School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
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Award Name and Date: Kimberley-Clark Dutch Holdings BV, Kimberly-Clark SLU, Kimberley Clark BVBA v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/18/3) – Award – 5 November 2021

Case Report by: Arno Janssens**, Amine Khaliss***. Editor Ignacio Torterola****

Summary: The Dutch, Spanish, and Belgian subsidiaries of the Kimberly Clark Group initiated arbitration against Venezuela under the ICSID Additional Facility Rules alleging breaches of fair and equitable treatment, full protection and security, most-favoured nation clauses, and safeguards against expropriation. Following bifurcation, the Tribunal declined jurisdiction for lack of consent on the part of Venezuela to arbitrate under the AF Rules. Under the Dutch and Spanish BITs, AF arbitration was only accessible until Venezuela acceded to the ICSID Convention. Later denunciation by Venezuela of that Convention was immaterial. Under the Belgian BIT, recourse was only available to ICSID Convention or UNCITRAL arbitration.

Main Issues: Interpretation of BIT clauses giving conditional access to arbitration under the ICSID Additional Facility Rules

Tribunal: Professor Gabrielle Kaufmann-Kohler (President), Mr David R. Haigh (Arbitrator), and Professor Brigitte Stern (Arbitrator)

Claimant's Counsel: Mr Steven E. Sletten (Gibson, Dunn & Crutcher LLP, Los Angeles); Mr Rahim Moloo, Ms Charline Yim, Ms Marryum Kahloon, Ms Kelly Tieu (Gibson, Dunn & Crutcher LLP, New York); Mr Piers Plumptre (London)

Respondent's Counsel: Mr Reinaldo Enrique Muñoz Pedroza (Procurador General de la República); Mr Henry Rodríguez Facchinetti (Procuraduría General de la República), Venezuela; Mr Alfredo De Jesus S. (De Jesús & De Jesús, S.A. - Venezuela); Dr. Alfredo De Jesús O.; Mr Pierre Daureu, Ms Marie-Therèse Hervella, Ms Eloisa Falcón López, Ms Erika Fernández Lozada, Ms Déborah Alessandrini (Alfredro De Jesús O. - Transnational Arbitration & Litigation, Paris - France)

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Digest:

1. Relevant Facts

The Spanish, Dutch, and Belgian subsidiaries of the Kimberly-Clark Group ("KCS," "KCN," and "KCB," collectively "**Claimants**") indirectly owned the majority of Kimberly-Clark Venezuela C.A. ("KCV") between 26 September 2007 and 21 April 2016. KCV was active in the manufacturing, importing and selling of personal care products in the Bolivarian Republic of Venezuela ("**Respondent**" or "Venezuela") (¶¶70-71).

On 22 October 1991, Venezuela signed a BIT with the Netherlands ("Dutch BIT"), which entered into force on November 1, 1993. Article 9(2) of the Dutch BIT provides recourse to arbitration under the ICSID Additional Facility Rules ("AF Rules") as long as Venezuela *is not* a party to the ICSID Convention (Dutch text) or as long as Venezuela *has not become* a party to the ICSID Convention (English and Spanish texts).

On 18 August 1993, Venezuela signed the ICSID Convention. The Convention entered into force for Venezuela on 1 June 1995 (¶116).

On 2 November 1995, Venezuela signed a BIT with Spain ("Spanish BIT"), which entered into force on 10 September 1997. Article XI(2)(b) provides recourse to AF arbitration if Venezuela *has not acceded* to the ICSID Convention (¶203).

On 17 March 1998, Venezuela signed a BIT with the Belgo-Luxembourg Economic Union ("Belgian BIT"), which entered into force on 28 April 28 2004. Article 9(3) of the Belgian BIT provides recourse to ICSID arbitration, or in the alternative, to *ad hoc* arbitration under the UNCITRAL Rules.

On 12 January 2012, Venezuela denounced the ICSID Convention. The denunciation became effective on 25 July 2012.

