returns to the argument that the fact that SKG plc consolidates its

[96] Claimant's Rejoinder, footnote 179.
[97] Claimant's Rejoinder, para. 70(b), footnote omitted.
[98] *Id.*, para. 71.

subsidiaries in its annual reports is for accounting standard reasons, and that this is irrelevant in assessing whether Smurfit BV has control.[99] As regards SKG plc's other reporting in its annual reports on control of its subsidiaries, Claimant argues:

> *In the same vein, Venezuela's arguments relating to Smurfit Kappa's reporting on its Venezuelan operations in its annual reports are also irrelevant. See Venezuela's Rejoinder, para. 368. Since Smurfit Kappa is the entity that presents consolidated financial statements, it also lists its principal subsidiaries, reports on whether it controls operations in the various countries in which it has assets, and reports any important pending litigation in the group, as required by the IFRS and other market disclosure rules.*[100]

154. Claimant also argues in its Rejoinder:

> *Venezuela does not articulate anywhere in its Rejoinder (or its Counter-Memorial) why Smurfit Kappa's ownership of Smurfit, and thus its status as ultimate parent of the Venezuelan subsidiaries, has any impact on this Tribunal's jurisdiction ratione materiae. The fact that Smurfit is owned by Smurfit Kappa, an Irish company, does not affect its standing as an investor under the Treaty. The Treaty does not contain any denial of benefits clause or other requirement precluding control by a foreign national.*[101]

155. Claimant also repeats other points made in previous pleadings. Beyond what is noted above, I do not consider any further significant new points to be made in the Rejoinder. In its Rejoinder on Jurisdiction of 6 December 2021, I do not see any new arguments, and hence need not simply repeat prior arguments here.

4.4 Analysis

156. I begin this analysis with the final quote I wish to share from the Claimant from it first post hearing brief. In my view, Claimant argues that, effectively, no meaning can be given to the word "control" in Art. 9(3):

> *Any interpretation of Article 9(3) depriving Claimant of the right to claim for losses to indirectly held investments would contradict the Treaty's broad definition of "investment" in Article 1 – which captures assets that are directly and indirectly held – and deprive it of meaning. As a consequence, once an asset qualifies for protection as an "investment" under Article 1 – which is a jurisdictional question – the investor is entitled to compensation for the harm*

[99] *Id.*, para. 71(a).
[100] Claimant's Rejoinder, footnote 190.
[101] Claimant's Rejoinder, footnote 195.

> *to that investment (regardless of whether it is directly or indirectly held) caused by breaches of the Treaty.*[102]

157. First, I note that the test in question by virtue of Art. 9(3) read with Art. 1(b) is applicable to the question of the scope of a claim by a "national", again with national here effectively substituting for the term investor more commonly used in BITs. Second, this test applies in addition to the definition of investment, and it is not a lesser test or one conditioned by the definition of investment. Nothing in Art. 1(b) says it is subservient to Art. 1(a), or that a claim automatically qualifies under one test if it qualifies under the other. Third, it is, in my view, perfectly possible for an indirectly owned investment to be controlled by the "national" as defined in 1(b)(iii) if that test applies. What the treaty says is that if the claim for damages to an investor or its investment falls within Art. 1(b)(ii), then a test of place of incorporation applies; but if it falls under Art. 1(b)(iii) then a test of control must apply for the Claimant to make a claim. Neither alter the tests for an investment and nothing in the test of investment in the treaty is inherently incompatible with a place of incorporation test or a control test for the national making the claim. Two cumulative conditions can apply at the same time if, indeed, that is what the treaty requires.

158. Art. 1(b)(ii) defines nationals as including "legal persons constituted under the law of that Contracting Party." As to whether this test can be met by the Claimant, Smurfit BV, I have no doubt. My colleagues have done an extensive review of shareholdings along the corporate chain and I have no reason to question those results, at least as it relates to the place of incorporation of the Claimant. It thus falls within this test.

159. Art. 1(b)(iii) brings into the scope of "nationals" "legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (1) or by legal persons as defined in (ii) above." First, I will look at whether the test is met here by Claimant, and then I will turn to the application of this issue.