On 19 June 2017, Claimants served Venezuela with a Notice of Dispute, alleging KCV had lost its entire value as a direct result of four sets of measures initiated by the Venezuelan Government. The Notice reproached Respondent for allegedly breaching its obligations under international law by (i) restricting foreign exchange and imposing currency control measures (¶¶74-77); (ii) imposing a maximum retail price on some of KCV's products (¶¶78-79); (iii) failing to reimburse 203.6 million Bolivars in undue VAT (¶¶80-82); and (iv) expropriating all of KCV's assets in Venezuela.

2. Procedural History

On 2 January 2018, Claimants submitted a Request for Arbitration to ICSID under Article 36 of the ICSID Convention and Articles 2(a) and 4(2) of the AF Rules. ICSID rejected the Request, as the Secretary-General was prevented from "*registering one request for arbitration under the ICSID Convention and the Additional Facility Rules in the terms proposed*" (¶¶85-86).

On 6 April 2018, Claimants submitted an amended Request for Arbitration to ICSID (solely) under the AF Rules, which was registered on 17 April 2018 (¶¶9-10). The Tribunal was constituted on 29 March 2019 (¶16). On 25 April 2019, Respondent filed a proposal to disqualify Prof. Schill as presiding arbitrator (¶19). Prof. Schill tendered his resignation and was replaced by Prof. Gabrielle Kaufmann-Kohler. The Tribunal was reconstituted on 26 August 2019 (¶¶21-24). Following the first session held between the Parties and the Tribunal on 25 September 2019 (¶¶27-28), Respondent filed a Request for Bifurcation on 6 March 2020. Claimants agreed to the bifurcation on 26 March 2020 (¶35-36). The Hearing on jurisdiction was held virtually from 31 August to 1 September 2020 due to the COVID-19 pandemic (¶59). Claimants and Respondent submitted their respective Cost Submissions on 2 October 2020 (¶62).

3. Positions of the Parties

3.1 Dutch BIT

Article 9(2) of the Dutch BIT reads in relevant part as follows:

> **Authentic English version:**
>
> "As long as the Republic of Venezuela has not become a Contracting State of the [ICSID Convention], disputes [] shall be submitted to [ICSID] under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility Rules)."
>
> **Authentic Spanish version:**
>
> "Mientras la República de Venezuela no se hiciere Estado Contratante [del Convenio CIADI], las controversias […] serán sometidas al [CIADI] bajo las Reglas que Rigen la Facilidad Adicional para la administración de Procedimientos por el Secretariado del Centro (Reglas de Facilidad Adicional)."
>
> **Authentic Dutch version:**
>
> "Zolang de Republiek Venezuela geen partij is bij het [ICSID Verdrag], worden geschillen […] voorgelegd aan [ICSID] in overeenstemming met de regels betreffende de Aanvullende Voorziening voor de verlening van administratieve diensten bij procedures door het Secretariaat van het Centrum."

3.1.1 Respondent's Position

Jurisdiction cannot be established through Article 9(2)

Respondent submits that Article 9(2) of the Dutch BIT cannot be seen as an expression of consent on the part of Respondent to arbitrate under the AF Rules (¶109).

First, Respondent notes that the English and Spanish versions of the Dutch BIT provide for recourse to AF arbitration if Respondent "*has not become*" a party to the ICSID Convention. The Dutch version, however, uses the words "*is not"* a party ("*is geen partij*"). In Respondent's submission, the English and Spanish texts require a retrospective assessment: if Respondent became a party to the ICSID Convention at any point in time, recourse to AF arbitration would

be excluded (¶113). Denunciation of the Convention has no bearing on the mechanism contained in the Spanish and English texts. The Dutch text, on the other hand, refers to the state of affairs at the time of assessment (¶111). In this version of the text, denunciation would close the door to ICSID arbitration, but would revive arbitration under the AF Rules.

In light of these inconsistencies, Respondent submits that the English text must prevail, per Article 3 of the Protocol to the Dutch BIT (¶112). Article 33(3) of the VCLT does not apply to the present case as the Protocol explicitly deviates from this provision (¶121).