160. As previously noted, there is also a Protocol to the BIT which adds to the present analysis:

> *Protocol, Ad Article 1(b)(iii)*
>
> *A Contracting Party may require legal persons referred to in Article 1, paragraph (b)(iii) to submit proof of such control in order to obtain the benefits provided for in the provisions of this Agreement. For example, the following may be considered acceptable proof:*

[102] Claimant's First Post Hearing Brief, para. 172 (footnote omitted).

> *(a) that the legal person is an affiliate of a legal person constituted in the territory of the other Contracting Party;*
>
> *(b) that the legal person is economically subordinated to a legal person constituted on the territory of the other Contracting Party;*
>
> *(c) that the percentage of its capital owned by natural or legal persons of the other Contracting Party makes it possible for them to exercise control.*

161. First, I note that these are expressly defined as "examples" of acceptable proof under the text, and thus are not necessarily the only types of proof that can be offered, or necessarily determinative of the issue in themselves. Second, I note that the legal test in the header to the Protocol, as well as in Art. 1(b)(iii), remains one of whether the Claimant has control over the directly or indirectly held foreign affiliate, and not simply whether it falls within the scope of one of these examples of proof.

162. It is critically important to note that Art. 1(b) employs three different tests that apply to the definition of a "national". In 1(b)(i) the test applied for natural persons is that of the place of nationality. In the case of legal persons claiming for their own mistreatment due to a breach of an obligation and resulting damages, the test is whether the legal person is "constituted under the law of that Contracting Party". This is a test Smurfit BV clearly passes and thus can fall under for such a claim. The third test is for legal persons not constituted under the law of that Contracting Party, "but controlled, directly or indirectly … by legal persons as defined in (ii) above." The test used in (iii) is thus very specific and is not one of ownership, or "constituted under the law of that Contracting party", or other legally formalistic standard such as the seat of the investor. Rather, it is expressly a more open-ended term of "control", and acknowledging that this control can be direct or indirect. Thus, the word "control" is clearly the applicable test, and it is not the same as a test of place of incorporation, nor is it the same as ownership.

163. The BIT expressly uses the test of "controlled", with no further definition, for paragraph 1(b)(iii) coverage. We must therefore rely first upon the meaning of "controlled", the precise word used in the treaty, in its normal usage, as required by Art. 31 of the VCLT. The online version of the Oxford English Dictionary[103] provides such a definition:

> *controlled, in control, v.: transitive. To exercise power or authority over; to determine the behaviour or action of, to direct or command; to regulate or govern*

[103] At https://www.oed.com/search/dictionary/?scope=Entries&q=controlled.

> *controlled, adj.: Held in check, restrained; subjected to direction and regulation, carefully governed.*

164. The question, therefore, is whether evidence relating to the issue of control in its normal usage can be considered based on actual facts about the exercise of control, direction or command. In short, whether actual management and operational control can be considered. I have no doubt in this case that it can be and indeed it must be. The language of the treaty indeed requires it.

165. This should not be shocking. I take as one example the decision of the tribunal in *Caratube*: "[t]*he Tribunal is not satisfied that a legal capacity to control a company, without evidence of an actual control, is enough in light of Devincci Hourani's characterization of his purported investment in CIOC* […]".[104] The specific issue of the purported investment is itself somewhat complex in that case, but beyond the scope of our analysis. Suffice to say it involved issues of direct investment, lack of presence in management, and other factors specific to that investment process and subsequent management. In the present case, I believe the Respondent has raised sufficient issues to demonstrate a serious question concerning the control by the Claimant of the Venezuelan entities. If one applies a simple burden of proof analysis as an analogy, Claimant's showing of the shareholding may provide a *prima facie* showing of control. But the evidence adduced by the Respondent, in my view, more than meets a level sufficient to rebut that. Thus, the burden returns to the Claimant to demonstrate control, and not, as argued by Claimant, on the Respondent to show lack of control.