Relying on the English text of Article 9(2), Respondent contends that the entry into force of the ICSID Convention in Venezuela on June 1, 1995 permanently shut the door to AF arbitration (¶116). In support of its position, Respondent argues that (i) the ordinary meaning of "*as long as*" is 'until such time,' (ii) the use of the present perfect tense points to an event that started in the past and continues in the present,[1] and that (iii) its interpretation is consistent with the use of 'has become a Contracting State' in other international law instruments (¶¶114-116). Respondent emphasizes that its position cannot be dismissed for the fact that KCN would be left without a forum to arbitrate (¶117). Under international law, the absence of an arbitral forum is the default position.[2]

Respondent further resorts to supplementary means of interpretation to confirm its reading of Article 9(2) (¶118). It contends that the *raison d'être* of Article 9(2) was to grant temporary access to AF arbitration while Respondent had not yet become a party to the ICSID Convention. Respondent argues that this is consistent with the Netherlands' treaty practice, which consistently and exclusively refers disputes to ICSID arbitration (¶119). In addition, Respondent asserts (i) that it is unlikely that the Netherlands and Venezuela had the denunciation by Respondent of the ICSID Convention in mind when they concluded the BIT, (ii) KCN's reading of Article 9(2) would grant Dutch investors more favourable access to arbitration than Venezuelan investors, (iii) and that several other investment tribunals have reached a similar conclusion (¶¶120-122).

Jurisdiction cannot be established through the MFN clause

Article 8(2) of the UK-Venezuela BIT of 15 March 1995 ("the UK BIT") expressly permits AF arbitration (¶136). Article 3(2) of the Dutch BIT contains a Most-Favoured-Nation Clause ("MFN") which reads as follows:

> More particularly, each Contracting Party shall accord to such investments full physical security and protection which in any case shall not be less than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned.

Respondent submits that the MFN does not grant Claimant any rights under Article 8(2) of the UK BIT.

First, Respondent argues that it is "*a well-established principle of international law*" that a party must first establish jurisdiction under the treaty before it can rely on an MFN clause contained in

[1] Here, the accession of Respondent to the ICSID Convention.
[2] Respondent refers to *ICS Inspection and Control Services Limited (United Kingdom) v. Argentine Republic,* PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, ¶281.

that treaty (¶123). The ICJ confirmed this rule in the *Anglo Iranian Oil Case*.[3] Respondent submits that investment tribunals, too, have consistently applied this principle.[4]

Second, Respondent asserts that even if Claimants could invoke the MFN clause, it would still not allow for jurisdiction to be established. After all, arbitration agreements are severable from the rest of the treaty and fall outside of the scope of application of any MFN clause (¶126). Several investment tribunals have confirmed this position.

Finally, Respondent submits that the text of the MFN clause solely covers "*physical security and protection*," which, at any rate, cannot be assimilated to dispute resolution (¶128).

3.1.2 KCN's Position

Article 9(2) establishes jurisdiction

KCN contests Respondent's interpretation of Article 9(2) of the Dutch BIT, and submits that Respondent's consent to AF arbitration did not elapse when it became a party to the ICSID Convention (¶129).

KCN argues that the English version should only prevail if no common interpretation is possible among the three versions of the Dutch BIT. Article 33(3) of the VCLT and the ILC both require parties to make every effort to find a common meaning of the texts, before preferring one to another (¶130).

This common meaning, according to KCN, is that AF arbitration is available as long as Respondent is not a party to the ICSID Convention at the time when the dispute is submitted (¶131). Article 9(2) of the Dutch BIT thus revived when Venezuela reverted to its prior status as non-Contracting State. KCN submits that (i) Respondent's interpretation is contrary to Article 9(2)'s purpose and object, as it would deprive investors of recourse to arbitration (¶132); (ii) KCN's interpretation is consistent with the circumstances of the Dutch BIT's conclusion: the Contracting Parties intended to always provide investors with an avenue to arbitration, regardless of whether it was under the AF Rules or the ICSID Convention (¶133); (iii) Respondent's arguments relating to supplementary means of arbitration, are speculative (¶133); and (iv) the investment awards referred to by Respondent do not support its position (¶¶134-135).

The MFN clause establishes jurisdiction

KCN submits that it can rely on Article 8(2) of the UK BIT to establish jurisdiction under the AF Rules, as per the MFN clause contained in Article 3(2) of the Dutch BIT (*see above*, 3.1.1).

Article 3(2) of the Dutch BIT guarantees full physical security and protection not less than that accorded to nationals of third states. In KCN's submission, "*protection*" includes dispute resolution. As a result, KCN invokes Article 8(2) of the UK BIT which expressly permits AF Arbitration (¶136).

KCN further argues that the MFN clause contained in the Dutch BIT, also applies to MFN clauses in other treaties. Since the UK MFN clause also applies to dispute settlement, KCN contends that

[3] *Anglo-Iranian Oil Co. (United Kingdom v Iran*), Preliminary Objection, Judgment, 22 July 1952, ICJ Rep. 1952, 93.
[4] Citing, e.g., *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013.

it is entitled to establish jurisdiction under the AF Rules through that clause (¶136). KCN refers to investment decisions confirming that MFN clauses extend to dispute settlement, even in the absence of express wording (¶137).[5]

3.2 Spanish BIT

Article XI(2)(b) of the Spanish BIT reads in relevant part as follows:

> […] En caso de que una de las Partes Contratantes no se haya adherido al [Convenio CIADI], se recurrirá al Mecanismo Complementario para la Administración de Procedimientos de Conciliación, Arbitraje y Comprobación de Hechos por la Secretaria de [CIADI].

3.2.1 Respondent's Position

Respondent submits that, like Article 9(2) of the Dutch BIT, Article XI(2)(b) of the Spanish BIT conditions Respondent's consent to AF arbitration to the prerequisite that "*one of the Contracting Parties* ***has not acceded*** *to the [ICSID Convention]*" ("*una de las Partes Contratantes no se haya adherido al [Convenio CIADI]*"). In Respondent's submission, once both Venezuela and Spain acceded to the ICSID Convention, recourse to AF arbitration became impossible (¶176). Both Spain and Respondent acceded to the ICSID Convention between 1994 and 1995 (¶176).

In addition, Respondent's denunciation of the ICSID Convention did not revive its offer to arbitrate under the AF Rules (¶177). In support of its position, Respondent refers to its arguments regarding Article 9(2) of the Dutch BIT (see 3.1.1. above). Respondent invokes the award in *Valores Mundiales v. Venezuela* which expressly followed Respondent's interpretation of Article XI(2)(b) of the Spanish BIT (¶178).[6]

Finally, Respondent contends that jurisdiction cannot be established through the MFN clause included in the Spanish BIT (Article IV(2)), for the same reasons as set out above (see 3.1.1.).

3.2.2 KCS's Position

KCS contends that the right to resort to AF arbitration revived with Respondent's denunciation of the ICSID Convention (¶183). KCS emphasizes that Respondent itself advocated this position in two prior arbitration proceedings[7] and that its interpretation is confirmed by Prof. Christoph Schreuer's expert report (¶184). KCS further argues that the circumstances of the conclusion of the Spanish BIT confirm its reading of Article XI. Since both Spain and Venezuela became a party to the ICSID Convention *before* signing the Spanish BIT, Respondent's interpretation of Article XI would render it inoperable and deprived of *effet utile* (¶185). Finally, KCS asserts that its interpretation is consistent with the purpose of the AF Rules (*i.e.* to provide investors with access to arbitration when the host State is not a party to the ICSID Convention) (¶186).

KCS also argues that jurisdiction can be established on the basis of the Spanish BIT's MFN clause (Article IV(2)), through which it seeks to import article 8(2) of the UK BIT (see 3.1.2.

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[5] *E.g. Le Chèque Déjeuner and C.D. Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016, ¶159.
[6] *Valores Mundiales, S.L. and Consorcio Andino, S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017, ¶255.
[7] *Manuel García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Decision on Jurisdiction, 13 December 2019; *Valores Mundiales, S.L. and Consorcio Andino, S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017.

above). KCS refers to its arguments set out under 3.1.2. Additionally, contrary to the MFN clause included in the Dutch BIT, the Spanish MFN clause is not limited in scope but guarantees no less favourable "treatment." In KCS's submission, this includes dispute settlement proceedings (¶190).