166. In the present case, following the company's own organization chart, starting with applying a legal test of share ownership for control, including indirect shareholdings, would yield a result of at least five companies, all of whom have large percentage shareholdings, qualifying as companies having "control".[105] This, for present purposes, is not, therefore, an answer as to which is entitled to be a Claimant against the host State. An answer that all of them qualify would make a mockery of a test of "control" in my view. And an answer that suggests the one that initiates the arbitration is somehow automatically the company with control simply ignores the role of the test in the definition. As we have already noted, initiating the arbitration does not, indeed cannot, in itself answer the applicable tests in a BIT, but simply opens the tests for application against a specific

[104] *Caratube v. Kazahkstan*, op. cit., para. 407.
[105] SKG group, Ireland, 100% owner of Smurfit Holdings BV (Claimant); in turn 100% owner of Packaging Finance NV; in turn 100% owner of SI Holdings, Bermuda; in turn 87.84% owner of Fibras Limited Bermuda; in turn 84.7% owner of Cartón de Venezuela.

claimant/investor/investment. It requires that the Tribunal then verify the application of the test against these actors. It thus starts the analysis, it does not answer or determine the outcome of the analysis.

167. Given this result of applying an ownership test for "control", one must, in my view, turn to other elements to assess whether Smurfit Holdings BV has exercised control. In this case, given the evidence already seen, this would be in comparison to the Claimant's own 100% owner, SKG plc.

168. Claimant argues that the evidence adduced by the Respondent about control of the Venezuelan entities by SKG plc as opposed to by the Claimant does not constitute evidence of the lack of control by Smurfit BV, the actual Claimant. But, at the same time, Claimant never, as far as I can tell, actually makes an argument supported by facts and evidence that Smurfit BV in fact controls the Venezuelan subsidiaries. What Claimant essentially argues is that the indirect share ownership, coupled with simply being the Claimant, is all that is needed. Yet even here it is one of five companies that exercises the same type of shareholding over the Venezuelan entities. It is not in dispute that Smurfit is 100% owned by SKG plc, which is also one of the five companies that can be defined as owner by shareholdings. It is perfectly reasonable for shareholding to be one test of control, that is beyond doubt. But as the test is control and not ownership, and as a shareholder test yields five results on the Claimant's own evidence, it cannot be determinative in fact or in law in my view in this case, especially given the absence of employees and consistent claims of control by SKG itself.

169. Once that is determined, one must turn to the fact that the Claimant has adduced virtually no evidence of the management control by Smurfit of the subsidiaries. Indeed, as far as I can see, it points to just two documents to overcome the evidence of the Respondent of the multitude of documents and references to SKG plc being in control. One is the September 2011 letter, on its face co-authored by Smurfit and SKG; and the other is the press release of 24 September 2018 notifying the public that SKG and Smurfit are deconsolidating the Venezuelan assets from its books. The release goes on to say that SKG is taking a write down of assets of approximately €60 million for the "Group", which is not apparently defined in the text to include Smurfit taking any write down. However, a press release some six weeks later by SKG plc that includes coverage of the same issue includes no reference to Smurfit at all, and finalizes the write down by SKG at €66

million.[106] Thus, as noted above, the record includes multiple statements in multiple contexts of control over the Venezuelan companies by SKG plc. It includes two statements suggesting shared control by SKG and Smurfit, both of which appear in a specific legal context of establishing a basis for this arbitration. I do not at all suggest that they have acted improperly in drafting these documents in this way. But the weight for purposes of determining control falls, in my view, clearly on the side of all the general use and annual report documents that Respondent has adduced.

170. In addition to these documentary claims by SKG plc of control over the Venezuela entities, we have the simple fact that the Claimant has, in fact, zero employees. None. The idea that a company can exercise any management control or operational control over another company that has thousands of employees and millions in assets is, at best, far-fetched. SKG, of course, is a fully functional headquarters operation with some 44,000 employees globally under its control.

171. Another element can be the contribution of know-how and skills as part of management or operational control. But, again, there are no employees with know-how and skills for them to share with the Venezuelan entities.

172. Further, at times there seems to be some confusion by the Claimant itself as to who the Claimant is. One key area of decision-making is the making of investments in operations and technology. During day 4 of the Tribunal hearings, Claimant argued that as of 2016-2017 and into early 2018, before the events leading to the deconsolidation by SKG of the Venezuelan entities, that it, the Claimant, was continuing to invest in those operations.[107] This appears to be a reference to the "Venezuela Strategic Plan Updated" of August 2017.[108] This is indeed a plan that shows continued investments into the Venezuela operations. The problem for present purposes is that nowhere in the plan is there a reference to the Claimant before us. It is not identified as any part of the investment process or decision-making. Rather, the plan has the Smurfit Kappa Group logo on each page. And on the last page, it is signed off as the plan set out by "Smurfit Kappa The Americas 1301 International Parkway, Suite 550 Sunrise, FL 33323 USA." There is nothing in the document that brings in the actual Claimant as part of this ongoing strategic plan or its related decision-making processes, despite the claim made during the hearings that the Claimant was continuing to

[106] **C-0324**, Press release: Smurfit Kappa Group plc, Deconsolidation of Venezuelan Operations, dated 24 September 2018. The text states that "Smurfit Kappa Group plc and a wholly-owned subsidiary Smurfit Holdings BV (together, 'SKG') […]" and states that SKG has lost control over the Venezuela operations. This, therefore includes the Claimant. The write down is then not ascribed to SKG, but rather to SKG plc only.
[107] Tr. Day 4, p. 1078.
[108] *See* **CLEX-51**.

invest in the operations (made in direct response to the Respondent's allegations that SKG has already planned to leave the country before the events of August 2018). I accept that this strategic plan shows an intention to continue operations and not leave precipitously. What is evident from this plan, however, is that the Claimant has no place on its face, and there is nothing else in the record to show the actual Claimant had any role in developing or implementing it.

173. In short, the record is replete with evidence of management and operational control being exercised by the SKG plc group. Their own statements say it clearly. The investment plan says it clearly. The record is almost completely devoid of any evidence of any inputs by Smurfit BV. Indeed, the Claimant itself, as best as I can tell, has pointed to just two documents, both critically associated with legal process issues as opposed to the ongoing day to day operations of either SKG plc or of the Claimant.

174. I will note here that added to this is the burden of proof issue related to proof of damages to the Claimant, which is considered below, but which I take for now to add additional weight to the present conclusion that the Claimant was not part of the management or operational chain between SKG plc and the Venezuelan companies. I thus find, as a matter of fact and law in accordance with the BIT, that the Claimant did not affect control over any enterprises in Venezuela.

4.5 Application

175. In addition to a substantive test, there is also a burden of proof requirement to prove all the elements of jurisdiction. Claimant has failed to meet the test of control in Art. 1(b)(iii) over the Venezuela entities. The Claimant does, however, pass the test in Art. 1(b)(ii). So what is the impact of this, why does this distinction matter?

176. The importance of this is directly related to the text of Art. 9(3):

> *The arbitral award shall be limited to determining whether there is a breach by the Contracting Party concerned of its obligations under this Agreement, whether such breach of obligations has caused damages to the national concerned, and if such is the case, the amount of compensation.*

177. These clear instructions relate to the scope of "national" under Art. 1(b) as well as requiring the burden of proof to be met by the Claimant for the proof of damages themselves. In my opinion, Art. 9(3) requires the damages to be linked back carefully to the applicable scope of "national" under Art. 1(b). The result in my view is straightforward and clear: the Claimant having failed to show it controls the Venezuelan entities that fall under Art. 1(b)(iii) is not entitled to claim for the

damages that may have been caused to those entities by breaches of the BIT. They are legal persons not constituted under the law of the contracting party of the Claimant, and thus require control by the Claimant, directly or indirectly, for the Claimant to claim for the damages they may have experienced. As there is no such control, there can be no such claim in my view.

178. That does leave the ability of the Claimant as a national of the Netherlands to claim for its own damages. In my opinion, however, a second problem arises for the Claimant in this case: has it met its burden of proof of damage to itself arising from the breaches of the Treaty. For the sake of argument, let us assume here that the breaches found by my colleagues are as such. The next question would be have they proven the damages to them arising from such breaches?