3.3 Belgian BIT

Article 9(3) of the Belgian BIT reads in relevant part as follows:

> **Authentic Spanish version:**
>
> En caso de recurso al arbitraje internacional, la controversia se someterá al [CIADI], creado por [el Convenio CIADI]. En caso de que el recurso a CIADI resulte imposible, el inversor podrá someter la controversia a un tribunal de arbitraje ad hoc establecido conforme a las reglas de arbitraje de la Comisión Internacional de las Naciones Unidas para el Derecho Mercantil Internacional. (CNUDMI).
>
> **Authentic French version:**
>
> En cas de recours à l'arbitrage international, le différend est soumis au [CIRDI], créé par [la Convention CIRDI]. Au cas où le recours à CIRDI s'avérerait impossible, l'investisseur pourra soumettre le différend a un tribunal d'arbitrage ad hoc, établi selon les règles d'arbitrage de la Commission des Nations Unies pour le Droit Commercial International (CNUDCI).
>
> **Authentic Dutch version**:
>
> Als internationale arbitrage wordt gevraagd, wordt het geschil voorgelegd aan [ICSID], dat is opgericht door het [ICSID Verdrag]. Indien het niet mogelijk is het geschil aan het ICSID voor te leggen, kan de investeerder zich wenden tot een ad-hoc arbitragehof dat wordt samengesteld volgens de arbitrageregels van de Commissie van de Verenigde Naties voor Internationaal Handelsrecht (UNCITRAL).

3.3.1 Respondent's Position

Respondent contends that the Belgian BIT never contained an offer to arbitrate under the AF Rules, as it only provides for arbitration under the ICSID Convention (¶214). Under the Article 3 of the AF Rules, the very purpose of the AF system is to administer disputes that fall outside of the jurisdiction of ICSID (¶216).

Additionally, Respondent claims that jurisdiction cannot be established through the MFN clause included in the Belgian BIT (in Article 3(3)) for the same reasons as set out above (see 3.1.1.). Respondent notes that it maintains its position on severability of the arbitration clause, even though the Belgian MFN clause (as opposed to the Dutch and Spanish provisions) protects "*all matters governed by this Agreement*." Finally, Respondent asserts that Article 3(3) is subject to a territorial restriction, because it refers to the "*treatment accorded in the host State's territory.*" In Respondent's view, international investment arbitration is no 'treatment' and does not take place on the host State's territory (¶219).

3.3.2 KCB's Position

KCB submits that Article 9(3) of the Belgian BIT allows investors to submit their disputes to ICSID, including both ICSID Convention arbitration and AF arbitration (¶220).

Article 9(3) only refers to the ICSID Convention insofar as it created the Center, but does not require disputes to be submitted 'pursuant to' or 'under' the ICSID Convention. Whether an investor must file its claim under the AF or ICSID Rules, is only "*a matter of circumstances*," namely whether both States are parties to the ICSID Convention (¶220). In KCB's submission, Respondent's treaty practice confirms the equivalence of the AF and ICSID mechanisms (¶221). It further sees its interpretation confirmed in the approval to initiate an AF arbitration granted by the Acting Secretary-General of ICSID in accordance with Article 4(2) of the AF Rules (¶222).

KCS also argues that jurisdiction can be established on the basis of the Belgian BIT's MFN clause (Article 3(3)), through which it seeks to import article 8(2) of the UK BIT (see 3.1.2. and 3.2.2 above). KCB refers to its arguments set out under 3.1.2 and 3.2.2 and adds that Article 3(3) of the Belgian BIT expressly covers "*all matters governed by this Agreement*", thus including dispute resolution conditions (¶¶223-224).

4. Tribunal's analysis

4.1 Dutch BIT

4.1.1 Jurisdiction under Article 9(2)

Article 31(3) of the VCLT requires the Tribunal to establish, in good faith, the ordinary meaning of the terms in their context and in light of the BIT's object and purpose. It may resort to supplementary means of interpretation under Article 32 of the VCLT to confirm its reading (¶139).