4.6 Damages and the Burden of Proof: has it been met?

179. What Art. 9(3) also tells us, in my opinion, is that damages suffered by the Claimant must be proven, as opposed to assumed ("whether such breach of obligations ***has caused*** damages"). Furthermore, like proof of damages in any other ICSID arbitration, the burden of proof is on the Claimant that is making the claim to damages.

180. The Claimant sets out the type of damages to itself that it asserts. A useful summary is set out in its Rejoinder:

> *… all of Venezuela's measures caused direct losses to Smurfit:*
>
> *(a) Venezuela's expropriation of Smurfit's entire business in Venezuela reduced the value of Smurfit's shares in Cartón, Refordos and Colombates to zero.*
>
> *(b) Venezuela's wrongful expropriation of Refordos' three forestry landholdings comprising 6,434 hectares (the size of 9,000 soccer fields) also caused direct economic harm to Smurfit as a shareholder. These takings restricted the ability of Smurfit's subsidiaries to provide raw material that could be turned into end products (packaging products), thus diminishing the value of Smurfit's shares in its Venezuelan production chain.*
>
> *(c) The inability by Smurfit's subsidiaries to repatriate dividends has caused a direct loss to Smurfit's rights as a shareholder in Cartón, Refordos and Colombates.*
>
> *(d) Finally, the sums that Cartón and Refordos ought to have received by way of timely VAT refunds were cashflows that Smurfit's businesses would have otherwise had were it not for Venezuela's wrongful measures. In other words, had Venezuela timely issued VAT refunds, Cartón and Refordos would have*

> *had these cashflows, which would have enhanced Smurfit's share value in these two companies.*[109]

181. I agree that any of these types of damages are possible in intra-company relationships. The issue I have is that they must be proven, and not simply assumed. There are no distinctions in the burden of proof between showing a breach of the treaty obligations and showing the damages resulting from that. Both burdens fall on the Claimant, and both must be factually based in the evidence. I understand and accept that there are circumstances where assumptions may be applied. But, the complete absence of factual proof should, in my view, raise a large degree of caution. This is especially so when the damage alleged can be proven by factual analysis but is not. It is especially the case, in my view, when the damage is present and past-based, and not simply future based lost revenues or profits. And, in my opinion, the record shows no factual proof and much by way of assumption. Moreover, Claimant's own live witness at the hearings gave significant reason to show that the assumptions made in this case are wrong.

182. The Claimant's damages expert, in his testimony at the hearings, confirmed this "assumption" based approach. At the conclusion of three lengthy exchanges on the issue on the fourth day of hearings, Dr. Abdala was asked specifically if they had ***assumed*** the cash flowed up the shareholding chain? He replied "correct". Asked if that included dividends, VAT refunds, other impacts, again he replied, "correct". Pressed further if they had verified these flows through financial statements, bank records, other records, he replied they had not. He noted they had verified there were no restrictions on such flows (such as outstanding loans). Pushed further with the view that this verified there were no restrictions but did not verify they happened, Dr. Abdala replied that "*Well, you also have to understand that we are not auditors, right? We're not auditing or trying to do a forensic analysis of tracking exactly cash or things like that. So, we're doing valuation of damages and value*."[110] This statement is not in any way "accidental" or misspoken, as is clear on the record. Asked previously in the exchanges why they had not looked at financial statements of the Claimant, or bank records, transaction records, etc., Dr. Abdala replied, "*Because that's not the way you typically assess value or damages. I mean, you just verify the ownership and that's enough*."[111]

[109] Claimant's Rejoinder, para. 87 (footnotes omitted).
[110] Witness testimony of Dr. Abdala, Tr., Day 4, pp. 965.
[111] *Id.*, p. 898.

183. The experts do say they reviewed some financial statements of the intermediary companies, but none for the Netherland's or Dutch company, as they often put it.[112] And even while noting they had financial statements from the intermediary companies, they indicated they had not reviewed them from the perspective of verifying cash flows up the ownership chain.[113]

184. The types of damages suggested above to the Claimant could be assessed by tracking the value of the Claimant or the value of the shares held in the Claimant, against the performance of its Venezuela-based entities. Asked if they had done so in any way, the answer was no:

> *Well, the tracking of the performance of the Venezuela operation to the Claimant would come through either by looking exactly at the--their own assessments of value of the Venezuelan assets, which they don't--I don't think they do on a regular basis, but no, I mean, there is no specific tracking of the value of Claimants with the performance of the Company that you can see--that you can see here. We're not doing that exercise, no.*[114]

185. This is consistent with a response to a prior question from counsel to the Respondent:

> *Q. We will see that later today, if not already for those who have actually read those Reports, but just to confirm, Mr. Abdala, so you're saying you're not assessing value or changes in value of the Dutch entities. Smurfit Holdings B.V. is a Dutch entity; right?*
>
> *A. (Dr. Abdala) Yes.*[115]

186. This confirmed prior statements that they had not assessed any damages actually to Smurfit BV, but simply transposed the direct damages to the Venezuelan entities to owners up the chain, and as such to Smurfit BV as the Claimant.[116] As noted previously, this is not something that Claimant is entitled to claim, as it is not the controlling entity of the Venezuelan entities.

187. Then the next concern with the assumptions arises. Mr. Alberto Ramírez, who had a stellar forty-two year career at the Venezuelan companies, ending with five years as CEO of Cartón from 2013 until the events of 2018, testified at the hearings.[117] He was asked if he knew where the dividend payments made by Cartón or other entities when they were made were sent to. His answer is clear: directly to SKG plc and to two other local Venezuelan shareholders. They did not, as the

[112] *Id.*, pp. 897-898.
[113] *Id.*, p. 897.
[114] *Id.*, p. 957.
[115] *Id.*, p. 889
[116] *Id.*, pp. 888-889.
[117] First Witness Statement of Mr. Alberto Ramirez, 11 May 2020, para. 2.

assumption of the economists would have it, simply follow the corporate chain in proportion to the shareholders "rights" as Claimant would have it based on the assumption.[118] Mr. Ramírez's testimony on this is uncontroverted by the Claimant through facts and evidence. All that stands against it is assumptions. Thus, this evidence stands as clear testimony from someone who would know, unrebutted, that the assumptions of the economists and hence of the Claimant are not correct, at least as it relates to substantial elements of cashflows. In my view, this veneer having been pierced in a major way leaves the burden of proof on the Claimant to provide evidence of actual losses to Smurfit BV, and not just rely on assumptions that are plainly discredited by their own witness.

188. What was available to the Claimant but has not been advanced into evidence includes, in relation to the Claimant, any financial statements, annual reports, bank records, other transaction records, evidence of write downs, assessments of value of their shares, other measures of corporate value, or any other manner to trace cash flows or assess actual changes in value of Smurfit BV as the fortunes of "its" subsidiary evolved for good or for bad. Nothing, despite the fact that their expert testified techniques are available to do so.[119] Not a single piece of factual evidence. Yet they assert a claim that with interest will go over $1Billion. Based, as testified to by their experts, only on economic assumptions which their own management witness testified were not correct.

189. In short, it is clear that the entire damages claim is based on an assumption that they suffered damage, not on proof. The damages experts have focused on the value of the damages to the Venezuelan companies and not to the "Dutch company". In my view, Claimant's first obligation, to show they suffered damages, has not, in my opinion been met by facts and evidence on the record. I have no doubt that someone suffered damages, but there is no evidence on the record, just assumptions, that it was the Claimant before us. And there is no basis in the treaty for Claimant to claim for damages suffered by any other entity in the corporate chain. That is my determination on this point.

190. This result should not be a surprise to my colleagues. Indeed, in assessing the quantum for moral damages they would potentially award, they acknowledge the lack of evidence of the Claimant on

[118] Testimony of witness, Mr. Alberto Ramírez, Tr. Day 2, pp. 416-418. At p. 418, it is made specifically clear that between 8-12% went to local persons and the balance, 88-92% went directly to SKG headquarters. *See also*, Testimony of Claimant expert, Dr. Abdala, Tr. Day 4, pp. 954-965. In pp. 964-965 of the transcript of the Hearing, the Claimant's expert stated the assumption that the cash flows would go up through the full ownership chain, but had no documentary proof of this, as reviewed in more detail below.