Ordinary meaning

Pursuant to Article 3 of the Protocol to the Dutch BIT, the English text must prevail in case of inconsistencies between the authentic versions of the BIT (¶145).

KCN is right to argue that the Dutch text requires the Tribunal to determine whether Respondent had the status of Contracting State when the arbitration was initiated (¶145). The English and Spanish texts, however, refer to the event of Respondent *becoming* a Contracting State (¶145). Given this clear inconsistency, the English text must prevail.

The ordinary meaning of the verb "to become" is "***starting*** to be something." As a result, the expression "has not become" does not require the Tribunal to verify whether Respondent *is* a party to the ICSID Convention, but solely whether it has completed the accession process (¶147). This analysis is strengthened by the use of the term "as long as" ("mientras"; "zolang") in all three authentic versions of the treaty, which refers to a finite period ending upon the occurrence of a specific event (¶148).

KCN's assertion that accession to a treaty is not a one-time event, but can be repeated, does not alter this analysis. The fact that Respondent could, later, again adhere to the ICSID Convention, does not change the fact that recourse to AF arbitration is and remains extinguished (¶152).

The context in which the ordinary meaning of terms is situated, further confirms the Tribunal's reading (¶149). If the AF mechanism had also been intended for denunciation of the ICSID Convention, the Parties would have given bilateral access to AF arbitration.

Finally, the Tribunal finds no objections against this reading in the object and purpose of the Dutch BIT. Policy considerations, including that it would be counter to the BIT's purpose to leave investors without access to arbitration, cannot expand Respondent's offer to arbitrate beyond its scope (¶151).

The Tribunal finds support for its understanding of Article 9(2) in several investment awards (¶¶153-154).[8]

Supplementary means of interpretation

Article 32 of the VCLT allows the interpreter to resort to supplementary means of interpretation to confirm the meaning established pursuant to Article 31 (¶156).

The unofficial French translation of Article 9(2) the Dutch BIT uses the phrase "[t]he Republic of Venezuela **not being a party** to the [ICSID Convention] […]."[9] This confirms that the Contracting States intended AF arbitration to be a temporary solution until Respondent became a party to the ICSID Convention (¶¶159-160).

In conclusion, Article 9(2) of the Dutch BIT does not establish jurisdiction under the AF Rules in respect of KCN.

4.1.2 Jurisdiction under the MFN clause

The Tribunal holds that it is barred from applying the treaty's substantive provisions, including the MFN clause, because it lacks jurisdiction. As a matter of principle, a tribunal without jurisdiction has no power to expand or create a Contracting State's consent to arbitrate by way of a substantive provision in the treaty (¶168).

At any rate, the terms "physical security and protection" (Article 3(2) of the Dutch BIT) cannot be read as referring to procedural protection. Even if the MFN clause *did* apply, *quod non*, KCN would not be entitled to claim more favourable dispute settlement terms (¶172).

In conclusion, the Arbitral Tribunal lacks jurisdiction over KCN's claims.

[8] *Enrique Heemsen and Jorge Heemsen v. Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award on Jurisdiction, 29 October 2019; *Venezuela US, S.R.L. (Barbados) v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-34, Interim Award on Jurisdiction (on the Respondent's Objection to Jurisdiction *Ratione Voluntatis*), 26 July 2016; *Valores Mundiales, S.L. and Consorcio Andino, S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017.

[9] "*La République du Venezuela n'étant pas partie à la Convention […].*" *cf.* ¶159 of the Award.

4.2 Spanish BIT

4.2.1 Jurisdiction under Article XI(2)(b)

Ordinary meaning

Article XI(2)(b) of the Spanish BIT provides access to AF arbitration *"[i]f one of the Contracting States has not acceded to the [ICSID Convention]*" ("*una de las Partes Contratantes no se haya adherido al [Convenio CIADI]*").

The verb 'to accede' targets an action, as opposed to a status or condition. The use of the present perfect tense, like in the Dutch BIT, denotes an action carried out in the past that is still relevant in the present. Arbitration under the AF Rules is therefore only available until both States have become parties to the ICSID Convention, irrespective of a later denunciation (¶195). The differences with the text of Article 9(2) of the Dutch BIT do not warrant reaching a different conclusion (¶¶196-197).