[119] Testimony of Claimant expert, Dr. Abdala, Tr., Day 4, pp. 887-888.

the issue of moral damages, and reflect that absence with a 1 Bolivar award of moral damages. Thus, the absence of evidence of damages, at least in so far as it relates to one issue, is already an agreed factor in this arbitration among all three arbitrators.[120]

191. So, too, in my view, have they failed to show damages in relation to other obligations under the treaty, expressly replacing facts and proof that could be available to them, through recognized techniques for this purpose as testified to by their experts, with the assumptions of their economics experts. In the end, my assertion here is simple: economists may well deal with assumptions (sometimes right and sometimes wrong). Lawyers and arbitrators must deal first with facts and evidence as proof of damages. This case provides an absolute dearth of facts and proof of damages to this Claimant before us, despite the recognition this could have been done. And what evidence is on the record shows the assumptions of the economists are most likely wrong.

192. I want to address the repeated reference of the Claimant to the international accounting standards applicable to SKG. This is, in my view, an entirely unrelated issue. One extensive example of Claimant's position may help refresh minds:

> *However, as Smurfit pointed out in its Reply, this does not prove that Smurfit does not "control" these entities from either an accounting or an international law perspective. Rather, Smurfit Kappa consolidates its financial statements with the Venezuelan subsidiaries because under the International Financial Reporting Standards (IFRS), when an entity is a parent, ie when it controls one or more entities ("control" is a defined term in the IFRS186), it is required to present consolidated financial statements. However, under the IFRS, not all "parents" are required to present consolidated financial statements. Where the ultimate or other intermediate parent prepares consolidated financial statements, then any other "parent" entities down the corporate chain are exempted from this requirement. Typically, the publicly traded company (in this case, Smurfit Kappa) will present the consolidated financial statement as required by the IFRS and market disclosure rules.*[121]

193. This addresses accounting standards that apply to SKG. In effect, what the Claimant is arguing here is that these accounting standards for the parent company of the Claimant somehow relieve the actual and only Claimant from its burden of proof in relation to its claim for damages. This is a clear mixing up of apples and oranges. At the same time, this argument by Claimant, in my view, acts as an admission by them that they have failed to produce any type of financial records that

[120] Majority Award, para. 741. For greater certainty, I agree with the determination of President Ramirez that the award for moral damages should be 1 Bolivar.
[121] Claimant's Rejoinder, para. 71(a).

show actual financial losses to the one Claimant before us. It is an attempt to excuse this total absence of evidence based on accounting standards applicable to an entirely different legal entity for our purposes, Smurfit BV's parent company. It is, therefore, irrelevant for our purposes as a legitimate basis for excusing the failure to meet its burden of proof.

194. Arguing that bank statements are not required because of applicable accounting standards may be a satisfactory answer to why SKG does not require all its line subsidiaries and shell companies to produce annual financial statements for its annual reporting purposes. But that is not a concern before us, and it does not answer the question of whether the Claimant has met its burden of proof in this case. Indeed, it seems to me it is an excuse, and a weak one, that acknowledges they have not met their burden of proof and seek to explain it away as a bookkeeping issue instead of as what it is, in my view, a burden of proof issue.

195. Given the above, I would rule as a matter of law pursuant to the Netherlands-Venezuela BIT, noting specifically Art. 9(3) and Art. 1(b), that this Tribunal is both without jurisdiction and that the abject lack of proof of damages in the face of Art. 9(3) and the burden of proof also creates a proper lack of admissibility in this instance.

5 VENEZUELA'S RIGHT TO EXIT THE ICSID CONVENTION

196. I want to address the notion that my proposed result would be a "backdoor" escape hatch to accountability for the Respondent. In my opinion, it is more a matter of illusion than reality that this is some kind of back door escape. Rather, it is very much a case where a Party to the ICSID Convention has walked out the very exit door – not backdoor escape hatch – put in place by the Convention itself. ICSID and its member states have known of this potential result for decades, and never amended, or to my knowledge proposed to amend, the Convention. And it is only the states party who can amend it, not arbitrators.

197. Venezuela has exercised its rights to leave ICSID, and to terminate the BIT. It did so in a timely manner in relation to this dispute, indeed 6 years and 10 years respectively before being notified of a dispute for arbitration under ICSID by the Claimant. Venezuela may have failed to meet the expectations of some foreign investors in doing so, but it has acted within the terms of the international agreements it has previously been party to. Indeed, it is beyond dispute that they walked out the very exit door provided to them and to all other States Party to the ICSID Convention for this purpose. There was no hidden or secret escape involved and to present such an

image is simply to assert a policy preference one might favor against any State Party denouncing the Convention but which the Convention drafters clearly and expressly rejected.

198. In addition, I note that there have been many investment treaties designed in this same way. Indeed, without having done a specific historical research on the issue, it is possible to assert that the vast majority if not all BITs have either a denunciation clause or an expiration clause. Many of these instruments, especially more modern ones, are also designed with multiple alternatives for arbitration, as my colleagues have noted. My colleagues appear to suggest, or at least this is a possible implication of their determination, that BITs with one arbitration option should be treated differently than BITS with multiple options. There is no basis, in my view, in the VCLT to draw such a result.

199. Moreover, I note that one of the most experienced states in terms of negotiating and completing bilateral investment treaties in 1991, when the negotiations on the Venezuela-Netherlands BIT were concluded (the BIT was signed on 22 October 1991) was, in fact, the Netherlands. A simple review of the UNCTAD Investment Treaty Navigator data base shows that this was the 30th such agreement negotiated by the Netherlands to this point, far in excess of most other States.[122]

200. The Netherlands was, therefore, not an inexperienced or unsophisticated negotiating party. As one example already noted above, the BIT includes specific rules for managing possible arbitrations prior to Venezuela joining the ICSID Convention. These rules were in fact operable for almost two years before Venezuela ratified the Convention and it entered into force. It thus falls equally to the Netherlands and Venezuela, should they choose to, to explain why no provision for an alternative arbitral forum was selected in the event either State party withdrew from the one forum that was selected, as other treaties with the Netherlands have done. Both States, we can presume, would have known this was a legal right of the other State. That both States failed to address this in the final text falls equally on both of them. And, indeed, given that the flows of investment are uniquely one way between these two States, like under so many other BITS, one can argue that the Netherlands in particular failed to secure adequate alternative options for its outward investors in this instance.

201. It is not the responsibility or jurisdiction of arbitrators to create alternative routings to jurisdiction because a State has done exactly what the negotiating parties have said it can do. It is, simply put,

[122] UNCTAD Investment Agreements Navigator, at https://investmentpolicy.unctad.org/international-investment-agreements/countries/148/netherlands.

not the role of the Tribunal to make up for this omission by the negotiators, if indeed it was an intended or accidental omission.

202. It is also worth noting that many states to date have taken advantage of the right to exit one or more investment treaties or terminate Investor State Dispute Settlement options in treaties, including ICSID. South Africa, Indonesia, Bolivia, Ecuador, India, Italy, Luxembourg, all of the EU that has committed to terminating membership in the Energy Charter Treaty, and even the USA, Canada and Mexico have terminated the ISDS provisions in the NAFTA under the revised Canada-USA-Mexico (CUSMA), and the CUSMA itself now has a built-in expiration date. It is not new, Venezuela was not the first State to do so and is certainly not the last to do so. Creating a sense that acting on these rights somehow makes a State a bad actor belies the legality, and on many occasions wisdom, of exercising this right.

203. Finally, on a different note, in the course of the majority and dissenting opinions on bifurcation, there was a concern expressed that there was some risk of a predetermination of the jurisdiction issue.[123] Prof. Zachary Douglas in his dissent raised this concern, and my colleagues responded to it in turn rejecting this suggestion. Regrettably, I must express a concern for a predetermination of issues during my tenure on this Tribunal as well.

Howard Mann

Mr. Howard Mann

Date: 23 Aug 2024

[123] There is no doubt that arbitrators have a wide discretion how to proceed with claims before them. But in my view there is a limit in any context where jurisdiction is being assessed that ensures no arbitrator can reach a determination on the issues of jurisdiction that takes into consideration how they would rule if they have the jurisdiction to do so.