This reading is confirmed by the context of Article XI(2)(b). The first sentence provides access to ICSID arbitration "*if each Contracting State has acceded to [the ICSID Convention]*" ("*cuando cada Estado parte en el presente Acuerdo se haya adherido a aquel*"). This provision confirms that recourse to AF arbitration was only open until both States had completed the accession process (¶199).

The Tribunal rejects KCS's argument that Respondent is estopped from defending a position contrary to what it advanced in two earlier arbitrations (¶200). The Tribunal is bound by an *ex officio* duty to establish its own jurisdiction, irrespective of the arguments advanced by the Parties. Moreover, the earlier Tribunals rejected Respondent's position and the Tribunal does not see why Respondent should be prevented from adjusting its position accordingly (¶200).

Supplementary means of interpretation

Even though, as per KCS's submission, both Spain and Venezuela had become a party to the ICSID Convention *before* signing the Spanish BIT, they were not when negotiations started in January 1991 (¶201). The ICSID Convention entered into force in Spain and Venezuela *after* the final text of the Spanish BIT had been negotiated (¶202). This explains why the States offered investors temporary access to AF arbitration. For this reason, the Tribunal's (and Respondent's) reading of Article XI(2)(b) did have *effet utile* when the State parties agreed on its terms (¶204). Finally, the Tribunal emphasizes that its interpretation is concurrent with other investment awards (¶205).

4.2.2 Jurisdiction under the MFN clause

The Tribunal has no jurisdiction to apply the MFN clause for the same reasons as set out in the context of the Dutch BIT (see 4.1.2. above).

In conclusion, the Arbitral Tribunal lacks jurisdiction over KCS's claims.

4.3 Belgian BIT

4.3.1 Jurisdiction under Article 9(3)

The Tribunal notes that the Belgian BIT only provides for arbitration under the ICSID Convention and, alternatively, for UNCITRAL arbitration. It makes no mention of AF arbitration.

In deciding whether the term 'ICSID' in Article 9(3) of the Belgian BIT refers to the institution or the Convention, the Tribunal points to the *raison d'être* of the Centre under Article 1(2) of the ICSID Convention, according to which "*[the Centre]'s purpose [is] to administer disputes* ***in accordance with the Convention***." A reference to ICSID can, therefore, only be understood as consent to arbitration under the ICSID Convention (¶228).

Additionally, the Tribunal finds that even if ICSID was only referenced as an arbitral institution (*quod non*), this reference would not suffice to establish consent under the AF Rules. The AF mechanism is distinct from dispute settlement under the ICSID Convention: it is governed by domestic arbitration law of the seat and by the AF Rules, and not by international law and the ICSID Rules. Consent to AF arbitration must therefore be expressly manifested (¶229). The Tribunal finds support of its reading in Respondent's treaty practice. When Venezuela intended to provide investors with access to AF arbitration, it included express language to that effect (¶230).

In conclusion, Article 9(3) of the Belgian BIT does not establish jurisdiction under the AF Rules in respect of KCB.

4.3.2 Jurisdiction under the MFN clause

The Tribunal has no jurisdiction to apply the MFN clause for the same reasons as set out in the context of the Dutch BIT (see 4.1.2. above).

Even if it were to apply Article 3(3), the Tribunal finds that the MFN clause would not allow for jurisdiction to be established. The settlement of investment disputes does not qualify as "treatment in the territory" of Venezuela. Even if international investment arbitration could, admittedly, be characterized as "treatment," the phrase "in the territory of the other Contracting Party" indicate that Article 3(3) applies only to substantive treatment (as opposed to procedural matters). In any case, the seat of the arbitration would never be located in the host State (¶¶234-235).

In conclusion, the Arbitral Tribunal lacks jurisdiction over KCB's claims.

5. Costs

The Tribunal ordered that the entirety of the costs of the proceedings be allocated to Claimant, and and that each Party bear its own costs and expenses incurred in connection with the arbitration (¶254).